Delhi High Court Commissioner Of Income Tax vs Divine Leasing And Finance Ltd. ... on 16 November, 2006 Equivalent citations: (2007) 207 CTR Del 38, 2008 299 ITR 268 Delhi Author: V Sen Bench: V Sen, S Muralidhar JUDGMENT Vikramajit Sen, J. 1. This batch of Appeals has been filed by the Revenue seeking to reverse the concurrent findings of the Commissioner of Income Tax Appeals (CIT (A) for brevity) as well as the Income Tax Appellate Tribunal (ITAT for short) adverse to the Revenue. Succinctly stated, in January, 1984 the assessed had commenced its business of extending finance to industrial enterprises. The total issued, subscribed and paid up capital in the Assessment Year's 1984-85, 1985-86 and 1986-87 was Rs.99,80,000/- received from Directors/Promoters and also by way of a public issue. These sums were received through banking channels and complete records were maintained. The Assessing Officer ('AO' for short) made the following additions which came to be deleted/reversed by the CIT (A), whose decision was thereafter upheld by the ITAT. A.Y. Amount received by way Addition made and, deleted of share capital by the by learned CIT (A) and, assessed company deletion upheld by learned ITAT 1984-85 10,23,000/- 9,53,500/- 1985-86 13,05,350/- 13,05,350/- 1986-87 76,51,650/- 76,51,650/- Total 99,80,000/- 99,10,500/-

2. In March, 1987 the assessed filed a revised Return for Assessment Year 1984-85 and Assessment Year 1985-86 by taking advantage of the Amnesty Scheme and surrendered Rs.62,500/- and Rs.1,87,000/- in the respective years. In these fresh assessment proceedings the AO issued summons under Section 131 of the Income Tax Act and thereafter impounded the Shareholder's Register, Share Application Forms and Share Transfer Register. The assessed has contended that because these materials were in the custody of the Department the former was unable to furnish any further details pertaining to the subscribers.

3. Reliance has been placed on behalf of the assessed on Commissioner of Income-Tax v. Stellar Investment Ltd. which has been repeatedly relied upon in several subsequent decisions. In our opinion this ruling has been misinterpreted and misconstrued. We, therefore, reproduce the entire Order verbatim for facility of reference:

The petitioner seeks reference of the following question:

Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was correct both on facts and in law in holding that the provisions of Section 263 have not been validly invoked in this case by ignoring the material fact that the Assessing Officer had failed to discharge his duties regarding the investigation with regard to the genuineness and creditworthiness of the shareholders, many of them being students and housewives?

In the present case, the subscribed capital of the assessed had been increased. The Income-tax Officer assessed the company and accepted the increase in the subscribed capital. The Commissioner of Income-tax came to the conclusion

that the Assessing Officer did not carry out a detailed investigation inasmuch as there had been a device of converting black money into white by issuing shares with the help of formation of an investment company. The Commissioner of Income-tax further held that the Assessing Officer did not make enquiries with regard to the genuineness of the subscribers of the share capital. He thereupon set aside the order of assessment.

The Tribunal reversed this decision for reasons which we need not go into.

It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessed. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that, would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself.

In our opinion, no question of law arises and the petition is, therefore, dismissed.

This Order was unsuccessfully carried in Appeal by the Revenue and was summarily dismissed by the Apex Court in Commissioner of Income-Tax v. Stellar Investment Ltd. in these brief words - 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.

4. In Stellar Investment the Division Bench had observed firstly, that no question of law had arisen before it; secondly, that if some bogus shareholders had been detected their assessment could justifiably be re-opened; and thirdly that the amount of increased share capital could not be assessed in the hands of the company. The later two aspects undeniably possess the character of question of fact. Reference to Section 68 of the Income Tax Act (hereafter referred to as the 'IT Act) is conspicuous by its absence. The Stellar Investment ratio cannot be stretched to the extent that it partakes as a reflection on Section 68, when the enquiry pertained only to Section 263. In Mysore State Road Transport Corporation v. Mysore Road Transport Appellate Tribunal , the Supreme Court had referred to an essay by Professor A.L. Goodhart for the proposition that the ratio decideni of a case is determined by taking into account the facts treated by the Judge deciding the case as being material, and that his decision is based thereon. Mention should immediately be made of the view prevailing in the Gujarat High Court expressed in Nirma Industries Ltd. v. Deputy Commissioner of Income Tax (2006) 202 CTR 198 (Guj), to the effect that the dismissal of an Appeal under Section 260A of the IT Act implies that the order of ITAT on the issue stands merged in the Order of the High Court, and for all intents and purposes it is the decision of

the High Court which is operative and which is capable of being given effect to. Indeed, this precedent contains a comprehensive and erudite discussion on the question of merger of assailed judgments/orders into the decision of the Appellate Court, and with humility, we commend its careful reading. The views of the Supreme Court have been assimilated from a plethora of precedents on this aspect of the law. What should not be lost sight of is the reality that the ITAT actively considers disputes pertaining to the facts as well as to the interpretation of the law. When the High Court dismisses an Appeal filed under Section 260A of the Act it does not ignore the factual matrix pertaining to the particular assessed; and it also does not interpret the law in abstraction or in its generality. If the High Court considers it necessary to speak broadly on the law it invariably frames a substantial question of law and thereafter decides it by a judgment in contradistinction to an order. The question before the Bench in Nirma Industries was whether the ITAT could assume a question being open to discussion despite the fact that the High Court had declined to admit the Appeal on that question in respect of that assessed, for a previous assessment years. We are in the agreement with the Bench of the Gujarat High Court that the rejection of the Appeal on certain grounds would operate as res judicata, but in our understanding it would operate between the litigating parties. We are unable to concur with the argument of Mr.Aggarwal, learned Counsel for the assessed that the dismissal of an Appeal under Section 260A constitutes an expression of a judicial view on the questions of law which the appellant had proposed in the Appeal. In other words, Stellar Investment would have to be restricted to the facts that had occurred strictly in those Appeals and no further. We are in respectful agreement with the understanding of the Division Bench in Commissioner of Income Tax v. Dolphin Canpack Ltd. (2006) 204 CTR (Delhi) 50 as articulated in this sentence - In Steller Investment's case (supra) the issue which the Revenue proposed to raise, related to the propriety of the Tribunal taking resort to s. 263 in the case by ignoring the material fact that the AO had failed to discharge his duties regarding the investigation with regard to the genuineness and creditworthiness of the shareholders, many of whom were found to be students and housewives. Rejection of an Appeal under Section 260A is similar to the dismissal in liming by the Supreme Court of Special Leave Petition. This is also the view of the Calcutta High Court. Authority for the proposition is available in Municipal Corporation of Delhi v. Gurnam Kaur and more recently in Director of Settlements, A.P. v. M.R. Apparao . The Full Bench of the Patna High Court in Smt. Tej Kumar v. Commissioner of Income Tax (2001) 247 ITR 210 has pithily made a distinction between the dismissal in liming of an SLP and the dismissal of a regular civil appeal by a non-speaking order. The view was that in the former it would not be possible to extract any expression on the legal position on the part of the Court.

5. This analysis, however, does not lead to the consequence that the conundrum indirectly covered by Stellar Investment remains unresolved. A

perusal of the opinion of the Full Bench in Commissioner of Income Tax v. Sophia Finance Ltd. makes it conclusively clear that this aspect of the law is no longer res integra. It should always be borne in mind that Division Benches cannot choose to navigate through waters which have already been voyaged, mapped and channeled by larger Benches.

6. We find it indeed remarkable that the attention of the Sophia Finance Full Bench had not been drawn to the decision of the Supreme Court in C.I.T. Orissa v. Orissa Corporation Pvt. Ltd. (, which if cited would really have left no alternative to the Full Bench but to arrive at the conclusion it did. The Books of Accounts of the assessed contained three cash credits aggregating Rs.1,50,000/- allegedly received as loans from three individual creditors under Hundis. Letters of confirmation as well as the discharged hundis were produced; but notices/summons sent to them remained unserved because they had reportedly 'left that address. The view of the Tribunal was that merely because the assessed could not produce these three parties, there was nevertheless no justification to draw an adverse inference. This approach as accorded approval by the Supreme Court in these words: In this case, the assessed had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesses. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessed, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessed could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessed has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises. This reasoning must apply a fortiori to large scale subscriptions to the shares of a public Company where the latter may have no material other than the application Forms and Bank transaction details to give some indication of the identity of these subscribers. It may not apply in circumstances where the shares are allotted directly by the Company/assessed or to Creditors of the assessed. This is why this Court has adopted a very strict approach to the burden being laid almost entirely on an assessed which receives a gift.

7. Sumati Dayal v. CIT-Bangalore a succinct yet complete precis on the essentials of income-tax liability can be discerned from these words - In all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if the 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 assessed. This decision is adequate authority for the proposition that

by virtue of Section 68 of the IT Act the assessed is obliged to establish that amounts credited in the accounts do not represent its income; in that case the assessed's version that she had won them through betting on horse racing in two consecutive years did not attract credibility. The Apex Court had followed its earlier decision, namely, Orissa Corporation wherein it had held that since the assessed had given the names and addresses of the creditors, all of whom were income-tax assesses, the failure of the creditors to respond to the Department's notices would not justify an adverse inference being drawn against the assesses. The Court also kept in perspective the fact that the documentation had also been produced by the assessed. It is obvious that the Supreme Court considered that in these circumstances the onus of proof had been discharged by the assessed. It is also palpable that the Supreme Court was of the further opinion that the Department had not discharged the burden of proof that had shifted to it, since it did nothing more than issue notices under Section 131 of the IT Act. Therefore, the Department ought to have made efforts to pursue these notices/creditors to determine their creditworthiness. These observations sound the death-knell for the contentions raised on behalf of the Department in the present batch of Appeals.

8. Justice B.N. Kirpal (as the learned Chief Justice of India then was) had authored the Order/Judgment both in Stellar Investment and in Sophia Finance. Justice Kirpal's extraordinary experience as the Advocate for the Revenue spanning two decades, and the platitude of precedents established by him in this realm of law may be paralleled only by his Lordship D.K. Jain and in this respect their Judgments can be viewed as exceptional and incomparable. In the latter Judgment it has been specifically recorded that Section 68 and its implications had not been analyzed in the former Order. Therefore, for a detailed discussion on Section 68 one should first turn to Gee Vee Enterprises v. Additional CIT and thence finally to the decision of the Full Bench of this Court in Sophia Finance.
9. In Gee Vee Enterprises the Division Bench had in the context of a challenge to the maintainability of the Writ Petition on the grounds of the availability of an alternative remedy laid down situations which would justify the invocation of Article 226 of the Constitution. The Bench had also opined that the intention of the legislature was to give a wide power to the Commissioner. He may consider the order of the Income-tax Officer as erroneous not only because it contains some apparent error of reasoning or of law or of fact on the face of it but also because it is a stereo-typed order which simply accepts what the assessed has stated in his return and fails to make inquiries which are called for in the circumstances of the case. It was further observed that the AO is both an adjudicator as well as an investigator, and it is his duty to ascertain the truth of the facts stated in the Return if such an exercise is `provoked, or becomes`prudent. The Bench held that Section 263 which deals with the Revision of orders prejudicial to the revenue by the Commissioner comes into operation wherever the AO fails to make such an inquiry, because it renders the order of the AO

erroneous. It seems to us that if this duty pervades the normal functioning of the AO, it becomes acute and essential in the special circumstances surrounding Section 68 of the IT Act.

10. Returning to Sophia Finance, the Full Bench which was now presided over by B.N.Kirpal, J. (as the Chief Justice of India then was) 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 proffered 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. It will at once become obvious that the Court had not reflected upon the question of whether the burden of proof rested entirely on the assessed, and at which point, if any, this burden could justifiably be shifted to the Assessing Officer. The Full Bench in fact clarified that they were not deciding as to whom and to what extent is the onus to show that an amount credited in the books of account is share capital and when does that onus stand discharged. This will depend on the facts of each case. It has been argued, but without substance, that the Full bench did not go further than holding that the only responsibility on the assessed is to identify the subscriber; or that the AO was not required to delve into the creditworthiness of the subscriber; or that the AO need not be satisfied about the genuineness of the transaction.

11. Before applying the law to the facts of the present case, we should reflect on the manner in which the Division Bench dealt with the factual matrix in Dolphin Canpack. It observed that where a 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. This is evident from the passage extracted from the order passed by the Tribunal earlier. 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 suffers from any irrationality, we see no substantial question of law arising for our consideration in this appeal to warrant interference. This appeal accordingly fails and is hereby dismissed. It seems clear to us that where moneys have been received in cash or even Demand Drafts, the standard of proof would be much more rigorous and stringent than where the transaction is by cheque where the date and source of the investment cannot be manipulated.

12. The Calcutta High Court has held in CIT v. Precision Finance Pvt. Ltd. that it is not sufficient for an assessed to disclose that credits in their Books had been received through Banking channels; the identity as well as the creditworthiness of the creditor must nevertheless be proved. In Sajan Das and Sons v. Commissioner of Income-Tax (2003) 264 ITR 435 (Del) the Division Bench was not convinced that merely because moneys could be identified and traced through banking channels the genuineness of the Gift in question stood established. This is obviously because an assessed can scarcely be heard to say that he does not know all particulars pertaining to the donor. Thereafter, the same dialectic lead the Bench to arrive at the opposite conclusion in Commissioner of Income-Tax v. R.S. Sibal (2003) 269 ITR 429 (Del). In C.I.T. v. Makhani & Tyagi (P) Ltd. this Court has not given its imprimatur to the inaction of the AO in doing nothing further after the issuance of summons under Section 131 of the Income-Tax Act. It did not condone the AO, failing to issue coercive process, and in this manner attempting incorrectly to shift the burden on the assessed to establish the ligitimacy of the transaction. In Commissioner of Income-Tax v. Antarctica Investment Pvt. Ltd. (2002) 262 ITR 493 (Del) the Court was satisfied that no interference was justified since the assessed had produced the Share Application Forms along with confirmation letters and copies of their Accounts, copies of their Bank Accounts of cheque payments and their Auditor's Report. The Assessing Officer's conclusion that the genuineness of the transaction had not been made good was not upheld. This conclusion was reached despite the fact that notices received by one of the common Directors of the two subscribing companies had been ignored and no information was forthcoming from the latter. However, the Under Secretary (Land Revenue, Government of Sikkim, Gangtok) had stated that both the subscribing companies were incorporated in Sikkim and their addresses were disclosed in the return of allotments; the subscribers thus stood identified. Their financial standing or capacity was not investigated by the Court. The decision in Commissioner of Income-Tax v. Achal Investment Ltd. (2004) 268 ITR 211 (Del) is also on the same lines.

13. 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 Revenues 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.

14. In Commissioner of Income-Tax v. S. Kamaraja Pandian , the Madras High Court took the view that it is for the assessed to initially prove the genuineness of the loan, and that the onus shifts to the Department only after the assessed has prima facie substantiated this fact. In that case one of the creditors had denied the transaction. The Patna High Court in Additional Commissioner of Income-Tax, Bihar v. Hanuman Agarwal was faced with the availability of a confirmatory letter filed by the assessed in whose books of account a credit was found. GIR number of the creditor was supplied, and it appears that he had confessed that this transaction was not genuine. The High Court did not act on the confession since it had not been made available to the assessed. The Bench observed that since the correct name and address, and the GIR number of the creditor had been supplied by the assessed the initial onus under Section 68 of the Income Tax Act had been completely discharged by the assessed. It would not be sanguine to conceive of a possibility of a genuine contributor abandoning his investment for diverse reasons. That would not lead to the conclusion that the assessed is automatically guilty of attempt of converting its income into capital.
15. In Bharati Pvt. Ltd. v. Commissioner of Income-Tax, West Bengal-I, Calcutta where notices to these alleged creditors had come back unserved, the Division Bench affirmed that the mere filing of confirmatory letters by the assessed did not discharge the onus that lay on the assessed. Different Division Benches of the same High Court have opined that the assessed must prove (a) the identity, (b) the capacity of the creditors to advance money, (c) the genuineness of the transaction. (See Shankar Industries v. Commissioner of Income-Tax, Central, Calcutta C.Kant & Co. v. Commissioner of Income-Tax, West Bengal-III and Commissioner of Income-Tax v. United Commercial and Industrial Co. Ltd. . In C.I.T. v. Korlay Trading Co. Ltd. , certain shares purchased through a broker were lost. The assessed furnished the name of the broker, as also the date of the sale, amount of purchase money and sale money. The broker was found not to have maintained regular accounts. However, the Court refused to draw an inference adverse to the assesseds interests. Instead the Calcutta

High Court observed that the ITO ought to have investigated the matter more thoroughly to controvert the claim of the assessed, and concurred with the conclusion of the Tribunal that the latter had discharged the initial burden that lay on it. The High Court set aside the decision of the Tribunal which had reversed the findings of the ITO as well as the CIT (Appeals) since the assessed had supplied the income tax file number of the creditor before it. The High Court noted that the mere filing of the income tax number was not sufficient to establish the identity and creditworthiness of the creditor and genuineness of the transaction. Although Orissa Corporation was referred to the decision of the Full Bench of this Court in Sophia Finance was not even cited. Korlay Trading as well as Sophia Finance was applied by the same Division Bench of the Calcutta High Court in four decisions delivered in March 2003. In Hindusthan Tea Trading Co. Ltd. v. C.I.T. , the Bench opined that in the case of a subscription to the share capital of a company, if Section 68 of the Income Tax Act is to be resorted to, it is necessary for the assessed to prove and establish the identity of the subscriber, their creditworthiness and the genuineness of the transaction. Once material to prove these ingredients are produced it is for the AO to find out as to whether, on these materials, the assessed has succeeded in establishing the ingredients mentioned above. The AO canlift the veil and enquire into the real nature of the transaction. C.I.T. v. Ruby Traders and Exporters Ltd. , C.I.T. v. Nivedan Vanijya Niyojan Ltd. and C.I.T. v. Kundan Investment Ltd. are the other three.

16. 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.
17. For a complete understanding of the concept of 'burden of proof attention should be drawn to decisions delivered in the context of penalty proceeding under Section 271 of the Income Tax Act. CIT, West Bengal v. Anwar Ali [1970] 76 ITR 697 was decided by the Apex Court holding that, if there

is no evidence on record except the explanation of the assessed, which explanation has been found to be false, it still does not follow that the receipt constitutes taxable income. This decision was followed by the Apex Court in Anantharam Veerasinghaiah & Co. v. Commissioner of Income-Tax, A.P. opining that the mere falsity of the explanation given by the assessed is insufficient without there being, in addition, cogent material or evidence from which the necessary conclusion attracting a penalty can be drawn. However, as has been noted in CIT v. Jeevan Lal Sah 1995 Supp (4) SCC 247 amendments were incorporated by Finance Act, 1964, into Section 271 which had deleted the word deliberately in its Sub-section 1(c), thereby shifting the onus of proof onto the assessed, rendering Anwar Ali ineffectual. Nevertheless, in CIT v. Mussadilal Ram Bharose it has been enunciated by the Supreme Court that though the Explanation shifts the burden to the assessed to show absence of fraud, this onus is a rebuttable one. The burden is not discharged by the assessed tendering an incredible or fantastic explanation; and every explanation does not have to be accepted. In our opinion, it is for Parliament to introduce legislation if the duty presently resting on the Department is thought to be too onerous. We ought not to twist the language of a statute to remove the burden of proof altogether from the Department even though it has the necessary wherewithal to discharge it. The malaise can also be arrested if unclaimed share subscriptions are taken over by the State and/or if the assessed concerned is precluded from distributing dividends, bonus shares etc. against such share subscriptions unless they are duly claimed by the original subscribers within a prescribed period, perhaps not exceedings three years. Thereafter the shares could automatically stand transferred to the State on the principle of escheat. For these events to happen, requisite amendments to the IT Act may be required.

18. We shall now turn our attention to the facts and details of the present Appeals. The Appeal of the Revenue in respect of Assessment Years 1984-1985 and 1986-87 was rejected on 4-9-2003 by the ITAT Bench comprising Shri R.M.Mehta and Shri Ram Bahadur. With regard to the in between Assessment Year 1985-1986 another Bench comprising Shri H.L.Karwa and Shri B.R.Jain dismissed the Revenue's appeal on 12.8.2005.

19. As would be evident from a perusal of the Table (supra) for the Assessment Year 1984-85 the assessed had filed a Return declaring a loss of Rs.25,090/- and consequent upon the addition of Rs.9,53,500/- made under Section 68 the assessment was made on this sum. The ITAT noted that the assessed 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 & Regulations of the Delhi Stock Exchange. Complete details appear to have been furnished. The ITAT has further recorded that the AO 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 repre-

sented the company's own income from undisclosed sources. By the same Orders dated 4.9.2003 the addition of Rs.76,51,650/- for the Assessment Year 1986-87 deleted by the CIT (A), was upheld.

20. In connection with Assessment Year 1985-86 the ITAT has extracted portions of the Orders of the CIT (A) and we must assume that it did so to adopt that reasoning. The ITAT has not articulated its own reasoning in respect of Ground No1 before it viz. deletion of the addition of Rs.13,05,450/- on account of unexplained shares subscription; whilst it has done so with regard to the other ground viz. deletion of addition of Rs.9,95,000/- made on account of unexplained loans. The ITAT has categorically held that the assessed has discharged its onus of proving the identity of the share subscribers. Had any suspicion still remained in the mind of the AO he could have initiated 'coercive process' but this course of action has not been adopted. In view of the concurrent finding pertaining to the factual matrix we find no merit in these Appeals which we accordingly dismiss. ITA NO. 880/2006

21. In respect of this assessed namely, General Exports & Credits Ltd., the ITAT has reversed the decision of the CIT(A) on the subject with which we are presently concerned. It is trite that the decision of the ITAT should not be interfered with by the High Court unless it finds it perverse and totally unacceptable. This is especially so with regard to the factual aspects of any Appeal where there are concurrent conclusions of the lower Authorities. The assessed as well as the Revenue had assailed the Order dated 22-2-2002 of the CIT(A) pertaining to the Assessment Year 1989-90. We are presently concerned with the dispute raised by the Revenue relating to the deletion of the addition of Rs.1,00,18,500/ made by the AO under Section 68 of the I.T.Act. The AO had noticed that the assessed had received these amounts towards share capital and share application money on account of issue of rights shares to five companies pursuant perforce to the renunciation of rights shares by several individual share holders. At the time of the Search conducted of the assessed the requisite Renunciation Forms were not found. As in the case of Divine Leasing & Finance Ltd., these five companies were registered in Sikkim and remarkably at the same address, namely, Dorjee Building, Nam Nang Road, Gangtok. All of them had replied to the Department asking for further time to provide details. The CIT (A) has noted that (a) the stridently adverse findings of the AO at Calcutta had been struck down in Appeal; (b) Notices under Section 143(6) of the IT Act sent to the five Companies were replied to by them; (c) these Companies were duly incorporated under the Sikkimese Companies Act; (d) Assessment of these Companies had been framed under the Sikkimese Taxation Manual; (e) their share subscriptions or capital were received through Banking channels. The CIT(A) deleted the addition for the reason that the identity of the shareholders had been established on the strength of Steller Investment, which approach may not be entirely correct in the light of the discussion above. We have already concluded that this merely shifts the burden of proving the illegal or illegitimate na-

ture of the transaction onto the Department. The investigations carried out by the AO in Calcutta cannot be relied upon by the AO Bulandsharar consequent on those proceedings being found to be without jurisdiction. While rejecting the assault of the Revenue on this aspect the ITAT has cogently noted that the share capital issued to the original shareholders in the AY 1984-85, which had been cancelled by the AO Calcutta, was found to be valid by the jurisdictional AO at Bulandshashar. But we hasten to clarify that the statement of law made by the ITAT to the effect that in case of share capital no additions could be made if it is established that the shareholders exist is not completely correct, and has not been so enunciated by this Court in Sophia Finance.

22. It has been contended on behalf of the Revenue that the Rights Issue could not have been subscribed to by the aforementioned five Companies sans renunciation by the original shareholders. It has also be argued, and with merit, that the ITAT had not articulated the premise for arriving at the conclusion that the renunciation had taken place in a legal manner. We have also noticed that the Rights Issue were picked up only in 1989-1990. These factors are not relevant in these proceedings, even if there have been transgressions to the Companies Act. Support for this approach can be found from The Coco-Cola Export Corporation v. Income Tax Officer . The Apex Court observed that - If any remittance of foreign exchange had been made in excess of the prescribed limit from January 1, 1969, that will be for the Reserve Bank or the Central Government to take action or to grant permission as may be provided under the Foreign Exchange Regulation Act, 1973. That, however, cannot be a ground for the Income-tax Officer to assume jurisdiction to start reassessment proceedings either under Section 147(a) or 147(b) of the Act on the ground that that will be 'in consequence of information' in his possession in the shape of these two letters. The analogy commends application to these proceedings also. In these circumstances we find no scope for interference under Section 260A of the IT Act. This appeal is accordingly dismissed. There shall be no order as to costs. ITA No.953/2006

23. The ITAT has dismissed the Revenue Appeal and thus there are concurrent findings pertaining to the factual matrix. The following paragraph from the impugned decision adequately encapsulates the necessary details: Thus, the question is whether in the present case, the AO had material to conclude that the share applicants in questions did not exist. It is seen that the assessed company has furnished the necessary details such as PAN No./Income-tax Ward No./ration card of the share applicants and some of them are assessed to tax. The share application money has been received through banking channel. In some case, the confirmations/affidavits of share applicants containing the above detail were also filed. It is seen that the AO did not carry out any inquiry into the income tax record of the persons who have given the PAN No./Ward No. in order to ascertain the non-existence of the share applicants in question. The AO has neither controverter nor disapproved the material filed by the assessed. In the

case of CIT v. Makhni & tyagi (P) Ltd. reported in 267 ITR 433(Del), the jurisdictional High Court has held that when the documentary evidence was placed on record to prove the identity of all the shareholders including their PAN/GIR numbers and filing of other documentary evidence in the form of ration card etc. which had neither been controverter nor disapproved by the AO, no interference was called for. The Tribunal was justified in deleting the addition. The AO proceeded to make the impugned addition on the ground that in some case some summons issued were returned unserved and in some case summons though served but there was no compliance. In this connection, it may be mentioned that in the case of CIT v. Orissa Corporation 159 ITR 78, the Honble Court has held that when the assessed borrows the loan and if an assessed gives names and address of the creditors, who are assessed to tax and full particulars is furnished then the assessed has discharged the duty. If the Revenue merely issues summons Under Section 131 and does not pursue the matter further, the assessed does not become responsible for the same even if the creditors do not appear. Addition cannot be made under Section 68. No question of law, far less any substantial question of law arises for our consideration. We may however briefly reflect upon a submission made by learned Counsel for the Respondent to the effect that the assessed had, by its letter dated March 8, 1999 requested the AO to examine the Assessment Records of the share applicants whose GR Nos. had been supplied. It is not controverter that action was not taken by the AO, but it has justifiably been contended that this inaction was due to paucity of time left at that stage since the assessment had to be framed by March 31, 1999. It has been pointed out that several adjournments had been granted by the Assessment Officer on the asking of the assessed. The timing of the assesseds said letter is most suspect. Generally speaking, it is incumbent on the AO to manage his schedule, while granting adjournments, in such a manner that he does not run out of time for discharging the duties cast on him by the statute. In the present case the details had been furnished to the AO much before March 1999 but he failed to react to the shifting of the burden to investigate into the creditworthiness of the share applicants. Therefore, the Appeal is dismissed.

24. A copy of this Judgment be given dusty to learned Counsel for the parties.