INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI SUDHANSHU SRIVASTAVA , JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA NO 6460/DEL/2015
A Y: 2006-07

The Income Tax Officer Ward 1 (1) New Delhi	VS	AASl (India) Properties In Infrastructure Private Limited 4 A/10, Old Rajinder Nagar New Delhi PAN AAFCA2494A
(Appellant)		(Respondent)

Appellant by	Shri PV Gupta Senior departmental representative
Respondent by:	None
Date of Hearing	12/06/2019
Date of pronouncement	15/07/2019

PER PRASHANT MAHARISHI, ACCOUNTANT MEMBER:-

1. Learned Income Tax Officer Ward 1 (1), New Delhi (the learned AO) has preferred this appeal against the order of The Commissioner Of Income Tax (Appeals)- IV, New Delhi dated 14/11/2014 raising following grounds of appeal:-

   "On the facts and circumstances of the case the learned CIT – A has erred in

   i. deleting the addition of INR 7,000,000 made by the learned assessing officer u/s 68 representing unexplained share capital by ignoring the fact that in some case, the alleged shareholders premises were found locked and in some cases summons could not be served remain on complied

   ii. deleting the addition of INR 1 22500/– made by the AO representing commission that was claimed to be paid thereon to the entry operator

2. Brief facts of the case shows that assessee is a company who filed its return of income for assessment year 2006 – 07 and 29/11/2006 declaring income of loss of INR 19801/-

3. A search and survey operation u/s 132 /133A of the income tax act, 1961 was conducted by the investigation wing of Department, Delhi on

19/4/2010 at the residential and business premises of Sri Surendra Jain and his brother Virendra Jain. Various incriminating documents were seized and impounded. During the post-search and survey operation, revenue impounded documents and enquiries conducted by the revenue, it was revealed that Sri SK Jain and Shri VK Jain are engaged in the business of providing accommodation entries by making payment in the form of various instruments through banking channel in lieu of cash to a large number of beneficiary companies through more than 100 paper and dummy companies, entities controlled by and operated by them through various persons by appointing them as directors/partner/proprietors et cetera apart from nominating them as authorised signatories for maintaining the bank accounts of these entities. However, in fact all these persons act only as stooges of Mr. SK Jain and Shri VK Jain. The learned assessing officer has discussed in first two pages of his assessment order with respect to the result of the search and seizure operation carried on by the revenue.

4. In case of the assessee, it was found that assessee has obtained 14 accommodation entries of INR 500,000 each from nine different companies through UTI Bank, Bank of India, Kotak Bank, ABN bank etc during the period 14/12/2005 to 28/02/2006 where the name of the agent was found to be Mr. Satish Goel. Thus, it was apparent that Assessee Company was found to be one of the beneficiaries who have obtained the accommodation entry.

5. Therefore, the proceedings under section 147 read with section 148 were initiated. The assessee was issued notice u/s 148 of the income tax act on 28/3/2013. The assessee responded vide letter dated 30/4/2013 stating that original return filed by it on 29/11/2006 may be considered as the return of income filed in response to the notice for reopening of the assessment. Consequently, the reassessment proceedings begin and the assessee was provided with the copies of the reasons recorded 02/05/2013. Subsequently the notice u/s 142 (1) and 143 (2) was also issued. Despite repeated opportunities, none appeared for many opportunities granted by the AO. Subsequently on 9/1/2014, the authorised representative of the assessee appeared and raised objection against the reopening proceedings under section 147 of the income tax act. Such objections were disposed of by the learned assessing officer on 5/2/2014.

6. Subsequently the assessee was also given several opportunities to prove the onus of the shareholders who invested INR 7,000,000 in the above company. The assessee merely filed the list of the company with name and address from who share application money has been received. The assessing officer issued notice u/s 133 (6) of the act by speed post, replies were received through speed post from eight companies. On examination of the reply, it created a doubt in the mind of the learned assessing officer

that all the speed post been received from the one post office and therefore all these persons do not exist but somebody else is operating on behalf of them and these are the dummy entities. Therefore, the learned assessing officer asked assessee to produce the principal officers of the alleged company who has given share application money and premium to the assessee. The learned authorised representative despite many opportunities did not produce any of the creditors or shareholders. In view of this, the learned assessing officer deputed the inspector to issue summons u/s 131 on the 4 companies personally and to other parties through registered post. The Inspector submitted a report that these companies do not exist at the addresses given by the assessee and the premises are locked. In case of the parties to whom the summonses were sent t through post, no reply was received. The learned assessing officer further examined the details furnished in response to notice u/s 133 (6) of the income tax act and found that these persons are not doing any business and the turnover is very nominal and on examination of the bank account it is found that these accounts have been used for rotating the transactions only. Further, once again the summonses were issued to the principal officers of those companies under section 131 of the income tax act on 26/3/2014. However, no reply was received from them. The assessee was also asked to produce the principal officer of these companies in order to verify the identity, creditworthiness, and genuineness of those transactions entered into by the share applicants. However, the assessee also did not produce them. In view of this the learned assessing officer reached at the conclusion that the above entities are merely accommodation entries provided by Mr. SK Jain and identity, creditworthiness and genuineness of those transactions are not proved by the assessee. In view of this after detailed discussion of facts and considering the provisions of section 68 of the income tax act along with various judicial precedents of several high courts and honourable Supreme Court, he made the addition of INR 7,000,000 as unexplained cash credit under section 68 of the income tax act. He further held that during the course of enquiries conducted by the investigation wing of the department it was found that most of the entry operators are charging commission at the rate of 1.75 percentage for giving accommodation entry and therefore he further made an addition of INR 1 22500/– towards the unexplained expenditure on commission. Accordingly he determined the taxable income of the assessee at INR 7102199/– against the returned loss of INR 19801/– as per order passed u/s 147 read with section 143 (3) of the income tax act on 28/3/2014.

7. Assessee aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT – A, who passed an order dated 14/11/2014. The assessee objected the proceedings u/s 148 of the income

tax act before the learned CIT – A and on this ground the learned CIT – A upheld the order of the learned assessing officer holding that the reopening of the proceedings is valid. On the ground number 4 – 7, with respect to the addition of INR 7,000,000 under section 68 of the income tax act, the learned CIT – A deleted the above addition as per para number 5.1 of the order. He held that as the assessing officer has received the replies from various shareholders and the learned assessing officer has made the addition only on the suspicion. He further held that the contention of the AO that subsequent notice u/s 131 were not responded to by the shareholder and that the appellant failed to produce the share holders cannot be a ground for making the addition. He further held that in the case of the appellant the notices u/s 133 (6) issued by the learned assessing officer to those shareholders were served on them and they filed their replies directly to the AO confirming the investment in the appellant company. He further held that several decision of the honourable Delhi High Court cited by the learned assessing officer does not apply in the case of the assessee. Accordingly, he deleted the addition of INR 7,000,000 under section 68 of the income tax act and consequent unexplained expenditure of INR 1 22500/– made because of commission was deleted. Therefore, the learned assessing officer aggrieved with the order of the learned CIT – capital has preferred an appeal before us raising the above grounds of appeal.

8. It is important to note that this appeal has been listed for hearing 5 times before the scheduled hearing on 12/06/2019. On all the occasion, none appeared on behalf of the assessee. The notices were also issued on many times through registered post and in the end through revenue. Therefore, it is apparent that assessee does not want to get himself represented in this case before the coordinate bench.

9. The learned departmental representative vehemently submitted that that it is a clear-cut case of bogus share capital introduced by the assessee through Mr. SK Jain and VK Jain. The issue is squarely covered by the decision of the honourable Delhi High Court in case of NDR promoters and of the honourable Supreme Court in case of NRA steel and Iron Limited. He further submitted the gist of host of the cases decided by the honourable Delhi High Court wherein on identical facts and circumstances the addition u/s 68 was upheld. He therefore submitted that in this case the addition deserves to be upheld and the order of the learned CIT – A deserves to be vacated and the order of the learned assessing officer may be restored.

10. We have carefully considered the contention and perused the orders of the lower authorities. In the present, case apparently assessee obtained share capital from nine different companies through 14 transactions of INR 500,000 each between December 2005 to February 2006 through Mr. satish Goel through accommodation entry provider Shri SK Jain and VK

Jain. The information was received during the course of search and seizure proceedings where the name of the assessee and the complete details of the whole transaction were found. It is apparent that had these companies through whom the assessee has obtained share application money, were not belonging to, or operated by Mr. SK Jain of VK Jain then this information would not have been unearthed from the premises of Sri VK Jain and Shri SK Jain. Therefore, the case of the assessee was reopened and assessee was asked to produce the relevant information to prove the identity, creditworthiness, and genuineness of the transaction of the above share capital. Assessee submitted name and address of share applicants, confirmation of share applicants, certificate of incorporation and memorandum and articles of Association of the companies, copies of income tax return acknowledgement of the shareholders, copies of the bank statement of the shareholders reflecting the investments made in appellant company and copies of audited statement of the accounts of investor companies duly reflecting the investment made by them in the share capital of the company. The assessee also filed the list before the assessing officer. Therefore the AO issued notices u/s 133 (6) of the act seeking certain information from those companies, undoubtedly, these information was received by the assessing officer from these companies, however, it was found to be a suspicious response from these companies. Therefore, the assessee was asked to produce the principal officers of these companies. The assessing officer issued summons u/s 131 of the income tax act through inspector who found that the premises of the some of the companies are locked. Summons issued under section 131 of the act through post was never replied. The AO analyzed the information received under section 133 (6) of the act from the shareholders, and found that these are merely the paper companies, does not have any substance, turnover, income. The bank statements of those companies received u/s 133 (6) of the act also did not inspire any confidence as according to AO they were merely transactions of accommodation entries only. In view of this, the addition was made u/s 68 of the income tax act. Apparently, in this case the assessee failed to discharge its onus u/s 68 of proving the identity, creditworthiness of the depositors, share applicants and the genuineness of the transactions. Therefore, the assessee has failed in his duty to discharged initial onus cast upon him. In spite of that, the learned assessing officer made the detailed enquiry by issuing summons u/s 131 of the act and by issuing the enquiry letters under section 133 (6) of the income tax act. The enquiry made by the learned assessing officer u/s 133 (6) of the income tax act was thwarted by the assessee by not producing the principal officers of these companies before the assessing officer. Apparently in this case the assessing officer could not have done anything more than what he has done.

11. The learned CIT – A has deleted the above addition merely on the basis of the information submitted by the assessee, in the form of complete name and address of share applicants, confirmation of share applicants, certificate of incorporation and memorandum and articles of Association of the companies, copies of income tax return acknowledgement of the shareholders, copies of the bank statement of the shareholders reflecting the investments made in appellant company, copies of audited statement of the accounts of investor companies duly reflecting the investment made by them in the share capital of the company. The learned CIT – A did not give any answer to the nonexistence of the above creditors, shareholders at the given address as well as non-production of the directors of these companies before the assessing officer to verify the creditworthiness of those companies. There is no whisper in the order of the learned CIT – A about genuineness of the transactions. He has merely considered the submission made by the assessee that all these companies are having huge net worth. He failed to understand the basic issue that if these companies have such a huge net worth, why are they running away from the income tax department and not proving before the assessing officer that yes , they have money and given by them to the above company. The learned CIT – A also failed to appreciate that how is it possible to comprehend that the companies with such a huge net worth, but their offices are locked and there is no response of the summons issued u/s 131 of the income tax act. Further, there is no whisper in the order of the learned CIT – A that how he is satisfied that the transaction is genuine when the details of the accommodation entries provided by Mr. SK Jain and VK Jain were found from their premises showing that assessee is beneficiaries of the accommodation entries. He also failed to comprehend the basic fact that in case of accommodation entries all the documents produced by the assessee before the assessing officer and before him were bound to be there. AO disbelieved them and conducted the necessary enquiries. However, the learned CIT – A has believed them without rebutting the findings of the learned AO, that these companies do not exist and they do not have any business. Further, the learned CIT – A also failed to comprehend that response to notice u/s 133 (6) was received from the one post office, which is a regular feature in case of accommodation entry operators whenever the confirmations are asked for. There is no whisper in the order of the learned CIT – A respect to the bank account of these parties where the learned assessing officer has observed that these are only the accommodation entries rooted through these accounts. The learned CIT – A has also held that that the replies have been received from the various shareholders as it has been sent by them from the same office and around the same time is at best the suspicion of the assessing officer and he further went ahead and said that it is not the case of the AO that replies were sent by the appellant.

The learned CIT – A failed to comprehend that the learned assessing officer has stated in many words that the reply received by him under section 133 (6) of the income tax act from the share applicants are not in order. It is neither the duty of the assessing officer to enquire that who sent this confirmations. In addition, apparently in this case it is the assessee in connivance with the accommodation entry operator who sent this confirmations under section 133 (6) of the act when the report of the inspector categorically says that they do not exist at the given address. The learned CIT – A further conveniently held that the order of the honourable Delhi High Court in case of Nipun builders and developers private limited does not apply to the facts of the case as in that particular case it was found that no such companies exist by the Post authorities. Apparently, in this case it is the report of the inspector himself that said that no such companies are existing thereon at the addresses given. Therefore, according to us the learned CIT – A distinguished the decision of the honourable Delhi High Court on flimsy ground, which is not acceptable.

12. The learned departmental representative has heavily relied on the decision of the honourable Supreme Court in case of Commissioner of income tax vs NRA iron and steel Co Ltd [2019] 103 taxmann.com 48 (SC)/[2019] 262 Taxman 74 (SC)/[2019] 412 ITR 161 (SC). It is interesting to note the history of the above decision of the honourable Supreme Court. The earlier the matter reached the coordinate bench in *ITA No. 3611/Del./2014 (C.O.No.263/Del./2015) Oct 16, 2017 (2017) 51 CCH 0790 Del Trib* and the whole issue has been dealt with by recording the following facts in paragraph number 2-4 of the order of the coordinate bench as under **:-**

> " 2. Briefly the facts of the case are that A.O. issued notice under section 148 of the I.T. Act after recording the reasons for reopening. The assessee submitted before A.O. that return already filed may be treated as return having been filed in response to notice under section 148 of the I.T. Act. The A.O. issued detailed questionnaire on the above issue of share capital and the assessee filed necessary details and clarifications before A.O. time to time. The assessee filed objections to the reopening of the assessment under section 148 of the I.T. Act, which was rejected on 13th August, 2012. The assessee submitted before A.O. that it has raised money aggregating to Rs.17.60 crores through share capital/share premium during the assessment year under appeal from various parties which are Mumbai based companies, Kolkata based companies and Gauhati based companies. The details of which are noted at pages 2 and 3 of the assessment order. It was submitted that assessee has already filed copies of the confirmations, income tax return acknowledgments and bank accounts in respect of these companies, duly establishing the identity, genuineness and source of transaction regarding share capital and share premium. The entire share capital/ application money has been received by the assessee-company through normal banking channels by account payee

cheques/demand drafts. Furthermore, the said confirmations also clearly reveal the source of funds, particulars of bank accounts through which payment have been received and income tax particulars which go to establish their identity and creditworthiness. It was therefore, submitted that there were no cause exists to make a recourse to the provisions of Section 68 of the I.T. Act, 1961. In the instant case, there is no material on record to prove or even remotely suggest that the share application money received actually emanate from the assessee-company. The share application money was received from independent legally incorporated Companies through banking channels. The initial onus upon assessee has thus been discharged. The assessee relied upon the decision of the Delhi High Court in the case of CIT vs. Steller Investment Ltd., (1991) 192 ITR 287 (Del.) in which it was held that any increased capital is not assessable in the hands of the assessee which has been confirmed by the Hon'ble Supreme Court in the case of CIT vs. Steller Investment Ltd., (2001) 251 ITR 263 (SC). The assessee also relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs. Lovely Exports Pvt. Ltd., 216 CTR 195 in which it was held that "if the share application money is received by the assessee-company from alleged bogus share holders whose names are given to the A.O, then the Department is free to proceed to reopen their individual assessments in accordance with law". The assessee relied upon several decisions in support of the contention. The A.O. however, did not accept the contention of the assessee on the basis of the enquiries conducted by him. It was found that existence of investment companies and genuineness of the transactions has not been proved. The A.O. noted that as regards Mumbai based Companies, some notices were served and some could not be served and no reply have been received from them. In respect of Kolkata based Companies, they have filed their reply through Dak counter confirming the transaction with the assessee, but copy of the bank account has not been enclosed. In respect of Guwahati based company, it was noted that this company do not exist at the address. Therefore, it was held that assessee failed to prove the genuineness of the transaction and accordingly, addition of Rs.17.60 crores was made in the hands of the assessee.

3. The assessee challenged the reopening of the assessment as well as addition on merits before Ld. CIT(A). The detailed contention of the assessee as regards reopening of the assessment has been noted in the impugned order. However, the Ld. CIT(A), confirmed the reopening of the assessment and dismissed this ground of appeal of assessee, particularly, when he has allowed the relief to the assessee on merit. Therefore, no detailed reasoning have been given because it was found that the issue is left with academic discussion only.

4. The assessee as regards the addition, on merit, reiterated the same submissions before Ld. CIT(A) and it was submitted that A.O. made the addition arbitrarily and unjustifiably. The assessee produced all the relevant documents before A.O. which have not been doubted. The assessee filed confirmations of all the share applicants, copy of their

income tax returns, bank accounts and copy of annual accounts. Therefore, no adverse inference has been drawn against the assessee. The Ld. CIT(A) on going through the documents and material on record, deleted the entire addition of Rs.17.60 crores and allowed the appeal of assessee. His findings in paras 3.3 to 3.5 of the impugned order are reproduced as under :

> *"3.3. I have considered the rival claims. The fact that appellant filed the requisite documents before the AO is undisputed. Thus, the appellant had discharged its primary onus of establishing the identity of the share holders / applicant ire source of the money. The only reason for the revenue to cause further verification was the report relating to survey conducted at the premises of the appellant which forms part of the satisfaction recorded for reopening the assessment proceedings. From the said report it transpires that the business premises of the appellant actually belonged to M/s Bhushan Steel Ltd. and several other companies were having their registered offices in the same premises. This led to the suspicion that these companies were paper companies. During further verification of the identity of the shareholders in Mumbai, some summons were served but parties did not respond. In Guwahati, both parties were not found at the given address. In Kolkata, all 11 parties responded by post but no one appeared.*
>
> *3.4. There is no law that more than one company cannot have its registered office at one address. There is no law that companies cannot change their registered office. Several companies can have the same registered office. Businesses raise capital and such capital is rotated in economy for increasing production and trade and for making more efficient use of capital. Companies change hands, sometimes in quick succession. This is the normal formation of capital in any open economy and the process of capital formation cannot be taken to be representing only unaccounted funds or impeded. All the companies having registered office at that premises undisputedly belonged to Bhushan Group. The sources of capital introduced in these companies were established during the respective assessment proceedings, including in the case of this appellant company. No evidence was found during the search to indicate introduction of unaccounted cash / funds in the form of share capital in these companies. Therefore, the conclusion based on the facts relied upon by the revenue that the share capital introduced in the companies belonging to Bhushan Group, including the appellant company, are unexplained, is at best premature.*

3.5. In the above facts and circumstances of the matter, and in view of the case laws relied upon by the Ld. AR, the addition made cannot be legally sustained and is deleted. This ground of appeal is allowed."

13. Thereafter after recording the arguments of the both the parties the coordinate bench decided the whole issue as under:-

"19. It may be noted here that investor companies have confirmed making investments in assessee-company who were having sufficient net worth to make investment in assessee-company. Assessee filed I.T. returns, PAN, Bank Statements of investor Company to prove they are existing assessees of Department and are genuine parties. **No efforts are made by A.O. for production of investors at assessment stage**. Therefore, the assessee has been able to prove identity of the share applicants, their creditworthiness and genuineness of the transactions in the matter. The Ld. CIT(A), on examination of the material on record, further found that the only reason for the Revenue to goes for further verification was the report relating to survey conducted at the premises of the assessee- company which forms part of satisfaction recorded for reopening of the assessment proceedings. **From the said report, Ld. CIT(A) found that the business premises of the assessee actually belong to M/s. Bhushan Steel Ltd., and several other Companies having their Registered Offices at the same address. This created a suspicion in the mind of the Revenue.** The Ld. CIT(A) therefore, rightly noted that there is no law that more than one Company cannot have its Registered Office at one address. The Companies could have change their address later on. It is also an admitted fact that source of the capital investment companies were established during their respective assessment proceedings including in the case of the present assessee-company as per the findings of the Ld. CIT(A). Ld. CIT(A) also found that no evidence was found during the course of survey to indicate introduction of unaccounted cash/funds in the form of share capital in these companies. These findings of fact recorded by the Ld. CIT(A) have not been rebutted through any evidence or material on record. **No evidence has been brought on record that money so invested in assessee-company came from coffers of assessee-company.** All objections of A.O. have been considered by Ld. CIT(A) and various case law referred to above support the findings of Ld. CIT(A) that addition has been correctly deleted.

20. The Ld. D.R. relied upon the decision of various Hon'ble High Courts and Delhi High Court referred to above. In these cases, the gist of the findings are that the assessee failed either to prove the identity or capacity of the subscriber companies or that the amount was received as accommodation entries. However, the assessee- company, in the present case, has been able to prove the identity of the investors, creditworthiness and genuineness of the transaction in the

matter. Therefore, Ld. CIT(A) on proper appreciation of evidence and material on record, correctly deleted the addition of Rs.17.60 crores. The Departmental appeal fails and is accordingly, dismissed.

21. In the result, appeal of the Revenue is dismissed."

14. When the matter reached the honourable Delhi High Court, it decided the whole issues in IT APPEAL NO. 244 OF 2018 FEBRUARY 26, 2018 as under holding that:-

"The AO for AY 2008-09 re-opened assessment under section 147 based upon the information received, pursuant to search conducted in the premises of third party. The AO sought to rely upon the reports received from companies situated in Mumbai, Kolkata and Guwahati. The additions were made based upon these reports. The CIT(A) directed that a sum of Rs. 17.6 crores brought to tax under Section 68 was not justified. Upon appeal, CIT(A) was of the opinion that the AO did not conduct any sufficient enquiry and given the material that had been placed on record by assessee, the genuineness of the creditors as well as the transactions had been *prima facie* disclosed which amounted to discharge of onus upon it. The ITAT rejected the revenue's objections.

The Court notices that CIT(A) in this case quite correctly had examined the entirety of the facts and concluded, as follows :

"3.3 I have considered the rival claims. The fact that appellant filed the requisite documents before the AO is undisputed. Thus, the appellant had discharged its primary onus of establishing the identity of the share holders /applicant *ire* source of the money. The only reason for revenue to cause further verification was the report relating to survey conducted at the premises of the appellant which forms part of the satisfaction recorded for reopening the assessment proceedings. From the said report it transpires that the business premises of the appellant actually belonged to M/s Bhushan Steel Ltd. and several other companies were having their registered offices in the same premises. This led to the suspicion that these companies were paper companies. During further verification of the identity of the shareholders in Mumbai, some summons were served but parties did not respond. In Guwahati, both parties were not found at the

given address. In Kolkata, all 11 parties responded by post but no one appeared.

3.4. There is no law that more than one company cannot have its registered of me at one address. There is no law that companies cannot change their registered office. Several companies can have the same registered office. Businesses raise capital and such capital is rotated in economy for increasing is the normal formation of capital in any open economy and the process of capital formation cannot be taken to be representing only unaccounted finds or impeded. All the companies having registered office at that premises undisputedly belonged to Bhushan Group. The sources of capital introduced in these - companies were established during the respective assessment proceedings, including in the case of this appellant company. No evidence was found during the search to indicate introduction of unaccounted cash/finds in the form of share capital in these companies. Therefore, the conclusion based on the facts relied upon by the revenue that the share capital introduced in the companies belonging to Bhushan Group, including the appellant company, are unexplained, is at best premature.

3.5. In the above facts and circumstances of the matter, and in view of the case laws relied upon by the Ld. AR, the addition made cannot be legally sustained and is deleted. This ground of appeal is allowed. "

This Court is of the opinion that the **issues urged are on facts and the lower appellate authorities have taken sufficient care to consider the relevant circumstances including the extract of the chart with respect to the amounts received from each creditor. No substantial question of law arises**. The appeal is consequently dismissed."

15. When the matter reached before the honourable Supreme Court of India, it was held that:-

"8.1. The issue which arises for determination is whether the Respondent / Assessee had discharged the primary onus to establish the genuineness of the transaction required under Section 68 of the said Act. Section 68 of the I.T. Act (prior to the Finance Act, 2012) read as follows:

"68. Cash credits- Where any sum is found credited in the book 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"

(emphasis supplied)

The use of the words "any sum found credited in the books" in Section 68 of the Act indicates that the section is widely worded, and includes investments made by the introduction of share capital or share premium.

8.2. As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act. The assessee is expected to establish to the satisfaction of the Assessing Officer, *CIT* v. *Precision Finance Pvt. Ltd.* (1994) 208 ITR 465 (Cal) 15 :

- Proof of Identity of the creditors;
- Capacity of creditors to advance money; and
- Genuineness of transaction

This Court in the land mark case of *Kale Khan Mohammad Hanif* v. *CIT,* [1963] 50 ITR 1 (SC), and, *Roshan Di Hatti* v. *CIT,* [1977] 107 ITR (SC), laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assesse, and there would be no further burden on the revenue to show that the income is from any particular source.

8.3. With respect to the issue of genuineness of transaction, it is for the assessee to prove by cogent and credible evidence, that the investments made in share capital are genuine borrowings, since the facts are exclusively within the assessee's knowledge.

The Delhi High Court in *CIT* v. *Oasis Hospitalities Pvt. Ltd.,* 333 ITR 119 (Delhi)(2011), held that :

"The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; (ii) their creditworthiness/investments; and (iii) genuineness of

the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise."

It has been held that merely proving the identity of the investors does not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established.

In *Shankar Ghosh* v. *ITO,* [1985] 23 TTJ (Cal.), the assessee failed to prove the financial capacity of the person from whom he had allegedly taken the loan. The loan amount was rightly held to be the assessee's own undisclosed income.

8.4. Reliance was also placed on the decision of *CIT* v. *Kamdhenu Steel & Alloys Limited and Other,* (2012) 206 Taxaman 254 (Delhi), wherein the Court that :

"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise if going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the case deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."

9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so- called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness.

10. On the issue of unexplained credit entries /share capital, we have examined the following judgments :

i. In *Sumati Dayal* v. *CIT,* [1995] 214 ITR 801 (SC), this Court held that :

"if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, vis., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation

of the assessee, the department cannot, however, act unreasonably"

ii. In *CIT* v. *P. Mohankala,* 291 ITR 278, this Court held that:

"A bare reading of section 68 of the Income-tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee ; (ii) such credit has to be a sum of money during the previous year ; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, 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. 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 burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature."

(emphasis supplied)

iii. The Delhi High Court in a recent judgment delivered in *PR.CIT - 6, New Delhi* v. *NDR Promoters Pvt. Ltd.,* 410 ITR 379, upheld the additions made by the Assessing Officer on account of introducing bogus share capital into the assessee company on the facts of the case.

iv. The Courts have held that in the case of cash credit entries, it is necessary for the assessee to prove not only the identity of the creditors, but also the capacity of the creditors to advance money, and establish the genuineness of the transactions. The initial onus of proof lies on the assessee. This Court in *Roshan Di Hatti* v. *CIT,* (1992) 2 SCC 378, held that if the assessee fails to discharge the onus by producing cogent evidence and explanation, the AO would be justified in making the additions back into the income of the assessee.

v. The Guwahati High Court in *Nemi Chand Kothari* v. *CIT,* [2003] 264 ITR 254 (Gau.), held that merely because a transaction takes place by cheque is not sufficient to discharge the burden. The assessee has to prove the identity of the creditors and genuineness of the transaction. :

"It cannot be said that a transaction, which takes place by way of cheque, is invariably sacrosanct. Once the assessee has proved the

identity of his creditors, the genuineness of the transactions which he had with his creditors, and the creditworthiness of his creditors vis-a-vis the transactions which he had with the creditors, his burden stands discharged and the burden then shifts to the revenue to show that though covered by cheques, the amounts in question, actually belonged to, or was owned by the assessee himself"

(emphasis supplied)

vi. In a recent judgment the Delhi High Court, *CIT* v. *N.R. Portfolio (P.) Ltd.*[2014] 42 taxmann.com 339/222 Taxman 157 (Mag.) (Delhi) 21, held that the credit-worthiness or genuineness of a transaction regarding share application money depends on whether the two parties are related or known to each other, or mode by which parties approached each other, whether the transaction is entered into through written documentation to protect investment, whether the investor was an angel investor, the quantum of money invested, credit-worthiness of the recipient, object and purpose for which payment/investment was made, etc. The incorporation of a company, and payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus.

vii. Other cases where the issue of share application money received by an assessee was examined in the context of Section 68 are *CIT* v. *Divine Leasing & Financing Ltd.,* (2007) 158 Taxman 440, and *CIT* v. *Value Capital Service (P.) Ltd.,* [2008]307 ITR 334.

11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.

12. In the present case, the A.O. had conducted detailed enquiry which revealed that :

i. There was no material on record to prove, or even remotely suggest, that the share application money was received from independent legal entities. The survey revealed that some of the investor companies were non-existent, and had no office at the address mentioned by the assessee.

For example:

a. The companies Hema Trading Co. Pvt. Ltd. and Eternity Multi Trade Pvt. Ltd. at Mumbai, were found to be non-existent at the address given, and the premises was owned by some other person.

b. The companies at Kolkatta did not appear before the A.O., nor did they produce their bank statements to substantiate the source of the funds from which the alleged investments were made.

c. The two companies at Guwahati viz. Ispat Sheet Ltd. and Novelty Traders Ltd., were found to be non-existent at the address provided.

The genuineness of the transaction was found to be completely doubtful.

ii. The enquiries revealed that the investor companies had filed returns for a negligible taxable income, which would show that the investors did not have the financial capacity to invest funds ranging between Rs. 90,00,000 to Rs. 95,00,000 in the Assessment Year 2009-10, for purchase of shares at such a high premium.

For example:

Neha Cassetes Pvt. Ltd. - Kolkatta had disclosed a taxable income of Rs. 9,744/- for A.Y. 2009-10, but had purchased Shares worth Rs, 90,00,000 in the Assessee Company.

Similarly Warner Multimedia Ltd. - Kolkatta filed a NIL return, but had purchased Shares worth Rs. 95,00,000 in the Assessee Company - Respondent.

Another example is of Ganga Builders Ltd. - Kolkatta which had filed a return for Rs. 5,850 but invested in shares to the tune of Rs. 90,00,000 in the Assessee Company - Respondent, etc.

iii. There was no explanation whatsoever offered as to why the investor companies had applied for shares of the Assessee Company at a high premium of Rs. 190 per share, even though the face value of the share was Rs. 10/- per share.

iv. Furthermore, none of the so-called investor companies established the source of funds from which the high share premium was invested.

v. The mere mention of the income tax file number of an investor was not sufficient to discharge the onus under Section 68 of the Act.

13. **The lower appellate authorities appear to have ignored the detailed findings of the AO from the field enquiry and investigations carried out by his office. The authorities below have erroneously held that merely because the Respondent Company - Assessee had filed all the primary evidence, the onus on the Assessee stood discharged.**

The lower appellate **authorities failed to appreciate that the investor companies which had filed income tax returns with a meagre or nil income had to explain how they had invested such huge sums of money in the Assesse Company - Respondent. Clearly the onus to establish the credit worthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility.**

The Court/Authorities below did not even advert to the field enquiry conducted by the AO which revealed that in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee.

14. **The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the Assessee since the information is within the personal knowledge of the Assessee.** The Assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee.

15. On the facts of the present case, clearly the Assessee Company - Respondent failed to discharge the onus required under Section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the Assessee's income.

16. The Appeal filed by the Appellant - Revenue is allowed. In the aforesaid facts and circumstances, and the law laid down above, the judgment of the High Court, the ITAT, and the CIT are hereby set-aside. The Order passed by the AO is restored

16. In the present case also, we find that the learned assessing officer has made enquiry by issuing letter under section 133 (6) of the act and which were found to be replied created suspicion in the mind of the AO. Further, the directors were not produced by the assessee. In response to summons u/s 131 on the companies, no replies were received. There is no indication that how these companies have managed to invest in the appellant company, which is a private limited company where there is no dividend, issued or there is any likelihood of substantial investment return to these companies. Further, it is conclusively found that information of the investment by the shareholders was unearthed during the course of search on Shri SK Jain. The assessee being private limited company should be in the know of things of the investors when they have made such a huge investment in the assessee company. The learned CIT – A has not even looked at the fact that what the assessee company is doing and what is the reason that nine companies operated by one person, comes together, and invest Rs. 70,00,000/- in the assessee company as share capital, in short span of time, which does not have any chance of return or earning huge dividend. All these facts considered in one compass clearly show that the identity of the creditors, creditworthiness of those creditors and genuineness of the transaction is just a make-believe story. In the result, we hold that the learned assessing officer is correct in making an addition u/s 68 of the income tax act of INR 7,000,000/- representing unexplained share capital and consequent addition of INR 1 22500/– of the commission thereon. Accordingly we reverse the order of the learned CIT – A and allow ground number 1 and 2 of the appeal of the learned AO.

17. In the result, appeal of the learned assessing officer is allowed.

Order pronounced in the open court on 15/07 /2019.

-Sd/-	-Sd/-
(SUDHANSHU SRIVASTAVA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 15/07/2019
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi