IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH,CHANDIGARH

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND Ms. RANO JAIN, ACCOUNTANT MEMBER

ITA No. 1138/CHD/2014
Assessment Year: 2010-11

M/s Lotus Integrated Taxpark Ltd., Trident Complex, Handiaya Road, Dhaula, Barwala.	Vs	The DCIT, Circle, Sangrur.

PAN: AABCL2655E

&

ITA No. 1139/CHD/2014
Assessment Year: 2011-12

M/s Lotus Integrated Taxpark Ltd., Trident Complex, Handiaya Road, Dhaula, Barwala.	Vs	The Addl.CIT, Range, Sangrur.

PAN: AABCL2655E

(Appellant) (Respondent)

Appellant by : Shri Ashwani Kumar,CA &
Shri Aditya Kumar,CA

Respondent by : Shri Jitender Kumar

Date of Hearing : 18.09.2015
Date of Pronouncement : 01.10.2015

O R D E R

PER BHAVNESH SAINI,JM

Both the appeals by assessee are directed against different orders of ld. CIT(Appeals) Patiala dated 20.11.2014 for assessment year 2010-11 and dated 21.11.2014 for assessment year 2011-12.

2. We have heard ld. Representatives of both the parties, perused findings of authorities below and considered the material available on record. Both the appeals are decided as under.

ITA 1138/2014

3. On ground No. 1 assessee challenged the order of ld. CIT(Appeals) in upholding the addition of Rs.3,70,00,000/- received by the assessee as share capital and share premium from non-resident company M/s Glacis Investment Limited. The facts are that the assessee has allocated 740000 shares to M/s Glacis Investment Limited at premium. The Assessing Officer asked for the Income Tax Return, assessee's PAN number, mode of acceptance of money with date, bank account of M/s Glacis Investment Limited to prove identity, credit worthiness and genuineness of the transactions. The assessee contended that M/s Glacis Investment Limited is non resident company at Mauritius. It was also submitted that amount was received through bank and Reserve Bank of India has confirmed the inflow of the amount invested. The Assessing Officer thereafter contended that these documents does not prove the credit worthiness of the party and genuineness of the transaction in the matter. The assessee further contended that certificate of incorporation of the investor company is placed on record and relied upon various case laws. The Assessing Officer, however, noted that assessee failed to prove the credit

worthiness of the party and genuineness of the transaction and made the addition.

4. The assessee challenged the addition before ld. CIT(Appeals). During the appellate proceedings, the assessee reiterated the submissions made before Assessing Officer. It was further contended that as per provisions of Section 68, assessee is only to prove the nature and source of the cash credit and identity of the investor. It was submitted that in this case, identity is proved by way of address given, certificate of incorporation and Tax Residence Certificate. Credit worthiness was proved as transaction is through banking channel approved by Reserve Bank of India. It was also submitted that confirmation in this case has been obtained and submitted an additional evidence under Rule 46A of the IT Rules and the inability to produce the bank statement does not falsify the credit worthiness of the creditor. The assessee submitted that confirmation could be obtained only after culmination of assessment proceedings. As regards genuineness of the transaction, same is proved as the transaction is through banking channel. The assessee relied upon decision in the case of CIT V Steller Investments Ltd. 251 ITR 263 (S.C) and CIT V Lovely Exports Pvt. Ltd. 299 ITR 268 (Delhi) etc. The Assessing Officer in the counter comments, relied upon assessment order, however he did not rebut the submissions regarding additional evidence filed before ld. CIT(Appeals). The ld. CIT(Appeals) noted that in this case, identity of the

shareholder is proved by way of certificate of incorporation. However, the assessee has failed to produce the bank statements or balance sheet etc. of the subscriber company as submitted by the Assessing Officer in the counter comments also. The ld. CIT(Appeals), therefore, noted that assessee has failed to prove credit worthiness of the subscriber. Therefore, addition was rightly made under section 68 of the Act. The ld. CIT(Appeals) further noted that even if additional evidence i.e. confirmation of the subscriber is admitted, it would not make any difference because the confirmation would not justify the credit worthiness of the party. This ground was, accordingly, dismissed.

5. The ld. counsel for the assessee reiterated the submissions made before authorities below. He has filed application for admission of the additional evidence under Rule 29 of the Income Tax Appellate Tribunal Rules and submitted that during the proceedings before the authorities below, assessee was not able to obtain copy of the balance sheet of M/s Glacis Investment Limited, a non resident company incorporated in Mauritius. Now the assessee has been able to obtain copy of the same. The ld. counsel for the assessee, by referring to the balance sheet of the subscriber submitted that the principal activity of the company is that of investment holding and has sufficient assets to make investment in the assessee company and also submitted that the balance sheet of M/s Glacis Investment Limited shows that subscriber company

has made investment in assessee company M/s Lotus Integrated Taxpark ltd.(PB-21). On the other hand, ld. DR objected to the admission of additional evidence and submitted that the subscriber company was not having any income in assessment year under reference and that the entire amount has been invested in the assessee company creates a doubt. He has, therefore, submitted that additional evidence may not be admitted.

6. We have heard rival submissions. The ld. CIT(Appeals) in his findings noted that assessee has failed to produce the bank statements or balance sheet etc. of the subscriber company and as such, assessee failed to prove credit worthiness of the subscriber company being a foreign investment. In the opinion of the ld. CIT(Appeals), the filing of the balance sheet was necessary to prove credit worthiness of the subscriber company. Therefore, the balance sheet of the subscriber company is relevant document and goes to the root of the matter. The assessee has explained the reasons that at the proceedings before authorities below, the balance sheet could not be obtained which is now available to the assessee, therefore, same was filed for consideration. The Hon'ble Supreme Court in the case of Tek Ram 262 CTR 118 admitted the additional evidence being the same relevant and required to be looked into. The Hon'ble Punjab & Haryana High Court in the case of Mukta Metal Works 336 ITR 555 held that "*the report of Forensic Science Laboratory was the relevant material and so was the affidavit of the searched persons.*

The additional evidence was necessary for just decision of the matter. The Tribunal was not justified in declining to consider additional evidence comprising the opinion of the laboratory of the Government Examiner and also the affidavit of the author of the diary. Though the documents had a direct bearing on the issue".

7. Considering the facts of the case in the light of the above decisions, it is clear from the findings of the ld. CIT(Appeals) that balance sheet of the subscriber company was relevant document to prove the credit worthiness of the subscriber company and would go to the root of the matter. Therefore, the additional evidence in the form of balance sheet of the subscriber company is admitted for hearing. The application of the assessee for admission of the additional evidence is allowed.

8. The ld. counsel for the assessee, on merits reiterated the submissions made before authorities below. He has referred to PB-27 which is the certificate of incorporation of M/s Glacis Investment Limited, PB-28 is Tax Residence Certificate of M/s Glacis Investment Limited, PB-29 is certificate of Reserve Bank of India taking note of transactions between assessee and M/s Glacis Investment Limited, Mauritius, PB-30 is share certificates issued by the assessee to M/s Glacis Investment Limited, PB-38 is confirmation of M/s Glacis Investment Limited of making investment in assessee company in a sum of Rs. 3.70 Cr on allotment of 740000 equity shares, PB-47 is certificate of

Mauritius Government granting Global Business License to M/s Glacis Investment Limited under the Financial Services Act. The ld. counsel for the assessee submitted that the identity of the subscriber company is not in dispute. He has also filed copy of bank account of assessee showing the receipt of money in question i.e. Rs. 3,70,00,000/- through transfer in the account of the assessee (PB-2 – 1). He has also filed balance sheet of the assessee ending March, 2010. The ld. counsel for the assessee, therefore, submitted that the initial onus upon assessee to prove genuine transaction in the matter has been discharged. The credit worthiness of the subscriber is proved being the amount received through banking channel with approval of the Reserve Bank of India. No evidence has been brought on record that it was the money of the assessee which is routed through the subscriber. He has relied upon following decisions in support of his contention :

i) Decision of Delhi High Court in the case of CIT V Steller Investment Ltd. 192 ITR 287 in which it was held as under :

> *"If it be assumed that the subscribers to the increased share capital were not genuine, even then under no circumstances could the amount of share capital be regarded as undisclosed income of the assessee. It may be there were some bogus shareholders and the money may have been provided by some other persons. It would have been more sensible to re-open, the assessments of the persons alleged to have advanced the money. How this amount of increased share capital could be assessed in the hands of the company itself was beyond understanding."*

This decision is confirmed by the Hon'ble Supreme Court in the case of CIT V Steller Investment Ltd. 251 ITR 263.

ii) Decision of Delhi High Court in the case of CIT V Divine Leasing & Finance Ltd. 299 ITR 268 in which it was held as under :

"In the instant case the Tribunal noted that the assessee was a public limited company, which had received subscriptions to the public issue through banking channels and the shares were allotted in consonance with the provisions of the Securities Contract Regulation Act, 1956, as also the Rules and Regulations of the Delhi Stock Exchange. Complete details appeared to have been furnished. The Tribunal further recorded that the Assessing Officer had not brought any positive material or evidence, which would indicate that the shareholders were (a) 'benamidars' or (b) fictitious persons or (c) that any part of the share capital represented the company's own income from undisclosed sources. [Para 19]

Further the Tribunal had categorically held that the assessee had discharged its onus of proving the identity of the share subscribers. Had any suspicion still remained in the mind of the Assessing Officer, he could have initiated 'coercive process', but that course of action had not been adopted. In view of the concurrent finding, pertaining to the factual matrix, there was no merit in those appeals which were, accordingly, to be dismissed."

iii) Decision of Hon'ble Supreme Court in the case of CIT V Lovely Exports P.Ltd. 216 CTR 195 in which it was held as under :

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

iv) Decision of Hon'ble Punjab & Haryana High Court in the case of CIT V GP International Ltd. 325 ITR 25 in which it was held as under:

Held , dismissing the appeal, (i) that during the proceedings under section 143(3) read with section 250 of the Act, the assessee furnished a confirmation certificate from A along with PAN number, The assessee had confirmed that the liability was still outstanding. Hence Section 41(1) was not applicable.(ii) That at the time of the original assessment, the assessee had had supplied the list of the persons to whom the shares were sold along with their addresses. The Assessing Officer did not doubt the identity of the persons from whom the assessee had shown receipt of application money. Merely because some of the persons did not respond to the notice issued by the Assessing Officer under section 133(6) of the Act, it could not be taken that the transaction was not genuine. The amount could not be taken as unexplained income in the hands of the assessee.

v) Decision of Delhi High Court in the case of CIT V Real Time Marketing (P) Ltd. 306 ITR 35 in which it was held as under :

Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2001-02 - Assessee-company took some unsecured loan from ACL and also filed confirmation thereof - Assessing Officer asked assessee to file a copy of income-tax return of ACL along with its audited profit and loss account, balance sheet and copy of bank statement for relevant period - Assessee furnished all documents asked for - From bank statement of ACL, Assessing Officer noticed that funds were transferred through internal transfer to ACL and then in same manner in bank account of assessee-company - Assessing Officer, therefore, treated same as unexplained cash credits under section 68 - On appeal, Commissioner (Appeals) held that assessee had discharged its burden of proving identity, capacity and genuineness of transaction and in those circumstances, addition made by Assessing Officer was not justified - An appeal preferred thereagainst by revenue was dismissed by Tribunal - Whether since there was no material with Assessing Officer to come to conclusion regarding any ingenuineness or fictitious identity of entries or non-capacity of lender, addition was rightly deleted - Held, yes.

vi) Decision of Delhi High Court in the case of CIT V Value Capital Services (P) Ltd. 307 ITR 334 in which it was held as under :

> *If department wants to make addition on account of share application money, burden is on department to show that even if applicant did not have means to make investment, investment made by assessee actually emanated from coffers of assessee so as to enable it to be treated as undisclosed income of assessee.*

vii) Decision of Delhi High Court in the case of CIT V Orbital Communication (P) Ltd. 327 ITR 560 in which it was held as under :

> *Where assessee had produced substantial evidence to establish identity and creditworthiness of creditors and genuineness of share application, merely because it failed to produce creditors, share application money could not be regarded as undisclosed income of assessee under section 68 [In favour of assessee].*

viii) Decision of Delhi High Court in the case of CIT V Dwarkadhish Investment (P) Ltd. 330 ITR 298 in which it was held as under :

> *In any matter, the onus of proof is not a static one. Though in section 68 proceedings, the initial burden of proof lies on the assessee, yet once he proves the identity of the creditors/share applicants by either furnishing their PAN numbers or income-tax assessment numbers and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the revenue. 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. One must not lose sight of the fact that it is the revenue which has all the powers and wherewithal to trace any person. Moreover, it is settled law that the assessee need not to prove the 'source of source."*

ix) Decision of Delhi High Court in the case of CIT V

Winstral Petrochemicals (P) Ltd. 330 ITR 603 in which it was held as under :

> *Undisputedly the share application money was received by the assessee by way of account payee cheques, through normal banking channels. It was not the case of the revenue that the payment of share application money was not made from the bank account of the applicant-companies. Admittedly, copies of applications for allotment of shares were also provided to the Assessing Officer. It was not the case of the revenue that the share applications were not signed on behalf of the applicant-companies and were forged documents or the shares were not actually allotted to the companies. Therefore, the Commissioner (Appeals) and the Tribunal were justified in holding that the genuineness of the transactions had been duly established by the assessee.*

x) Decision of Delhi High Court in the case of CIT V Fair Finvest Ltd. 357 ITR 146 in which it was held as under:

> *'Where assessee had filed documents including certified copies issued by Registrar of Companies in relation to share application, affidavits of directors, Form 2 filed with Registrar of Companies by such applicants, confirmations by applicants for company's shares, certificates by auditors, etc., Assessing Officer was not justified in making addition under section 68 on account of share application money merely on general inference to be drawn from the reading of the investigation report. The least that Assessing Officer ought to have done was to enquire into matter by, if necessary, invoking his powers under section 131 summoning the share applicants or directors.*

xi) Decision of Delhi High Court in the case of CIT V Gangeshwari Metal P.Ltd. 361 ITR 10 in which it was held as under :

> *Held, dismissing the appeal that there was a clear lack of inquiry on the part of the Assessing Officer once the assessee had furnished all the material. In such an eventuality no addition could be made under Section 68 of the Act.*

9. The ld. counsel for the assessee, therefore, submitted that assessee has proved the credit worthiness of the

subscriber company, its credit worthiness and genuineness of the transaction in the matter. The assessee is not connected with the subscriber company. He has, therefore, submitted that addition is wholly unjustified. On the other hand, ld. DR relied upon orders of the authorities below and submitted that copy of the bank account of subscriber company was not filed, therefore, credit worthiness of the creditor is not proved. The subscriber company did not do any business in this year and was established on 05.02.2009. There is no full signature on the confirmation. The entire money have been given by the creditor, therefore, it was not a genuine transaction in the matter.

10. We have considered the rival submissions. It is not in dispute that the assessee has allocated 740000 shares to M/s Glacis Investment Limited at premium. The Assessing Officer has not disputed the shares issued to this company at premium value. No investments have been made in this regard. The ld. DR also admitted that the reasons for issuing the shares to the subscriber company at paid up value and at premium have not been investigated by the Assessing Officer at assessment stage. The assessee has filed copy of the certificate of incorporation of M/s Glacis Investment Limited which is a registered company in Republic of Mauritius. The ld. CIT(Appeals) considering the subscriber company to be a company being legal entity held that the identity of the shareholder is proved. The assessee also filed copy of the Tax Residence Certificate issued by Mauritius Revenue authorities, certifying that M/s Glacis Investment Limited

incorporated in Mauritius is a company resident in Mauritius for income tax purposes under the Income Tax Act. The assessee also produced the certificate of Reserve Bank of India in which the Reserve Bank of India by referring to letter of the assessee has referred to the transaction held between assessee and M/s Glacis Investment Limited, Mauritius for issuing the shares at paid up value and premium for 740000 equity shares were recorded by the Reserve Bank of India in their records. The ld. DR submitted that the name of M/s Glacis Investment Limited is wrongly recorded in the Reserve Bank of India certificate. It appears to be typographical error and is not having much significance on the same because the assessee has issued 740000 equity shares to the shareholder company which is the same and only transaction carried out between the assessee and the shareholder company. The assessee also filed copy of the share certificate to show that actual share certificates 740000 in number have been issued to the shareholder company. The shareholder company has also issued a confirmatory letter in favour of the assessee certifying that M/s Glacis Investment Limited has invested Rs. 3,70,00,000/- for allotment of 740000 equity shares in assessment year under appeal. The Republic of Mauritius also certified that Global Business License under Financial Services Act have been granted to M/s Glacis Investment Limited. The balance sheet of the shareholder company M/s Glacis Investment Limited is also filed on record which is admitted as additional evidence which proved that the principal activity of this company is that of investment holding and was having the sufficient

funds/assets to make investment in assessee company and that the investment made in assessee company have been certified in the balance sheet. The bank statement of the assessee is also filed on record which support the contention of the assessee that Rs. 3,70,00,000/- have been invested by shareholder company in assessee company through transfer entries i.e. banking channels. The decisions relied upon by ld. counsel for the assessee clearly support the contention of the assessee that assessee has proved the credit worthiness of the shareholder company and genuineness of the transaction in the matter. The documentary evidences produced on record also support the contention of assessee that the shareholder company M/s Glacis Investment Limited, Mauritius has made investment in assessee company in 740000 equity shares by investing Rs. 3,70,00,000/-. The shareholder company also filed confirmation to that effect which is supported by Tax Residence Certificate, allotment of share certificates and Global Business License granted by Republic of Mauritius and the bank statement of the assessee.

10(i) In the case of Lovely Exports Pvt. Ltd. (supra), Hon'ble Supreme Court held that if share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of the Act of the assessee company.

The other decisions relied upon by ld. counsel for the assessee support the fact that assessee has received genuine share application money from the shareholder company.

10(ii) The ITAT Indore Bench in the case of Peoples General Hospital Ltd. in ITA 57/2007 vide order dated 28.09.2007 considering the identical issue held in para 11 to 12.2 as under :

> *11. We have considered rival submissions and material on record. We have bestowed our careful consideration and do not find any justification to interfere in the order of the ld. CIT(A).*
>
> *11.1 Full bench of Delhi High Court in the case of CIT vs. Sophia Finance Ltd. 205 ITR 98 held "Under section 68 of the Income-tax Act, 1961, 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 the assessee and it is immaterial as to whether the amount so credited is given the colour of a loan or a sum representing sale proceeds or even receipt of share application money. The use of the words "any sum found credited in the books". Section 68 indicates that the section is very widely worded and the Income tax Officer is not precluded from making and enquiry as to the true nature and source of a sum credited in the account books even if it is credited as receipt of share application money. The mere fact that the (assessee) company choose to show the receipt of the money as capital does not prelude the Income-tax Officer from going into the question whether this is actually so. Where, therefore, an assessee-company represents that it had issued shares on the receipt of share application money then the amount so received would be credited in the books of account of the company. The Income-tax Officer would be entitled, and it would indeed be his duty, to enquire whether the alleged share holders do in fact exist or not. If the share holders 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. The use of the words "may be charged" in section 68 clearly indicates that the Income-tax Officer would then have the jurisdiction, if the facts so warrant, to treat such a credit to be the income of the assessee.

If the share holders 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 and to that extent the observations in CIT v. Stellar Investment Ltd., [1991] 192 ITR 287 (Delhi), are correct; but the observations in that case to the effect that even if the subscribers to the capital were not genuine "under no circumstance could the amount of share capital be regarded as undisclosed income of the [company]" are not."

M.P. High Court in the case of CIT vs. Dhar Ispat (P) Ltd., 134 Tax Man 747 (180 CTR 491), held "Sec. 68 is applicable in respect of share application money; however, the question of genuineness of the entries regarding share application money is a question of fact to be decided by the assessee authority on the basis of evidence available on record."

Delhi High Court in the case of CIT vs. Stellar Investment Ltd., 192 ITR 287, held "that, even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances could the amount of share capital be regarded as undisclosed income of the company. No question of law arose out of the Tribunal's order."

Hon'ble Supreme Court in the case of CIT vs. Stellar Investment Ltd., 251 ITR 263, held "We have read the question which the High Court answered against the Revenue. We are in agreement with the High Court. Plainly, the Tribunal came to a conclusion on facts and no interference is called for. The appeal is dismissed. No order as to costs."

Delhi High Court in the case of CIT vs. Dolphin Canpack Ltd., 283 ITR 190, held "In its return for the assessment year 1998-99, the assessee claimed to have received share application money of Rs. 62 lakhs. The Assessing Officer rejected the explanation of the assessee and added the amount to the taxable income of the assessee. The Tribunal found that the assessee had furnished complete details to the Assessing Officer regarding the transactions in question, which included confirmation details of bank accounts and the permanent account numbers of the parties in whose favour the share capital was subscribed. The Tribunal also noted that all the payments were received by the assessee by cheques and that the assessee had, in the process, fully discharged the onus that

lay upon it for proving the identity of the subscribers and the genuineness of the transactions. On that basis, it deleted the addition made by the authorities below. On appeal to the High Court: Held, dismissing the appeal, that in the absence of any perversity in the view taken by the Tribunal or anything to establish conclusively that the finding regarding the genuineness of the subscribers and the transactions suffered from any irrationality, no substantial question of law arose from the order of the Tribunal. The deletion of the amount was justified."

Gauhati High Court in the case of CIT vs. Down Town Hospital Pvt. Ltd., 267 ITR 439, held "That regarding amounts received as share application moneys, the Tribunal had given clear finding after appreciation of the material on record that the assessee had filed the details regarding the source of funds of shares and their income tax file nos. before AO. According to the Tribunal the assessee had also submitted before the AO the confirmation from the creditors where full addresses, income tax no. etc. were given. The Tribunal was justified in deleting the addition.

Rajasthan High Court in the case of Shree Barkha Synthetics Ltd. vs. CIT, 283 ITR 377, held "If the transactions are made through banking channels and once the existence of persons by name in the share applications in whose name the shares have been issued is shown, the assessee-company cannot be held responsible to prove whether that person himself has invested the said money or some other person had made investment in the name of that person. The burden then shifts on the Revenue to establish that such investment has come from the assessee-company itself."

Delhi High Court in the case of CIT vs. Dwarkadhish Financial Services,148 Taxman 54, held "The assessee had produced all relevant evidence to establish that the share application money received by the assessee was a result of genuine transaction. It had been noticed even in the impugned order that evidence was produced by the assessee including affidavits, copies of the share application forms, copies of the confirmation from the applicant-companies, copies of board of directors' resolution approving such transactions as well as cheque number, branch and address of the bank through which the investment was made.

It was also noticed that the Assessing Officer himself had noticed in his order that the applicant-share holders were income-tax payees. In such circumstances, it could not be presumed that the share holder who was assessed to tax was not in existence. That would tantamount to contradiction in the stand of the department itself."

ITAT, Jodhpur Bench (TM) in the case of Uma Polymers (P) Ltd. vs. DCIT, 124 TTJ 124, held "In respect of share capital

money, the assessee-company has to prove only the existence of the person in whose name share application is received and there is no further burden on the assessee to prove whether that person himself has invested the money or some other person has made the investment in his name; distinction between a public company and a private company is not very material for this purpose."

Madhya Pradesh High Court in the case of CIT vs. Metachem Industries, 245 ITR 160, held "Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee is over. Whether that person is an income-tax payer or not and where he had brought this money from, is not the responsibility of the firm. The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm or the purposes of income-tax."

ITAT Indore Bench in the case of ACIT vs. M/s Vindhya Soya Limited, ITA No. 227/IND/ 2004, held "In the instant case, the CIT (A) in annexure of his order has mentioned details of the share holder, their addresses, holding of agricultural land, permanent account number of some of the share holders, amount of deposit, their occupation and evidence filed in form of confirmation letter, copy of acknowledgement receipt of some of the share holders filing return of income, evidence of agricultural holding, etc. We have also noted that the assessee company has furnished complete details of all the share holders. Therefore, before drawing any conclusion the AO should have issued summons u/s 131 to these share holders to arrive at the truth about the investment made by them. However, no such exercise was carried out by the AO and simply for the reason that the amount was deposited in cash, he held that the credit worthiness of and genuineness of transaction was not proved. The AO has not doubted the identity of the share holders. From the above it appears that the AO made the addition on surmises and conjectures. Therefore, in view of the above facts and circumstances and placing reliance on the decisions discussed (supra), we do not find any infirmity in the order of the CIT (A). Hence, the appeal of the revenue is dismissed."

Delhi High Court in the case of CIT vs. Glocom Impex P. Ltd. , 205 CTR 571, held "Once it was established that the share holder was a genuine person and also creditworthy and that she had the requisite amount for making the investment in question, no addition could be made under s. 68 in the hands of the assessee-company ; Revenue could not go further to find out whether the person from whom the share holder had received money through cheque was also a genuine party and creditworthy."

Hon'ble Gauhati High Court in the case of Nemichand Kothari vs. CIT 264, ITR 254, held "that the assessee had established the identity of the creditors. The assessee had also shown, in accordance with the burden, which rested on him under section 106 o f the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors which was not in dispute. Once the assessee had established these, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter, the burden had shifted to the Assessing Officer to prove the contrary. The failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, could not, under the law be treated as the income from undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. The Assessing Officer failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. Therefore, the Assessing Officer could not have treated the said amounts as income derived by the assessee from undisclosed sources."

Hon'ble Rajasthan High Court in the case of CIT vs. First Point Finance Ltd. 286 ITR 477, held "that it was not denied that all the share holders/ share applicants were genuinely existing persons. It was also not denied that each of them was an income-tax assessee and copies of the return of their income were also place before the Assessing Officer. There was no presumption that the assessee was the benami owner of the investment made by the existing persons. The Tribunal was justified in deleting the addition."

Hon'ble Delhi High Court in the recent decision in the case of CIT vs. Illac Investment Pvt. Ltd. 287 ITR 135, held "The respondent-assessee had for the assessment year 1989-90 disclosed in its return sum of Rs. 4,75,000 received as share application money. The Assessing Officer added the said amount to the taxable income of the assessee under section 68 of the Income-tax Act, 1961, on the ground that the identity of the subscribers had not been established. In an appeal filed by the assessee against the said order, the Commissioner of Income-tax (Appeals) held that the assessee had satisfactorily established identity of the share subscribers. The view taken with the Assessing Officer was, accordingly, reversed. The Income-tax Appellate Tribunal has in a further appeal filed by the Revenue before it placed reliance upon the decision of this court in CIT v. Antarctica Investment P. Ltd. [2003] 262 ITR 493 and CIT v. Sophia Finance Ltd. [1994] 205 ITR 98 (Delhi) [FB] to hold that the respondent assessee had discharged the onus by reference to the material produced to establish the identity of the subscribers. The Tribunal has observed:

> *"On going through the various orders to which reference has been made by the learned counsel for assessee, it is found that on similar facts the additions made by the Assessing Officer have been deleted. So far as the present case is concerned, the learned Commissioner of Income-Tax (Appeals) has considered the facts and circumstances in detail and has recorded findings of fact. He has also placed reliance on the decision in the case of CIT v. Sophia Finance Ltd. [1994] 205 ITR 98 (Delhi) [FB]. The learned Commissioner of Income-tax (Appeals) has also considered the provisions of sections 72,75 and 77 of the Companies Act and has also taken into consideration the details furnished by the assessee before the Assessing Officer including the certificate of incorporation of subscribers, copies of their bank statements and copies of their assessment orders as well as the copies of their audited accounts. The findings recorded by the learned Commissioner of Income-tax (Appeals) are based on a proper appraisal of the material and we do not find any scope to interfere with the same. Consequently, the order of the learned Commissioner of Income-tax (Appeals) is upheld."*

12. It is admitted fact that the assessee filed the confirmation letter from M/s. Alliance Industries Ltd. confirming that it has transferred foreign currency from their bank to the account of the assessee and in the said confirmation all the details of several payments are mentioned. It is also admitted fact that the said NRI Company is registered company and which fact is also proved by the certificate of incorporation of M/s. Alliance Industries Ltd. which is also certified by the Notary Public and is countersigned by the Governor and Commander in Chief of the city of Gibraltar. These certificates are supported by later on by Faria and Associates Chartered Accountants. The identity of the foreign investor M/s. Alliance Industries Ltd. is therefore established beyond doubt. The AO also did not dispute the identity and existence of the shareholder M/s. Alliance Industries Ltd. The AO also did not dispute transfer of money by M/s. Alliance Industries Ltd. to the assessee for the purchase of shares of the assessee company and the amount invested in the assessee company on account of share capital/share premium. The assessee from the certificate of the Govt. of India has established that M/s. Alliance Industries Ltd. invested the money in the business of the assessee after obtaining the permission of the Govt. of India. The forms filed with the RBI would also indicate that the foreign remittances

received from M/s. Alliance Industries Ltd. were duly approved by RBI for investment in the shareholding of the assessee company. The assessee also filed several certificates issued time to time by the State Bank of India, Commercial Branch, Bhopal explaining therein that on several dates the foreign remittances were ordered, to be credited to the account of the assessee with State Bank of India, by M/s. Alliance Industries Ltd. The assessee at the appellate stage filed a consolidated certificate issued by State Bank of India, Commercial Branch, Bhopal explaining therein that Standard Chartered Bank, Dubai has confirmed that all the remittances sent in favour of the assessee company by M/s. Alliance Industries Ltd. are routed through the bank account of M/s. Alliance Industries Ltd. The details of payments, date and USD are the same as have been mentioned in the confirmation letter of M/s. Alliance Industries Ltd. filed before the AO and are on the same line on which assessee filed several certificates before the AO. The Standard Chartered Bank also filed certificate confirming the above position and that M/s. Alliance Industries Ltd. maintained bank account with them and the account is conducted to their satisfaction. The AO neither at the assessment stage nor at the appellate stage disputed the genuineness of these documentary evidences and also did not make any meaningful inquiry on such evidences. State Bank of India, Bhopal confirmed the name of M/s. Alliance Industries Ltd. in the certificates who has transferred the USD to the assessee. The entries in the confirmation are therefore confirmed by the State Bank of India, Bhopal also. From the above it is clearly proved by the assessee that the amount in question have come to the assessee company from the bank account of M/s. Alliance Industries Ltd. through proper banking channel and it is the money of M/s. Alliance Industries Ltd. that has come to the assessee and that M/s. Alliance Industries Ltd. had the capacity to invest this much of the amount during the FY relevant to the AY in question. The transfer of foreign currency from the bank account of M/s. Alliance Industries Ltd. clearly proved the creditworthiness of M/s. Alliance Industries Ltd. It is a settled law that the income-tax authority cannot ask the assessee to prove source of the source. All the issue of the shares to M/s. Alliance Industries Ltd. have already

been reported by the assessee to the Registrar of Companies. As per submission of ld. counsel for assessee though the Directorate of Enforcement Govt. of India conducted certain inquiries against the assessee under the provisions of foreign exchange management act but no further inquiry has been made into the matter. It would also prove that the money in question flow from M/s. Alliance Industries Ltd. therefore AO was not justified in drawing adverse inference against the assessee. The AO has not brought any evidence on record that the share application money received by assessee from M/s. Alliance Industries Ltd. belong to the assessee or that it was the assessee's own money which it had received in the shape of dollars from the NRI Company. It is therefore not in the nature of income of the assessee because the money received was on account of share capital/share premium. The ld. CIT(A) has given categorical finding in the impugned order that the AO himself had accepted the similar deposits in the earlier AYs 2001-02 and 2002-03 as genuine. He also observed in fact assessee order relating to AY 2001-02 was passed after inquiry u/s 143(3) wherein similar investment from same NRI company M/s. Alliance Industries Ltd. to the tune of Rs.4,64,71,322/- was accepted as genuine and investment of Rs.9,47,81,895/- from the same company was also accepted in subsequent AY 2002-03 u/s 143(1). Ld. counsel for assessee also argued and made the above submission before the Tribunal as considered by ld. CIT(A). During the course of arguments, ld. DR did not dispute the above facts recorded by the ld. CIT(A) in the impugned order and therefore it stands proved that in the earlier years the AO did not dispute the identity of M/s. Alliance Industries Ltd., genuineness of transaction and its creditworthiness in respect of share application money remitted by the above foreign investor. We do not find if there is any deviation of the facts of the investment in respect of the same NRI Company M/s. Alliance Industries Ltd. We may also note that in AY 2001-02, the assessment order u/s 143(3) was passed by the same AO Shri Yogendra Dubey, ACIT-2(1), Bhopal accepting the identical submission of the assessee. Therefore, there was no justification on the part of same AO Shri Yogendra Dubey for not accepting the credits in this year as genuine. Ld. DR submitted that principle of res-judicata is not applicable and AO is

competent to make inquiry on the same facts in the subsequent year. Hon'ble M.P. High Court in the case of CIT vs. Godawari Corpn. Ltd., 156 ITR 835 held "With regard to the third point, we would like to say that the question posed before us is not whether the Tribunal has committed an error of law in applying the principles of res-judicate. However, though it is true that the principles of res-judicata do not apply, the rule of consistency does apply. In the instant case, the Department has failed to point out that the circumstances for treating the gain in the transactions for the assessment year 1972-73 as a capital gain were different from those in the assessment years 1962-63 and 1963-64 and, as such, the finding has to be consistent. The Tribunal has, therefore, not committed any error. In this respect, we would like to set out hereinbelow an excerpt from the decision of the Orissa High Court in CIT vs. Belpahar Refractories Ltd. [1981] 128 ITR 610 at pp. 613-614".

Hon'ble Punjab & Haryana High Court in the case of CIT vs. Vikas Chemi Gum India, 276 ITR 32 held "That since the appellant did not challenge the order passed by the Tribunal in relation to the assessment year 1986-87 by which it confirmed the order of the Commissioner(Appeals) deleting the addition made by the AO on account of value of "bardana" used for storing "churi and korma", it could not challenge a similar order passed in relation to the AY 1988-89."

Hon'ble Supreme Court in the case of Berger Paints India Ltd. vs. CIT, 266 ITR 99 held "HIGH COURT-DECISION IN THE CASE OF ONE ASSESSEE-DEPARTMENT ACCEPTING AND NOT CHALLENGING CORRECTNESS-NOT OPEN TO DEPARTMENT TO CHALLENGE IN THE CASE OF OTHER ASSESSEES, WITHOUT JUST CAUSE."

In view of the above facts and decisions noted, we do not find any merit in the submission of ld. DR, the same is therefore rejected. Ld. DR also submitted that balance sheet of M/s. Alliance Industries Ltd. is not filed as is considered relevant in the case of M/s. Kalani Industries Ltd. (supra). We do not agree with the submission of ld. DR because every case has its own facts and the findings are dependant upon the appreciation of the evidence

available on record. In the case of present assessee, the entire documentary evidence available on record and the previous history of assessee noted above in respect of the same NRI company M/s. Alliance Industries Ltd. clearly proved the case of the assessee that the share application money received by the assessee is not in the nature of income of the assessee. The assessee also able to prove creditworthiness of M/s. Alliance Industries Ltd. This contention of ld. DR is also rejected. Ld. DR also contended that AO raised serious doubt about the genuineness of transaction because no prudent businessman would make huge investment for getting lesser shareholding in the company. It appears from the above submission from the ld. DR that he himself contradicted his submission because according to his submission for proving genuine credit u/s 68 the assessee shall have to prove identity of creditor, genuineness of transaction and creditworthiness of the creditor which assessee in this case has already proved. What the businessman has taken a decision is entirely dependant upon their business needs which is not open to challenge by the revenue therefore it was not relevant criteria to disbelieve the version of the assessee. Ld. DR also submitted that NRI Company was not knowing much about the assessee before making the huge investment. It appears that ld. DR forgot to note that the same NRI Company had made investment in the assessee company in the earlier years which is not disputed by the AO therefore contentions of the ld. DR have no merits and are rejected. The reliance of ld. DR on the order of ITAT, Delhi Bench in the case of A-One Housing Complex Ltd.(supra) is misplaced because ultimately in this case it was held "whether onus of assessee in the case of share capital by public issue is lighter one and therefore such onus would stand discharged if identity of share applicant is established-held-Yes." This case is not applicable in favour of the revenue because the amount is not received from close relative or friend.

12.1 On going through the above documentary evidences on records and the judicial pronouncements referred to above, it is clear neither the AO nor the ld. DR appearing for the revenue have

disputed the documentary evidences filed by the assessee before the authorities below. The only point agitated by the AO was creditworthiness of M/s. Alliance Industries Ltd. which is also satisfactorily proved by the assessee. The decision of the full Bench of Delhi High Court in the case of M/s. Sophia Finance Ltd. (supra) holds the field. Hon'ble MP High Court in the case of Dhar Ispat Pvt. Ltd. held that the question of genuineness of entries regarding share application money is a question of fact to be decided on the basis of evidence available on record. The assessee on the basis of evidence available on record has been able to prove creditworthiness of M/s. Alliance Industries Ltd. The ratio of the decisions relied upon by the ld. counsel for assessee and referred to by us in this order are squarely applicable to the facts and circumstances of this case. The assessee through the evidences on record has been able to prove the identity of shareholder, its existence and transfer of money from the bank account of M/s. Alliance Industries Ltd., which fact have not been disputed by the AO. The assessee produced sufficient and reliable material and evidence before the AO to prove that the amount in question have been invested by M/s. Alliance Industries Ltd. The ld. CIT(A) on the basis of the material on record was justified in accepting the contention of the assessee that the share applicant in fact exist. The creditworthiness of the shareholder is also proved because all the payments have been made through banking channel through the account payee cheque which fact could be verified from the respective bank and in fact the respective banks namely SBI, Bhopal and Standard Chartered Bank have certified the same fact. The genuineness of the transaction is not disputed. Considering the totality of facts and circumstances of the case in the light of the material and evidence on record, we are of the view that assessee has discharged the onus lay upon it to prove identity and existence of the shareholder M/s. Alliance Industries Ltd., its creditworthiness and genuineness of transaction. The AO has however not brought any evidence contrary to the evidence filed by assessee. The decisions cited by ld. DR have been considered in the light of facts and circumstances of the case and we are of the opinion that the same could not support the contention of ld. DR. We may also note that Hon'ble Supreme Court

in the case of CIT vs. P. Mohan Kala, as relied upon by ld. DR has considered the fact in which the AO held that the gift though apparent were not real and accordingly treated all the amounts of the gift as income of the assessee u/s 68 of the IT Act. The assessee did not contend that even if there explanation was not satisfactory, the amount were not of the nature of income. The ld. CIT(A) confirmed the order and the Tribunal through majority view confirmed the orders of the authorities below. On an appeal, the High Court re-appreciated the evidence and substituted its own finding and came to the conclusion that the reasons assigned by the Tribunal were in the realm of surmises, conjecture and suspicion. Hon'ble Supreme Court on such facts "held, reversing the decision of the High Court, that the findings of the AO, the Commissioner (Appeals) 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 was not by itself of any consequence. The High Court misdirected itself and erred in disturbing the concurrent findings of fact."

However, the facts and circumstances of the appeal before us are clearly distinguishable as noted above. The reliance of ld. DR on the cases referred to above are therefore misplaced.

12.2 Considering the above discussion, we do not find any infirmity in the order of the ld. CIT(A). The appeal of the revenue has no merit and is accordingly dismissed. No other point is argued or pressed."

11. The aforesaid order of the Indore Bench have been confirmed by Hon'ble Madhya Pradesh High Court in the case of CIT V Peoples General Hospital Ltd. 356 ITR 65 in which the Hon'ble High Court following the decision of Hon'ble Supreme Court in the case of Lovely Exports Pvt. Ltd. (supra) held as under ;

Held, dismissing the appeals, that if the assessee had received subscriptions to the public or rights issue through banking channels

and furnished complete details of the shareholders, no addition could be made under section 68 of the Income-tax Act, 1961, in the absence of any positive material or evidence to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented the company's own income from undisclosed sources. It was nobody's case that the non-resident Indian company was a bogus or non-existent company or that the amount subscribed by the company by way of share subscription was in fact the money of the assessee. The assessee had established the identity of the investor who had provided the share subscription and that the transaction was genuine. Though the assessee's contention was that the creditworthiness of the creditor was also established, in this case, the establishment of the identity of the investor alone was to be seen. Thus, the addition was rightly deleted.

12. In the present case, assessee company had received money on allotment of shares from M/s Glacis Investment Limited through banking channel and furnished complete details of the shareholder, no addition would be made under section 68 of the Act, in the absence of any positive material or evidence to indicate that the shareholder company was benamidar or fictitious company or that any part of the share capital represented the assessee's own income from undisclosed sources. The assessee on the basis of the documentary evidence on record has been able to prove that Non Resident Company i.e. M/s Glacis Investment Limited was an existing company and that the shareholder company made investment in the assessee company would prove that assessee received genuine share application money from this non-resident company. Thus, assessee had established the identity of the shareholder company and that transaction was

genuine. The assessee has also proved the credit worthiness of the shareholder company, therefore, authorities below were not justified in making the huge addition against the assessee.

13. Considering the totality of the facts and circumstances on the basis of the evidences on record and in the light of the judicial pronouncements noted above, we are of the view that assessee has been able to prove the identity of the creditor which is not in dispute, credit worthiness of the shareholder company and genuineness of the transaction in the matter. Therefore, addition of Rs. 3.70 Cr under section 68 of the Act is wholly unjustified. We, accordingly, set aside the orders of authorities below and delete addition of Rs. 3.70 Cr. In the result, ground No. 1 of appeal of the assessee is allowed.

14. On ground No. 2, assessee challenged the order of the ld. CIT(Appeals) in upholding the disallowance of a sum of Rs. 3 Cr paid to M/s Abhishek Industries Ltd. for up-gradation of Power Station required for supply of power to the assessee company. Briefly the facts are that assessee in the Schedule of Fixed Assets has shown the addition of Rs. 3 Cr as expenditure on up-gradation of Sub Station owned by the company. When confronted, the assessee, during the course of assessment proceedings submitted that the assessee company has developed Textile Capital with a cluster of units so as to ensure power supply and MOU was made between Abhishek Industries and the assessee company for uninterrupted supply of power by Abhishek Industries

assessee's company. The assessee agreed to bear cost of Rs.3 crores for up gradation of existing power station of Abhishek Industries Ltd. and the same amount was amortized over a period of 10 years @ of 10% on straightline basis. The assessee relied on various decisions, however, Assessing Officer did not accept the submission of the assessee contending that expenditure is incurred for up-gradation of the Sub Station and therefore, it is a capital expenditure. The expenditure has also not been shown in the Profit & Loss Account meaning thereby that it is not revenue expenditure. The A.O. relied upon the case of Sudarson Chemical Industries Ltd. vs. ACITvs. ITAT Pune (110) ITD 171 etc. The A.O. also distinguished the case relied upon by the assessee. It was noted that the assets in this case are actually shown by the assessee in the list of fixed assets and, therefore, owned by the assessee. The A.O. also held that depreciation is not allowed on this capital expenditure as this expendituree is made out of the grant received from the Ministry of Textile.

14(i) During the course of appellate proceedings, the assessee reiterated the same submissions before the ld. CIT(Appeals). The ld. CIT(Appeals) noted that assets credited are shown as owned by the Company and, therefore, Assessing Officer has rightly disallowed the same considering it to be capital expenditure. Further, depreciation has been rightly disallowed because, the expenditure is made through the grants in aid. The appeal of the assessee on this ground was accordingly dismissed.

15. We have heard ld. Representatives of both the parties. The ld. counsel for the assessee reiterated the submissions made before authorities below. He has fairly stated that the issue 'whether the expenditure was revenue or capital in nature' has been decided against the assessee by Hon'ble Punjab & Haryana High Court in the case of CIT V Shreyans Industries Ltd. 303 ITR 393 in which it was held as under :

> *Held, (i) that setting up of a system/plant and creation of other infrastructure in an industrial unit is always a capital expenditure and the right acquired by the assessee for creation of channel to discharge effluents was capital in nature. The expenditure in question enabled the assessee to use the drain fora/I times to come and even to transfer such a right. It was further relevant that for use of the right to transport its effluent through forest land, the assessee had transferred its own land. During subsequent years on the maintenance thereof, the expense was around Rs. 8 to 10 lakhs, which was being allowed as revenue expenditure. Therefore, the expense made by the assessee during the first year when the drain was dug out was capital in nature. The expenditure was not deductible.*

15(i) He has further submitted that the matter is remanded back to the High Court in the matter reported in 314 ITR 302. He has, however, submitted that depreciation on the capital expenditure is liable to be allowed by the authorities below. He has submitted that the grant-in-aid as is noted by the ld. CIT(Appeals) on this issue for denying depreciation in the case of assessee, was granted by Ministry of Textiles, Government of India in September,2005 introduced in a scheme namely 'Scheme for Integrated Textile Parks' (SITP or

'the scheme') by merging its erstwhile textile parks for export schemes and Textile Centre Infrastructure Development Scheme. The aim of the scheme is to encourage group of entrepreneurs to come together and establish integrated textile parks with world class infrastructure under a Public Private Partnership frame work. Under the scheme, Ministry of Textiles would pro vide a grant upto 40% of the approved capital cost of each textile park subject to ceiling of Rs. 40 Cr to the special purpose vehicle established for setting up the textile park. The objective to grant-in-aid to the entrepreneurs was to develop textile parks under the scheme. The details of the same is also filed on the subject. He has submitted that the incentive/grant-in-aid could not be considered as a payment directly or indirectly to meet any portion of the actual cost and thus, had fell outside the provisions of Section 10 to Section 43(1) of the Act. Therefore, the depreciation is allowable to the assessee and the grant-in-aid amount could not be reduced from the cost of the capital asset. In support of his contention, he has relied upon following decisions :

i) Decision of Madras High Court in the case of CIT V Standard Fireworks P.Ltd. 326 ITR 498 in which it was held as under :

> *"(ii) That the Tribunal was right in treating the subsidy as a capital receipt and deleting the addition representing the wind mill subsidy and not reducing it from the cost of the wind mills to work out the value for calculating depreciation."*

ii) Decision of Allahabad High Court in the case of CIT V P. Glass Works 333 ITR 355 in which it was held as under :

(ii) That in computing the actual cost for purposes of depreciation Government subsidy was not deductible. CIT v. P. J. Chemicals Ltd. [1994] 210 ITR 830 (SC) followed.

(iii) That the Assessing Officer had given depreciation on generators at the rate of 15 per cent. This was I enhanced to 20 per cent, by the Commissioner (Appeals) and confirmed by the Tribunal. Depreciation of 20 ' per cent, was incorrect and was on the higher side but the grant of depreciation of 15 per cent, by the Assessing Officer was not challenged by the Department and it could not be done in the reference.

iii) Order of ITAT Vishakhapatnam Bench in the case of Sasisri Extractions Ltd. V ACIT 122 ITD 428 (307 ITR (AT) 127 in which it was held as under

Held allowing the appeal, that the scheme was intended to accelerate industrial development of the State and the incentive was given for setting up of industries in Andhra Pradesh. The amount of subsidy to be given was determined by taking the cost of eligible investment as the basis. The incentive in the form of subsidy could not be considered as a payment directly or indirectly to meet any portion of the Actual cost and thus it fell outside the ken of Explanation 10 to section 43(1) of the Income-tax Act 1961. The subsidy amount could not be reduced from the actual cost of the capital asset.

iv) Order of ITAT Hyderabad Bench in the case of Inventaa Chemical Ltd. V ACIT 42 SOT 249 in which it was held as under :

"II. Section 43(1) of the Income-tax Act, 1961 - Actual cost - Assessment year 2003-04 - Assessee had received Rs. 20 lakhs on account of State subsidy - Revenue held that said subsidy had to be reduced from cost of fixed assets for purpose of arriving at depreciation - Whether if payment of subsidy is not related to actual acquisition of assets and subsidy is granted on capital investment on land, building and machinery then it cannot be reduced from value of asset (written down value) - Held, yes - Whether further, if there is no special mention regarding intention to adjust said subsidy against actual cost of machinery, then that amount of subsidy cannot be reduced from cost of plant and machinery - Held,

yes - Whether in view of above, issue was to be set aside to file of Assessing Officer to examine terms and conditions of sanction of subsidy and if subsidy was not given to meet cost of any specific capital asset and amount of subsidy so received was quantified according to investment made by assessee in plant and machinery and building, claim of assessee was to be allowed - Held, yes."

v) Order of ITAT Pune Bench in the case of Soham Electroplast Pvt. Ltd. V ITO in ITA No. 1578/PN/2008 dated 28.10.2008 in which the Tribunal following the decision of Vishakhapatnam Bench in the case of Sasisri Extractions Ltd. V CIT (supra) has held the similar claim of assessee.

16. On the other hand, ld. DR relied upon orders of the authorities below and submitted that Explanation 10 to Section 43(1) applies in the case of the assessee, therefore, no depreciation is allowable.

17. We have considered rival submissions. It is not in dispute that in the Schedule of Fixed Assets, assessee has shown the addition of Rs. 3 Cr as expenditure on up-gradation of sub-station owned by the assessee company. The assessee made agreement with M/s Abhishek Industries for uninterrupted supply of power and met the cost of the upgradation of existing Power Station. The amount was also amortized in the books of account. The expenditure has also not been shown in the Profit & Loss Account, would mean that assessee did not claim it to be revenue expenditure. The authorities below were, therefore, justified in holding it to be capital expenditure and the similar claim of assessee has already been disallowed by Hon'ble Punjab & Haryana High

Court in the case of Shreyans Industries Ltd.(supra) in which also ld. counsel for the assessee accepted that the issue has been decided against the assessee. Therefore, we confirm the orders of authorities below that expenditure involved on this issue is capital in nature.

18. Now the question is left whether on the capital expenditure which is shown in the Schedule of Fixed Assets, assessee would be entitled for depreciation on Rs. 3 Cr which is not in dispute that the assessee in the Schedule of Fixed Assets has shown the addition of Rs. 3 Cr on up-gradation of the Sub-Station owned by the assessee company. Therefore, it would increase the value of the fixed assets by an amount of Rs. 3 Cr and same was capital in nature. The ld. CIT(Appeals), however, confirmed the addition holding that since this amount was made through the grant-in-aid, therefore, no depreciation is allowable on Rs. 3 Cr addition. Explanation 10 to Section 43(1) of the Income Tax Act reads as under :

> *"Explanation 10. - Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:*
>
> *Provided that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee."*

19. For applying the above provisions against the assessee, it is necessary to prove that portion of cost of asset acquired by the assessee has been met directly or indirectly by the government or the authority established under any law or by any other person in the form of subsidy or grant or reimbursement by whatever name called. In the decisions relied upon by ld. counsel for the assessee reproduced above, the various High Courts and the different benches of the Tribunal, considered the identical issue in the light of the provisions contained under section 43(1) of the Income Tax Act and issue was decided in favour of the assessee. In the case of Sasisri Extractions Ltd. (supra) ITAT Vishakhapatnam Bench, after careful perusal of the scheme in question, noted that it was intended to accelerate industrial development of the State and the incentive was given for setting up of industries in the State and for the purpose of determining the amount of subsidy to be given, cost of eligible investment was taken as basis. Under those circumstances, the incentives in the form of subsidy could not be considered as payment directly or indirectly to meet any portion of actual cost and thus, it was held that same would fall outside the provisions of Explanation 10 to Section 43(1) of the Income Tax Act and depreciation was allowed. The ld. counsel for the assessee has explained the scheme formulated by Ministry of Textiles, Government of India, the aim of the scheme of Integrated Textile Parks was to encourage group of entrepreneurs to come together and establish Integrated Textile Parks with world class infrastructure under a public private partnership frame work. Therefore, the scheme in the case of the

assessee was intended to encourage the group of entrepreneurs to come together and establish Integrated Textile Parks with world class infrastructure under a public private partnership frame work and the grant-in-aid was given for setting up of the industries/textile parks in the State, therefore, the grant-in-aid could not be considered as a papyment directly or indirectly to meet any portion of actual cost and thus, it would fall outside the purview of Explanation 10 to Section 43(1) of the Act. All the decisions relied upon by ld. counsel for the assessee are on identical point and support the contention of the assessee that assessee is entitled for depreciation on the same amount.

20. Considering the above discussion in the light of the scheme formulated by the Government of India and in the light of the judicial pronouncements referred to above, we set aside the orders of authorities below and direct them to grant depreciation to assessee on the amount of Rs. 3 Cr being the capital expenditure. In the result, part of this ground of appeal of assessee is allowed.

21. On ground No. 3, assessee challenged the order of ld. CIT(Appeals) in upholding the disallowance of depreciation amounting to Rs. 3,04,63,791/-. The facts are that in this case, the assessee has received grant-in-aid of Rs. 40 Cr from the Ministry of Textiles, New Delhi under the scheme of Integrated Taxpark (SITP). Out of total grant of Rs. 40 Cr., Rs. 36 Cr was received upto 31.03.2010 including Rs. 12 Cr received during the year under consideration. As per

provisions of Section 43(1) Explanation 10, the Assessing Officer confronted as to why the grant may not be reduced from the capital assets and depreciation may not be recomputed on the reduced value of the fixed assets. The assessee, during the course of assessment proceedings has made his submission which is noted in the assessment order. It was submitted that grant was sanctioned for utilization against the project as a whole i.e. for development of textile park and was neither sanctioned nor disbursed for the specific assets individually. The Assessing Officer noted that total approved project cost was Rs. 110.26 Cr and grant-in-aid was sanctioned for Rs. 40 Cr. The Assessing Officer reproduced the sanction order in the assessment order. As per project report submitted during the course of assessment proceedings, the total cost is Rs. 129.25 Cr and excluding the cost of land, the figure is Rs. 110.26 Cr. Since the assessee has not furnished head-wise grant received and money utilized for each specific head of assets, therefore, the Assessing Officer apportioned the amount in ratio of the cost of all fixed assets against various heads. Thereafter, actual cost of the asset was accordingly worked out. After deducting the grant-in-aid, the Assessing Officer recomputed depreciation allowable and balance depreciation claimed was disallowed.

22. The assessee reiterated the submissions made before authorities below and referred before ld. CIT(Appeals) the note of the Auditors that the grant received is not to be deducted from the cost of the acquisition of fixed assets for

the purpose of computing depreciation as the amount is in the nature of contribution towards the total subsidy outlay. It was submitted that the grant was given to stimulate growth in the Textile Industry. The ld. CIT(Appeals), however, noted that since grant-in-aid was used to meet the cost of assets, therefore, in this case Section 43(1) Expenditure-10 is clearly applicable and accordingly, dismissed this ground of appeal of the assessee.

23. After considering rival submissions, we are of the view the issue is same as have been considered on ground No. 2 above in which we have held that Expenditure 10 to Section 43(1) is not applicable in this case because the scheme of the Government was to encourage group of entrepreneurs to come together and establish integrated textile parks with worth class infrastructure under a Public Private partnership frame work. The grant-in-aid was granted to the entrepreneurs to develop textile parks under the scheme. Following the reasons for decision on ground No. 2 above, we set aside the orders of authorities below and direct the authorities below to grant depreciation to the assessee without reducing the grant received from Ministry of Textiles. This ground of appeal of the assessee is accordingly, allowed.

24. In the result, this appeal of the assessee is partly allowed, as indicated above.

ITA 1139/CHD/2014 (A.Y. 2011-12)

25. The assessee has raised the following grounds of appeal:

1. That order passed by the Ld. CIT (Appeals), Patiala u/s 250(6)

is against law and facts on the file in as much as he was not justified to disallow depreciation amounting to Rs. 2,95,97,2121- due to reduction in brought forward balances from the last year. He was not justified to uphold the action of the Ld. Assessing Officer in reducing the amount of Rs. 36.00 crores from the value of total block of assets received by the appellant as grant-in-aid.

2. That he was further not justified to uphold the disallowance of a sum of Rs. 1,00,00,000/- crore paid to M/S Abhishek Industries Limited for upgradation of power sub-station required for supply of power to the appellant company.

3. That the Ld. CIT (Appeals) was not justified to arbitrarily uphold the following out of interest account:-

a) a sum of Rs.81,62,546/- in respect of capital advances which were advanced out of own funds as well as grant-in-aid received from Ministry of Textiles in earlier years.

b) a sum of Rs. 30,68,339/- in respect of amounts spent towards capital work in progress. Inspite of the fact that these amounts were paid out of own funds as well as grants-in-aid received from Ministry of Textiles.

26. The ld. CIT(Appeals) on ground Nos. 1 & 2 above, followed his order for assessment year 2010-11 and confirmed the disallowance of the depreciation and dismissed these grounds of appeal of the assessee. In assessment year 2010-11 in ITA 1138/2014, we have allowed these grounds of appeal of the assessee and directed the authorities below to grant depreciation to the assessee. Both the parties stated that these issues are same as have been decided in assessment year 2010-11 on ground No. 2 & 3. Therefore, following the order for assessment year 2010-11 in ITA 1138/2014, we set aside the orders of authorities below and direct the authorities below to grant depreciation to the assessee. Accordingly, ground Nos. 1 & 2 of appeal of the assessee are allowed.

27. As regards ground No. 3, the facts are that the Assessing Officer has made disallowance of proportionate

interest on interest free advances. Firstly, it was noticed that the assessee has given interest free capital advanced amounting to Rs. 5,93,61,080/- as per details reproduced in the assessment order. While at the same time, assessee has paid interest of Rs. 2.08 Cr on term loan @ 13.75%. During assessment proceedings, assessee submitted that these payments were made out of interest free grant-in-aid received from the Government of India and from the operating income. However, the Assessing Officer held that entire fund is kept in a common kitty and the4refore, decision rendered in the case of CIT V Abhishek Industries Ltd. 286 ITR 1 (P&H) is clearly applicable. The Assessing Officer, accordingly, disallowed proportionate interest of Rs. 81,62,546. The Assessing Officer further noticed that assessee has shown capital work in progress at Rs. 4.93 Cr as per details given in the assessment order. The Assessing Officer held that as per provisions of Section 36(1)(iii) of the Act , the interest paid on the capital work in progress is to be disallowed and capitalized till the assets could be used. Since the assets were not put to use during the financial year, therefore, Rs. 30,68,339/- was disallowed. During assessment proceedings, the assessee submitted that the payments were made out of interest free grant-in-aid and from operating income. The Assessing Officer, however, did not accept the contention as no such corroborative evidences were filed.

28. The assessee challenged both the additions before ld. CIT(Appeals) and as regards addition of Rs. 81,62,546/-, it was submitted that capital advance was made against work

orders which was complete in the financial year 2010-11 and 2012-13. However, the Assessing Officer, on the basis of assessment records has submitted that no details of such work orders were filed. Regarding addition of Rs. 30,68,339/- assessee submitted that fixed assets were capitalized against the outstanding balance in term loans and that operating activity was started in financial year. Further investments were made out of own funds i.e. share capital and reserves and no borrowed funds have been used. The ld. CIT(Appeals), however, noted that even during the appellate proceedings, no details have been submitted in support of the contention that the amounts were given against work order. Even no plea was taken before Assessing Officer. The assessee is having common kitty out of which expenses were made. No evidence is submitted that advance is made out of interest free grant-in-aid. Further, no evidence regarding assets having been put to use in assessment year 2010-11 have been submitted and accordingly, this ground was dismissed.

29. We have heard ld. Representatives of both the parties. The ld. counsel for the assessee reiterated the submissions made before authorities below and regarding disallowance of interest in respect of capital advances, it was submitted that capital advances of Rs. 5.93 Cr were made as advances against the work order which was completed in financial year. The capital advances were duly set off with the bills for Rs. 3.04 Cr, security of Rs.65.27 lacs and the balance amount of Rs. 2.24 Cr were duly received back. The details of advances

alongwith details of sources were filed with the reply before the Assessing Officer. Out of total advances of Rs. 5.93 Cr, a sum of Rs. 4.74 Cr was paid out of Government grant received which was totally interest free and no interest was required to be disallowed. He has relied upon decision of the Hon'ble Supreme Court in the case of S.A. Builders Vs CIT 288 ITR 1. As regards disallowance of interest of Rs. 30,68,339/- in respect of capital work in progress, it was submitted that assessee company was having outstanding balance in term loan account of Rs. 14.27 Cr as on 31.03.2010 against which the fixed assets of Rs. 56.18 Cr were capitalized and operating activity was also started in financial year itself. Again in financial year 2011-12, against increase in term loan of Rs. 5.10 Cr addition to the fixed assets was made to the tune of Rs. 14.97 Cr which clearly shows that investment in capital work in progress was made out of own funds i.e. share capital and reserve and not out of borrowed funds. He has filed details of capital advances with accounts of the four parties namely Lotus Infra Build Ltd. (Advance Landscaping), Lotus Infra Build Ltd. (Advance Pack IV) Lotus Infra Build Ltd. (Advance Pack V) and Lotus Infra Build Ltd. (Advance Pack VII) for a sum of Rs. 5.93 Cr. He has referred to source of the funds out of share capital, reserve and surplus, equity share warrants and secured loans for a sum of Rs. 80.84 Cr. He has referred to Schedule V of Fixed Assets to show that in preceding assessment year 2010-11, the net block was of Rs. 54.81 Cr and in assessment year

under appeal, it is Rs. 68.08 Cr. He has, therefore, submitted that investments have been made out of own funds and no borrowed funds have been used.

30. On the other hand, ld. DR relied upon orders of the authorities below and submitted that no details were filed before the authorities below, therefore, addition is justified.

31. We have considered rival submissions. The assessee pleaded before the authorities below that the investments were made out of interest free grant-in-aid received from Government of India and from operating income. The Assessing Officer, however, relied upon decision of the Hon'ble Punjab & Haryana High Court in the case of Abhishek Industries Ltd. (supra) holding that when entire fund is kept in common kitty, therefore, this decision would apply against the assessee. Hon'ble Punjab & Haryana High Court in its subsequent unreported decision in the case of Bright Enterprises Pvt. Ltd. V CIT in ITA 224 of 2013 dated 24.07.2015 considered the similar issue of disallowance of interest under section 36(1)(iii) of the Act of on account of disallowance of interest paid to the bank on the ground that assessee had advanced an interest free loan to its sister concern, although the assessee had no business dealings with the sister concern. The Hon'ble Punjab & Haryana High Court also considered its earlier decision in the case of M/s Abhishek Industries (supra). Hon'ble High Court has also considered the decision of the Hon'ble Supreme Court in the case of S.A. Builders Ltd. (supra) and its earlier decision in

the case of CIT V Marudhar Chemicals & Pharmaceuticals Ltd. 319 ITR 75 and has accepted the contention of the assessee that the amount was advanced for commercial exigency. In the same judgement also, Hon'ble High Court has considered that the funds/reserves of the assessee were sufficient to cover the interest free advances made by it to the sister concern and agreed with the judgement of the Bombay High Court in the case of Reliance Utilities & Power Ltd. 313 ITR 340 and answered the question in favour of the assessee and against the department. The order of the Tribunal was set aside. The details furnished by the assessee show that assessee was having sufficient funds to make advances out of its own sources. The details of capital advances have also been filed which according to the ld. CIT(Appeals), were not filed before the authorities below. The authorities below should also give a finding whether amounts are advanced for commercial exigencies. Therefore matter should be remanded to Assessing Officer.

32. Considering the material produced before us in the light of the later decision of Hon'ble Punjab & Haryana High Court, we are of the view that the matter requires re-consideration at the level of the Assessing Officer. We, accordingly, set aside the orders of authorities below and restore this issue to the file of Assessing Officer with direction to re-decide this issue in accordance with law by giving reasonable sufficient opportunity of being heard to the assessee.

33. In the result, this ground of appeal of the assessee is allowed for statistical purposes.

34. In the result, appeal of the assessee is partly allowed.

35. In the result, both appeals of the assessee are partly allowed.

Order pronounced in the Open Court.

Sd/-	Sd/-
(RANO JAIN)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 1st Oct., 2015.

'Poonam'

Copy to:

The Appellant, The Respondent, The CIT(A), The CIT,DR

Assistant Registrar,
ITAT/CHD