

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD " C " BENCH – AHMEDABAD

**Before Shri S. S. Godara, JM, & Shri Manish Borad, AM.**

ITA No.1716/Ahd/2012  
Asst. Year: 2009-10

ACIT, Cir-5, Ahmedabad.	Vs.	Nakoda Fashion Pvt. Ltd., J-17/18, Ghantakarna Mahavir Market, Nr. New Cloth Market, Sarangpur, Ahmedabad.
Appellant		Respondent
PAN AACCS 1393P		

Appellant by	Shri Prason Kabra, Sr. DR
Respondent by	Shri R. B. Rath, AR

Date of hearing: 22/7/2016  
Date of pronouncement: 18/8/2016

**O R D E R**

**PER Manish Borad, Accountant Member.**

This appeal by Revenue for Asst. Year 2009-10 is directed against the order of Id. CIT(A)-XI, Ahmedabad dated 23.5.2012. Assessment u/s 143(3) of the IT Act (in short the Act) was framed on 26.12.2011 by JCIT(OSD) Circle-5, Ahmedabad. Revenue has raised following grounds of appeal :-

- i) *The Id. CIT(A) has erred in law and on facts in deleting the addition of Rs.3,50,00,000/- u/s 68 of the Act, in respect of unexplained share capital and premium received by the Assessee.*

- ii) *On the facts and circumstances of the case, the id. Commissioner of Income tax (A) ought to have upheld the order of the Assessing Officer.*
- iii) *It is, therefore, prayed that the order of the Ld. Commissioner of Income tax (A) may be set-aside and that of the Assessing Officer be restored.*

2. Briefly stated facts of the case are that assessee is a private limited company engaged in the business of purchase and sale of grey cloth, dying painting & processing in other process house. Return of income was e-filed on 28.09.2009 declaring total income at Rs.45,85,980/-. Case was selected for scrutiny assessment through CASS. Notice u/s 143(2) of the Act was issued on 7.6.2011 and duly served upon the assessee. Notice u/s 142(1) of the Act along with detailed questionnaire was issued on 25.7.2011. Major thrust of Assessing Officer was towards examination of amount received during the year at Rs.3.5 crores towards share capital along with share premium from following 5 companies each contributing Rs.70 lacs towards 1,00,000 equity shares of Rs.10/- each and share premium of Rs.60/- per share:-

- i) Green Star Financial Service Pvt. Ltd., Ahmedabad.
- ii) Archer Financial Service Pvt. Ltd., Ahmedabad.
- iii) Suraj Corporate Service Pvt. Ltd., Ahmedabad.
- iv) Fly High Exports Pvt. Ltd., Kolkata.
- v) Oasis Cine Communication Ltd., Kolkata.

Necessary details were called for to verify the identity, creditworthiness and genuineness of the transaction of the above said 5 parties. Assessee duly submitted names, addresses, PAN, I.T. Returns, bank statements, confirmation letters and confirmation of accounts. However, assessee was unable to produce any of the five share-holders for verification. Ld. Assessing Officer also came across the statement of Shri Jitendra Jain, director of Suraj Corporate Service Pvt. Ltd., which was one of the subscriber to equity share of the assessee company having invested Rs. 70 lacs. In his statement given before DDIT (Inv), Ahmedabad, during investigation of another assessee, Mr. Jitendra Jain stated that Suraj Corporate Service Pvt. Ltd. is engaged in providing accommodation entries to the companies and is just a paper company. On the basis of this statement as well as after going through the financial documents of other 4 impugned parties Ld. Assessing Officer was of the view that assessee has introduced its unaccounted money in the form of share application and share premium amounts through the entry providers and has failed to establish the creditworthiness and genuineness of the said transactions and has also failed to discharge the onus of proving the said transactions. Accordingly addition u/s 68 of the Act towards unexplained capital in share capital and share premium of Rs.3.5 crores was made and income was assessed at Rs.3,95,85,980/-.

3. Aggrieved, assessee went in appeal before Ld. CIT(A). Appeal of the assessee was allowed in full by Ld. CIT(A) who observed as under :-

*2,2 I have carefully considered rival submissions. I have also perused various evidences filed by the appellant during assessment proceedings and the case laws relied upon by the appellant. The appellant has received share capital of Rs. 3,50,00,000/- from the following five companies :-*

<i>1. Green Star Financial Service Pvt. Ltd.</i>	<i>Rs. 70,00,000/-</i>
<i>2. Archer Financial Service Pvt. Ltd.</i>	<i>Rs. 70,00,000/-</i>
<i>3. Suraj Corporate Service Pvt. Ltd.</i>	<i>Rs. 70,00,000/-</i>
<i>4. Fly High Exports Pvt. Ltd.</i>	<i>Rs. 70,00,000/-</i>
<i>5. Oasis Cine Communications Ltd.</i>	<i>Rs. 70,00,000/-</i>

*To explain the source of share capital the appellant during the assessment proceedings had filed following evidences :-*

- (1) PAN of the persons from whom share capital was received.*
- (2) Copy of return for the A.Y.2009-10 in respect of subscribers of share capital.*
- (3) Confirmations from the subscribers. Investment made is duly reflected in the balance sheet of subscribers.*
- (4) Copy of bank statement of the subscribers. In these bank accounts the cheques issued by these persons are reflected.*
- (5) Copy of audited balance sheet of the subscribers.*

*The fact of these documents being part of assessment records are duly acknowledged by the A.O. in the assessment order itself. The above documents clearly establish the fact that all the share capital has been received from five companies who are regularly assessed to income-tax. The share capital has been received through banking channels and the same is reflected in the balance sheet of the subscribing companies. The balance sheet of subscribing companies are audited and these investments are reflected in the balance sheet of the subscribing, companies. The subscribing companies are established companies as these are having substantial funds in the form of share capital and Reserve and Surpluses. The funds available in-the form of share capital and reserve and surplus is far exceeding the amount of subscription i.e. Rs. 70,00,000/-. The appellant has even furnished copies of Income-tax returns of subscribing companies. In my considered view, these documents conclusively proves the identity, genuineness of transaction and creditworthiness of the creditor in respect of the share capital received by the appellant. By filing these documents the appellant had discharged onus cast upon him by the provisions of section 68 of the I.T. Act. In view of above, I am of firm opinion that addition of Rs. 3,50,00,000/- made by the A.O. u/s.68 is untenable.*

*2.3 It is further seen that the appellant has received share capital and share premium of Rs. 3,50,00,000/- from five companies. It is clearly held by Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. 216 CTR 195 (S.C.) that in case of share subscriptions, to discharge onus of section 68, the appellant has to establish the identity of the persons who had subscribed the share capital, in this case the identity of the subscribing companies is established beyond doubt.' The A.O. has not doubted the identity of the subscribing companies. In view of these facts, addition of Rs.3,50,00,000/- cannot be made u/s.68 of the I.T. Act. '*

*2.4 I have also perused various case laws relied upon by the appellant. The case laws support the conclusions as discussed in the preceding paras.*

*2.5 It is further seen that in some cases the A.O. had doubted the source of deposits in the bank accounts of the subscribing companies before issuing cheques to the appellant company. It is also a matter of fact that the deposits in the accounts of subscribing companies were also through banking channels. Since the deposits in the bank account of subscribing companies are through banking channels, apparently these deposits have been made from legitimate sources. Even if for the argument sake, it is assumed that the deposits in the bank account of subscribing companies are suspect, in such eventuality also, addition cannot be made in the hands of the appellant company. In such a case, appropriate action will be to initiate proceedings in the case of subscribing companies. This way additions made in the income of the appellant of Rs. 3,50,00,000/-u/s.68 is uncalled for.*

*2,6 In view of above facts, addition of Rs. 3,50,00,000/- made by the A.O. u/s.68 of the I.T. Act is deleted. This ground of appeal is allowed.*

4. Aggrieved, Revenue is now in appeal before the Tribunal.

5. Ld. DR supported the order of Assessing Officer and also placed reliance on the judgment of Hon. Supreme Court in the case of Navodaya Castles (P) Ltd. vs. CIT (2015) 56 taxmann.com 18 (SC), judgment of Hon. Calcutta High Court in the case of CIT vs. Maithan International (2015) 56 taxmann.com 283 (Calcutta), decision of the Tribunal, Kolkata Bench "B" in the case of Subhlakshmi Vanijya Pvt. Ltd. vs. CIT (2015) 60 taxmann.com 60 (Kolkata-trib) and Id. DR urged that all the 5 companies through

which share capital and share premium of Rs.3.5 crores has been received are just paper company which are engaged in providing accommodation entries. Ld. DR further referred to the bank statements, financial statements, balance sheets and profit and loss accounts of all those 5 concerns where there is huge transactions in the bank accounts but are having a meager sale and meager income which nowhere co-relates to the voluminous transactions passed through bank accounts. Ld. DR also referred the statement of one of the directors of the cash creditors M/s Suraj Corporate Services Pvt. Ltd., Ahmedabad where the director has categorically accepted that this company is engaged in providing accommodation entries in which cash is routed through various other paper entities and finally once the amount reaches to the bank of Suraj Corporate Services Pvt. Ltd. the same is introduced in the form of share capital along with share premium. Ld. DR further submitted that Id. Assessing Officer has rightly made the addition u/s 68 of the Act as the assessee has been unable to prove the genuineness, creditworthiness of the impugned transactions.

6. On the other hand, Id. AR relied on the order of Id. CIT(A) and submitted that assessee has proved beyond doubt the identity of the 5 parties by filing PAN, copies of IT Returns, names and addresses and further submitted to prove creditworthiness and genuineness of the transactions filed evidence towards payment through cheques, copy of bank statements, audited balance sheets, for Asst. Year 2009-10 and complete explanation has been offered for the credit appearing in the books of account. Ld. AR further submitted that

assessee is not required to prove the source of source as held by Hon. Supreme Court in the case of CIT vs. Lovely Exports (2008) 216 CTR 195 (SC) and the department was free to proceed to take action in the cases of impugned 5 cash creditors but certainly no addition should have been made u/s 68 of the Act in the hands of assessee.

7. We have heard the rival contentions and perused the material placed before us and gone through the judgments, decisions cited by both the parties. The solitary grievance of the Revenue is against the order of Id. CIT(A) deleting the addition of Rs.3.5 crores made u/s 68 of the Act towards share capital and share premium. We find that during the year under appeal Rs.70 lacs each was contributed by following 5 parties totaling to Rs.3.5 crores towards share capital and share premium by way of subscribing one lacs equity shares having face value of Rs.10/- each and premium of Rs.60/-:-

1. Green Star Financial Service Pvt. Ltd.	Rs. 70,00,000/-
2. Archer Financial Service Pvt. Ltd.	Rs. 70,00,000/-
3. Suraj Corporate Service Pvt. Ltd.	Rs. 70,00,000/-
4. Fly High Exports Pvt. Ltd.	Rs. 70,00,000/-
5. Oasis Cine Communications Ltd.	Rs. 70,00,000/-

8. We further observe that total amount of Rs.3.5 crores was received through account payee cheques. During the course of assessment proceedings itself in order to prove the identity, creditworthiness and genuineness of the transactions, assessee has filed PAN, copies of income-tax returns for Asst. Year 2009-10, confirmation regarding share purchases along with proof of payments through cheques, copies of bank accounts and audited balance

sheets for Asst. Year 2009-10. We further find that summon was served u/s 131 to the following three parties based at Ahmedabad :-

- i) Green Star Financial Service Pvt. Ltd., Ahmedabad.
- ii) Archer Financial Service Pvt. Ltd., Ahmedabad.
- iii) Suraj Corporate Service Pvt. Ltd., Ahmedabad.

9. It was alleged by assessee that summons u/s 131 were not received by Archer Financial Service Pvt. Ltd. and Green Star Financial Service Pvt. Ltd. As far as personal attendance of the director of Suraj Corporate Service Pvt. Ltd., authorized representative on behalf of the company appeared and again filed documents which were already filed by the assessee and submitted that he took leave on behalf of the director for attending in personal due to illness of director's father. We further find that Assessing Officer came across the statement of Mr. Jitendra Jain, one of the directors of Suraj Corporate Service Pvt. Ltd., Ahmedabad recorded by DDIT(Inv) on 21.9.2010, in case of another investigation, in the case of M/s B. R. Metals and Alloy (Gujarat) Ld., wherein it was stated by Mr. Jitendra Jain that the said company, Suraj Corporate Services Pvt. Ltd. provides accommodation entries to the companies which gives cash to the said entities and the same was routed through various other paper entries and finally from the bank account of Suraj Corporate Services Pvt. Ltd. the same was introduced in the form of share application money.



10. Relevant extract of statement recorded on 21.09.2010- in the form of Questions & Answers in respect of Shri Jitendra Jain by DDIT(Inv), Ahmedabad, are as follows :-

Q. 22. *In which companies you are the director within last 6 years ? Pl. explain.*

Ans:22 *I am the director within last 6 years in the following companies –*

1. *Surat Corporate Services Pvt. Ltd.*
2. *Grin BPO Services Pvt. Ltd.*
3. *Siddhi Vinayak Fincap Ltd.*
4. *Shelja Finlease Pvt. Ltd.*
5. *Radhe Finservice Pvt. Ltd.*
6. *Tirupati Shelters Ltd.*
7. *Honest Business Deal Pvt. Ltd.*

Q. 24. *How much transactions of Suraj Corporate Services Pvt. Ltd. and Grin BPO Services with B. R. Metals and explain the nature of transaction ?*

Ans :24 *During the F.Y.2008-09 from Suraj Corporate Services Pvt. Ltd. the company invested Rs. 1 crores with B. R. Metals vide a/c No.213090 of PNB as share capital and Grin BPO Pvt. Ltd. has invested 1 crores 85 lacs in F.Y.2008-09 through bank account no.213373 of PNB as share capital.*

Q. 25 *What are the sources of above investment ?*

Ans: 25 *The transactions are nearly accommodation entries whereby cash was received from B. R. Metals and Alloy (Gujarat ) Ltd. which was then routed through a few bank a/cs of paper concerns and ultimately the money was invested in B.R. Metals & Alloys (Gujarat) Pvt. Ltd. through PNB by Suraj Corporate Services Pvt. Ltd. and Grin BPO Pvt. Ltd. as share capital and had received commission of 0.25% for making this arrangement.*

11. We further find from going through the bank statement of one of the impugned party Fly High Exports Pvt. Ltd., Kolkata placed at

pages 21 & 22 of CIT(A)'s order that a large volume of transaction totaling in crores of rupees have passed through their bank account during the year but when we turn to the profits and loss account, there is a meager interest income of Rs.9,77,080/- and similarly in case of Oasis Cine Communication Ltd., Kolkata against bank transaction in crores of rupees there is sales turnover of Rs.348500/- and net profit before tax at Rs.1289.56 which shows that the transactions which happened through the bank account are not having any impact on the profit and loss account.

12. Similarly in the case of Suraj Corporate Services Pvt. Ltd. when we refer to the bank statement placed on pages 14 & 15 of CIT(A)'s order, we find that transactions worth crores of rupees have moved through bank balances at various points of time are more than Rs.50 lacs whereas a meager amount of interest has been shown at Rs.18,903/-. Similar type of financial datas are depicted in other two impugned parties namely – Archer Financial Service Pvt. Ltd. and Green Star Financial Service Pvt. Ltd. having common address. From observing these documents it seems that huge volume of transactions are in the form of debit and credit of cheques and are of typical nature of paper companies engaged in providing accommodation entries.

13. Further we observe that Co-ordinate Bench, Kolkata in the case of Subhlakshmi Vanijya(P) Ltd. vs. CIT (2015) 60 taxmann.com 60 (Kolkata –Trib) came across issue relating to unexplained cash credit u/s 68 of the Act wherein share capital was received from companies

having very meager income and low financial capacity to invest huge amounts in other companies”share capital wherein the Co-ordinate Bench has held as under :-

HELD

***Whether the provisions of section 68 can be attracted if share capital with premium is not properly explained by the assessee company?***

- As per section 68 where *any sum* is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. This section has received the attention of the Supreme Court and almost all the High Courts in numerous cases. It has been almost unanimously held that the burden under this section is discharged by the assessee only when the assessee proves three things to the satisfaction of the Assessing Officer, *viz.*, identity of the creditor, capacity of the creditor and genuineness of the transactions. Onus under section 68 can be said to have been discharged only when the assessee proves identity and capacity of the creditor along with the genuineness of transaction to the satisfaction of the Assessing Officer. All the three constituents are required to be cumulatively satisfied. If one or more of them is absent, then the Assessing Officer can lawfully make addition.[Para 13.b.]
- In case of a closely held company where the shares are issued to the family members or close friends/relatives, the burden of proof rests on the company to properly explain the identity and capacity of shareholders along with the genuineness of the transactions. *Ex consequent*^ the argument of the assessee that he was not obliged to explain the genuineness of share capital after having furnished preliminary details about the shareholders etc., is not capable of acceptance and hence *reje* %d. In all cases, where the assessee fails to cumulatively prove to the satisfaction of the Assessing Officer, the identity and capacity of the shareholders along with the genuineness **of the** transactions there can be no escape from section 68.[Para 13.t]

***Whether insertion of proviso to section 68 by the Finance Act, 2012 with effect from 1-4-2013 empowering the Assessing Officer to examine the genuineness of the share capital in the case of a company in which public are not substantially interested, is prospective?***

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

- It is settled rule of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation Ordinarily the courts are required to gather the intention of the legislature from the overt language of the provision as to whether it has been made prospective or retrospective, and if retrospective, then from which date. However, some times what happens is that the substantive provision, as originally enacted or later amended, fails to clarify the intention of the legislature. In such a situation if subsequently some amendment is carried out to clarify the real intent, such amendment has to be considered as retrospective from the date when the earlier provision was made effective. Such clarificatory or explanatory amendment is declaratory. As the later amendment clarifies the real intent and declares the position as was originally intended, it takes retroactive effect from the date when the original provision was made effective. Normally such clarificatory amendment is made retrospectively effective from the earlier date. It may also happen that the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, the judicial or quasi-judicial authorities, on a challenge made to it, can justifiably hold such amendment to be retrospective. The justification behind giving retrospective effect to such amendment is to apply the real intention of the legislature from the<sup>1</sup> date such provision was initially introduced. The intention of the legislature while introducing the provision is

gathered, *inter alia*, from the Finance Bill, Memorandum explaining the provision of the Finance Bill etc. [Para 13.x.] /

- Any amendment to the substantive provision which is aimed at clarifying the existing position or removing unintended consequences to make the provision workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively. The border line between a substantive provision having retrospective or prospective effect, is quite prominent. One needs to appreciate the nature of the original provision in conjunction with the amendment. Once a provision has been given retrospective effect by the legislature, it shall continue to be retrospective. If on the other hand, the statute does not amend it retrospectively, then one has to dig out the intention of the Parliament at the time when the original provision was incorporated and also the new amendment. If the later amendment simply clarifies the intention of the original provision, then it will always be considered as retrospective. [Para 13aa]

On advertent to the language of section 68, it transpires that it refers to '*any sum credited*' in the books of an assessee maintained for any previous year. The expression '*any sum credited*' has not been specifically defined in the provision. Thus, it would extend to all the amounts credited in the books of account. A sum can be credited in the books of account, which would invariably either find its place either on the income side of the Profit and loss account or in the liability side of the balance sheet. Items credited to the Profit and loss account are themselves income and hence there can be no reason to make addition once again for them. Items appearing on the liability side of the balance sheet can be loans or share capital etc. Once there is specific reference in section 68 for applying it to '*any sum credited*', there can be no reason to restrict its application only to '*loans*' and not to '*share capital*'.<sup>1</sup> The burden of proof under section 68 can be no different in respect of issue of share capital by closely held companies vis-a-vis loans or gifts. The High Court in *CIT v. Maithan International* [2015] 375 ITR 123/231 Taxman 381/56 taxmann.com 283 (Cal.). *CIT v. Active Traders (P.) Ltd.* 1995 1214 ITR 583/[1993] 69 Taxman 281 (Cal. *Mimec (India) (P.) Ltd, v. Dy. CIT*[2003] 353 ITR 284/216 Taxman 157 (Mag.)/35 taxmann.com 319 (Cal.) and *CIT v. Nivedan Vanijya Niyogan Ltd.* [2003] 263 ITR 623/1 30 Taxman 153 (Cal.)<sup>a</sup> has specifically held that the three ingredients, viz, identity and capacity of creditor and genuineness of transaction are required to be satisfied even in case of issue of share capital by a closely held company. It shows that the intention of the legislature, as interpreted by the High Court, is always to cast duty on the assessee to prove the satisfaction of the three ingredients in case of transaction of issue of share capital by a closely held company in the same way as is in the case of transaction of loans. [Para 13. ab]

A careful perusal of the first para of the Memorandum brings out that the onus of satisfactorily explaining issue of share capital with premium etc. by a closely held company is on the company. Next para recognizes that judicial pronouncements, while considering that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, have advised a balance to be maintained regarding onus of proof to be placed on the company. After going through the above parts of the Memorandum explaining provisions of the Finance Bill, there remains no doubt whatsoever that the onus has always been on the closely held companies to prove the issue of share capital etc. by the company in terms of section 68. Thus, the amendment makes it manifest that the intention of the legislature was always to cast obligation on the closely held companies to prove receipt of share capital etc. to the satisfaction of the Assessing Officer and it was only with the aim of setting to naught certain contrary judgments which '*created doubts*' about the onus of proof by holding that there was no requirement on the company to prove the share capital etc. and as such no addition could be made in the hands of company even if such shareholders are bogus. As the amendment aims at clarifying the position of law which always existed, but was not properly construed in certain judgments, there can be no doubt about the same being retrospective in operation. [Para 13. ad.]

Therefore, the amendment to section 68 by insertion of proviso is clarificatory and hence retrospective. The contrary arguments advanced by the assessee being devoid of any merit, are hereby jettisoned. [Para 13. ae.]

Thus, the contention of the assessee that since the Assessing Officer of the assessee-company is not empowered to examine or make any addition on account of receipt of share capital with or without premium before amendment by the Finance Act, 2012 with effect from assessment year 2013-14 and hence the Commissioner by means of impugned order under section 263 could not have directed the Assessing Officer to do so, is unsustainable. [Para 13.ak.]

14. We further observe that in the case of CIT vs. N. Tarika Properties Investment in ITA No.2080 of 2010 Hon. Delhi High Court vide its judgment dated 28.11.2013 has held as under :-

31. We are of the considered opinion that the Assessee has not been able to discharge the initial onus and has not been able to establish the identity, creditworthiness of the share applicants and the genuineness of the transaction. The surrounding circumstances and

inquiries made by the Assessing Officer were significant but the said finding though not disturbed have been ignored. Further the Tribunal has failed to take holistic view and has relied upon neutral and general evidence without noticing other evidence, which are :-

- a) The Respondent - Assessee is a private limited company.
- b) The subscribers were unknown persons, not related or friends.
- c) The subscribers bank account statements furnished were forged and fabricated.
- d) There were corresponding cash deposits in the bank accounts before issue of share application cheques.
- e) The subscriber companies it has been shown were carrying on effective and day to day business or were angle investors.
- f) The subscribers did not bother and ensure protection of their investment.

32. In view of the above, we are of the view that the Assessee has not discharged the onus satisfactorily and the additions made by the Assessing Officer was justified and sustainable and the order of the Tribunal ignoring and nor dealing with the factual findings recorded by the assessing officer is perverse .

33. The substantial question of law is thus answered in favour of the Appellant/Revenue and against the Respondent/Assessee. The appeal is accordingly allowed with costs that are assessed at Rs. 20,000/-.

15. Further we observe that in the case of Sumati Dayal vs. CIT 1995 AIR 2109, Hon. Supreme Court held as under :-

*5. It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See :Parimiseti Seetharamamma (supra) at P. 5361. But, in view of [Section 68](#) of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut , the said evidence being un rebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably. (See : Sreelekha Banerjee (supra) at p. 120)*

16. Further we observe that in the case of CIT vs. Maithan International (2015) 56 taxmann.com 283 (Calcutta), Hon. Calcutta High Court has held as under :-

*Held –*

- *When payment by cheque did not establish the creditworthiness of the lender mere examination the pass book or the bank statement or me letter of confirmation or the balance sheet of the lender was not enough. The inspector appointed by the Assessing Officer did not go beyond the aforesaid documents. Therefore, it cannot be disputed that the view formed by the Commissioner that in none of the reports, he has commented upon the issue of creditworthiness ;.e. whether these parses had sufficient means to advance such huge loans, is not without basis.*
- *It is well establishes that credits allegedly based on loan from parties, who are. not possessed of sufficient means cannot be accepted as genuine. The Assessing Officer was required to make proper investigation to determine whether the money was really lent by the third party or it has come out of the resources of the assessee himself. Thus the Assessing Officer has failed to apply his mind to all aspects of the case is self-evident. Such non-application of mind constituted passing of an erroneous order which is also prejudicial to the interest of revenue. [Para 11]*
- *In the instant case, the Commissioner had reasons to hold that creditworthiness of the alleged lenders was not enquired into. Mere examination of the bank pass book, profit and loss account and balance sheet of the creditors is not enough. When the requisite enquiry was not made, the order is bound to be erroneous and prejudicial to the interest of the revenue. The Tribunal proceeded on the theory that it was not a case of no enquiry; that no doubt is true, but that is not enough, if the relevant enquiry was not made, it may in appropriate cases amount to no enquiry and may also be a case of non-application of mind. [Para 12]*
- *The power under section 263 can be exercised where the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue. When an order is erroneous, then the order is also deficient and in order to remedy the situation, power under section 263 has been given. Therefore, the view that the power could not have been exercised to allow the Assessing Officer to make up the deficiency is altogether an incorrect impression of the law. [Para 16]*
- *It is not the law that the Assessing Officer occupying the position of an investigator and adjudicator can discharge his function by perfunctory or*



*inadequate investigation. Such a course is bound to result in erroneous and prejudicial, orders. Where the relevant enquiry was not undertaken as in this case, the order is erroneous and prejudicial too and therefore revisable. Investigation should always be faithful and fruitful Unless all fruitful areas of enquiry are pursued the enquiry cannot be said to have been faithfully conducted. .[Para 19]*

- *In view of above, the order of the Tribunal is set aside.*

17. Hon'ble Apex Court in the case of Navodaya Castle (P) Ltd vs CIT reported in (2015) 56 taxmann.com 18 (SC) has held that mere filing of certificate of incorporation, PAN were not sufficient for the purpose of identification of subscriber company especially when there was material to show that subscriber was a paper company and not a genuine investor.

18. Examining the facts in the light of above judgments and decisions we observe that assessee is a private limited company which is not open to public and, therefore, if it requires to increase its capital base or invite investment in the share capital along with premium which in this case is Rs.60/- over the face value of Rs.10/- then it has to approach within its friends and relatives for the investment. In the given case Rs.70 lacs each has been given by the impugned 5 parties to the private limited company i.e. the assessee. Any prudent person who intends to invest in a company with a motive of gaining from the said investment, looking to the quantum of share capital and premium invested by these 5 parties which is of a substantial percentage of the total share capital of the company it is surprising to note that none of them was able to appear before the Assessing Authority nor the assessee was able to bring any of them

in person to prove the genuineness of transaction and creditworthiness of the investor towards share capital and share premium given these impugned 5 parties. More so we find that out of the 5 parties three parties are within Ahmedabad and so is the assessee. It is not simple to believe that none of them could have been made to appear before the Assessing Officer to prove the transaction. This non-attendance of the equity share holders makes the situation little grimy which further gets suspicious when the financial statements are gone through. It has been uniform situation in all the 5 parties that transactions totaling in crores are routed through bank accounts, huge reserve and surplus is appearing in the balance sheet along equal amount of investment; but when the profits and loss account is looked into it seems complete dry as interest against investment running in crores the income shown is few thousand and so is the total turnover. Adding more to this in the statement given by one of the directors of Suraj Corporate Services Pvt. Ltd. it has been clearly accepted that Suraj Corporate Services Pvt. Ltd. is an accommodation entry provider and just a paper company. This modus operandi of accommodation entry provider cannot get itself covered under the shadow of PAN, income-tax return, audited financial statement and proof of transactions by account payee cheques. One has to go ahead to rethink why such company is incorporated. In normal course a business entity is incorporated to earn profits and capital is contributed for doing the same but when the capital investment or reserve and surplus created is just used to invest in other companies without having any return and the gross turnover of the company is not having any direct

connection with the voluminous bank transaction then such companies end up into a paper company.

19. From going through all the above judgments and decision, we find that along with evidences, surrounding circumstances, human probability and intentional acts are also to be taken note off while accepting the identity, creditworthiness and genuineness of the cash creditors which in this case is the share applicants. In the case before us we observe that assessee is trying to assert again and again upon the PAN, IT returns, bank statement and confirmations of the impugned 5 parties but has nowhere tried to clarify or disclose the fact which has embedded in the financial statement of these 5 parties which speaks in itself that they are paper companies. Further if it has been genuine transaction and assessee company is asked to produce the new share holders who have been allotted a substantial portion of equity shares, he would have easily called upon the investors. The investors could have come along with all the financial documents and could have clarified about his intention to make investment in the equity shares of the company because every investor wants to earn income from investment in the form of dividend as well as expects appreciation in the valuation of shares with the growth of business. If this has been the situation, then there would have been no doubt on the genuineness of the transactions. On the contrary in the instant case assessee completely fails to prove the same.

20. It is well settled that in order to discharge the onus the assessee must prove the following :-

- i. The identity of the cash creditor;
- ii. Capacity of the cash creditor to advance money towards capital.
- iii. Genuineness of the transaction.

If the assessee has adduced evidences to establish the prima facie, the aforesaid onus shifts to the Department. However, mere furnishing of particulars or the mere fact of payment by account payee cheque or the mere submission of confirmation letter by the share applicant is by itself, not enough to shift the onus to the Department although these facts may, along with other facts be relevant in establishing the genuineness of the transaction. As held by Hon. Supreme Court in the case of CIT vs. N. Tarika Properties Investment (2014) 51 taxmann.com 387(SC) that *“PAN cannot be treated as sufficient disclosure of identity of the person. PANs are allowed on the basis of application without actual de facto clarification of identity or ascertainment of activities, nature of business activity and are just as to facilitate the Revenue to keep track of transactions and thus PAN cannot be blindly and without consideration of surrounding circumstances treated as sufficient disclosing the identity of individual”*.

21. We further observe that Hon. Delhi High Court in the case of CIT V Empire Builtech P Ltd 361 ITR 258 (Del), has held that when

assessee does not produce evidence or tries to avoid the appearance before the Assessing authority it necessarily creates difficulties and prevents ascertainment of the truth and correct facts as the Assessing Officer is denied the advantage of the attendance or factual assertion by the assessee before him. If an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent enquiry or investigation an adverse opinion should be drawn. The assessee had not discharged the initial onus to establish the identity, creditworthiness of the share applicants and the genuineness of the transactions. The additions made by the Assessing Officer were justified and sustainable.

22. We are, therefore, of the view that in the given facts and circumstances of the case and respectfully following the judgments of Hon. Supreme Court, High Court and the decision of Co-ordinate Bench as discussed above, we are of the confirmed view that assessee has been able to just prove the identity of the company but unable to prove the genuineness & creditworthiness of the impugned 5 parties. In the result, the sum of Rs.3.5 crores has rightly been treated as unexplained money u/s 68 of the Act by the Id. Assessing Officer. We set aside the order of Id. CIT(A) and restore that of the Assessing Officer. In the result ground no.(i) of Revenue is allowed.

23. Ground No.(ii) & (iii) are of general nature, which need no adjudication.

24. In the result, appeal filed by the Revenue is allowed.

Order pronounced in the open Court on 18<sup>th</sup> August, 2016

Sd/-  
(S. S. Godara)  
Judicial Member

sd/-  
(Manish Borad)  
Accountant Member

Dated 18/8/2016

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 16/08/2016
2. Date on which the typed draft is placed before the Dictating Member: 17/08/2016 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: \_\_\_\_\_
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 18/8/16
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: