726/11

15

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.972 of 2009, ITA No.1324 of 2008, ITA No.29 of 2010, ITA No.1228 of 2010, ITA No.1229 of 2010, ITA No.1230 of 2010, ITA No.1710/2010, ITA No.8 of 2011, ITA No.339 of 2011, ITA No.613 of 2011 and ITA No.726 of 2011**

Reserved on: 25th November, 2011

% *Pronounced on: 23rd December, 2011*

1) **ITA No.972/2009**

Commissioner of Income Tax –II,
Central Revenue Building,
New Delhi . . . Appellant

VERSUS

Kamdhenu Steel & Alloys Ltd. . . .Respondent

2) **ITA No.1324/2008**

Gupta Citi Shelters Ltd. . . Appellant

VERSUS

Commissioner of Income Tax, New Delhi . . .Respondent

3) **ITA No.29/2010**

Commissioner of Income Tax . . . Appellant

VERSUS

Vijay Foils P. Ltd. . . .Respondent

4) **ITA No.1228/2010**

Infomediary India Pvt. Ltd. . . . Appellant

VERSUS

Commissioner of Income Tax . . .Respondent

5) **ITA No.1229/2010**

Infomediary India Pvt. Ltd. . . . Appellant

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Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

VERSUS

Commissioner of Income Tax . . .Respondent

6) **ITA No.1230/2010**

Infomediary India Pvt. Ltd. . . . Appellant

VERSUS

Commissioner of Income Tax . . .Respondent

7) **ITA No.1710/2010**

CIT . . . Appellant

VERSUS

JH Finvest Pvt. Ltd. . . .Respondent

8) **ITA No.8/2011**

CIT . . . Appellant

VERSUS

North Delhi Construction
& Investment Pvt. Ltd. . .Respondent

9) **ITA No.339/2011**

CIT . . . Appellant

VERSUS

Laxman Industrial Resources Ltd. . . .Respondent

10) **ITA No.613/2011**

JBA Enterprises (Pvt.) Ltd. . . . Appellant

VERSUS

Income Tax Officer,
Ward 4(1), New Delhi . . .Respondent

11) **ITA No.726/2011**

Commissioner of Income Tax-III . . . Appellant

VERSUS

Sham Mohan Pvt. Ltd. . . .Respondent

Counsel for the Assessee - Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.
Dr. Rakesh Gupta with Ms. Rani Kiyala & Ms. Poonam Ahuja, Advocates.
Mr. Salil Kapoor with Mr. Sanat Kapoor, Mr. Ankit Gupta and Mr. Vikas Jain, Advocates.
Mr. Chandra Shekahar with Mr. Manoj Agrawal and Ms. Meghna De, Advocates.
Mr. S.K. Arora with Mr. Bharat Arora, Advocates.
Mr. C.S. Aggarwal with Mr. Prakash Kumar, Advocates.

Counsel for the Revenue - Mr. Kiran Babu, Sr. Standing Counsel, Ms. Rashmi Chopra, Sr. Standing Counsel, Mr. N.P. Sahni, Sr. Standing Counsel, Mr. Sanjeev Sabharwal, Sr. Standing Counsel, Mr. Sanjeev Rajpal, Sr. Standing Counsel, Mr. Kamal Sawhney, Sr. Standing Counsel.

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE M.L. MEHTA

A.K. SIKRI (Acting Chief Justice)

1. For orders, see ITA No.972 of 2009.

ACTING CHIEF JUSTICE

(M.L. MEHTA)
JUDGE

DECEMBER 23, 2011
pmc

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

18

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CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE M.L. MEHTA

A.K. SIKRI (Acting Chief Justice)

1. The issue relating to the additions made by the Assessing Officer (AO) under Section 68 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on account of unexplained share application money is becoming mercurial

and mercurial by the day. Though plethora of case law is available deciding various facets of this issue and the principles which are to be applied have almost been crystallized and pumped up by the series of decisions of the Apex Court and various High Courts, the issue keeps bouncing back with new dimensions and intricacies. In all these appeals, we are again confronted with the additions which were made by the AO under Section 68 of the Act. All these appeals, which pertain to different assessees, are filed by the Revenue as the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') has deleted the additions made by the Assessing Officer.

2. Before we embark upon the discussion on factual aspects, in the appeals, which prompted the AOs to make the additions, it would be appropriate to revisit the legal position as enunciated in various judgments interpreting the provisions of Section 68/69 of the Act. We may record that this very Bench had the occasion to deal with another batch of appeals touching upon this very issue, which culminated into judgment dated 31.1.2011 with lead case entitled ***CIT Vs. Oasis Hospitalities***, (2011) 333 ITR 119. As catena of judgments were taken note of and the ratio culled out

therein after undertaking in-depth analysis, we are of the view that our purpose can be served by borrowing liberally from the said judgment to state the legal position. Some more cases which have been decided thereafter or cited before us now, but not taken note of in the said judgment would be added thereafter. Operative portion of that judgment reads as under:

> "2. Section 68 of the Act deals with unexplained incomes and is couched in the following language:
>
> "**Section 68**
>
> **CASH CREDITS.**
>
> Where any sum is found credited in the books of an assessee maintained for any previous year, and 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."
>
> 3. As per the provisions of this Section, in case the assessee has not been able to give satisfactory explanation in respect of certain expenditure or where any sum is found credited in the books of accounts, the AO can treat the same as undisclosed income and add to the income of the assessee. The assessee is required to give satisfactory explanation about the "nature and source" of such sum found credited in the books of accounts.
>
> 4. It is a common knowledge that insofar as the companies incorporated under the Indian Companies Act are concerned, whether private limited or public limited companies, they raise their capital through shares, though the manner of raising the share capital in the private limited companies on the one hand and public limited companies on the other hand, would be different.

In the case of private limited companies, normally, the shares are subscribed by family members or persons known/close to the promoters. Public limited companies, on the other hand, generally raise public issue inviting general public at large for subscription of these shares. Yet, it is also possible that in case of public limited companies, the share capital is issued in a close circuit.

5. When the companies incorporated under the Companies Act raise their capital through shares, various persons would apply for shares and thus give share application money. These amounts received from such shareholders would, naturally, be the sums credited in the books of account of the assessee. If the AO doubts the genuineness of the investors, who had purportedly subscribed to the share capital, the AO may ask the assessee to explain the nature and source of those sums received by the assessee on account of share capital. It is in this scenario, the question arises about the genuineness of transactions. The plain language of Section 68 of the Act suggests that when the assessee is to give satisfactory explanation, burden of proof is on the assessee to provide nature and source of those receipts.

6. What kind of proof is to be furnished by the assessee, is the question. It has come up for discussion in various judgments rendered by this Court, other Courts as well as the Supreme Court. The law was discussed by a Division Bench of this Court in the case of ***Commissioner of Income Tax*** Vs. ***Divine Leasing and Finance Ltd.*** [299 ITR 268]. Since the entire gamut of case law as on that date was visited in the said judgment, we may initiate our discussion by taking note of this case. In this case, the Court highlighted the menace of conversion of unaccounted money through the masquerade or such channels of investment in the share capital of a company and thus stressed upon the duty of the Revenue to firmly curb the same. It was also observed that, in the process, the innocent assessee should not be unnecessary harassed. A delicate balance must be maintained. It was, thus, stressed:

> "15. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the preponderance of evidence indicates absence of culpability and

complexity of the assessed it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the AO for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of Section 68 and 69 of the IT Act. The burden of proof can seldom be discharged to the hilt by the assessed; if the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company."

7. Taking note of the earlier judgment of Full Bench of this Court in the case of ***Commissioner of Income Tax*** Vs. ***Sophia Finance Ltd.*** **[(1994) 205 ITR 98]**, the Court observed that the Full Bench had enunciated that Section 68 reposes in the Income-tax Officer or AO the jurisdiction to inquire from the assessed the nature and source of the sum found credited in its Books of Accounts. If the Explanation preferred by the assessed is found not to be satisfactory, further enquiries can be made by the Income-tax Officer himself, both in regard to the nature and the source of the sum credited by the assessed in its Books of Accounts, since the wording of Section 68 is very wide. The Full Bench opined that if the shareholders exist then, possibly, no further enquiry need be made. But if the Income-tax Officer finds that the alleged shareholders do not exist then, in effect, it would mean that there is no valid issuance of share capital. Shares cannot be issued in the name of non-existing persons. If the shareholders are identified and it is established that they have invested money in the purchase of shares then the amount received by the company would be regarded as a capital receipt but if the assessed offers no Explanation at all or the Explanation offered is not satisfactory then, the provisions of Section 68 may be invoked.

8. The Court also referred to the earlier Division Bench judgment in the case of ***Commissioner of Income Tax*** Vs. ***Dolphin Canpack Ltd.*** **[(2006) 283 ITR 190]** and quoted the following observation:

> ". . . credit entry relates to the issue of share capital, the ITO is also entitled to examine whether the alleged shareholders do in fact exist or not. Such an inquiry was conducted by the AO in the present case. In the course of the said inquiry, the assessed had disclosed to the AO not only the names and the particulars of the subscribers of the shares but also their bank accounts and the PAN issued by the IT Department. Super added to all this was the fact that the amount received by the company was all by way of cheques. This material was, in the opinion of the Tribunal, sufficient to discharge the onus that lay upon the assessed."

9. The Court took note of many other judgments of different High Courts and on the analysis of those judgments formulated the following propositions, which emerged as under:

> "18. 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, Shared 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."

10. By this common judgment, the Division Bench decided these appeals of which one appeal related to ***Lovely Exports P. Ltd.***. Against the said judgment, Special Leave Petition was preferred, which was dismissed by the Supreme Court vide orders dated 11.01.2008 and is reported as ***Commissioner of Income Tax*** Vs. ***Lovely Exports (P) Ltd.*** **[216 CTR 195 (SC)]**. The Court while dismissing the SLP recorded some reasons as well *albeit* in brief, which is as under:

> "2. Can the amount of share money be regarded as undisclosed income under s.68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment....."

11. It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove:

(a) Identity of shareholder;
(b) Genuineness of transaction; and
(c) Credit worthiness of shareholders.

12. In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the AO to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc. can be furnished.

13. Genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers from that very shareholder. The Division

Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be the copies of the shareholders register, share application forms, share transfer register, etc.

14. As far as creditworthiness or financial strength of the credit/subscriber is concerned, that can be proved by producing the bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are produced, the assessee would have satisfactorily discharge the onus cast upon him. Thereafter, it is for the AO to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the AO and he cannot go into the realm of suspicion.

15. At this stage, we would like to refer to the judgment of the Bombay High Court in the case of ***CIT*** Vs. ***M/s Creative World Telefilms Ltd.*** (in ITA No.2182 of 2009 decided on 12.10.2009). The relevant portion of this order is reproduced below:

> "In the case in hand, it is not disputed that the assessee had given the details of name and address of the shareholder, their PA/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. **The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement 'not traceable'. In our considered view, the Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer.** In the above circumstances, the view taken by the Tribunal cannot be faulted. No substantial question of law is involved in the appeal.

In the result, the appeal is dismissed *in limini* with no order as to costs.

(emphasis supplied)"

16. The Court thus clearly held that once documents like PAN Card, bank account details or details from the bankers were given by the assessee, onus shifts upon the Assessing Officer and it is on him to reach the shareholders and the Assessing Officer cannot burden the assessee merely on the ground that summons issues to the investors were returned back with the endorsement 'not traceable'. Same view is taken by the Karnataka High Court in ***Madhuri Investments Pvt. Ltd.*** Vs. ***ACIT*** (in ITA No.110 of 2004, decided on 18.02.2006). In this case also, some of share applicants did not appear and notices sent to them were returned with remarks 'with no such person'. Addition was made on that basis which was turned down by the High Court in the following words:

> "6. Having heard the learned counsel for the parties, we notice that whenever a company invites applications for allotment of shares from different applicants, there is no procedure contemplated to find out the genuineness of the address or the genuinenity of the applicants before allotting the shares. If for any reason the address given in the application were to be incorrect or for any reason if the said applicants have changes their residence or the notices sent by the assessing officer has not been received by such applicants, the assessee company cannot be blamed. Therefore, we are of the view that the Tribunal was not justified in allowing the appeal of the revenue only relying upon the statement of Sri Anil Raj Mehta, a Chartered Accountant."

17. However, in ***Commissioner of Income Tax*** Vs. ***Arunananda Textiles Pvt. Ltd.*** (in ITA No.1515 of 2005, decided on 02.03.2010), the Karnataka High Court went to the extent of observing that it was not for the assessee to place material before the Assessing Officer in regard to creditworthiness of the shareholders. Once the company had given the addresses of the shareholders and their identity was not in dispute, it was for the Assessing Officer to make further inquiry. It was borne by the following discussion in the said judgment:

> "6. The question raised in this appeal are squarely covered by several judgments of the

Supreme Court and also the judgment of this Court passed in ***ASK Brothers Ltd.*** Vs. ***Commissioner of Income Tax***, wherein this Court following the judgments of the Supreme Court in the case of ***Commissioner of Income Tax*** Vs. ***Lovely Exports (P) Ltd.*** reported in (20089) 216 CTR (SC 195) and also in the case of ***Commissioner of Income Tax*** Vs. ***Steller Investment Ltd.*** reported in (2001) 251 ITR 263 (SC) has ruled that it not for the assessee to place material before the Assessing Officer in regard to creditworthiness of the shareholders. If the company has given the addresses of the shareholders and their identity is not in dispute, where they were capable of investing, the assessing officer shall investigate. It is not for the assessee company to establish but it is for the department to enquire with the investor about their capacity to invest the amount in the shares. Therefore, we are of the view that the substantial questions of law framed in this appeal are to be answered against the revenue and in favour of the assessee. Accordingly, this appeal is dismissed."

18. Rajasthan High Court had an occasion to deal with the submission of the Revenue predicated on Benami transactions in the case of ***Commissioner of Income Tax*** Vs. ***AKJ Granites (P) Ltd.*** reported as 301 ITR 298 (Raj.) and the arguments were dealt with in the following manner:

"3. So far as question No. 1 is concerned, it is stated by learned counsel for the appellant that the issue embedded in the said question has already been decided by this Court and governed by the ratio laid down in ***Barkha Synthetics Ltd.*** Vs. ***Asst. CIT (2005) 197 CTR (Raj.) 432***. It has been pointed out that share applications are made by number of persons, may be in their own names or benami, but the fact that share applications received from different places accompanied with share application money, no presumption can be drawn that same belong to the assessee and cannot be assessee in his hands as his undisclosed income unless some nexus is established that share application money for augmenting the investment in business has flown from asssessee's own money. In coming to this conclusion, the Court relied on

CIT Vs. ***Steller Investment Ltd. (1991) 99 CTR (Del.) 40***, which has since been affirmed by the Supreme Court in ***CIT vs. Steller Investment Ltd. (2000) 164 CTR (SC) 287***. In view thereof, this question need not be decided again."

19. This very aspect came up for consideration before different Courts on number of occasion and was dealt with in favour of the assessee.

20. The observations of the Supreme Court in the case of ***Lovely Exports (supra)*** go to suggest that the Department is free to proceed to reopen the individual assessment in case of alleged bogus shareholders in accordance with law and, thus, not remediless. It is, thus, for the AO to make further inquiries with regard to the status of these parties to bring on record any adverse findings regarding their creditworthiness. This would be moreso where the assessee is a public limited company and has issued the share capital to the public at large, as in such cases the company cannot be expected to know every detail pertaining to the identity and the financial worth of the subscribers. Further initial burden on the assessee would be somewhat heavy in case the assessee is a private limited company where the shareholders are family friends/close acquaintances, etc. It is because of the reason that in such circumstance, the assessee cannot feign ignorance about the status of these parties.

21. We may also usefully refer to the judgment of the Supreme Court in the case of ***Commissioner of Income Tax*** Vs. ***P. Mohanakala*** **[(2007) 291 ITR 278 (SC)]**. In that case, the assessee had received foreign gifts from one common donor. The payments were made to them by instruments issued by foreign banks and credited to the respective accounts of the assessees by negotiations through bank in India. The evidence indicated that the donor was to receive suitable compensation from the assessees. The AO held that the gifts though apparent were not real and accordingly treated all those amounts which were credited in the books of account of the assessee, as their income applying Section 68 of the Act. The assessee did not contend that even if their explanation was not satisfactory the amounts were not of the nature of income. The CIT (A) confirmed the assessment. On further appeal, there was a difference of opinion between the two Members of the Appellate Tribunal and the matter was referred to the Vice

President who concurred with the findings and conclusions of the AO and the CIT (A). On appeal, the High Court re-appreciated the evidence and substituted its own findings and came to the conclusion that the reasons assigned by the Tribunal were in the realm of surmises, conjecture and suspicion. On appeal to the Supreme Court, the Court while reversing the decision of the High Court held that the findings of the AO, CIT (A) and the Tribunal were based on the material on record and not on any conjectures and surmises. That the money came by way of bank cheques and was paid through the process of banking transaction as not by itself of any consequence. The High Court misdirected itself and erred in disturbing the concurrent findings of fact. While doing so, the legal position contained in Section 68 of the Act was explained by the Supreme Court by assessing that a bare reading of Section 68 of the Act 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 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. 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. Application of mind is the *sine qua non* for forming the opinion. In cases where the explanation offered by the assessee about the nature and source of the sums found credited in the books is not satisfactory there is, *prima facie*, evidence against the assessee, viz., the receipt of money. The burden is on the assessee to rebut the same, and, if he fails to rebut it, it can be held against the assessee that it was a receipt of an income nature. 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.

22. We would like to refer to another judgment of the Division Bench of this Court in the case of ***Commissioner of Income Tax*** Vs. ***Value Capital Services P. Ltd.*** **[(2008) 307 ITR 334 (Delhi)]**. The Court in that case held that the additional burden was on the Department to show that even if share application did not have the means to make investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as the undisclosed income of the assessee. In the absence of such findings, addition could not be made in the income of the assessee under Section 68 of the Act.

23. It is also of relevance to point out that in ***Commissioner of Income Tax*** Vs. ***Stellar Investment Ltd.*** **[(1991) ITR 287 (Del.)]** where the increase in subscribed capital of the respondent company accepted by the ITRO and rejected by the CIT on the ground that a detailed investigation was required regarding the genuineness of subscribers to share capital, as there was a device of converting black money by issuing shares with the help of formation of an investment which was reversed by the Tribunal, this Court held that even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances the amount of share capital could be regarded as undisclosed income of the company. This view was confirmed by the Apex Court in ***CIT*** Vs. ***Stellar Investment Ltd.*** **[(2001) 251 ITR 263 (SC)]**."

24. It is, thus, clear that initial burden lies on the assessee to explain the nature and source of the share application money received by the assessee. It is also clear that the assessee has to satisfactorily establish the identity of the shareholders, the genuineness of the transaction and the creditworthiness of the shareholders. The manner in which such a burden is to be discharged has been explained in various judgments and noted by us above. At the same

time, it is also well established principle of law that in any matter, the onus brought is not a static one. Though initial burden is upon the assessee, once he proves the identity of credits/share application by either furnishing Permanent Account Numbers or copies of bank accounts and shows the genuineness of the transaction by showing money in the banks is by account payee cheques or by draft, etc., then the onus to prove the same would shift to the assessee. The question which assumes importance at this stage is to what the Revenue is supposed to do to dislodge the initial burden discharged by the assessee and to throw the ball again in the assessee's court demanding the assessee to give some more proofs, as the documents produced earlier by the assessee either become suspect or are rendered insufficient in view of the material produced by the Department rebutting the assessee's documentary evidence. This is the aspect which has to be gone into in all these cases. Before that, we would like to refer to the observations of some Courts touching the core issue relating to discharge of burden.

A) **CIT Vs. Rathi Finlease Ltd., 215 CTR 167 (M.P.)** the Court held as under :-

> "17. .....S.68 of the Act enjoined the assessee to offer an explanation about the nature and source of the sum found credited in his books and if the explanation was not satisfactory, the amount can be credited and charged to income-tax as income of the assessee. Since the assessee, though tried to explain the genuineness of the credit on the basis of letters of confirmation, **it could not be explained as to how the transaction was materialized when the companies were not in existence** and the amount was paid by cheque only on the date on which the amount was credited to the account of the company. It was for the assessee to discharge this burden....."

B) Calcutta High Court in **CIT vs. Kundan Investment Ltd., 263 ITR 626 (Cal.)** held as under:-

> ".....Under Section 68, **the Income-tax Officer is empowered to lift the veil of corporate identity and find out as to whether the apparent is real.** It is the assessee on whom the onus lies. Unless sufficient materials are produced, the onus does not shift on the Revenue. But **once the materials are scrutinized and the result of the scrutiny is communicated to the assessee, the onus shifts from the Revenue to the assessee.** Then the assessee has to take appropriate steps for proving its case. Unless there are sufficient materials after such communication, produced by the assessee, the Income-tax Officer can do no further."

C) This Court in **Commissioner of Income Tax vs. Sophia Finance Limited, 205 ITR 98 (Del)** dealt with the issue as under :-

> ".....As we read Section 68 it appears that whenever a sum is found credited in the books of account of the assessee then, irrespective of the colour or the nature of the sum received which is

sought to be given by the assessee, the Income tax Officer has the jurisdiction to enquire from the assessee the nature and source of the said amount. When an explanation in regard thereto is given by the assessee, then it is for the Income tax Officer to be satisfied whether the said explanation is correct or not. It is in this regard that **enquiries are usually made in order to find out as to whether, firstly, the persons from whom money is alleged to have been received actually existed or not. Secondly, depending upon the facts of each case, the Income tax Officer may even be justified in trying to ascertain the source of the depositor, assuming he is identified, in order to determine whether that depositor is a mere name lender or not. Be that as it may, it is clear that the Income tax Officer has jurisdiction to make enquiries with regard to the nature and source of a sum** credited in the books of account of an assessee and it would be immaterial as to whether the amount so credited is given the colour of a loan or a sum representing the sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books" in section 68 indicates that the said section is very widely worded and an Income tax officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money.

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.....On the basis of the language used under Section 68 and the various decisions of different High Courts and the Apex Court, the only conclusion which could be arrived at is: (i)that there is no distinction between the cash credit entry existing in the books of the firm whether it is of a partner or of a third party, (ii) that the burden to prove the identity, capacity and genuineness has to be on the assessee, (iii) if the cash credit is not satisfactorily explained the Income Tax Officer is justified to treat it as Income from "undisclosed sources", (iv) the firm has to establish that the amount was actually given by the lender, (v) the genuineness and regularity in the maintenance of the account has to be taken into consideration by

> the taxing authorities, (vi) if the explanation is not supported by any documentary or other evidence, then the deeming fiction credited by Section 68 can be invoked. In these circumstances, we are of the view that simply because the amount is credited in the books of the firm in the partner's capital account it cannot be said that it is not the undisclosed income of the firm and in all cases it has to be assessed as an undisclosed income of the partner alone. In these circumstances, we are of the view that the Tribunal was not justified in holding that the cash credits of Rs.11,502 in the account of Shri Kishorilal, one of the partners, could not be assessed in the hands of the firm and in deleting the same. Since the matter was not considered by the Tribunal on the merits, the Tribunal would be free to hear the arguments of both the parties and decide afresh in view of the observations made above. Accordingly, the reference is answered in favour of the Revenue and against the assessee."

D) **CIT vs. Korlay Trading Co. Ltd., 232 ITR 820 (Cal)**

was cited by the Revenue to press the following:-

> ".....**There should be a genuine transaction. The income tax file number has been given but that is not enough to prove the genuineness of the cash credit.** Admittedly, there is no affidavit to this effect, by the creditor, on record. Considering these facts, we find that the finding of the Tribunal in this regard is perverse. The assessee has failed to prove the genuineness of the cash credit..... "

25. Following dicta of the Apex Court judgment in ***Sumati Dayal vs. CIT, 214 ITR 801 (SC)*** was heavily relied upon by the Revenue:-

> "It is no doubt true that in all cases in which a receipt is sought to be taxed as Income, the burden lies upon 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 the exemption provided by the Act lies upon the assessee. (See Parimisetti Seetharamamma [1965] 57 ITR 532 at page 536). 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 a case there is, prima facie, evidence against the assessee, viz. the receipt of money, and if he fails to rebut it the said evidence being unrebutted, 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.

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.....**This raises the question whether the apparent can be considered as the real. As laid down by this Court the apparent must be considered the real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities**.....

xxxx xxxx xxxx xxxx

This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities....."

(Emphasis supplied)

26. With this discourse on the legal position, we advert to the cases at hand. In these appeals, there is a common thread which runs through all these cases insofar as nature of

transaction is concerned. As would be seen when we discuss the facts of this case, the share applicants are all companies incorporated under the Indian Companies Act, either public limited or private limited companies. Since these companies are incorporated under the provisions of Indian Companies Act, their identity, at least on papers, is established. Here, they are assessed to income tax as well. These companies have PAN numbers and are filing regular income tax returns. The assessee companies which have received share applicant money from such applicants have produced documents in the form of PAN, income tax returns, copies of the bank accounts through which the funds were transferred by way of credit entries, deposits in the accounts of such applicants, etc. by furnishing such kinds of proofs/documents, the assessees have been able to discharge their initial burden. Notwithstanding the same, as per the AO(s), the applicants were bogus companies which were only paper companies and there is no real existence. In certain cases, it was also found that just before issuing the cheques by the applicants towards share applicant money, cash was deposited in their bank accounts. Except in ITA No.726/2011, in other cases, the AOs also relied upon

the investigation report of Director of Income Tax (Investigation), the details whereof would be mentioned at the appropriate stage. From the aforesaid and some other aspects peculiar to each case, the AO(s) was of the opinion that the assessees had not discharged the burden.

27. With this background, we now pick up one of the appeals, the outcome whereof would determine the fate of all these appeals.

ITA No.972 of 2009

28. In the case of this assessee, we are concerned with the Assessment Year 2004-05. While scrutinizing this case, the AO found that the balance-sheet revealed that during the period relevant to the year under assessment, the assessee had received share application money of ₹2.74 Crores from various applicants. The assessee filed details of all the share applicants and the amounts received along with their confirmation and copies of the bank accounts of such investors from as many as 32 share applicants. All these applicants were private limited companies. The AO was of the opinion that the creditors were not genuine parties and were only entry providers. He referred to the report dated

02.3.2006 of the Directorate of Income Tax (Investigation), Unit-V, New Delhi in this behalf. He issued detailed questionnaire on 09.11.2006 wherein he also gave specific reasons in respect of each of the applicant which was of the following nature:

(i) In the bank account of the various share applicants, they had deposited cash for specific purpose for applying for share in addition to providing entry to the assessee, the same modus was adopted in the other cases as well.

(ii) Many companies did not exist at the addresses furnished. The registered letters sent to them had been received back undelivered.

(iii) There were reports of the Inspectors (Income Tax) that many parties were not genuine assessees and were not in existence.

29. The assessee had given reply to the said questionnaire in which it had summed the position as under:

"1. All the share applicants are existing assessees.

2. These companies are registered with the Registrar of Companies.

3. The share applicants have filed their respective confirmations.

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4. The companies are genuine existing share holder.

5. The investments have been made by them by account payee cheques.

6. AO's remarks that the share applicants are "entry providers" have not basis.

7. The assessee company is not accountable for the share applicants depositing cash in their accounts before investing by cheques.

8. AO's remarks "not a genuine tax payer" is the Department and the share applicant in which the assessee has not role to play.

9. The assessee has not means to produce the shareholders physically.

10. The postal remarks on the communications to the share applicants were not made available to the assessee company.

11. The report of the Directorate is one sided.

12. The proposal of the AO to treat the credits received as share application money runs contrary in law to the judgment of the Hon'ble Supreme Court in the case of M/s. Steller Investments Ltd. (115 Taxman Page 99)."

30. The AO was not convinced with this explanation. He was of the view that though contentions appeared good theoretically, but the assessee had miserably failed to discharge burden, in the background of the facts on record, in totality. He maintained that the companies were bogus, as they were not found at the existing address and the cash was also deposited by these companies just before issuing the cheques. The fact that the assessee had showed its

inability to produce them was also viewed against the assessee. The AO relied upon the report of the Directorate of the Income Tax (Investigation) which had concluded that all these companies were bogus companies floated by one Mr. Mahesh Garg, who was master behind it, with intent to provide entries. He *inter alia* observed:

> "The assessee company has complied with elementary requirements by filing confirmations from the share applicants with their Permanent Account Numbers and copies of bank accounts through which the funds were transferred by way of credit entries. In most of the cases in which the assessee company filed bank statements of the share applicants, the deposits in the accounts of such applicants were shown to have been received by way of transfer of funds to them but when such statements were requisitioned directly from the banks under Section 133(6) of the Income Tax Act, it was discovered that cash had been deposited in the accounts of the share applicants before being transferred to the account of the assessee company. This anomaly is almost universal except in a few cases where transfer entries have been rotated. In certain other cases both cash has been deposited and entries rotated. The claim of the assessee that he was unaware of this state of affairs is much too difficult to digest. In the light of this fact, other contentions of the assessee company in its representation dated 17.11.2006 become redundant. The claim of the assessee company of its inability to produce the shareholders physically is hollow because no such shareholder exists to be physically present for any deposition."

31. We have taken note of the aforesaid assessment order in detail as the entire argument of the learned Counsel for the Revenue was backed by and based upon the reasons given by the learned AO(s). In support thereof, Mr. N.P. Sahni,

learned counsel for the Revenue, also furnished 'Brief Note' on Accommodation Entries' as prepared by the Directorate of Income Tax (Investigation), the gist whereof is noted above as recorded in the orders of the AO. In the light of the aforesaid, Mr. Sahni referred to the judgments on onus which have also been taken note of above by us.

32. Before we deal with the same, let us find out the *raison d'eter* behind the orders of the Tribunal in deleting the addition, as CIT (A) had confirmed the orders of the AO agreeing with his reasons. The order of the Tribunal is very brief and appeal was allowed following the judgment of the Apex Court in the case of ***Commissioner of Income Tax*** Vs. ***Lovely Exports (P) Ltd.*** **[216 CTR 195 (SC)]** and ***Commissioner of Income Tax*** Vs. ***Divine Leasing and Finance Ltd.*** [299 ITR 268] of this Court. The entire discussion can be traced in para 3 of the impugned order:

> "3. We have considered the rival submission. A perusal of the order of the Hon'ble Supreme Court in the case of Divine Leasing and Finance Ltd. referred to supra is in regard to SLP filed by the Revenue against the order of Hon'ble Jurisdictional High Court and the Hon'ble Supreme Court has specifically with a speaking order dismissed the SLP. The Hon'ble Supreme Court in the various decisions referred to by the Ld. AR has categorically held that the addition in regard to the share capital cannot be treated as the undisclosed income of the

assessee if the share application money is received by the assessee company from alleged bogus shareholders whose names are given to the AO. Further, the Hon'ble Supreme Court has categorically held that the Revenue is free to proceed to re-open the individual assessment of such alleged bogus shareholders. The decision of the Hon'ble Jurisdictional High Court in the case of Value Capital Services Ld. Has also categorically held that there is additional burden on the Revenue to show that even if the applicant does not have the means to investment but the investment made by the appellant should be shown t have emanated from the coffers of the assessee so as to enable it to be treated as undisclosed income of the assessee. It is noticed that the Revenue has not been able to specifically show that the investments had emanated from the coffers of the assessee in this case. In these circumstances, respectfully following the decision of the Hon'ble Jurisdictional High Court as also Hon'ble Supreme Court referred to supra the addition made by the AO and has confirmed by the Ld. CIT(A) in regard to the alleged bogus shareholders represented by the increase in share capital of the assessee cannot be treated as unexplained cash credits in the hands of the assessee. However, respectfully following the decision of the Hon'ble Court referred to supra, it is directed that the Department is free to proceed to re-open the individual assessments of such alleged bogus shareholders. The direction is being given under Section 151(i) read with section 153(3) of the Income Tax Act."

33. What does follow from the aforesaid? It is not in doubt that the assessee had given the particulars of registration of the investing/applicant companies; confirmation from the share applicants; bank accounts details; shown payment through account payee cheques, etc. As stated by us in the beginning, with these documents, it can be said that the assessee has discharged its initial onus. With the registration of the companies, its identity stands established,

the applicant companies were having bank accounts, it had made the payment through account payee cheques.

34. No doubt, what the AO observed may make him suspicious about such companies, either their existence, which may be only on papers and/or genuineness of the transactions. When he found that investing companies are not available at given addresses or that the issuance of the cheque representing share application money or preceded by the deposit of cash in the bank account of these investment companies.

35. The important question which arises at this stage is as to whether on the basis of these facts, could it be said that it is the assessee which has not been able to explain the source and receipt of money. According to the assessee, he had given the required information to explain the source and was not obligated to prove source of the money. It is the submission of the assessee that even in case there is some doubt about the source of money in giving into coffers of the share applicants which they invested with the assessee, it would not automatically follow that the said money belongs to the assessee and becomes unaccounted money. According to us, the assessee appears to be correct on this

aspect. We feel that something more which was necessary and required to be done by the AO was not done. The AO failed to carry his suspicious to logical conclusion by further investigation. After the registered letters sent to the investing company had been received back undelivered, the AO presumed that these companies did not exist at the given address. No doubt, if the companies are not existing, i.e., they have only paper existence, one can draw the conclusion that the assessee had not been able to disclose the source of amount received and presumption under Section 68 of the Act for the purpose of addition of amount at the hands of the assessee. But, it has to be conclusively established that the company is non-existence.

36. The AO did not bother to find out from the office of the Registrar of Companies the address of those companies from where the registered letter received back undelivered. If the address was same at which the letter was sent or the Inspector visited and no change in address was communicated, perhaps it may have been one factor. In support of the conclusion which the AO wanted to arrive at, that by itself cannot be treated as the conclusive factor. As

pointed out above, these applicant companies have PAN and assessed income tax. No effort was made to examine as to whether these companies were filing the income tax return and if they were filing the same, then what kind of returns these companies were filing. If there was no return, this could be another factor leading towards the suspicion nurtured by the AO. Further, if the returns were filed and scrutiny thereof reveals that such returns were for namesake, this could yet another be contributing factor in the direction AO wanted to go. Likewise, when the bank statements were filed, the AO could find out the address given by those applicant companies in the bank, who opened the bank accounts and are the signatories, who introduced those bank accounts and the manner in which transactions were carried out and the bank accounts operated. This kind of inquiry would have given some more material to the AO to find out as to whether the assessee can be convicted with the transactions which were allegedly bogus and or companies were also bogus and were treated for namesake. We say so with more emphasis because of the reason that normally such kind of presumption against the assessee cannot be made as per the law laid down in various

judgments noted above. Just because of the creditors/share applicants could not be found at the address given it would not give the Revenue a right to invoke Section 68 of the Act without any additional material to support such a move. We are reminding ourselves of the following remarks of a Division Bench of this Court in its decision dated 02.8.2010 in the case of ***Commissioner of Income Tax – IV Vs. M/s. Dwarkadhish Investment (P) Ltd.*** (ITA No.911 of 2010) in the following words:

> "Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke Section 68. **Once must not lose sight of the fact that it is the Revenue which has all the power and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the "*source of source*".**
>
> (Emphasis supplied)

37. We are conscious of the malice of such kind of pernicious practice which is prevalent. In ***Divine Leasing and Finance Ltd.*** *(supra)*, this Court had eloquently highlighted the same in the following manner:

> "There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. In the case of a public issue, the company concerned cannot

> be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain and made available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of Sections 68 and 69 of the Income Tax Act. **The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty bound. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company.**"
>
> (Emphasis supplied)

38. Even in the 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 landing entries. But, it is unfortunate that all this exercise is going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the cash 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.

39. We may repeat what is often said, that a delicate balance has to be maintained while walking on the tight rope of

Sections 68 and 69 of the Act. On the on hand, no doubt, such kind of dubious practices are rampant, on the other hand, merely because there is an acknowledgement of such practices would not mean that in any of such cases coming before the Court, the Court has to presume that the assessee in questions as indulged in that practice. To make the assessee responsible, there has to be proper evidence. It is equally important that an innocent person cannot be fastened with liability without cogent evidence. One has to see the matter from the point of view of such companies (like the assessees herein) who invite the share application money from different sources or even public at large. It would be asking for a moon if such companies are asked to find out from each and every share applicant/subscribers to first satisfy the assessee companies about the source of their funds before investing. It is for this reason the balance is struck by catena of judgments in laying down that the Department is not remediless and is free to proceed to reopen the individual assessment of such alleged bogus shareholders in accordance with the law. That was precisely the observation of the Supreme Court in ***Lovely Export (supra)*** which holds the fields and is binding.

40. In conclusion, we are of the opinion that once adequate evidence/material is given, as stated by us above, which would *prima facie* discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has "created" evidence, the Revenue is supposed to make thorough probe of the nature indicated above before it could nail the assessee and fasten the assessee with such a liability under Section 68 and 69 of the Act.

41. During the arguments, we had posed these queries. Learned counsel appearing for the Revenue understood the limitation of their case. For this reason, a fervent plea was made that this case be remitted back to the AOs to enable him to make further investigation.

42. However, in the facts and circumstances of these cases, it would be difficult to give such an opportunity to the Revenue. There are number of reasons for denying this course of action which are mentioned below:

(i) It is not a case where some procedural defect or irregularity had crept in the order of the AO. Had

that been the situation, and the additions made by the AO were deleted because of such infirmity, viz., violation of principle of natural justice, the Court could have given a chance to the AO to proceed afresh curing such procedural irregularity. One example of such a case would be when statement of a witness is relied upon, but opportunity to cross-examine is not afforded to the assessee.

(ii) On the contrary, it is a case where the AO(s) did not collect the required evidence which they were supposed to do. To put it otherwise, once the assessee had discharged their onus and the burden shifted on the AO(s), they could not come out with any cogent evidence to make the additions. No doubt, as indicate by us above, the AO(s) could have embark upon further inquiry. If that is not done and the AO(s) did not care to discharge the onus which was laid down, for this "negligence" on the part of the AO(s), he cannot be provided with "fresh innings".

(iii) The order of the AO(s) had merged in the order of the CIT(A) and in some of the cases before us and before the CIT(A), the assessees had succeeded.

(iv) This Court is acting as appellate Court and has to act within the limitations provided under Section 26A of the Act. The appeals can be entertained only on substantial questions of law. In the process, this Court is to examine as to whether the order of the Tribunal is correct and any substantial question of law arises therefrom. The Tribunal has passed the impugned orders, sitting as appellate authority, on the basis of available record. When the matter is to be examined from this angle, there is no reason or scope to remit the case back to the AO(s) once it is found that on the basis of material on record, the order of the Tribunal is justified. Even the Tribunal acts purely as an appellate authority. In that capacity, the Tribunal has to see whether the assessment framed by the AO, all for that matter, orders of the CIT(A) were according to

law and purportedly framed on facts and whether there was sufficient material to support it. It is not for the Tribunal to start investigation. The Tribunal is only to see as to whether the additions are sustainable and there is adequate material to support the same if not the addition has to be deleted. At that stage, the tribunal would not order further inquiry. It is to be kept in mind that the AO is prosecutor as well as adjudicator and it is for the AO to collect sufficient material to make addition. There may be exceptional circumstances in which such an inquiry can be ordered, but normally this course is not resorted to.

43. In the facts of these cases, where the appeals relate to the assessment years, which are of 7-8 years old or even more and going by the nature of evidence which is required, it may not be apposite to make such an order.

44. We had taken ITA No.972 of 2009 as the lead case and the facts situation in all other appeals of the Revenue is almost similar and therefore, it may not be necessary to deal with these cases individually. ITA 972/2009, ITA 29/2010, ITA

1710/2010, ITA 8/2011 and ITA 339/2011 are accordingly dismissed.

ITA No.726 of 2011

45. Insofar as this appeal is concerned, the facts in brief are that the respondent assessee is a private limited company incorporated on 27.4.2004 under the Companies Act, 1956 to carry on the business of manufacture of fabric from synthetic polyester man-made yarn. During the Financial Year, 2005-06, relevant to instant assessment year 2006-07, the assessee received share application money aggregating to ₹1 Crore from 17 share-applicants who were allotted shares on 31.3.2007. A list of such seventeen shareholders along with their addresses and details of the bank accounts as had been obtained by the assessee to establish he existence and genuineness of sum received as share application had been furnished. The documents furnished by the assessee was as follows:

(i) Date of notice/order sheet entry -16.6.2008 and Date of reply – 18.8.2008

a) Letters from the share-applicants for all shareholders with PAN and account payee cheques details;

b) Certificate of incorporation

(ii) Date of notice/order sheet entry – 26.9.2008 and Date of reply – 07.10.2008

a) Letters from the share-applicants for four shareholders;

b) Confirmation;

c) Bank statement

d) PAN

46. All the shareholders are corporate entities, who are duly registered with the Registrar of Companies and are also assessed to tax.

47. The AO sent notice to these 17 shareholders, out of which 13 remained unserved and 4 who were served did not respond. When this was put to the assessee, the assessee furnished latest address of all the 17 shareholders. The AO allegedly deputed and inspected to verify their existence. The Inspector purportedly furnished three reports dated 11.9.2008 regarding 13 shareholders and another report dated 16.10.2008 regarding four shareholders alleging that

none of these shareholders are physically "available" at the given address. On this basis, the AO made addition under Section 68/69 of the Act. The assessee challenged this order of the AO before the CIT (A), who passed the remand order. The AO submitted remand report. The CIT(A) examined the matter and dismissed the appeal. Its submission was that the AO never disputed the fact that all these companies were incorporated and duly registered with the Registrar of Companies. He also did not dispute that the amounts received from the assessee did not emanate from the bank accounts of those investors. It was also submitted that no proper opportunity was given to rebut the reports of the Inspect which was relied upon by the AO inasmuch as the assessee was not even confronted with these reports. The assessee also argued that the AO brushed aside the voluminous evidence furnished to establish that the shareholders are corporate entities and duly assessed to tax and money had been received by account payee cheques. The AO had neither examined the assessment records of shareholders and not the ROC records of the shareholders. In fact, no summons were even issued to the bankers of the subscribing companies. In view thereof, addition was made

arbitrarily and was, thus, in disregard of the statutory provisions of law. It was also argued that in the remand report, the AO did not dispute the fact that the notices sent under Section 131 of the Act to the Directorate of the investing companies were duly served. It was pointed out that the AO had made adverse comments on "physically unavailability" of the three parties and in the report in respect of remaining 14 parties, the AO never adversely commented about their availability or otherwise. It was further argued that in any case, even those three shareholder companies had duly confirmed having put in share application money and also confirmed that they had filed income tax return for the Assessment Year 2008-09 as well. It was argued that the Apex Court in the case of ***Orissa Corporation*** [159 ITR 78] had held that since the assessee had given names and addresses of the creditors, all of whom were income tax assessees, the failure of the creditors to respond to Department's notices would not justify adverse inference being drawn against the assessee.

48. The assessee further submitted that the entire money had been received through account payee cheques and, Patna High Court in the case of ***Addl. CIT Vs. Bahri Bros***[154 ITR

244] has held that the question of identity fails into oblivion, if the transaction is through account payee cheques. The same view has been expressed by the Calcutta High Court in the case of ***CIT Vs. Matehr and Platt*** [168 ITR 493]. Moreover, no summons had been issued to bankers of the shareholders and the Registrar of Companies despite specific request of assessee. The assessee seeks to reply upon the case of ***CIT Vs. Genesis Commet (P) Ltd.*** [163 Taxman 482 (Del), wherein it has been held that an officer, if he was not inclined to believe material placed by the assessee he could have used coercive powers available to him.

49. The contention of the assessee has been found to be convincing by the Tribunal and the learned Tribunal has allowed the appeal thereby deleting the addition. The Revenue is in appeal before us. The entire case of the Revenue based on the plea that as per the report, the investing companies were not found at the given addresses and on this basis, argument is raised that the companies are non-existing and the transactions were bogus and not genuine. Here, the case of the Revenue is even weaker than the cases discussed above. It is not even the case that the Directorate of Income Tax (Investigation) has found Mr.

Mahesh Garg in such racket of floating bogus companies. We state at the cost of repetition that after the assessee had furnished the evidence, initial onus had been discharged and it was for the AO to make further necessary inquiries which are completely missing.

50. We are, thus, of the view that no question of law much less substantial question of law arises. This appeal is dismissed.

ITA 613 of 2011

51. This appeal is preferred by the assessee against the order of the Tribunal. We may record that the AO had made addition on account of unexplained credits under Section 68 of the Act in the sum of ₹1.52/- Crores and ₹3,04,000/- on account of commission for obtaining accommodation entry. It was made on the basis of information received from the Investigation Wing pursuant to the statements recorded from Shri Mukesh Gupta, Shri Rajan Jassal, Shri S.P. Singh and Shri Mukesh Garg.

52. In appeal, the CIT (A) set aside the order of the AO and deleted the addition. Before doing so, the CIT (A) had called for the remand report. The CIT (A) recorded that the AO had himself observed in the assessment order as well as in

the remand report that during the course of the assessment proceedings, following particulars/details were furnished by the assessee:

> "a) Confirmation from shareholders containing the complete details of amount invested, cheque number, date, bank particulars, PAN:
>
> b) Copy of acknowledgement of Income Tax Return of shareholders:
>
> c) Copy of Bank Statement of shareholders reflecting the transaction:"

53. On this basis, CIT (A) observed that the assessee had discharged its onus under Section 68 of the Act and the AO had not made further inquiry to rebut the said evidence. Following were the reasons given by the CIT (A) in support:

> "5.5 In the present case the assessee can be said to have discharged its onus under section 68 of the Act. The appellant has given all the necessary details in order to establish the identity of the share applicants. After considering the entire material placed on record, it is fair to conclude that the share applicants were existing parties and the payments were made through banking channels. It is also observed that the Assessing Officer could not point out and discrepancy in the evidences relied upon by the assessee. He has neither brought out any direct or inferential evidence to contradict the contention of the assessee. It is further observed that even though A.O. has vast powers under section 131 and 133(6) of the Act, he has not used any of his powers to verify the genuineness of the claim of the assessee by verifying the documents furnished by it. If A.O. had doubted the impugned transaction after receiving the evidences which had been produced by the assessee in support of its claim it was very much open to the A.O. to do his independent enquiry and verification. This has not been done by the A.O. Further, what is the desired documentary evidence required to support the claim of the assessee as required by the A.O. is not coming out of

the order of the A.O. Though the share-applicants could not be examined by the AO, since they were existing on the file of the Income Tax Department and their income-tax details were made available to the AO, it was equally the duty of the AO to have taken steps to verify their assessment records and if necessary to also have them examined by the respective AOs having jurisdiction over them (share-applicant), which has not been done by him.

5.6 The A.O. has also given a finding that all the share-applicants were entry operators as per the information available on the basis of the investigation conducted by the Investigation Wing of the Income-tax department. AS contended on behalf of the appellant, the Ld. Assessing Officer did not provide any such information to the assessee to rebut the adverse material, if any and he did not afford any opportunity of cross examination of all the adverse material on the basis of which impugned addition has been made in the assessment order. It is settled proposition of law that the information gathered behind the back of the assessee cannot be used against him unless until an opportunity of rebutting the same is given to the assessee. It is against the principle of natural justice. Reliance is placed on the decision of Hon'ble Supreme Court in case of Prakash Chand Nahta v. Union of India (2001) 247 ITR 274 in support of the proposition that cross-examination of the witness is must, before the A.O. relies on the statement of the witness for making addition. Reliance is also place on the decision of Allahabad High Court in the case of Nathu ram Premchand v. CIT (1963) 49 ITR 561, wherein the Hon'ble court explained that it was the duty of the Assessing Officer to enforce the attendance of a witness, if his witness is material in exercise of his powers under order 19, r, 10 of CPC and where the officer does not do so, no inference can be drawn against the assessee, Reliance is also placed on the decision of the jurisdictional High Court i.e. Delhi High Court in Commissioner of Income Tax Vs. Pradeep Kumar Gupta and Vijay Gupta (2008) 303 ITR 95 (Delhi) wherein it was held hat reopening of assessment is not permissible on mere adverse statements from others. Such statement by itself does not constitute information, unless the Assessing Officer has made enquiries thereon and inferred understatement of income. I am therefore inclined to agree with the submissions made on behalf of the appellant to the effect that the information, if any, gathered behind the back of the assessee without being

> subjected to cross-examination cannot be fully admitted as evidence against the assessee."

54. In the appeal filed by the Revenue before the Tribunal, the Revenue could not dispute the aforesaid conclusion of the CIT (A) based on the record before him. However, the plea of the Revenue was that the CIT (A) could have remitted the case back to the AO for granting the opportunity to cross-examine the assessee. On this submission and without commenting upon the merits of the order passed by the CIT (A), the Tribunal took the view that the matter needs further examination and therefore, restored the same to the file of the AO in the following words:

> "We have considered the facts of the case and submissions made before us. We are of the view that the investment by various companies in the shares of the assessee company require further examination and in particular the information received from investigation has to be verified further by recording statements of the applicants in present of the assessee. Therefore, the matter is restored to the file of the AO to make enquiries as above and allow the assessee to cross-examine the applicants so as to arrive at the correct facts in the matter."

55. In our discussion on the aspect of remand in ITA No.972/2009, we have indicated that if the addition is set aside only because of some procedural defect or irregularity, viz., violation of principle of natural justice, then matter can be remitted back to give opportunity to the assessee to cross-examine the witness if it was not done. The clincher

on this aspect is now the order of the Supreme Court in the case of ***Income Tax Officer Vs. M Pirai Choodi*** [Civli appeal No.9756-9757/2010, decided on 19.11.2010] where the Court held as under:

> "Heard learned counsel on both sides.
>
> Leave granted.
>
> In this case, the High Court has set aside the order of assessment on the ground that no opportunity to cross-examine was granted, as sought by the assessee. We are of the view that the High Court should not have set aside the entire Assessment Orders. At the highest, the High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned witness. Be that as it may, we are of the view that, even on this particular aspect, the assessee could have gone in appeal to CIT (Appeals). The assessee has failed to avail the statutory remedy. In the circumstances, we are of the view that the High Court should not have quashed the assessment proceedings, vide impugned order. Consequently, the impugned order is set aside. Liberty is granted to the assessee to move CIT (Appeals). It is made clear that the assessee herein will move the CIT (Appeals) within a period of six weeks from today."

56. Accordingly, we find nothing wrong in the approach of the Tribunal in remitting the case back to the AO in the instant case. This appeal is accordingly dismissed.

ITA Nos.1228, 1229, 1230/2010

57. These three appeals pertain to two assessment years. There are two appeals in respect of Assessment Year 2001-02 and one appeal in respect of Assessment Year 2002-03. The

assessee filed two appeals in respect of Assessment Year 2001-02 and one is on merit and other challenges the validity to reassessment proceedings under Section 148 of the Act. In both the years, the subject matter is addition made by the AO under Section 68 of the Act as well as allegedly commission expenses under Section 69C of the Act.

58. In respect of Assessment Year 2001-02, the original assessment order made on 24.2.2003 under Section 143(3) of the Act and the assessment was completed at the returned loss of ₹4,44,629/-. However, later on, the case was reopened under Section 148 of the Act through notice dated 28.3.2008. In the relevant year, the assessee had received share application money from two different entities M/s Suma Finance and Investment Ltd. ₹60,85,776/- and M/s Ankur Marketing Ltd. ₹14,34,500/-. The assessee in all received amount of ₹75,20,276/- is as share application money. The amount received is well-supported and explained by the documentary evidences. The assessee had filed the confirmations of accounts, PAN details, and share application from the applicants. The AO treated the said amount ₹75,20,276/- as cash credit and mode the addition under

Section 68 and also added and amount of ₹18,801/- by way of alleged Commission Expenses under section 69C of the Act. In all the addition under Section 68 was ₹75,39,077/- (₹75,20,276/- + ₹18,801/-) by the AO.

59. The main reason for making the addition was that the share applicants were not produced or non-attendance of the applicants was in response to the notices issued to them. The assessee filed an appeal before CIT (A).

60. The assessee had challenged the issuances of notice under Section 148 of the Act and also the merits of the additions made. The CIT(A) vide its order dated 21.5.2009, upheld the validity of proceedings under Section 148 on the ground that the AO had *prima facie* sounds reasons to pen the case. However, he deleted the additions of ₹75,39,077/- received as share application money. The CIT (A) has held that the assessee had filed all the income tax details of the assessees which were not got verified by the AO. He also held that the assessee had discharged its burden by filing details which were required to fulfil the conditions of section 68 which have not been controverted by the AO. He followed the decisions of ***Divine Leasing (supra)*** and ***Lovely Exports (P) Ltd. (supra)*** and deleted the additions. He also held in Para 4.2

(a) that the AO has not brought anything on record to dispute the facts/details filed by the appellant.

61. The matter was carried before the Tribunal by the Revenue. The assessee also field the Cross-Objection against the issuance of the notice under Section 148 of the Act dated 28.3.2008. The Tribunal vide its order dated 09.10.2009 dismissed the Cross-Objection on the ground that the reason recorded by the AO have the substantive satisfaction and adequate material to belief the escapement of the income in the hands of the appellant and the in the appeal of Revenue, restored the matter back to the file of the AO on the ground that the facts of the case needs to be investigated by the AO. While upholding the validity of reopening, the Tribunal relied on the decision of the Supreme Court in the case of ***ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd.***, 291 ITR 500 (SC).

62. It is under these circumstances, these appeals are filed for these assessment years. We shall first take up the facts regarding validity of notice under Section 148 of the Act. Learned counsel for the assessee argued that this notice was admittedly issued beyond four years from the date of assessment order and there was nothing on record to show that the assessee had not disclosed all material particulars

or had suppressed any information. He pointed out that in the 'reasons to belief' furnished by the AO, the AO had merely referred to certain investigation carried out by the Directorate of Income Tax (Investigation) in respect of bogus/accommodation entries provided by certain individuals/companies. The AO, according to him, the reading of these reasons clearly indicated that the AO had not applied his own mind to the issue or carried out any incumbent verification before issuing the notice.

63. We find this contention of the assessee to be correct. In Para 2, the AO has reproduced the particulars of allegedly bogus transactions as "given by the Directorate of Income Tax (Investigation) after making the necessary inquiries". The AO did not even care to see those particulars, which are repetitive in nature as is clear from the following:

Name of the assessee/ Beneficiaries	Name of the Bank Beneficiaries	Name of the Operator	Instrument No.	Operator's A/c No. and Bank	Date on which entry taken	Amount (in ₹)
M/s Intermediary India Pvt. Ltd.	Indian Bank	M/s. Suma Finance Investment Ltd.	311108	2919, Corpn. Bank, Karol Bagh, New Delhi	23-Mar-01	10,46,568/-

-do-	-do-	-do-	311108	-do-	16-Feb-01	10,46,568/-
-do-	-do-	-do-	302578	-do-	16-Feb-01	3,80,760/-
-do-	-do-	-do-	302578	-do-	16-Feb-01	3,80,760/-
-do-	-do-	-do-	302581	-do-	16-Feb-01	5,61,120/-
-do-	-do-	-do-	302581	-do-	16-Feb-01	5,61,120/-
-do-	-do-	M/s Ankur Marketing	450592	CA/11011938 Bank of Punjab, Cannaught Place, New Delhi	27-Mar-01	9,50,000/-

64. Furthermore, after extracting the aforesaid particulars, the AO recorded following reasons:

> "3. In view of the above information, it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries. Therefore, I have reasons to believe that the income amounting to ₹43,65,776/- has escaped assessment, which is required to be assessed to tax under the provision of Section 147 of the I.T. Act, 1961."

65. It is clear from the above that the AO acted mechanically on the information supplied by the Directorate of Income Tax (Investigation) without applying his own mind. He did not even care to see the apparent mistake in the particulars where three entries were repeated twice each. Almost on identical facts, a Division Bench of this Court set aside such a notice under Section 147/148 of the Act in the case ***Sarthak Securities Co. P. Ltd. Vs. ITO (Delhi)***, 329 ITR 110. After taking note of various judgments delineating the scope of Section 148 of the Act as well as law regarding undisclosed income under Section 68 of the Act, the Court held that:

> "The obtaining factual matrix has to be tested on the anvil of the aforesaid pronouncement of law. In the case at hand, as is evincible, the assessing officer was aware of the existence of four companies with whom the assessee had entered into transaction. Both the orders clearly exposit that the assessing officer was made aware of the situation by the investigation wing and there is no mention that these companies are fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicate independent application of mind. True it is, at that stage, it is not necessary to have the established fact of escapement of income but what is necessary is that there is relevant material on which a reasonable person could have formed the requisite belief. To elaborate, the conclusive proof is not germane at this stage but the formation of belief must be on the base or foundation or platform of prudence which a reasonable person is required to apply. As is manifest from the perusal of the supply of reasons and the order of rejection of objections, the names of the companies were available with the authority. Their existence is not disputed. What is mentioned is that these companies were used as conduits. In that view of the matter, the principle laid down in Lovely Exports (P) Ltd. (supra) gets squarely attracted. The same has not been referred to while passing the order of rejection. The assessee in his objections had clearly stated that the companies had bank accounts and payments were made to the assessee company through banking channel. The identity of the companies was not disputed. Under these circumstances, it would not be appropriate to require the assessee to go through the entire gamut of proceedings. It is totally unwarranted."

66. Similar view is taken by another Division Bench of this Court in ***The Commissioner of Income Tax III Vs. SFIL Stock Broking Ltd.*** (ITA No.1056/2009, decided on 27.4.2010). In that case also, the AO had recorded the reasons to believe in similar manner, viz., more information received from the Deputy Director of Income Tax (Investigation) and the Court took the view that these were no reasons within the

meaning of Section 148 of the Act. Following discussion in this behalf needs to be noted:

> "
>
> 9. In the present case, we find that the first sentence of the so-called reasons recorded by the Assessing Officer is mere information received from the Deputy Director of Income Tax (Investigation). The second sentence is a direction given by the very same Deputy Director of Income Tax (Investigation) to issue a notice under Section 148 and the third sentence again comprises of a direction given by the Additional Commissioner of Income Tax to initiate proceedings under Section 148 in respect of cases pertaining to the relevant ward. These three sentence are followed by the following sentence, which is the concluding portion of the so-called reasons:-
>
> > "Thus, I have sufficient information in my possession to issue notice u/s 148 in the case of M/s SFIL Stock Broking Ltd. on the basis of reasons recorded as above."
>
> 10. From the above, it is clear that the Assessing Officer referred to the information and the two directions as "reasons" on the basis of which he was proceeding to issue notice under Section 148. We are afraid that these cannot be the reasons for proceeding under Section 147/148 of the said Act. The first part is only an information and the second and the third parts of the beginning paragraph of the so-called reasons are mere directions. From the so-called reasons, it is not at all discernible as to whether the Assessing Officer had applied his mind to the information and independently arrived at a belief that, on the basis of the material which he had before him, income had escaped assessment. Consequently, we find that the Tribunal has arrived at the correct conclusion on facts. The law is well settled. There is no substantial question of law which arises for our consideration.
>
> The appeal is dismissed."

67. In view of that, we need not go into the merits of the addition made by the AO. As pointed out above, the CIT (A)

had deleted the addition on merits and the Tribunal has simply remitted the case back to the AO.

68. There is another recent judgment dated 21.7.2011 of this Court in ***Signature Hotels (P) Ltd. Vs. Income Tax Officer-Ward 8(4) & Anr.*** [W.P.(C) No.8067/2010]. That was also a case where the notice was issued on the basis of information received from Directorate, Income Tax (Investigation). The Court first set out the approach that is to be adopted in such cases, by mentioning as under in para 12:

> "12. In these circumstances, we are examining the reasons given by the Assessing Officer in the proforma seeking permission/approval of the Commissioner and whether the same satisfy the pre-conditions mentioned in Section 147 of the Act."

69. On examination, the Court set aside the notice under Section 148 of the Act and in the process, discussion therein is as under:

> "14. The first sentence of the reasons states that information had been received from Director of Income-Tax (Investigation) that the petitioner had introduced money amounting to Rs.5 lacs during financial year 2002-03 as per the details given in Annexure. The said Annexure, reproduced above, relates to a cheque received by the petitioner on 9th October, 2002 from Swetu Stone PV from the bank and the account number mentioned therein. The last sentence records that as per the information, the amount received was nothing but an accommodation entry and the assessee was the beneficiary.

15. The aforesaid reasons do not satisfy the requirements of Section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except Annexure, which has been quoted above. Annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. Annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the Assessing Officer did not independently apply his mind to the information received from the Director of Income-Tax (Investigation) and arrive at a belief whether or not any income had escaped assessment.

16. It may be noted here that a company by the name of Swetu Stone Pvt. Ltd. had applied for and was allotted shares in the petitioner company on payment by cheque of Rs.5 lacs. As noticed above, in the Annexure the name of the company/account holder is mentioned as Swetu Stone PV. The same is also mentioned in the undated reasons mentioned above.

17. In the counter affidavit it is stated that M/s Swetu Stone Pvt. Ltd. had applied for allotment of shares worth Rs.5 lacs and the same were allotted by the petitioner. It is further stated that statements of Mahesh Garg and Shubhash Gupta were recorded by the Director of Income-Tax (Investigation) and on the basis of the statements they have come to the conclusion that the said persons were entry operators. Copy of the statements of Mahesh Garg and Shubhash Gupta have not been placed on record by the respondent. The petitioner, has, however, enclosed copy of statements of Mahesh Garg and Shubhash Gupta recorded on different dates. The said persons have not specifically named the petitioner though other parties have been named and details have been given and it is stated that they were provided accommodation entries. However, it is stated that the entries were made by giving cheque/DD/PO after receiving cash and sometimes expenses entries were provided. The reasons recorded by the Assessing Officer do not make reference to any statement of Mahesh Garg or Shubhash Gupta. This may not also be necessary, if the statements were on record and it is claimed and prima facie established that they were examined by the Assessing Officer before or at the time of recording reasons. On the other hand, in the present case,

information as enclosed as Annexure, has been referred. This is the only material relied upon by the Assessing Officer. The said Annexure has been quoted above. In this connection, we may notice that M/s Swetu Stone Pvt. Ltd. is an incorporated company and the petitioner has pleaded and stated that the said company has a paid-up capital of Rs.90 lacs. The company was incorporated on 4th January, 1989 and was also allotted a permanent account number in September, 2001. To this extent, there is no dispute. In these circumstances, we feel the judgments of the Delhi High Court in ***Commissioner of Income Tax versus SFIL Stock Broking Limited***, [2010] 325 ITR 285 (Delhi) and ***Sarthak Securities Company Private Limited versus Income Tax Officer***, 2010 (329) ITR 110 (Delhi), in which ***CIT versus Lovely Exports (P) Limited***, (2009) 216 CTR 195 (SC) has been applied and followed, are applicable. We may notice here that the respondent in their counter affidavit have stated that Swetu Stone Pvt. Ltd. is unidentifiable and, therefore, the aforesaid decisions should not be applied and the ratio of the decision dated 7th January, 2011 in Writ Petition (Civil) No. 7517/2010, ***AGR Investment Limited versus Additional Commissioner of Income Tax and Another*** should be applied. In the said decision, decisions in the case of ***Sarthak Securities Company Private Limited*** (supra) and ***SFIL Stock Broking Limited*** (supra) was distinguished by giving the following reasons:

> "22. ....In SFIL Stock Broking Ltd. (supra), the bench has interfered as it was not discernible whether the assessing officer had applied his mind to the information and independently arrived at a belief on the basis of material which he had before him that the income had escaped assessment. In our considered opinion, the decision rendered therein is not applicable to the factual matrix in the case at hand. In the case of Sarthak Securities Co. Pvt. Ltd. (supra), the Division Bench had noted that certain companies were used as conduits but the Assessee had, at the stage of original assessment, furnished the names of the companies with which it had entered into transaction and the assessing officer was made aware of the situation and further the reason recorded does not indicate application of mind. That apart, the existence of the companies was not disputed and the companies had bank accounts and payments

> were made to the Assessee company through the banking channel. Regard being had to the aforesaid fact situation, this Court had interfered. Thus, the said decision is also distinguishable on the factual score."
>
> 18. The facts indicated above do not show that M/s Swetu Stone Pvt. Ltd. is a non-existing and a fictitious entity/person. Decision in ***AGR Investment Limited*** (supra), therefore, does not help the case of the respondent.
> 19. For the reasons stated above, the present writ petition is allowed and writ of certiorari is issued quashing the proceedings under Section 148 of the Act. In the facts of the case, there will be no order as to costs."

70. In respect of Assessment year 2002-03 also additions were made under Section 68 read with Section 69C of the Act after reopening assessment under Section 147/148of the Act. For the aforesaid reasons, even notice for this year also stands quashed. The question No.(1) is accordingly answered in favour of the assessee and for this reason, we are not going into the second question.

71. As a result, appeals of the assessee are allowed.

ACTING CHIEF JUSTICE

(M.L. MEHTA)
JUDGE

DECEMBER 23, 2011
pmc