IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2440 OF 2023

Pravir Polymers Private Limited ….Petitioner

V/s.

Income Tax Officer 15(2)(4) and Ors. ....Respondents

Dr. K. Shivaram, Senior Advocate a/w. Mr. Shashi Bekal for petitioner.
Mr. Suresh Kumar for respondents.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 18th DECEMBER 2023

P.C. :

1 This petition is filed impugning an order dated 21st November 2022 passed by the Income Tax Appellate Tribunal (ITAT) rejecting two misc. applications filed by petitioner under Section 254 (2) of the Income Tax Act, 1961 (the Act) being MA No.178/MUM/2022 and MA No.179/MUM/2022 for Assessment Years 2011-2012.

2 The two misc. applications were filed by petitioner (assessee) seeking recall of an order dated 29th April 2022 passed by the ITAT in ITA No.2595/MUM/2019 alongwith Cross Objection No.103/MUM/2021. Following are the mistakes that were alleged to be apparent on record in the impugned order :

> *I. Violation of Rule 46A of the Rules : The Revenue had neither raised the violation of the Rule 46A in the grounds of appeal, nor was it argued by the revenue, nor an opportunity was given to the appellant to explain the case there by violating the principle of natural justice.*

Without prejudice to the above, If Department has raised the violation of Rule 46A, the respondent would have made an application before the Appellate Tribunal to admit the additional evidence.

II. Sufficient Opportunity of Hearing : The Assessing Officer has not given sufficient opportunity of hearing (Page 51) of paper book I) hence supplementary papers were filed before the CIT(A). Therefore, there is no violation of Rule 46A.

III. Not dealt with the cases relied on by the Applicant : The Hon'ble Tribunal has not dealt with the decision of the Hon'ble Supreme Court, Jurisdictional High Court and Jurisdictional Tribunal, inter alia which were relied on by the Applicant at the time of hearing.

IV. Non-compliance of Daily Order : Direction of the Hon'ble Tribunal via daily Order dated January 24, 2022 to the Departmental Representative to produce information/document to ascertain as to why the assessment was made under section 148 read with section 143(3) of the Act; The same was not complied by the Departmental Representative.

3 The misc. applications came to be rejected by the impugned order. The ITAT, while considering the rival submissions of the parties while hearing the misc. applications, as regards the alleged violation of Rule 46A of the Income Tax Rules, 1962 (the Rules) has observed that during the course of the hearing before the ITAT, the authorised representative of the assessee was asked whether the assessee could appear before the learned Commissioner of Income Tax (Appeals) [CIT(A)] or the Assessing Officer in case the matter was restored but the counsel of the assessee did not accept that suggestion because according to the assessee's representative it was not possible for the assessee to produce the parties, from whom the assessee is alleged to have obtained unsecured loans, before the Assessing Officer or the learned CIT(A).

4 Dr. Shivaram stated and rightly so that it was not within the power of the assessee to produce third parties before the Income Tax officer. If the officer feels presence of certain parties are required for him to probe the matter further or go behind the entries made by the assessee in its books of accounts, the Assessing Officer should exercise his powers under Section 131 of the Act by issuing a summons to those parties. Dr. Shivaram stated that of course the assessee would provide the address as the assessee may have as on date and also co-operate in tracking those third parties.

5 As a background, against the Assessing Officer's order, petitioner had preferred an appeal before the CIT(A). During the proceedings before the CIT(A), the assessee tendered certain documents. Mr. Suresh Kumar submitted that the CIT(A), at that stage, should have followed the procedure prescribed under Rule 46A of the Rules, forwarded copy of those documents to the Assessing Officer and called for a remand report. Mr. Suresh Kumar submitted that instead of calling for such a remand report, the CIT(A) proceeded to consider those documents and passed an order in favour of the assessee. Mr. Suresh Kumar submitted that in effect it is the department who is more affected by the CIT(A) not following the procedure prescribed under Rule 46A of the Rules.

6 Dr. Shivaram submitted that no such issue was raised by the Revenue in its grounds of appeal nor an opportunity was given to the assessee to explain the case of violation of principles of natural justice.

7 Be that as it may, the position is the assessee had relied on certain documents before the CIT(A) whereas the CIT(A) did not follow the procedure prescribed under Rule 46A of the Rules and call for a remand report.

8 In our view, instead of making the parties to go back and forth or devoting precious judicial time including in the appeals that have been filed by petitioner against the order dated 29th April 2022 passed by the ITAT, interest of justice would be meet if we remand the matter to the CIT(A) for *denovo* consideration.

9 The CIT(A) shall follow the procedure as prescribed under Rule 46A of the Rules and may also exercise all powers that he has under the Act to summon third parties to appear before him and record their statements. After hearing the parties, the CIT(A) may pass such orders, as he deems fit, in accordance with law.

10 In view of the above, we hereby quash and set aside the order dated 29th April 2022 passed by the ITAT in ITA No.2595/MUM/2019 alongwith Cross Objection No.103/MUM/2021 for Assessment Years 2011-2012 and also the impugned order dated 21st November 2022.

11 Petition disposed accordingly.

12 We clarify that we have not made any observation on the merits of the matter.

13 In view of the above, Dr. Shivaram, on instructions, seeks leave to withdraw Income Tax Appeal No.2372 of 2022.

14 Income Tax Appeal No.2372 of 2022 dismissed as withdrawn.

(DR. NEELA GOKHALE, J.) **(K. R. SHRIRAM, J.)**

Signed by: Gauri A. Gaekwad
Designation: PS To Honourable Judge
Date: 22/12/2023 10:57:53

Gauri Gaekwad

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

MA No. 178/MUM/2022
(ITA No. 2595/MUM/2019)
Assessment Year: 2011-12
&
MA No. 179/MUM/2022
(CO No. 103/MUM/2021)
Assessment Year: 2011-12

Pravir Polymers Pvt. Ltd., 601-602, Delta, Central Avenue Technology Street, Hiranandani Garden, Powai, Mumbai-400053. **PAN No. AAACP 4621 K**	**Vs.**	ITO, CC-15(2)(4), Mumbai.
Appellant		**Respondent**

Assessee by	:	Mr. Shashi Bekal, AR
Revenue by	:	Mr. Dilip K. Shah, DR
Date of Hearing	:	02/09/2022
Date of pronouncement	:	21/11/2022

ORDER

PER OM PRAKASH KANT, AM

These two Miscellaneous Applications have been filed by the assessee seeking recall of order of the ITAT (in short 'the Tribunal')

dated 29/04/2022 passed in ITA No. 2595/Mum/2019 along with cross objection No. 103/Mum/2021 for assessment year 2011-12.

2. The Ld. counsel of the assessee filed a paperbook (Pgs. 16) containing various decisions relied upon.

3. In both the Miscellaneous Application, identical grounds have been raised. In the second miscellaneous application, there is only repetition of the grounds raised in first miscellaneous application. The Ld. Counsel of the assessee contended that these two applications have been filed in view of appeal of the Revenue and cross objection, both disposed by the Tribunal by way of a common order. Therefore, the grounds raised in both the Miscellaneous Applications are decided jointly.

4. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Ld. counsel submitted that mistakes are apparent on record mainly due to three reasons.

4.1 Firstly, the Tribunal in para 17 of the order has held that Ld. CIT(A) has not followed the procedure laid down under rule 46A of the Income Tax Rules, 1962 (in short 'the Rules'), whereas neither such issue was raised by the Revenue in its grounds of appeal nor any opportunity was given to the assessee to explain the case of violation of principle of natural justice by the Ld. CIT(A). Alternatively it was also submitted that supplementary papers were filed before the Ld. CIT(A) because no sufficient opportunity was granted by the Assessing Officer, therefore there was no violation of Rule 46A. The Ld. DR on the other hand submitted that regarding additional evidences filed before the Ld. CIT(A), during the course of the hearing before the Tribunal, the authorized representative of the assessee was duly asked whether the assessee could appear before the Ld. CIT(A) or the Assessing Officer in case the matter was restored back, however, the Ld. counsel of the assessee, who appeared before the Tribunal, expressed inability of the assessee for producing the unsecured loan parties or the evidences before the Assessing Officer/Ld. CIT(A), therefore the Tribunal justified in not restoring the matter to the lower authorities.

4.2 We find that Tribunal in para 10 of the impugned order has noted that additional documents were filed before the Ld. CIT(A). A list of such documents has been reproduced in the impugned order. The Tribunal has further referred to the arguments of the Ld. DR that Ld. CIT(A) did not forward those documents to the Assessing Officer as per the procedure laid down in Rule 46A of the Rules. With reference to those arguments of the Ld. Departmental Representative, the Tribunal in para 17 observed that the Ld. CIT(A) was required to follow the procedure laid down in Rule 46A of the Rules. For ready reference, the finding of the Tribunal (supra) is reproduced as under:

> *"17. We have reproduced summary of the submission of the assessee before the Assessing Officer as well as before the Ld. CIT(A). Before the Ld. CIT(A), the assessee has filed supplementary papers in the form of confirmation of the unsecured loan parties, bank statement of unsecured parties and in some cases audited financial statement of loan parties. Evidently, these documents were filed for the first time before the Ld. CIT(A), however Ld. CIT(A) in para 2.4.1.3 has wrongly recorded that these documents were filed before the Assessing Officer. On this wrong presumption, the Ld. CIT(A) concluded that complete details of investors were available with the assessing officer. Regarding the documents filed first time before the Ld. CIT(A), he was required to follow the procedure laid down in Rule 46A of the Rules and send those documents to the Ld.*

Assessing Officer for objection for admission and also comment on merit, but no such procedure has been followed by the Ld. CIT(A), which is against the principle of natural justice."

4.3 The contention of the assessee before us is that no specific ground was raised by the revenue in respect of the violation of the Rule 46A of the Rules. In our opinion, the Tribunal has dealt the arguments of the Ld. DR on the issue of the addition. There was no requirement of raising any specific ground by the Department in this respect. Further the Ld. counsel of the assessee has contended that the Tribunal should have restored the matter back to the Ld. CIT(A) in view of the additional evidence admitted without following the procedure laid down. In this respect, we may like to mention that Tribunal in para 18 has specifically noted non-willingness of the assessee to produce the unsecured loan parties or any other evidences. The relevant para of the order of the Tribunal is reproduced as under:

"18. On perusal the paperbook of the assessee, it is found that audited financial statements have been filed in respect of the only two unsecured loan parties i.e. Alishan estate Private Limited and Elgin Sales Promotion P. Ltd. On being pointed out, the Ld. counsel expressed his inability in producing the documents, other than which have already been filed. He

also expressed inability to produce those unsecured loan parties before the Assessing Officer. In such circumstances, the finding of the Ld. CIT(A) that audited financial statements have been filed by the assessee in case of all unsecured loan parties is not correct.

18.1 Further the Ld. CIT(A) in para 2.4.1.4 has held that in view of the retraction by Sri Shirish Chandra Shah, cognizance of the his statement of engaged in providing accommodation entries is not justified. In our opinion, this evidence of retraction by Sh. Shirish C Shah was also produced for the first time before the Ld. CIT(A) and therefore the Ld. CIT(A) should have asked the assessee to produce Sh Shirish C Shah for cross-examination by the Assessing Officer. Admitting such an additional evidence by the Ld. CIT(A) without following due process of law is unjustified."

4.4 Thus it is the assessee, who did not wish to restore the matter to the file of the either the Assessing Officer or the Ld. CIT(A). Further, it is the Revenue which was aggrieved by way of not providing opportunity of being heard in respect of additional evidences, whereas as far as the assessee is concerned, the Ld. CIT(A) has analyzed those evidences, thus as far violation of principles of natural justice as laid down in Rule 46A, is concerned it is the revenue, who has suffered and not the assessee. In circumstances, we do not find any mistake on the part of the

Tribunal in not restoring the matter back to the file of the Ld. CIT(A) or the Assessing Officer.

4.5 The secondly, the Ld. counsel of the assessee argued that Tribunal has not dealt with the various decisions of the Hon'ble Supreme Court, judicial High Court and jurisdictional Tribunal, which were relied upon by the assessee at the time of the hearing.

4.6 We find that Tribunal after analyzing the decisions relied upon by the Ld. counsel of assessee, in para 32 of the impugned order has specifically mentioned that decision cited with the Ld. counsel were not applicable on the facts of the instant case. The relevant finding of the Tribunal (supra) is reproduced as under:

> *"32. The decisions cited by the Ld. counsel are not applicable in the facts of the instant case as for invoking the provision of section 153C of the Act during relevant time the prime condition of material belonging to third/other person was to be fulfilled as held by the Hon'ble Supreme Court above in Sinshad Technical Education Society (supra)."*

4.7 In view of the above, the contention of the Ld. counsel of the assessee that due to non-considering of the decisions relied upon

by the assessee, there is a mistake apparent from the record, are liable to be rejected.

4.8 Thirdly, the Ld. counsel submitted that Tribunal has not followed the direction of the Tribunal via daily order sheet dated 24/01/2022, which constitute a mistake apparent from record. The assessee has filed a copy of the order sheet dated 24/01/2022. For ready reference, said order sheet is reproduced as under:

> *"Learned DR seeks time to obtain necessary information & documents to ascertain as to why Assessment was made U/s.148 read with Sec 143(3). Learned Councel for the Assessee submitted that on the last date of hearing adjournment was sought by the DR for similar reason. One more opportunity is granted to DR to ascertain the facts as prayed. Adjourned to 29.03.2022. Both parties informed in the open court."*

4.9 Thus, we find that it was the Ld. DR who sought adjournment on the ground of producing information/documents in relation to the reassessment challenged by the assessee. It is the choice of the appellant (i.e. Revenue) to file document in support of its claim and Tribunal cannot sit upon the judgement is what to be argued or not to be argued by the appellant or what to be filed or not to be filed in support of the arguments. The Tribunal has adjudicated the matter

on the basis of the arguments made before the bench and if adjournment was sought by the Ld. DR on any ground, then that adjournment sought is not relevant for adjudicating the issue in dispute by the Tribunal. Therefore we are of the opinion that there is no mistake apparent on record in the order of Tribunal on the allegation of not considering daily order sheet.

4.10 In view of above discussion, the grounds raised in Miscellaneous Applications are dismissed.

5. In the result, the Miscellaneous Application of the assessee are dismissed.

Order pronounced under Rule 34(4) of the ITAT Rules, 1963 on 21/11/2022.

Sd/-	**Sd/-**
(KULDIP SINGH)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 21/11/2022
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT

5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER) AND SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA No. 2595/MUM/2019
Assessment Year: 2011-12

Income Tax Officer-15(2)(4), Room No. 360, Aayakar Bhavan, M.K. Road, Marine Lines, Mumbai-400020. **Appellant**	**Vs.**	M/s Pravir Polymers Pvt. Ltd., 601/602, Delta, Central Avenue, Technology Street, Hiranandani Garden Powai, Mumbai-400076. **PAN No. AAACP 4621 K** **Respondent**

CO No. 103/MUM/2021
(ITA No. 2595/MUM/2019)
Assessment Year: 2011-12

M/s Pravir Polymers Pvt. Ltd., 601/602, Delta, Central Avenue, Technology Street, Hiranandani Garden Powai, Mumbai-400076. **PAN No. AAACP 4621 K** **Appellant**	**Vs.**	Income Tax Officer-15(2)(4), Room No. 360, Aayakar Bhavan, M.K. Road, Marine Lines, Mumbai-400020. **Respondent**

Assessee by	:	Dr. K. Shivram, Sr. Advocate
Revenue by	:	Mr. C.T. Mathews, DR
Date of Hearing	:	05/04/2022
Date of pronouncement	:	29/04/2022

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue and cross objection by the assessee are directed against order dated 04/01/2019 passed by the Ld. Commissioner of Income-Tax (Appeals)-24, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2011-12.

2. The grounds raised by the Revenue are reproduced as under:

> 1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to delete the addition on account of cash credit us 68 of the IT. Act when it was evident that neither the identity nor creditworthiness of the six parties, which are benami concerns of Shri Shirish C Shah was proved nor the genuineness of the transaction in the form of unsecured loans raised by the assessee company from these six company was proved and also whose nature and source is not explained."*
> 2. *On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) erred holding that the assessee has proved the identify and genuineness of transaction of cash deposit, ignoring the recent decision of the Hon"ble Supreme court in the case of Novodaya Castle (P) Ltd. (2015) 56 Taxmann.com 18(SC) wherein the Apex Court has held that certificate of incorporation, PAN etc. were not sufficient for purpose of the identification of subscriber Company transaction when there is material to show that concrete evidence available in the form of ITD system data.*

3. The Grounds raised by the assessee in cross objection are reproduced as under:

> 1. *The Ld. AO has failed to appreciate that the provisions of section 147 & 148 of the Income-tax Act, 1961 (Act) are not applicable when assessment is to be on the basis of search initiated on a third party. The same is governed by section 153C of the Act which contains a non-obstante clause, thereby overriding section 139, 147 and 148, 151 and 153 of the Act.*
> 2. *The Id. AO has erred in passing an assessment Order under section 1143(3) read with 148 section of the Act instead of section 143(3) read with section 153C of the Act, as the assessment has been initiated as a consequence to a search action, relating to a person other than the person referred to in section 153A of the Act*

4. Briefly stated facts of the case are that the assessee is domestic company and filed its return of income for the year under consideration on 29/10/2012 declaring total income at nil. In the case of the assessee, the Assessing Officer received an information from the Deputy Commissioner of Income-Tax (DCIT) Central Circle, Mumbai, who was assessing the case of Mr. Shirish C Shah. In the said information, he intimated that a search under section 132 of Income Tax Act, 1961 (in short 'the Act') was carried out at the

various premises of Sh. Shirsh C Shah, who happened to be engaged in providing bogus accommodation entries for long-term capital gain, share capital/ share premium, turnover, loan etc. through various entities including one company namely M/s Secunderabad Health Care Limited. The DCIT further intimated that the assessee has obtained accommodation entry by way of loan of Rs.25 lakh on 18/03/2011 from said company. In view of the information received, the Assessing Officer in the case of the assessee recorded reasons to believe that income escaped assessment and accordingly, issued notice under section 148 of Act on 31/03/2017. In response, the assessee submitted that return of income filed on 29/10/2012 might be treated as return of income in response to notice under section 148 of the Act. The assessee also e-filed return of income on 28/11/2017 declaring Nil income. In the reassessment proceeding completed on 27/12/2017 in terms of section 147 read with section 143(3) of the Act, the Assessing Officer made addition for loan of Rs.25 lakh received from Secunderabad Healthcare Limited along

with other loans totalling to Rs.1,75,79,740/- treating the same as unexplained cash credit in terms of section 68 of the Act. On further appeal, the Ld. CIT(A) deleted the addition. Aggrieved, the Revenue is by way of the appeal before the Tribunal whereas, the assessee has raised cross objections.

5. Before us, the assessee has filed paperbook into volumes containing pages 1-191 and 192 to 248 and also filed copy of decision of the Tribunal relied upon.

6. In the ground Nos. one and two of the appeal, the Revenue has agitated the finding of the Ld. CIT(A) of deleting the addition on account of cash credit under section 68 of the Act on the ground that identity and creditworthiness of the loan parties were not established, particularly in view of the decision of the Hon'ble Supreme Court in the case of Navodaya Castle (P) ltd (supra).

7. The brief facts qua the issue in dispute are that in the books of accounts of the assessee for the year under consideration, loans from following parties have been shown:

S. No.	Name of the Party	Amounts
1.	Alishan Estates Pvt. Ltd.	25,00,000/-
2.	Azopen Pvt. Ltd.	22,79,000/-
3.	Chintan P. Shah	3,00,740/-
4.	Elgins Sales Promotion Pvt. Ltd.	50,00,000/-
5.	Pushpanjali Commotrade Pvt. Ltd.	50,00,000/-
6.	Secunderabad Healthcare Limited	25,00,000/-
	Total	**1,75,79,740/-**

8. The Assessing Officer asked the assessee to justify the above loan entries in terms of section 68 of the Act and substantiate the identity, creditworthiness and genuineness of transactions. The assessee, in response filed certain documents in respect of each parties which *inter alia* include copy of bank statement of the assessee highlighting receipt of loan through cheque and repayment thereof, ledger account of those entities in the books of accounts of the assessee, Ministry of Company Affairs (MCA) record of those loan parties claiming that those companies were live. The assessee

has summarized the documents filed before the Assessing Officer in his reply before the Ld. CIT(A), which is extracted as under:

Name of the Party	Registered Office	PAN of the Party	Amount of Loan Accepted	Date of Loan Taken	Date of Repayment	Mode of Acceptance/Repayment	Remarks
Alishan Estate Private Limited	212, Martin Burn, 2nd floor, R.N. Mukerjee Road, Kolkatta, West Bengal, 700001	AAFCA2670L	25,00,000	08/4/11	12/10/12	Cheque/RTGS	Assessee Bank Statement highlighting the transaction of acceptance and repayment Ledger A/c in assessee book MCA record of the loan party stating the company's live. The Loan party filed all documents with ROC as on 31/03/2014
Azofen Private Limited	212, Martin R.N. Mukerjee Road, Kolkatta West Bengal. 700001	AAACA5098F	22,79,000	19/6/10	03/10/11	Cheque/RTGS	Assessee Bank Statement highlighting the transaction of acceptance and repayment Ledger a/c in assessee book MCA record of the loan party stating the company's live. The Loan party filed all documents with ROC as on 31/03/2014.
Pushpanjai Commo Trade Private Limited	27, Khangn Chaterjee Road, Kolkatta, West Bengal-700002.	AACCP9272C	50,00,000	08/4/10	12/10/12 with interest	Cheque/RTGS	Assessee Bank statement highlighting the transaction of acceptance and repayment Ledger a/c in assessee book MCA record of the loan party stating the Company's live. The loan party filed all the documents with ROC as on 31/03/2017.
Elgin Sales Promotion Private Limited	Office No. 16/1, Hanspukur Lane, Kolkatta-700007	AAACE5790J	50,00,000	16/4/10	06/10/12 with interest	Cheque/RTGS	Assessee Bank statement highlighting the transaction of acceptance and repayment. Ledger a/c in assessee book.
Chintan P. Shah	21, Gokulshyam, Devi Dayal Road,	AWGPS3362P	3,00,000	28/3/11	02/7/11 With interest	Cheque/RTGS	Assessee Bank statement highlighting the transaction of acceptance and repayment. Ledger

	Mulund (W), Mumbai-400080.						a/c in assessee book

9. In view of above submission filed before the Assessing Officer, the Authorized Representative of the assessee stated that loans received by the assessee were genuine loan. The Ld. Assessing Officer has recorded in the assessment order that he issued notice under section 133(6) of the Act in the case of Secunderabad Healthcare Ltd. for verification of the party however same returned back unserved. In view of the failure on the part of the assessee in substantiating creditworthiness of the unsecured loan parties, returned back of notice under section 133(6) of the Act and background of the information received in the case of Sh Shirish C Shah, he held the unsecured loans under reference as unexplained cash credit in terms of section 68 of the Act. The relevant finding of the Ld. Assessing Officer is reproduced as under:

5.2 It needs no elaboration that through a catena of decisions of the Courts including the Hon'ble Apex Court have held that the three fundamental tests which have to be established by the assessee to discharge the burden under

section 68 of the Act are (i) Identity of the creditor; (ii) Creditworthiness of the creditor; and ill) Genuineness of the transaction.

"5.3 It is imperative to mention here the background of reopening of assessment in the present case before proceeding further. A search & survey action was carried out in the case of Shri Shirish Chandrakant Shah at the residence of his key employees and associates at Mumbai. On the basis of the various documents seized/impounded from the various premises, the activities of Shri Shirish Chandrakant Shah is briefly enumerated as under:

> *Shri Shirish Chandrakant Shah managed and controlled 212 companies including 16 listed companies which had no real business activities. Further, the Directors of these companies were namesake Directors used by him for carrying out the activities of providing bogus share capital, long term capital gain, unsecured loans, etc. through accommodation entries. Even the bank accounts of the said companies were controlled and managed by Shri Shirish Chandrakant Shah. It has been established by the Department while completing the assessments of Shri Shirish Chandrakant Shah as well as it has been accepted by him in various statements recorded by the Investigation wing that accommodation entries were provided against receipt of cash and the records were maintained on day-to-day basis in the form of cash sheets. The modus operandi explained by Shri Shirish Chandrakant Shah was that the cash was not deposited in the bank account of the companies, but the same were given to other entry providers/ hawala operators so as to obtain RTGS in the accounts of the companies managed and controlled by him. These RTGS received were layered within his infrastructure and finally paid in the form of accommodation entries like unsecured loan, long term / short term capital gains, Share premium etc.*

5.4 Out of the 212 companies managed and controlled by Shri Shirish Chandrakant Shah, M/s Secunderabad Healthcare Limited is one such company. It is pertinent to note that the assessment of M/s Secunderabad Healthcare Limited for the AY. 2011-12 has been completed u/s 143(3) r.w.s.153C of the I.T. Act, 1961, wherein it is held that Shri Shirish Chandrakant Shah controlled and managed the said company and was used by him in his accommodation entry business. It was also held that the receipt of the funds in the form of share capital/premium and investments made out of the same in different companies were not genuine. The investment in share capital/premium have been made by companies/entities controlled by Shri Shirish Chandrakant Shah after layering the cash received by him for providing accommodation entries. Thus, it was established that the funds received in the companies managed and controlled by Shri Shirish Chandrakant Shah were mere layering transactions, wherein cash was received from the clients of Shri Shirish Chandrakant Shah for obtaining various types of accommodation entries which were finally routed into the bank accounts of the beneficiaries as share capital/premium, unsecured loans/payout on sale of shares of the listed companies managed and controlled by Shri Shirish Chandrakant Shah.

5.5 In view of the above discussion and facts of the case, it is clear that the assessee company has not been able to prove the creditworthiness of the concerns advancing the loans and genuineness of the transactions. The assessee company has not offered any satisfactory explanation about the nature and source of the amount credited in its books of accounts. Recently the Hon'ble Supreme Court has in the case of Navodaya Castle (P) Ltd. v. CIT (2015) 230 Taxman 268, upheld the order of the Hon'ble High court, wherein it is held that certificate of incorporation, PAN etc., is not sufficient for purpose of identification of subscriber company when there was material to show that subscriber was a paper company and not a genuine investor. The creditworthiness is not proved by showing issue and receipt of a cheque or furnishing a copy of the statement of bank account, there should be evidence of

a positive nature to show that the subscribers had made genuine investment. The onus of proving the source of a sum of money found to have been received by the assessee is on him and when the nature and source of receipt cannot be satisfactory explained than the same is to be treated as unexplained credit and no further burden lies on the revenue to show that the income is from any particulars source. The Calcutta High Court in the case of Precision Finance Pvt. Ltd. (208 IT 465) has held that mere proof of identity of creditor or that the transactions were by cheque is not sufficient, thus holding that the assessee has to establish the Identity of his creditors, Capacity of creditors to advance money; and Genuineness of transaction.. It has been held by CIT Vs. United Commercial and Industrial Co. (Pvt.) Ltd. (1991) 187 ITR 596 (Cal), that the onus does not get discharged merely by such confirmatory letters. This view was further held in the case of Nemi Chand Kothari v. CIT [2003) 264 ITR 254 (Gau.) wherein it was held that it cannot be said that a transaction, which takes place by way of cheque, is invariably sacrosanct. The Supreme Court in the case of Sumati Dayal (214 ITR 801) held that if the explanation offered by the assessee about the nature and source thereof of any sum credited in the books of accounts are not satisfactory, then the same is chargeable to tax as income of the assessee. The proviso to section 68 of the I.T. Act, 1961 specifies as under:

> *"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:*

For the detailed reasons recorded herein above, it is held that the submissions of the assessee company made in respect of the sums found credited to the books of the assessee during the year under consideration are found to be unsatisfactory and the sum of Rs.1,75,79,740/- admittedly credited in the books as detailed above is brought to tax as income under the provisions of section 68 of the IT. Act, 1961. Penalty proceedings under the provisions of section 271(1)(c) of the I.T. Act, 1961 are initiated concealment of income by furnishing of inaccurate particulars in respect of the same."

10. Before the Ld. CIT(A) the assessee filed certain additional documents to substantiate his claim of loans as genuine. The list of relevant documents in the form of a table, reproduced by the Ld. CIT(A) is extracted as under:

Name of the Loan Creditors	Details
Alishan Estate Pvt. Ltd.	Confirmation letter in original - Page 31 ITS of the loan creditor -Page 32 Bank statement copy of the loan creditor highlighting the debit entries in their bank statement with immediate sufficient fund available with the loan creditor and Interest payout page no 33., Audited accounts page no 36.
Azofen Private Limited	Confirmation letter in original -Page 37 38
Pushpanjai Commo Trade Private Limited	Confirmation letter in original page no -39, IT acknowledgement of the loan creditor page no 40, Bank statement copy of the loan creditor highlighting the debit entries in their bank statement with immediate sufficient fund available with the loan creditor and Interest payout page no 41-43
Elgin Sales Promotion Private Limited	Confirmation letter in original page no-44, IT return acknowledgement copy page no 45, Audited accounts page no 46, Bank statement copy of the loan creditor highlighting the debit entries in their bank

	statement with immediate sufficient fund available with the loan creditor and Interest payout page no - 47.

11. The assessee claimed that loans were genuine due to following reasons:

> 1. *The loans have been accepted for short average period of one to one and half year and repaid thereafter.*
> 2. *All the loans were accepted by cheque/RTGS and repaid also by way of Cheuqe or RTGS.*
> 3. *On all the loans interest were paid in TDS was deducted as per applicable rates.*
> 4. *The loan creditors are corporate entities and their MCA master data was filed along with PAN details, address etc.*

12. Further, the assessee has filed confirmation from the parties, bank statement of the loan creditor highlighting the debit entries in the statement and interest received, audited accounts of the loan creditors and therefore, according to the assessee, he had proved the identity source and genuineness of the loans. The assessee emphasized that since identity of the loan creditors was established and the loan was taken through banking channel , therefore, genuineness of the transaction cannot be doubted.

13. The Ld. CIT(A) considering the submission of the assessee, deleted the addition observing as under:

> *2.4.1.3 During the course of assessment proceedings, in respect of the above said parties the appellant had submitted the following details /evidence.*
>
> *a. Copy of confirmation from the concerned parties for the relevant assessment year.*
>
> *b. Copy of acknowledgement of return of income of the investor for the relevant assessment year.*
>
> *c. Copy of annual audit accounts of the concerned parties for the assessment years.*
>
> *d. Copy of relevant pages of bank statements evidencing that the said transaction were carried out through proper banking channel.*
>
> *From the aforesaid submissions it is evident that the complete details of investors were available on the records of the Ld A.O.*
>
> *2.4.1.4 The Ld. AR further argued inalit was also brought to the novice of the Ld.O hat Shri Shirish Chandrakant Shah has retracted his statement given during the search and hence no cognizance of the same can be taken and in view of this retraction also the addition made us 68 of the Act was not justified. He has also submitted that the only basis of coming to conclusion that the impugned unsecured loans were not genuine, was the statement of Shri Shirish Chandrakant Shah.*
>
> *2.4.1.5 During the course of Assessment Proceedings the learned AO asked the Appellant to produce investors before him for verification. As against*

this the Appellant submitted having filed the requisite details as regards loans, the primary onus that lay upon him to prove the genuineness of the loans was already discharged. However, the AO did not accept the contentions of the appellant and after discussing the modus operandi explained by Shri Shirish Chandrakant Shah. during the course of search proceedings, based on the statement of Shri Shirish Chandrakant Shah & his associates recorded in the course of Search & Seizure Proceedings wherein they have confessed on oath that the companies controlled and operated by them are providing accommodation entries for share application money and unsecured loans, the Ld. AO has also held that the appellant is availing the bogus and accommodation entries by introducing/routing its own unaccounted money into books through entry providers and these entry providers do not have their own creditworthiness to fund such transactions & the entry providers are admittedly working for commission.

2.4.1.6 The Ld. AO has rejected the appellant's submission that no cognizance can be taken of the statement given by Shri Shirish Chandrakant Shah during the course of search proceedings in his case as he had retracted from his said statement by filing an affidavit.

The provisions of section 132(4)of the Act stipulates as under.

"(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian income-tax Act, 1922 (11 of 1922), or under this Act."

From the above provisions of sec 132(4) of the Act, it is evident that the statement recorded therein may be used as evidence in any proceeding

under the Act. The usages of word "may" clearly suggest that the statement made therein can be rebutted subsequently if the assessee is able to prove with documentary evidence that the facts earlier stated was not true. The evidentiary value of statement recorded on oath has been subject matter of judicial scrutiny and the law declared by various Hon'ble Courts/Tribunals is that the statement recorded under oath is an important piece of evidence, however the additions/disallowance cannot be made solely on the basis of such statements in absence of any corroborative evidence supporting the same. The Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co. Ltd vs State of Kerala reported in 91 ITR 18 has held that and admission is an extremely piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect. It is also admitted fact that Praveen Kumar Jain has retracted from his statement by filing an affidavit. The validity of such retraction has also been settled judicially that any person who has made any statement can retract from the same with corroborative evidence.

2.4.1.7 This is also settled law that no addition/disallowance can be made solely on the basis of statement made u/s 132(4) of the Act without bringing any corroborative evidence on record. The Hon'ble Andhra Pradesh High Court in its decision dated 09.09.2014 in ITAT No. 112 of 2003 in the case of CIT vs. Naresh Kumar Agarwal has held that "10. Assuming that a statement, which fits into sub-section (4) of Section 132 of the Act was recorded from the respondent, it needs to be seen as to how far that can constitute the basis for the appellant to proceed against the respondent. Subsection (4) of Section 132 of the Act itself, is to the effect that the statements recorded shall be treated as piece of evidence in the proceedings under the Act. That would be so, as long as the statement is not retracted. If the assessee comes forward with a plea that his statement was recorded under threat or coercion, the evidentiary value of the statement suffers a serious dent.

11. The mandate under sub-section (4) gets honoured only when there is no other version from the assessee, vis-a-vis the statement. In such a case, the statement would constitute the basis for making block assessment even if the Department does not have any other material to buttress its case. However, if the statement is retracted by the person from whom it is said to have been recorded, it has to be subjected to the same test, as is done in matters of similar nature. This is particularly so, when the person, from whom it is recorded, is going to be visited with penal consequences. Sub-section (4) of Section 132 of the Act cannot be taken as a provision laying down any new principle in the law of evidence.

12. For all practical purposes, the statement recorded under sub-section (4) of Section 132 of the Act, partakes the character of the one recorded by an investigating officer under Section 162 of Cr.P.C. Howsoever desirable, it may appear to be, it cannot be ascribed the status of a proven fact. At the most, it would constitute the basis for the prosecution to frame its case and correspondingly be a material for the defense to ensures that the prosecution sticks to its version. The question of a statement of that nature being treated as the clinching evidence, by itself, leading to any penal action does not arise.

Similarly the Hon'ble Delhi High Court in its decision dated 02.11.2015 in IT Appeal No. 224 of 2003 in the case of CIT vs. Sunil Agganyal held as under.

"14. Therefore, although the counsel for the Revenue may be right in his submission that a statement under Section 132(4) of the Act carries much greater weight than the statement made under Section 133A of the Act, a retracted statement under Section 132(4) of the Act would require some corroborative material for the AO to proceed to make additions on the basis of such statement. Of- course, where the retraction is not for any convincing reason, or where it is not shown by the Assessee that he was

under some coercion to make the statement in the first place, or where the retraction is not followed by the Assessee producing material to substantiate his defense, the AO might be justified in make additions on the basis of the retracted statement.

15. In the present case, the Assessee had an explanation for not retracting the statement earlier. He also furnished an explanation for the cash that was found in the hands of his employee and this was verifiable from the books of accounts. In the circumstances, it was unsafe for the AO to proceed to make additions solely on the basis of the statement made under Section 132(4) of the Act, which was subsequently retracted.

16. Consequently, the Court is unable to find any legal infirmity in the conclusion reached by the ITAT that the addition of Rs. 86 lakhs to the income of the Assessee was not justified. Question (B) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue."

Similarly, the Hon'ble ITAT, Mumbai vide its decision dated 04 11 2015 in the case of Tribhovandas Bhimji Zaveri in ITA No. 2250 and 2251/Mum/2013 has held as under.

"25. The Ld D.R as well as the assessing officer has reiterated that the admission was made in the sworn statement recorded u/s. 132(4) and the same is admissible in evidence. A careful perusal of provisions of sec. 132(4) as well sec. 292C would show that the said provisions state that the statement taken u/s 132(4) may be used in evidence in any proceeding under the Act". Thus, this provision; gives discretion to the assessing officer not to use the statement in evidence. In fact, the assessing officer himself has observed that the admission made under sec. 132(4) can be rebutted. The Hon'ble Supreme Court in the case of Pullangode Rubber Products Company Limited Vs. State of Kerala (91 ITR 20) held that "an admission is extremely an important piece of evidence but it cannot be said that it is

conclusive and it is open to the person who made the admission to show that it is incorrect".

The Hon'ble Bombay High Court has dealt with this issue in case of Balmukund Acharya (310 IT 310) and has held as under:-

"31.Having said so, we must observe that the Apex Court and the various High Courts have ruled that the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected (see S.R. Kostiv. CIT (2005) 276 ITR 165 (Guj.), CPA Yoosuf v. 1TO [19701 77 ITR 237 (Ker.), CIT v. Bharat General Reinsurance Co. Ltd. (1971] 81 ITR 303 (Delhi), CIT v. Archana R. Dhanwatey[1982] 136 ITR 355 (Bom.).

32. If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel. (See Dy. CST v. Sreeni Printers [1987] 67 SCC 279.

33. This Court in the case of Nirmala L. Mehta V. A Balasubramaniam, CIT (2004] 269 TR 1 has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law, In the case on hand, it was obligatory on the part of the Assessing Officer to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field."

Similarly, the Hon'ble Gujarat High Court in the case of DCIT vs Narendra Garg & Ashok Garg (AOP) in Tax Appeal No. 1531 and 1532 of 2007 vide its decision dated 28.07.2016 held as under.

"5. We have duly considered the rival contentions made by learned advocates for both the sides. It is true that the addition was made by the Assessing Officer pursuant to the statement recorded u/s 132(4) of the Act. The assessee has retracted from the said disclosure which has not been accepted by the revenue. It is required to be borne in mind that the revenue ought to have collected enough evidence during the search in support of the disclosure statement. It is a settled position of law that if an assessee, under a mistake, misconception or on not being properly instructed, is over assessed, the authorities are required to assist him and ensure that only legitimate taxes are collected. The Assessing Officer cannot proceed on presumption u/s 132(4) of the Act and there must be something more than bare suspicion to support the assessment or addition. In the present case, though the revenue's case is based on disclosure of the assessee stated to have been made during the search u/s 132(4) of the Act, there is no reference to any undisclosed cash, jewellery, bullion, valuable article or documents containing any undisclosed income having been found during the search.

5.1 In the case of KailashbenManharla/Chokshi (supra), this Court has held as under:-

"22. We have heard learned counsels appearing for the respective parties at great length and considered the submissions. We have also gone through the orders passed by the authorities below. It is true that in normal circumstances this Court would not interfere in the finding of fact arrived at by the authorities. It is, however, to be seen as to whether the explanation tendered by the assessee would be considered by the authorities below. It is also to be seen as to whether an addition made is

merely based on the statement recorded by the Assessing Officer under Section 132(4) of the Act and whether any cognizance may be taken of the retracted statement. So far as case on hand is concerned, the glaring fact required to be noted is that the statement of the assessee was recorded under Section 132(4) of the Act at mid night. In normal circumstances, it is too much to give any credit to the statement recorded at such odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded at such odd hours. Moreover, this statement was retracted after two months.

26. In view of what has been stated hereinabove we are of the view that this explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under Section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority. We are, therefore, of the view that merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is tound in support of such admission. We are also of the view that from the statement recorded at such odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and mecessary evidence is led contrary to such admission Hence there is no reason not to disbelieve the retraction made by the Assessing Officer and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs. 6 lacy on the basis of statement recorded by the Assessing Officer under Section 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee."

6. We have gone through the order passed by the Tribunal and we do not find any infirmity in the said order. Learned advocate for the revenue is not

in a position to produce any material on record so as to warrant interference by this Court. The deletion of addition on account of household expenses and cloth transaction has been rightly confirmed by the Tribunal. We also find that the Tribunal has rightly applied the principles of telescoping for reducing additions made by the Assessing Officer. We thus find that all the questions raised in the present appeals are required to be answered in favour of the assessee and against revenue."

Similar law was laid down by the Hon'ble Gujarat High Court in the case of Chetnaben J Shah vs. ITO in Tax Appeal No. 1437 of 2007, after considering the CBDT Circular in F. No. 286/2/2003-IT(In) dated 10.03.2003 and letter in F.No. 286/98/2013- IT(Inv.I) dated 18.12.2014, wherein the emphasis has been made that no attempt should be made to obtain confession as to the undisclosed income, vide its decision dated 17.07.2016 has held as under.

"We have heard learned Counsel for the respective parties and perused the records of the case. We are of the view that the C1T (Appeals) has rightly appreciated the case based on the sound principles of law and has also considered the statement made by the assessee at the relevant point of time. We are of the view that in light of the observations made by this Court in the case of Kailashben Manharlal Chokshi (supra), mere speculation cannot be a ground for addition of income. There must be a some material substance either in the form of documents or the like to arrive at a ground for addition of income. Considering the ratio laid down in the above decision and in the facts of the present case, we are of the view that the issue raised in this Appeal is required to be answered in favour of the assessee and against the Department."

2.4.1.8 From the assessment order, it is observed that the Ld. AO had referred to the general modus operandi explained by Shri Shirish Chandrakant Shah and nowhere has it been alleged that he had given any

statement specifically implicating the appellant that he had provided accommodation entries to the appellant. The Statement made by Shri Shirish Chandrakant Shah was subsequently retracted by filing an affidavit. In view of the facts and law discussed above, I am of the considered opinion that the Ld. AO was not justified in placing reliance on the statement made by Shri Shirish Chandrakant Shah, who had subsequently retracted his earlier statement, without bringing any corroborative evidence on record. Moreover, the Ld AO did not make any enquiry with the lender companies & merely, relied upon the Statement of Shri Shirish Chandrakant Shah made the impugned addition u/s 68 of the Income Tax Act, 1961.

2.4.1.9 The Ld AO also could not establish that the Appellant has routed his unaccounted cash in form of bogus accommodation entries from the investing companies cash to the share applicant companies. There is force in the contention of the appellant that suspicion though ground for scrutiny of evidence cannot be made the foundation of the decision. Coniecture is not 2 substitute for legal proof, suspicion, however strong cannot take the place of the proof. The Ld AO was not justified in making addition of Rs.1,75,79,740/- u/s.68 of the Act upon his own suspicion or upon mere supposition after discarding the evidence produced by the appellant.

2.4.1.10 At this Juncture, it is worthwhile to refer to various Judgments delivered in respect of additions u/s 68 of the Act as both the provisions of Section 68 as well Section. Once the onus that lay under Section 68 of the Act is discharged, the addition u/s 68 of the Act cannot sustain. As per the provisions of the section 68 of the Act the appellant is required to establish the identity, genuineness and creditworthiness of the share applicant concerns.

Several Hon'ble Courts have settled the issue of onus of the assessee uls 68 of the Act and it has been held that where any assessee submits the details of investors, submit confirmation of share capital from them, submit the assessment details of the investors and prove that the transaction under considerations have been made through proper banking channel it can be said that the assessee has discharged its onus of proving identity,genuineness and creditworthiness of the investors within the meaning of provisions of section 68 of the Act. It is important to note that the Hon'ble Courts have held that the assessee is not required to prove source of the source as held in the case of Tolaram Daga vs CIT reported in 59 IT 632. The Hon'ble High Court in the case of Addl. CIT vs Hanuman Agarawal reported in 151 IT 150 held that it can never be within the exclusive knowledge of the debtor to know the source of income of the investors and once he has furnished the true identity, the correct address and the correct PAN/GIR number of the creditors he fulfils his obligation under the Act. Further, the various Hon'ble Courts have held as under.

a. Shree Barkha Synthetic Ltd. Vs ACIT, 155 Taxmen 289 (Rajsthan)- The Hon'ble court held that where the assessee company had received share application money from a company and from an individual investor through banking channels and had furnished confirmation of the investment in share capitalby the said company and had also proved the genuineness of the saidtransactions, then the AO could not make any addition to the income of theassessee in respect of said share application money by treating the same asunexplained cash credit u/s 68 of the Act.

b. Nemi Chand Kothari vs CIT. 264 ITR 154 (Gau)- The Hon'ble Court held that the assessee's burden is confined to prove creditworthiness of investors with reference to the transactions between the assessee and the creditor.

c. DCIT vs, Rohini Builder, 256 ITR 360 (Guj)- The Hon'ble Court held that if the identity of the parties proved and the transaction is through cheque and the income tax assessment particulars are provide the assessee has discharged its onus u/s 68 of the Act.

d. RanchorJivabhaiNakhava vs. C1T, 21 Taxman 159 (Guj)- The Hon'ble Court held that once the assessee has established that he has taken money by way of account payee cheques from the investors who are all income tax assessee whose PAN have been disclosed, the initial burden u/s 68 of the Act was discharged.

2.4.1.12 The Hon'ble ITAT Mumbai in the case of ITO vs Anant Shelter P Ltd in ITA No. 4310 (Mum) of 2007 vide its decision dated 30.03.2012 has held as under.

We have heard both the parties and perused the documents produced before us. Question to be decided, in this matter, is whetherFAA was justified in allowing appeal filed before her by the assessee. Additions to the income of the assessee were made u/s.68 of the Act, as the AO was not satisfied with the details filed by the assessee. It will be useful to understand the provisions of sec. 68 of the Act in right perspective. While dealing with the taxation laws Courts have regularly invoked Section 106 of the Evidence Act, 1872. Section 68 of the Act is the statutory recognition of the said section according to which aperson is in the best position to know the relevant facts related to him. Treating the cash credits as income of the assessee is not a new concept introduced by the Act. The position under the 1922 Act, in respect of income from undisclosed sources was that such income from an undisclosed source could be assessed by making an assessment on the basis that the previous year for such an income would be the financial year. The effect of section 68 of the Act is that asum found credited in the books of the assessee can be charged to income-tax as his income. Over the years law regarding cash credits have evolved and has

taken a definite shape. A few important aspects of the law with regard to Section 68 can be enumerated here-

(i) Section 68 can be invoked when following three conditions aresatisfied.

(a) when there is credit of amounts in the books maintained by the assessee

(b) such credit has to be a sum of money during the previous year (c) either the assessee offers no explanation about the nature and source of such credits found in the books or the? explanation offered by the assessee, in the opinion of the AO, is not satisfactory. It is only then that the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

(ii) The expression the assessee offers no explanation means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The opinion of the_AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on the record. The opinion of the AO is required to be formed objectively with reference to the material on record file. Once the explanation of the assessee is found unbelievable orfalse the AO is not required to bring positive evidence on record to treat amount in question as income of the assessee. While considering the explanation of the assessee, the AO has to act reasonably-application of mind is the sine qua non for forming the opinion.

(ii) Phrase appearing in the section - nature and sources of such credits - should be understood in right perspective, so that genuineness of the transaction can be decided on merits and not on prejudices. Courts are of the firm view that the evidence produced by the assessee cannot be brushed aside in a causal manner. Assessee cannot be asked to prove

impossible. Explanation about ' source of source' or 'origins of the origin' cannot and should not be called for while making inquiry under section.

(v) In the matters related to section 68 burden of proof cannot be discharged to the hilt -such matters are decided on the particular facts of the case as well as on the basis of preponderance of probabilities. Credibility of the explanation, not the materiality of evidences, is the basis for deciding the cases falling under Section 68.

(v) Confirmatory letters or A/c payee cheques do not prove that the amount in question is properly explained for the purpose of section 68. Assessee has to establish identity and creditworthiness of the creditor as well as the genuineness of the transaction. All the three ingredients are cumulative and not exclusive.

(vi) In matters regarding cash credit the onus of proof is not a static one. As per the provisions of the section the initial burden of proof lies on the assessee. Amount appearing in the books of accounts. of the assessee is considered a proof against him. He can prove the identity of the creditors by either furnishing their PANs or assessment orders. Similarly, genuineness of the transaction can be proved by showing that the money was received by an account payee cheque or by draft. Credit worthiness of the lender can be established by attending circumstances. Once the assessee produces evidences about identity, genuineness and credit worthiness of the lender onus of proof shifts to the Revenue.

if above referred principles are applied to the facts and circumstances of the case under consideration, it becomes absolutely clear that the CIT(A) had rightly deleted the additions made u/s.68 of the Act by the AO. Assessee had filed PANs, bank statements and return acknowledgements of the creditors. We are of the opinion that by furnishing above details the assessee had discharged his burden of

proof. if AO had any doubt about the credit worthiness or identity of the creditors, he had all the rights under the Act to hold further inquiry and confront the assessee with such inquiry. AO did not make any attempt to discharge his burden to rebut the evidences produced by the assessee. AO cannot brush aside the evidences submitted during assessment proceedings and make additions. It is beyond comprehension that when the new loans received from the various creditors during the A.Y. 2003-04 amounted to Rs.38.35 lakhs only, then how an addition of Rs. 80 lakhs could have been made. It is found that loan repayments- three cases have been subjected to addition made u/s.68 of the Act. We fail to understand how such an appeal could have been authorized. As the AO made the additions without any material, so the order of the CIT(A) deleting the said additions is upheld. We also uphold the order of the CIT(A) with regard to interest disallowance made by the AO."

2.4.1.13 From the assessment order, it is observed that the Ld. AO had not brought on record any evidence suggesting that the appellant had paid cash to the loan creditors in lieu of loans received from them. It is also admitted fact that the shares were allotted against the share capitals received from the respective investors.

The Ld AR has placed reliance on the decisions of the following citations and placed copies of the relevant documents:

The Ld AR has apart from the other citations heavily referred to the latest decision of the Hon'ble Mumbai ITAT in ITA NO.2317/Mum/2017 dated 16th November, 2018. The Hon'ble Tribunal has made the following observations/findings in the said case:

"We have gone through the case laws relied by the assessee have been distinquished by the Tribunal while rendering the aforesaid decision.

We seek to specifically address how the Tribunal dealt with the decision of Hon'ble Jurisdictional High Court in case of CIT vs. Gagandeep Infrastructure P. Ltd. (2017) 394 TR 680. The Hon'ble Tribunal has held that in the case of Gagandeep (supra) the Hon'ble Bombay High Court considered the factual matrix of the case wherein it was observed that the taxpayer satisfied the three ingredients of section 68 of the Act which stood proved namely identity and creditworthiness of shareholders and genuineness of the transaction and on that factual matrix decision of the tribunal was accepted wherein tribunal ruled in favour of the assessee by holding that the taxpayer did satisfied all the three ingredients of section 69 of the Act.

Now let us go through the decision relied on by the assessee of Hon'ble Bombay High Court in case of Gagandeep (supra) which reads as under:-

Being aggrieved the revenue carried the issue in the appeal to the Tribunal. The impugned order of the tribunal holds that the respondent assessee had established the identity genuineness and capacity of the shareholders who had subscribed to its shares. The identity was established by the very fact that the detailed names address of the shareholders PAN numbers bank details and confirmatory letters were filed. The genuineness of the transaction was established by filing a copy of share application form, the form filed with the registrar of companies and as also bank details of the shareholders and their confirmations which would indicate both the genuineness as also the capacity of the shareholders to subscribe to the shares. Further the Tribunal while upholding the finding of CIT(A) also that the amount received on issue of share capital alongwith the premium received thereon would be on capital and not in the revenue field. Further reliance was also placed upon the decision of Apex Court in Lovely

Exports P. Ltd. to uphold the finding of the CIT(A) and dismissing the revenue's appeal.

Now in the present case of the assessee the main crux of the facts that the assessee filed sufficient evidences viz return of income, share allotment, annual return, details including name, address and PAN of the shareholder which are not negated by the AO. The AO in the present case has himself assessed the preference shareholder for the assessment year under consideration and alter scrutiny has passed the order u/s. 143(3) of the Act around the same date and has neither made any addition nor made any adverse remarks. The AO has not questioned the preference share capital to the extent of the fact value but has only questioned the preference share capital to the extent of the face value but has only questioned the share premium. By this action of the AO himself the nature of transaction as that of preference share allotment is proved beyond doubt and merely because he feels that the share premium is high the genuineness of the transaction cannot be doubted for the purpose of section 68 of the Act.

We find that in the given facts of the case the decision of Hon'ble Jurisdictional High Court in case of Gangadeep (supra) squarely applies to the assessee's case. The decision of Hon'ble Jurisdictional High Court in case of CIT vs Green Infra Ltd. 78 taxmann.com 340 is squarely applicable to the case of the assessee. Despite being the specific argument of the CIT-DR that the share premium defied commercial prudence, Hon'ble Jurisdictional High Court has held that genuineness of the transaction is proved since the entire transaction is recorded in the books of the assessee and the transaction has taken place through banking channels. The decision of the Hon'ble High Court has specifically held that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the

shareholders whether they want to subscribe to such a heavy premium. The revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. The tribunal after examining the ingredients of section 68 of the Act held that the addition of share premium under section 68 of the Act cannot be sustained. We hereunder reproduce the relevant paragraph of the decision of Hon'ble Jurisdictional High Court is ease of Green Infra (supra) for ready reference.

Regarding question no. (ii)

a) Before the Tribunal the revenue raised a new plea viz that the so called share premium has also to be judged on the touchstone of section 68 of the Act which provides for cash credit being charged to tax. The impugned order of the Tribunal allowed the issue to be raised before it for the first time overruling the objection of the respondent assessee.

b) The impugned order examined the applicability of section 68 of the Act on the parameters of the identity of the subscriber to the share capital genuineness of the transaction and the capacity of the subscribe to the share capital. It found that the identity of the subscribers was confirmed by virtue of the AO issuing a notices us. 133(6) of the Act to them. Further, it hold that the revenue itself makes no grievance of the identity of the subscribers. So far as the genuineness of the transaction of share subscriber is concerned, it coucludes as the entire transaction is recorded in the books of accounts and reflected in the financial statements of the assessee since the subscription was done through the banking channels as evidenced by bank statements which were examined by the Tribunal. With regard to the capacity of the subscribers the impugned order records a finding that 98% of the shares is held by IDFC Pvt. Equity fund which is a fund manager of IDFC

Ltd. Moreover the contributions in IDFC Pvt. Equity fund are all by public sector undertakings.

c) Mr. Chhotaray the Ld. counsel for the revenue states that the impugned order itself holds that share premium of Rs.490/- per share defies all commercial prudence. Therefore it has to be considered to be cash credit. We find that the tribunal has examined the case of the revenue on the parameters of section 68 of the Act and found on facts that it is not so hit. Therefore, section 68 of the act cannot be invoked. The revenue has not been able to show in any manner the factual finding recorded by the Tribunal is perverse in any manner.

d) Thus, question no. (ii) as formulated does not give rise to any substantial question of law and thus not entertained.

In view of the aforesaid, we are of the view that valuation is not relevant for determining genuineness of the transaction for the purpose of section 68 of the Act. We are of the view that CIT(A) has rightly deleted the addition on account of the share premium relying on the decision of Honible Jurisdictional tribunal in case of Green infra Ltd. VS. ITO (2013)) 145 ITR 240. It is a settled position that what is apparent is real unless proved otherwise. It is a settled legal position that apparent is real and,the onus to prove that the apparent is not the real is on the party who claims it to be so as held by Honble Supreme Court in case of CIT vs. Daulat Ram Rawatmull (1973) 87 IT 349.

In the present case, the overwhelming evidence proves that the nature of receipt is share premium. The audited accounts of both parties the statutory since it was the department which claimed that the share premium is not in fact so, despite the statutory forms viz. Form 2 for return of allotment and form 20B for annual return filed with the ROC all show the nature as share premium. If the department wants to

contend that what is apparent is not real, it is the onus of the department to prove that it was assessee's own money which was routed through a third party. Only then can the provisions of section 68 of the Act be invoked. This aspect is considered in the decision of Mumbai Tribunal in case of Green Infra Ltd. Vs. IT (2013) 145 ITD 240, wherein Tribunal has held that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. The said decision has been affirmed by Hon'ble Jurisdictional High Court in case of Green Infra Ltd. (supra)."

The various courts have held that if the identity of the creditors proved and the transaction is through cheque and the income tax assessment particulars are provided then it can be held that the assessee has discharged its onus of proving the genuineness of the transactions. In the absence of any contrary corroborative evidence brought on record by the Assessing Officer, I am of the considered opinion that_ the Ld. AO was not justified making addition of Rs.1,75,79,740/- u/s 68 of the Act. Hence, the addition made to that extent is deleted. Accordingly these grounds are allowed.

2.5 In the result, the appeal is allowed."

14. Before us, the Ld. counsel of the assessee submitted that the Assessing Officer has made the addition on sole basis of statement of Sh. Shirish C Shah, which has been retracted by him and therefore no cognizance should be given to the said statement. Further, the

said statement has not been corroborated with any other evidences. He submitted that assessee has already discharged his onus under section 68 of the Act by way of filing necessary documents in support of identity, creditworthiness and genuineness of the transaction. He referred to page No. 26 of the paperbook in support of creditworthiness of the unsecured loan party namely 'Azophen Private Limited'. He submitted that decision of the Hon'ble Delhi High Court in the case of Navodaya Castle (P.) Ltd. (supra) is not applicable on the facts of the assessee. He also submitted that amendment to section 68 by way of Finance Act 2012 for providing source of the source is not applicable in the year under consideration. He also submitted that said amendment is applicable in case of the share capital or share premium and not in case of the loans.

15. The Ld. DR on the other hand submitted that the assessee has filed confirmation of the unsecured loan party for the first time before the Ld. CIT(A), but he wrongly concluded that same were

filed before the Assessing Officer, and he proceeded on this wrong premises to hold that assessee has discharged his onus of substantiating documents in support of identity, creditworthiness and genuineness of the transaction. According to him, the Ld. CIT(A) has not followed the procedure as laid down in rule 46A of the Income Tax Rules, 1962 (in short 'the Rules'). Further, he submitted that even before the Ld. CIT(A), the assessee did not file evidence in support of creditworthiness of the loan parties. Further, notice sent by the Assessing Officer under section 133(6) of the Act were not complied by the unsecured loan parties. On being asked by the Assessing Officer to produce those parties, the assessee could not comply. The Ld. DR submitted that in above circumstances the finding of the Ld. CIT(A) that the assessee has discharged onus is devoid of merit. Accordingly he submitted that order of the Ld. CIT(A) should be set aside.

16. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. It is

undisputed that loan received from above six parties are duty reflected in books of accounts of the assessee. The contention of the assessee that in view of the documents filed before the Assessing Officer and the Ld. CIT(A), identity, creditworthiness and genuineness of the transaction is established but according to the Ld. DR confirmation of the unsecured loan parties have been filed for the first time before the Ld. CIT(A) , and relying on which the Ld. CIT(A) has allowed relief to the assessee, which is in violation to Rule 46A of the Income Tax Rules.

17. We have reproduced summary of the submission of the assessee before the Assessing Officer as well as before the Ld. CIT(A). Before the Ld. CIT(A), the assessee has filed supplementary papers in the form of confirmation of the unsecured loan parties, bank statement of unsecured parties and in some cases audited financial statement of loan parties. Evidently, these documents were filed for the first time before the Ld. CIT(A), however Ld. CIT(A) in para 2.4.1.3 has wrongly recorded that these documents were filed

before the Assessing Officer. On this wrong presumption, the Ld. CIT(A) concluded that complete details of investors were available with the assessing officer. Regarding the documents filed first time before the Ld. CIT(A), he was required to follow the procedure laid down in Rule 46A of the Rules and send those documents to the Ld. Assessing Officer for objection for admission and also comment on merit, but no such procedure has been followed by the Ld. CIT(A), which is against the principle of natural justice.

18. On perusal the paperbook of the assessee, it is found that audited financial statements have been filed in respect of the only two unsecured loan parties i.e. Alishan estate Private Limited and Elgin Sales Promotion P. Ltd. On being pointed out, the Ld. counsel expressed his inability in producing the documents, other than which have already been filed. He also expressed inability to produce those unsecured loan parties before the Assessing Officer. In such circumstances, the finding of the Ld. CIT(A) that audited

financial statements have been filed by the assessee in case of all unsecured loan parties is not correct.

18.1 Further the Ld. CIT(A) in para 2.4.1.4 has held that in view of the retraction by Sri Shirish Chandra Shah, cognizance of the his statement of engaged in providing accommodation entries is not justified. In our opinion, this evidence of retraction by Sh. Shirish C Shah was also produced for the first time before the Ld. CIT(A) and therefore the Ld. CIT(A) should have asked the assessee to produce Sh Shirish C Shah for cross-examination by the Assessing Officer. Admitting such an additional evidence by the Ld. CIT(A) without following due process of law is unjustified.

19. Further the Ld. CIT(A) has mentioned in para 2.4.1.5 that the Assessing Officer asked the assessee to produce investors before him for verification. According to Ld. CIT(A) the Assessing Officer was not justified in asking the presence of the unsecured loan parties in view of all the equity details filed by the assessee and onus

of the assessee was already discharged. In our opinion, the Assessing Officer issued notice under section 133(6) for verification of the identity i.e. addresses, but same returned unserved, and therefore in such circumstances, the Assessing Officer is justified in asking the presence of the unsecured loan parties before him and the onus was on the assessee to produce those parties before him. In failure to do so, it is obvious that assessee failed in discharging his onus to substantiate his claim of unsecured loan parties as genuine.

20. Further it is not the case that Assessing Officer has only relied on the statement of Sh. Shirish C Shah, but he has asked the assessee to demonstrate, the identity, creditworthiness and genuineness of the transaction. But the assessee has emphasized only on the point that transactions have been made through banking channel and therefore genuineness of the transaction is established, whereas on perusal of the bank statement of Secunderabad Healthcare Private Limited available on page 16 of the paperbook, we find that there is no substantial bank balance and money is received in lakhs of

rupees and after a lapse of one or two days same has been transferred out. The said party has filed return of income declaring nil income for assessment year 2011-12 (PB-18). Bank transactions on similar pattern have been observed in the case of 'Pushanjali Commotrade Private Limited' (PB-110 to PB 112). Similarly, the 'Elgin Sales Promotion Ltd.' has also filed return of income declaring nil income (PB-115). On perusal of profit and loss account, we find that small amount of profit of Rs.8,841/- (PB-122) has been declared in the profit and loss account. Thus, above loan provider companies are merely paper companies, without having capacity of their own to provide huge loan to the assessee. In such circumstances, it cannot be said that creditworthiness of the unsecured loan parties and genuineness of the transactions is established.

21. Further the Ld. CIT(A) held that the Assessing Officer has not brought on record any evidence to substantiate that unaccounted cash has been rooted by the assessee. In our opinion, the assessee

was required to discharge his onus of substantiating identity, creditworthiness and genuineness of the transaction and rather than asking the Assessing Officer to substantiate routing of the cash, which is within the knowledge of the assessee and all evidence in this respect are with the assessee, for which the Assessing Officer cannot be held responsible.

22. The Ld. DR on the other hand relied on the decision of the Hon'ble Supreme Court in the case of Navodya Castle (P) Ltd (supra), wherein Hon'ble Supreme Court upheld the decision of the Hon'ble Delhi High Court. The Hon'ble Delhi High Court has after considering various decisions on the issue in dispute, given a detailed finding, which is reproduced as under:

> *"13. As we perceive, there are two sets of judgments and cases, but these judgments and cases proceed on their own facts. In one set of cases, the assessee produced necessary documents/evidence to show and establish identity of the shareholders, bank account from which payment was made, the fact that payments were received thorough banking channels, filed necessary affidavits of the shareholders or confirmations of the directors of the shareholder companies, but thereafter no further inquiries were conducted. The second set of*

cases are those where there was evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances. The primary requirements, which should be satisfied in such cases is, identification of the creditors/shareholder, creditworthiness of creditors/shareholder and genuineness of the transaction. These three requirements have to be tested not superficially but in depth having regard to the human probabilities and normal course of human conduct.

14. Certificate of incorporation, PAN number etc. are relevant for purchase of identification, but have their limitation when there is evidence and material to show that the subscriber was a paper company and not a genuine investor. It is in this context, the Supreme Court in CIT Vs. Durga Prasad More [1971] 82 ITR 540 (SC) had observed:-

"Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a 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."

15. Summarizing the legal position in Nova Promoters and Finlease (P) Ltd.(supra), and highlighting the legal effect of section 68 of the Act, the Division Bench has held as under:-

"32. The tribunal also erred in law in holding Assessing Officer ought to have proved that the monies emanated from the coffers of the assesseecompany and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. In A. Govindarajulu Mudaliar v CIT, (1958) 34 ITR 807, this argument advanced by the assessee was rejected by the Supreme Court. Venkatarama Iyer, J., speaking for the court observed as under (@ page 810): -

"Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and

circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been it was clearly upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs."

(emphasis supplied)

Section 68 recognizes the aforesaid legal position. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law laid down by the Supreme Court in the judgment cited above. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, we are inclined to think that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and Rajan Jassal, the entry providers, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis

of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wing also figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assesseecompany. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT (Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference.

16. In the said case, the Division Bench had also examined the decision of the Supreme Court in Lovely Exports P. Ltd. (supra) and other cases in which the assessee had succeeded. It was noticed that in the case of Lovely Exports P. Ltd. affidavits/confirmations of shareholders were filed and income tax record numbers of the shareholders were made available, but the Assessing Officer, who had sufficient time, failed to carry out inquiry and examination. reference was made to the observations in Divine Leasing (supra) to the effect that there cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment as share capital must be firmly excoriated by the Revenue, but when there is preponderance of evidence to show absence of culpability, the assessee should not be harassed by the Revenue. A delicate balance must be maintained between the two interests. In Divine Leasing (supra), the following proposition was elucidated:-

"In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the IT Act. The assessed has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber. (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable Explanation by the assessed. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessed nor should the AO take such repudiation at face value and construe it, without more, against the assessed. (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation."

17. Nova Promoters and Finlease (P) Ltd. (supra) after referring to the dismissal of SLP against Divine Leasing case (supra) observed as under:-

"……………So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders' register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no

material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec.68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such "entry providers". The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan – a smokescreen – conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence ormaterial in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under

this category and it would be a travesty of truth and justice to express a view to the contrary."

18. Lovely Exports Pvt. Ltd. (supra) was also considered and distinguished in N.R. Portfolio Pvt. Ltd. (supra) and it was held that the entire evidence available on record has to be considered, after relying upon CIT Vs. Nipun Builders and Developers, [2013] 350 ITR 407 (Delhi), wherein it has been held that a reasonable approach has to be adopted and whether initial onus stands discharged would depend upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call money, dividends, warrants, etc. have to be sent and the relationship remains a continuing one. Therefore, an assessee cannot simply furnish some details and remain quiet when summons issued to shareholders remain un-served and uncomplied. As a general proposition, it would be improper to universally hold that the assessee cannot plead that they had received money, but could do nothing more and it was for the Assessing Officer to enforce shareholders' attendance in spite of the fact that the shareholders were missing and not available. Their reluctance and hiding may reflect on the genuineness of the transaction and creditworthiness of the creditor. It would be also incorrect to universally state that an Inspector must be sent to verify the shareholders/subscribers at the available addresses, though this might be required in some cases. Similarly, it would be incorrect to state that the Assessing Officer should ascertain and get addresses from the Registrar of Companies' website or search for the addresses of shareholders themselves. Creditworthiness is not proved by showing issue and receipt of a cheque or by furnishing a

copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature to show that the subscribers had made genuine investment or had, acted as angel investors after due diligence or for personal reasons. The final conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assessee may face to unimpeachably establish creditworthiness of the shareholders.

19. In N.R. Portfolio Pvt. Ltd. (supra), it has been held as under:-

"18. In the remand report, the Assessing Officer referred to the provisions of Section 68 of the Act and their applicability. The word "identity" as defined, it was observed meant the condition or fact of a person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN number or assessment particulars did not establish the identity of the person. The actual and true identity of the person or a company was the business undertaken by them. This according to us is the correct and true legal position, as identity, creditworthiness and genuineness have to be established. PAN numbers are allotted on the basis of applications without actual de facto verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions. PAN number is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.

19. On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions. 30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies.

> *It is the persons behind the company who take the decisions, controls and manage them."*
>
> *20. Now, when we go to the order of the tribunal in the present case, we notice that the tribunal has merely reproduced the order of the Commissioner of Income Tax (Appeals) and upheld the deletion of the addition. In fact, they substantially relied upon and quoted the decision of its coordinate bench in the case of MAF Academy P. Ltd., a decision which has been overturned by the Delhi High Court vide its judgment in C.I.T vs. MAF Academy P.Ltd [(2014) 206 DLT 277). In the impugned order it is accepted that the assessee was unable to produce directors and principal officers of the six shareholder companies and also the fact that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer has observed that there were genuine concerns about identity, creditworthiness of shareholders as well as genuineness of the transactions."*

23. Before us, the Ld. counsel submitted that Assessing Officer has not asked any further documents or rejected the document placed on record. We find that this observation of Ld. Counsel is not correct. The learner Assessing Officer issued notice under section 133(6) of the Act, but there was no compliance on the part of the unsecured loan party. The Ld. CIT(A) has also noticed that Assessing Officer

asked that assessee to produce those unsecured loan parties, but assessee failed in doing so.

23.1 In view of above facts as circumstances, we are of the opinion that assessee failed to discharge his onus required in terms of section 68 of the Act. The finding of the Ld. CIT(A) on the issue in dispute is accordingly set aside and addition in dispute made by the Assessing Officer is hereby sustained. The grounds of the appeal of the Revenue are accordingly allowed.

24. In the cross objection, the assessee has mainly raised that assessment under section 147 of the Act has been made wrongly in the case of the assessee and assessment should have been made under section 153C of the Act . This objection has been raised by way of an additional ground on oral plea as the Ld. DR did not object for admitting the said plea of the assessee.

25 The contention of the Ld. counsel that assessment is consequent to search in the case of Sh. Shirish C Shah therefore the

Assessing Officer was bound to issue notice under section 153C of the Act and thereafter proceed to assess income under section 153A of the Act. He submitted that provision of section 153C contains non-obstance clause, which specifically exclude the operation of section 147 of the Act and therefore, the Assessing Officer has erred in invoking section 147 of the Act. He submitted that if action under section 147 of the Act is permitted on the basis of the material found in the course of the search, then the provision of section 153A would become redundant.

26. In support of his contention he relied on the decision of Tribunal Delhi bench in the case of **Rajat Shubra Chatterji Vs ACIT ITA No. 2430/Del/2015 dated 20th May, 2016**, wherein it is held that provisions of section 153C are not non-obstantive provisions and especially exclude the operation of section 147 of the Act.

27. The Ld. counsel also relied on the decision of the Tribunal Amritsar Bench in the case of **ITO Vs Arun Kumar Kapoor (2011)**

16 taxmann.com 373 (Amritsar), wherein also it is held that provision of section 153C supersedes the applicability of provisions of section 147 of the Act. The Ld. counsel also relied on the decision of the **Visakhapatnam Bench in the case of G Koteshwar Rao Vs DCIT 64 taxmann.com 159** wherein it is held that the Assessing Officer is bound to issue notice under section 153C and thereafter proceed to assess income under section 153A of Act and if the Assessing Officer has proceeded with a reassessment proceeding under section 147/148 of the Act same would be illegal, arbitrary and without any jurisdiction.

28. The Ld. DR on the other hand submitted that provision of section 153C can be invoked in case of other person only when the material found during the course of the searched person, is belonging to the other person. According to him this condition of section 153C has to be satisfied first and then only section 153C can be invoked, otherwise the remedial action lies under section 147 of the Act.

29. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. As the controversy revolves around the issue as to under which section of the Act, the assessment should have been carried out in the case of the assessee. The contention of the assessee the assessment proceedings would have been carried out under section 153C of the Act rather than section 147 of the Act. For deciding the controversy, it is relevant to reproduce the section 153C of the act, during relevant, as under:

> *"75. "Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or* ***belong to a person*** *other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and the Assessing Officer shall proceed against each such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A."*

30. On perusal of the above provisions it is evident that for invoking section 153C in the case of other person, prime requirement is that the material found from the searched person should be belonging to the third person. If said condition is satisfied, then irrespective of the provision of section 147, the assessment in the case of other person has to be carried out as per provision of section 153C of the Act.

31. But in the instant case before us the assessee has not established that the material found from the search in the case of Sh Shirish C Shah belongs to the assessee. During the course of the search in the case of Sh Shrish Shah, he stated to have been engaged in providing bogus accommodation entries through the companies controlled by him including M/s Secunderabad Healthcare Private Limited. The DCIT, central circle found that said entity has given accommodation entry of the loan to the assessee and accordingly he provided said information to the Assessing Officer. This fact is evident from the reasons recorded by the Assessing Officer

reproduced in the assessment order, which is extracted as under for ready reference:

> *"Information received from DCIT CC 2(2) vide letter No. Mum/DCIT CC 2(2)/Intimation/2016/747 dated 16th January, 2017 that a search u/s. 132 of the Income Tax 1961 was carried out at the residence and various premises of Shri Shirish C Shah who happened to be main persons engaged in providing bogus accommodation entries like long term capital gain, share capital with huge share premium, turnover, loan etc to reduce and suppress profit.*
>
> *In the instant case as per the information received from DIT CC 2(2) vide letter No. Mum/DIT CC 2(2)/Intimation/2016/747 dated 16th January, 2017, the assessee M/s Pravir Polymers Pvt. Ltd. (PAN : AAACP4621K) whose PAN lies with this charge had received payment on 23.03.2011(F.Y. 2010-11) of Rs.25,00,000/- from bank account of M/s Secunderabad Health care Ltd.*
>
> *The assesse M/s Pravir Polymers Pvt. Ltd. (PAN : AAACP4621K) has filed the return of income on 27/09/2012 declaring total income loss at Rs.43,225/-. From the above, it is clear that the assessee has failed to disclose fully and truly all material facts. In view of the above, I have, therefore, reason to believe that the income to the tune of Rs.25,00,000/- has escaped assessment for A. Y. 2011-12, coming within the meaning of in Rise section 147 of the I.T. Act 1961."*

31.1 The Hon'ble Supreme Court in the case of **CIT Vs Singhad Technical education Society in Civil Appeal No. 11080 of 2017** has discussed the essential condition of material belonging

to person other than the searched person, for invoking section 153C of the Act as under:

> *"20) Insofar as the judgment of the Gujarat High Court relied upon by the learned Solicitor General is concerned, we find that the High Court in that case has categorically held that it is an essential condition precedent that any money, bullion or jewellery or other valuable articles or thing or books of accounts or documents seized or requisitioned should belong to a person other than the person referred to in Section 153A of the Act. This proposition of law laid down by the High Court is correct, which is stated by the Bombay High Court in the impugned judgment as well. The judgment of the Gujarat High Court in the said case went in favour of the Revenue when it was found on facts that the documents seized, in fact, pertain to third party, i.e. the assessee, and, therefore, the said condition precedent for taking action under Section 153C of the Act had been satisfied".*

32. The decisions cited by the Ld. counsel are not applicable in the facts of the instant case as for invoking the provision of section 153C of the Act during relevant time the prime condition of material belonging to third/other person was to be fulfilled as held by the Hon'ble Supreme Court above in Sinshad Technical Education Society (supra).

33. In view of the above discussion, the cross objection of the assessee accordingly dismissed.

34. In the result, the appeal filed by the Revenues is allowed, whereas the cross objection filed by the assessee is dismissed.

Order pronounced in the open Court on 29/04/2022.

Sd/-	Sd/-
(KULDIP SINGH) **JUDICIAL MEMBER**	**(OM PRAKASH KANT)** **ACCOUNTANT MEMBER**

Mumbai;
Dated: 29/04/2022
Dragon Legal Software/Rahul Sharma, Sr. P.S.

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai