

Dcit Cir 3(3)(1), Mumbai vs Reliance Utilites P. Ltd, Mumbai on 17 February, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

ITA No.223/Mum/2016

ITA No.224/Mum/2016

(A.Y:2008-09)

Dy. Commissioner of Income Tax,
Central Circle-3(3)(1),Room
No.609, Aaykar Bhavan, M.K.
Road, Mumbai -400020

M/s Reliance Utilities P Ltd.,
&
M/s Reliance Ports and Terminals Ltd.

Vs.

5 t h Floor, Maker Chambers, IV,
222, Nariman Point,
Mumbai-400021

Appellant .. Respondent

PAN No.AAABCR8359K & AAABCR 3878B

Revenue by .. Shri. ShirDhamija, CIT DR

Assessee by .. Shri. Venkatraman, AR

Date of hearing .. 17-11-2016

Date of pronouncement .. 03-02-2017

ORDER

PERMAHAVIR SINGH, JM:

These two appeals by the Revenue are arising out of the common order of CIT (A)-8, Mumbai in appeal No. CIT (A)-8/IT-115/15-16 dated 30-10-2015. The Assessment was framed by DCIT Circle-3(3)(1), Mumbai for the A.Y. 2008-09 vide order dated 31-03-2015 u/s 143(3) r. w. s. 147 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only common issue in these two appeals of revenue is as under:-

"Whether, the CIT(A) erred in deleting the addition of unexplained cash credit made by AO u/s 68 of the Act, by holding that the nature and genuineness of the transaction of investment of Compulsorily Convertible Preference Shares ("CCPS") in the assessee Company is explained in the given facts and circumstances of the case?"

ITA No.223 & 224/Mum/2016 Ld. CIT-DR as well Ld. Counsel for assessee agreed that the facts and circumstances of both the appeals of revenue are identical and hence they argued from the facts of same can be adopted for the other appeal. Hence, the grounds as raised in the appeal in the case of Reliance Utilities P Ltd reads as under:-

"1. "Whether on the facts & circumstances of the case and in law, the learned Commissioner of Income Tax(A) is correct in deleting the addition of unexplained cash credits of 700,00,00,000/- made by assessing officer u/s 68 of Income Tax. Act 1961"

2. "Whether on the facts & circumstances of the case and in law, the learned Commissioner of Income Tax(A) is correct in deleting the addition made u/s. 68 of the Income Tax Act, 1961 holding that the power of the AO to lift the corporate veil is not in question without appreciating the fact that on lifting the corporate veil it is clear that Biometrix has been created as a mere camouflage or shell or sham company deliberately created by the persons exercising control over the same for the purpose of avoiding liability."

3. "Whether on the facts & circumstances of the case and in law, the learned Commissioner of Income Tax(A) is correct in deleting the addition made u/s. 68 of the Income Tax Act, 1961 holding non submission of most crucial documents like Loan account of Biometrix and OCBC account of Biometrix is not necessary. It clearly confirms the doubts raised by the AO regarding the nature and genuineness of the transaction and thereby clearly attract the provisions of section 68 of the I.T Act"

4 "Whether on the facts & circumstances of the case and in law, the learned Commissioner of Income Tax(A) is correct in completely ignoring the fact that Biometrix is ultimately subsidiary of one of the Reliance group company, taking a view that it's an independent company and following the laws of ITA No.223 & 224/Mum/2016 Singapore, completely disregarding the fact that its an arrangement within Reliance group companies and biometric is just a conduit"

5 "Whether on the facts & circumstances of the case and in law, the learned Commissioner of Income Tax(A) is correct in completely ignoring the fact regarding the valuation of the CCPS. The Biometrix has sold CCPS of all the 4 Indian companies, including that of assessee's, to much lower price than the market value as shown by the Biometrix to ICICI bank in the last submission before selling of these CCPS."

6 "Whether on the facts & circumstances of the case and in law, the learned Commissioner of Income Tax(A) is correct in completely ignoring the fact that flaws in monitoring the terms of loan by ICICI bank by just saying that it is not making any impact with respect to section 68 of the Act. He has completely disregarded the fact that by doing so the nature and genuineness of the transaction has become, not only doubtful, but proved to be non-genuine."

3. Brief facts are that the Reliance Utilities Private Limited, the assessee, is a private limited company filed its return of income for the assessment year 2008-09 on 29.09.2008 declaring a total income of Rs. 1,69,52,919. The assessment was completed by an assessment order u/s. 143(3) of the Act dated 27.12.2010. The assessee during the previous year relevant to the assessment year 2008-09 had credited a transaction in its books for the receipt of Rs. 700 crores from Biometrix Marketing Private Limited, Singapore (in short "Biometrix") towards subscription of Compulsorily Convertible Preference Shares (in short "CCPS") against which the assessee had allotted seven

crores CCPS of Rs. 10 each at a premium of Rs. 90 per share to Biometrix. This transaction was investigated by the Investigation Wing of the Income Tax Department, Mumbai upon receipt of commercial intelligence report dated 10.08.2012 from the High Commission of India, Singapore. The AO has summarized the observations in the said report that the source of funds of Biometrix, which invested Rs 700 crores in the CCPS issued by the assessee and also in other ITA No.223 & 224/Mum/2016 group companies (in all aggregating to USD 1627.24 millions), needs further investigation considering that the said company incorporated under the laws of Singapore had a paid-up capital of Singapore Dollars 1,10,000 only and its shares were held by two corporate entities, of which one entity in Singapore held 91% of the shares. The ultimate owner of the two companies in Singapore i.e. Biometrix and its shareholder entity is an individual based in Mumbai holding 100% of the capital. The quantum of investment made by Biometrix which was the largest FDI from Singapore to India, given its small capital base and other facts such as a single room office in Singapore remaining closed most of the time which reinforced that Biometrix is a small company, made it highly probable that Biometrix may have raised loans from Singapore or from other countries mostly tax havens and hence the report stated that the ultimate source needs to be ascertained.

4. The investigation wing of the Income Tax Department, Mumbai carried out the investigation in the matter and the findings in its report dated 10.07.2012 are extracted by the AO in para 10 of the assessment order. It was ascertained that the investment made by Biometrix in the CCPS of the assessee through the Foreign Direct Investment route was not out of equity capital of Biometrix but was out of a loan of USD 1700 million taken by Biometrix from ICICI Bank, Singapore. The said loan was secured by contractually binding a group company of the assessee to purchase the CCPS upon exercise of option to sell those shares by Biometrix. The investigation wing had also obtained copies of acknowledgements of the income tax returns and goods & services tax returns filed by Biometrix with the authorities in Singapore. It was also observed that Biometrix subsequently repaid the loan to ICICI Bank, Singapore by selling the investments it made in the CCPS to other group companies of the assessee and the said group companies which purchased the CCPS from Biometrix have provided the details and explained the sources for the monetary consideration paid to Biometrix. Upon receipt of the above investigation report from DGIT (Inv.), Mumbai, the AO recorded the reasons, which essentially are the findings in the reports of the High Commission of India, Singapore and the ITA No.223 & 224/Mum/2016 Investigation Wing mentioned hereinabove. Stating that the new information received clearly cast a doubt on the creditworthiness of Biometrix as well as the ultimate source of Rs 700 crores, based on the said information, the AO issued the notice u/s 148 dated 04.01.2013 with the reason to believe that income to the tune of Rs. 700 crores has escaped assessment for the assessment year under consideration. The assessee requested that the original return filed on 29.09.2008 be treated as the return filed in response to the notice u/s 148 of the Act. The AO provided a copy of reasons recorded as requested by the assessee on 19.08.2013. The assessment was taken up by issuing a notice u/s. 143(2) of the Act on 20.09.2013. The Investigation Wing in Mumbai vide letter dated 10.09.2013 requested that the assessment be kept in abeyance till further communication is issued to the AO. The Investigation Wing forwarded another report dated 05.02.2014 to the AO, which apart from the findings in its first report dated 10.07.2012, carried the details of the subsequent transactions of the purchase of CCPS from Biometrix by the group companies of the assessee and that the purchasers of CCPS have explained

that the consideration was paid out of the proceeds from sale of units of mutual funds. The report stated that Biometrix had entered into separate Investment Agreement with the assessee and other group companies. It also stated that a Put & Call Option Agreement was entered into by Biometrix with a group company of the assessee, which gave Biometrix the right to sell the CCPS and that the loan from ICICI Bank was secured by assigning the rights in the Investment Agreement, the Put and Call Option Agreement and the charge was filed with the authority in Singapore. The report also stated how ICICI bank had sanctioned a loan of USD 1.2 billion on 28.06.2007 and a further sum USD 0.5 billion on 07.11.2007 and as per the documents filed by ICICI Bank, actual borrower was to be a SPV in a tax efficient jurisdiction. After reviewing the financial statements of Biometrix, the report also drew an inference that Biometrix is essentially a shell company. Further, Biometrix paid interest and loan repayment to ICICI Bank where as it received a lower consideration from the sale of CCPS it held in various group companies. There is also information gathered from Singapore regarding the identity of the shareholders of Biometrix, which are corporate entities, ITA No.223 & 224/Mum/2016 the individuals who had invested in one such shareholder entity in Singapore and the mode used for such investment. The report also states that the bank account statement of Biometrix, its financial accounts and KYC documents could not be obtained from the investee companies, which include the assessee. The report also narrated the failed attempts to obtain information about the identity of current shareholders and directors in the corporate entity in Singapore, which held substantial shares in Biometrix. These information and efforts of the Investigation Wing are outlined by the AO in the order in Para 16 to 32 of the Assessment Order.

5. Accordingly, assessment proceedings were conducted in view of the aforesaid information in the possession of the AO. The notice dated 09.06.2014 had a questionnaire calling for complete details / supporting evidences in respect of receipt of investments amounting to Rs 700 crores from Biometrix and thus the assessee was required to prove the identity and creditworthiness of the investor and the genuineness of the aforesaid transaction. The assessee filed a reply on 24.11.2014 explaining that the assessee issued 7 crores CCPS of Rs. 10/- each at a premium of Rs. 90/- each to Biometrix. An Investment Agreement between the assessee, Biometrix and persons named as promoters dated 31.08.2007 was furnished. Copies of the share certificates issued to Biometrix for the CCPS allotted were also furnished. It was stated that the investment made by Biometrix fell under the automatic route of Foreign Direct Investment under the Foreign Exchange Management Act, 1999 ("FEMA") and it was not necessary to obtain the approval of Foreign Investment Promotion Board. The assessee also submitted the form filed with Reserve Bank of India on the issue of CCPS along with the acknowledgment for filing the same. The terms of the issue of CCPS were explained and the valuation report of S.R. Batliboi & Co was furnished. The assessee explained its understanding that Biometrix had obtained a loan from ICICI Bank, Singapore for making the investment in the CCPS and stated that it is not in possession of any correspondence in this regard. The bank statements of the assessee were furnished and credit entries ITA No.223 & 224/Mum/2016 for the receipt of Rs. 700 crores from Biometrix were identified in the bank statements.

6. The AO also made reference through FT & TR Division of the CBDT to Inland Revenue Authority in Singapore ("IRAS") on 13.03.2014. The reference was made as per requirement for exchange of information in relation to investments made by Biometrix in four reliance group companies

including assessee. IRAS provided information pertaining to Biometrix, viz, the tax residency certificate, List of Directors and employees, Financial Statements and Income Tax Returns, Director's resolutions/KYC documents, ICICI bank statements with details of inward credits, disbursement related documents, loan principal and interest related documents, credit appraisal note and facility documents. On finding that complete information as sought was not provided by IRAS including the bank statement of Biometrix tracing the receipt of loan amounts and the repayment of interest & principal. The AO made another reference through FT & TR Division to IRAS. IRAS provided further information that loan was disbursed by ICICI Bank, Singapore Branch to the bank account of Biometrix held in Overseas Chinese Corporation Bank, Singapore ("OCBC"). Following this a fresh reference was made to IRAS through the Competent Authority on 16.09.2014. The bank statement of the account held by Biometrix in OCBC sent by IRAS contained entries only from 01.01.2008. It was not possible to obtain the bank statement pertaining to earlier period as per the India Singapore Exchange of Information Protocol. The AO made enquiries from assessee and issued summons under section 131 of the Act to directors of Biometrix who were resident in India, the shareholders of the parent entity of Biometrix and officials of ICICI Bank Limited. While the directors and shareholders of Biometrix omitted to attend and ICICI Bank Limited expressed inability to divulge information on account of restrictions imposed by Banking Secrecy Act of Singapore in respect of bank account statements and KYC documents of Biometrix. The AO also found that the receipt of share application money by the assessee for the issue of CCPS is an international transaction between two associated enterprises which the assessee failed ITA No.223 & 224/Mum/2016 to report in the prescribed form and with the prior approval of the CIT, the AO referred the transaction to Transfer Pricing Officer for determination of arm's length price. The TPO issued an Order u/s 92CA of the Act dated 29.01.2015 confirming that the transaction has been done at arms length price. The TPO also suggested that the source of the loan has to be examined by the AO. The AO analysed the material gathered from ICICI Bank, the other group companies of the assessee and information received from IRAS through FT & TR division confirmed that loan amounts aggregating to USD 1700,000,000 were remitted by ICICI Bank, Singapore Branch on various dates between 18.09.2007 to 12.12.2007 to the bank account of Biometrix with OCBC. The audited financial statements of Biometrix as at 30th September 2008 showed entries for Secured Term Loan of USD 1700,000,000 obtained for financing its long term investments and the Long Term Investments available for sale amounting to USD 1650,125,325. From the Facility Agreement entered into between Biometrix and ICICI Bank, the AO inferred that the loan has been advanced to Biometrix by ICICI Bank Limited through its overseas branches and ICICI Bank, Singapore Branch had also acted as an agent for facilitating the loan. In other words, ICICI Bank, Singapore Branch handled the disbursements, collection of interest and principal repayments. After examining various documents in relation to the loan, the AO found that ICICI Bank, Singapore Branch had not monitored the loan it granted to Biometrix strictly as per the terms of the contract.

7. Hence, the AO added the amount of Rs. 700 crores received by the assessee and invested by Biometrix in the CCPS issued by the assessee as income of the assessee as unexplained cash credit u/s. 68 of the Act. According to the AO the nature and genuineness of the transaction of investment in the CCPS of the assessee was not explained as required in Section 68 of the Act. The AO has stated that the assessee, the investor i.e. Biometrix, shareholders and directors of the investor, ICICI Bank, Singapore and other group companies of the assessee have not provided information to his

satisfaction. Aggrieved, assessee preferred appeal before CIT(A).

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8. The CIT(A) considered the issue that is whether the AO was justified in invoking Section 68 of the Act holding that the nature and genuineness of the transaction of investment of Compulsorily Convertible Preference Shares ("CCPS") in the assessee Company is not explained and therefore treated as unexplained cash credit of the assessee?

9. The CIT(A) deleted the addition on merits by observing as under:-

"5.4 Before I embark to discuss the grounds and contentions raised, it may be fit and proper to first refer to certain facts and findings as recorded in the assessment order. The short question for consideration is whether the Appellants have proved the source of the investments in their company.

5.5 The assessment order records in paragraph 10, the enquiries conducted by DDIT (Inv) - Unit-2(1), Mumbai who had vide report dated

10.07.2012 has given the following findings:

a) The investment in shares (CCPS) in India, through FDI route was not out of equity capital of M/s. Biometrix Marketing P Ltd., but it was out of loan of UDS 1700 million from ICICI Bank, Singapore, which was secured with options agreement to sell the shares to M/s. Ekansha, a group company of M/s. Reliance Industries Limited (RIL)

b) M/s. Biometrix is said to be filing the income tax returns, goods & service tax returns and other regulatory returns with the authorities in Singapore and copies of acknowledgements were filed as proof of the same.

c) Shri Atul Shantikumar Dayal is the joint shareholder for legal convenience but he had not invested personally in shares of M/s. Strasbourg Holdings P. Ltd., The investment in shares of M/s. Strasbourg Holdings P. Ltd., was made by late Shri Sandeep Tandon out of his income from professional receipts.

d) M/s. Biometrix Marketing P. Ltd., has repaid the loan to ICICI Bank, Singapore through the money raised by sale of the CCPS to M/s. Reliance Gas Transportation Infrastructure Ltd., MIs. Reliance Ports & Terminals Ltd., and M/s. EkaIa Enterprises Pvt. Ltd.,

e) M/s. Reliance Gas Transportation Infrastructure Ltd., M/s. Reliance Ports and Terminals Ltd., and M/s. Ekansha Enterprises Pvt. Ltd., have filed details and explained the sources of money paid to M/s. Biometrix Marketing P. Ltd., for

acquiring the CCPS.

ITA No.223 & 224/Mum/2016 5.6 Even as per the DDIT report dated 10.07.2012, the source of this investment is from Biometrix which was not out of the equity capital but borrowed as a loan of USD 1700 million from ICICI Bank, Singapore. Two things are clear. The source is Biometrix and the source of source is the loan sanctioned by ICICI Bank, Singapore to Biometrix. Secondly, ICICI Bank has secured this loan with Option Agreements to sell the shares to M/s. Ekansha, a group company of M/s. Reliance Industries Limited.

5.7 The report further finds that Biometrix is said to be filing income tax returns, goods and service tax returns and other regulatory returns with the authorities in Singapore and copies of acknowledgement were filed as proof of the same. The report also confirms that Biometrix had repaid the loan to ICICI Bank, Singapore through the money raised by sale of CCPS to Reliance Gas Transportation Infrastructure Limited, Reliance Ports and Terminals Limited and Ekansha Enterprises Private Limited. The report also concludes that Reliance Gas Transportation Infrastructure Limited, Reliance Ports and Terminals Limited and Ekansha Enterprises Private Limited have filed details and explained the sources of money paid to Biometrix for acquiring the CCPS.

5.8 In paragraph 17 of the assessment order, the AO has referred to the further investigation report dated 05.02.2014 of the DDIT (Inv), Unit 11(1), Mumbai which was forwarded to the AO by DIT (Inv.)-1, Mumbai. Here again the report confirms the fact that "the transaction in question which has been examined is one where a loan of USD 1.7 billion was taken from ICICI Bank, Singapore and routed into India as FDI. The investment in India is by way of CCPS issued by four unlisted private limited companies of Mukesh Ambani group. Subsequently, the CCPS held by Biometrix were purchased by three companies of Mukesh Ambani group. The principal amount of loan from ICICI Bank was also repaid out of remittances from Mukesh Ambani group. The sources of funds of Mukesh Ambani group companies which purchased the CCPS from Biometrix has been explained by way of redemption of mutual funds."

5.9 Of course, the same report also says that "however it was suggested that deeper look may be taken by the assessing officer and the application of funds received from Mukesh Ambani group companies from ICICI Bank, Singapore through Biometrix is not clear."

5.10 The AO has then proceeded to pass a detailed assessment order holding that the source and genuineness of the investment does not stand proved and therefore needs to be taxed as income under section 68 of the Act in the hands of the Appellants.

ITA No.223 & 224/Mum/2016 5.11 The main contention of the Appellants are that neither the two investigation reports dated 10.07.2012 and 05.02.2014 dispute either the source or its genuineness even though it directs the AO to have a deeper look into the issue. It is for this reason that the Appellants have tendered all the evidences available on record to prove both the source and genuineness of the investment into the Appellants. It is contended that none on the evidences on record has been disputed by the AC in the assessment order.

Bank statement vis-à-vis swift messages 5.12 After taking all the evidences available on record the AO has given an adverse finding only on the sole basis that the Appellant had failed to produce the bank statement of Biometrix maintained with its bankers viz., OCBC Bank, Singapore. The AO vide para 35 and 38 held as follows: "the bank statement provided was containing entries from 01.01.2008 since the information pertaining to earlier period could not be provided as per Indo Singapore exchange of information protocol" (Para 35). "The crucial information in relation to this transaction that is the bank statement and other relevant documents is not on record" (Para 38). The Appellants had placed on record the swift messages dated 18.09.2007 issued by ICICI Bank, Singapore to OCBC Bank, Singapore and swift message dated 19.09.2007 issued by OCBC Bank, Singapore to HDFC Bank, Mumbai. It was also submitted that these swift messages were in fact forming part of the records in the files of the AO as obtained by the AO from IRAS, Singapore. Appellants had applied for the copies and the same had been duly furnished by the AO. These copies were again placed on record by the Appellants during the hearing.

5.13 Since, this evidence goes to the root of the matter, the same is dealt with first. The assessment order states that bank statements have not been furnished. However, the AO has secured the swift messages referred to above from IRAS, Singapore. A careful look at the swift messages shows that the three banks involved in the transaction viz., ICICI Bank, Singapore - the lender to Biometrix, OCBC Bank, Singapore - the bankers of Biometrix into which the loan proceeds had been duly credited, and HDFC Bank, Mumbai - the bankers of the Appellants into whose account OCBC Bank, Singapore had remitted the monies from the bank account of Biometrix towards subscription of the CCPS issued by the Appellant. Since these are crucial documents which indicate the actual movement of funds from ICICI Bank, Singapore into OCBC Bank, Singapore and from OCBC Bank, Singapore into the bank account of the Appellant with HDFC Bank, Mumbai, these swift messages are extracted below.

ITA No.223 & 224/Mum/2016 The relevant swift messages are reproduced at para ----at page---- of this order.

Narration for the first swift message:

5.14 The bank account number of Biometrix with OCBC Bank, Singapore is 662001767301. A sum of USD 383,500,000 has been credited by ICICI Bank, Singapore into this account. Likewise, ICICI Bank, Singapore has credited the entire loan of USD 1673,367,325 on the following dates.

Date	USD
18.09.2007	383,500,000
03.10.2007	220,000,000
16.10.2007	576,625,325
16.11.2207	672,000
12.12.2007	492,570,000
Total	1673,367,325

5.15 Out of the said amount of USD 383,500,000 disbursed by ICICI Bank, Singapore, a sum of USD 174,000,000 has been remitted by OCBC Bank, Singapore on behalf of Biometrix into the bank account of Appellant maintained with HDFC Bank, Mumbai on 19.09.2007 as evidenced by the swift messages which is extracted above. Line 50K of the swift message shows that the remittance from OCBC Bank, Singapore is from the same bank account of Biometrix into which the loan proceeds from ICICI Bank, Singapore was duly credited.

5.16 These are evidences which clinch the issue both on source and its genuineness. There is a complete link between the amounts lent by ICICI Bank, Singapore to Biometrix which monies had been invested by Biometrix in the CCPS issued by the Appellants. These are documents issued by the respective banks and with reference to the bank account held by Biometrix. It is also evident further from the audited financial statements of Biometrix that other than the loan from ICICI Bank, no other sums were raised by Biometrix.

In the circumstances, the non-receipt of the bank statements of Biometrix cannot give rise to any adverse consequences. The swift messages refer to the bank account of Biometrix maintained with OCBC Bank, Singapore and also show the inward remittances by ICICI Bank, Singapore and the outward remittances to the bank account of the Appellants with HDFC Bank, Mumbai. These are evidences secured by the AO from IRAS Singapore, the genuineness of which is not doubted in the assessment order. When the Appellants placed these evidences once again during the hearing, the same was forwarded to the AO seeking a remand report and the remand report does not dispute the facts ITA No.223 & 224/Mum/2016 and evidences on record. Consequently, the sole reason or basis in the assessment order and remand report is the non-receipt of bank account which was beyond the capacity of the Appellant and IRAS, Singapore cannot stand scrutiny, and therefore should fail in the light of the bank account references of this very transaction under question as is available through the swift messages issued by ICICI Bank, Singapore and OCBC Bank, Singapore respectively. The purpose of seeking the bank statement is to track the transaction and to find the link. The very purpose for which the bank statements were sought for had been achieved through the swift messages which are again documents issued by ICICI Bank, Singapore and OCBC Bank, Singapore respectively evidencing the movement of funds from ICICI Bank, Singapore to Biometrix and from Biometrix to the Appellants.

5.17 The Appellants had placed on record several documents and evidences during the assessment and also before me which according to them go to aid and support the irrefutable conclusion that the investment by Biometrix in the CCPS issued by the Appellants is out of the loan raised by Biometrix from ICICI Bank, Singapore.

5.18 I would now examine these documents and evidences one after the other. Even though the Appellants have produced it in the form of list of dates and events, I would like to deal it with reference to the entities and the action points involved.

ICICI Bank, Singapore 5.19 ICICI bank is a premier independent financial institution which is regulated both in India and Singapore. Both the reports of DDIT (Inv) dated 10.07.2012 and 05.02.2014 confirm that Biometrix had sourced the funds by way of a loan from this bank. ICICI Bank is not a group company or a related party of Biometrix. It is an independent public bank. The genuineness of the loan as sanctioned by ICICI Bank to Biometrix cannot be. In fact, the assessment order also does not dispute this fact.

Biometrix 5.20 The investigation report dated 10.07.2012 of the DDIT (Inv) states that Biometrix is said to be filing income tax returns, goods and service tax returns and other regulatory returns with the authorities in Singapore and copies of acknowledgements were filed as proof of the same. Tax Residency certificate has also been issued by IRAS Singapore to Biometrix. Para 49 of the assessment order also records this fact. In support of this the fact that Biometrix is an independent recognised legal entity in Singapore also stands demonstrated by the Appellants while placing on record various documents and evidences and as shown in the chart below:

ITA No.223 & 224/Mum/2016 As per financial statements for the period ending 30-09-2008 30-09-2009 31-12-2010 31-10-2011 Positive tests: An entity is a shell/conduit company if:

(1) its affairs were arranged with the primary purpose to take advantage of the benefits in Article 1 of this Protocol; No No No No (2) any legal entity falling within the definition of resident with negligible or nil business operation or with no real and continuous business activities; No No No No Turnover (in USD) 121 433 1 067 440 4 221 643 422 675 Cost of Sales (in USD) - 121 433 -1 064 580 -4 213 555 - 421 531 Other income (in USD) 896 910 15 045 208 369 3 123 231 (3) its total annual expenditure on operations is less than S\$200,000 in the immediately preceding period of 24 months No No No No Salary & Employee benefits (in USD) 102 950 Administrative expenses & other operating expenses (in USD) 5 995 772 38 937 226 29 543 845 110 377 287 Annual expenditure (in USD) 5 995 772 39 040 176 29 543 845 110 377 287 Negative tests: An entity is deemed no to be a shell/conduit company if:

(4) it is listed on a recognised stock exchange of the Contracting State; or

No

No

No

No

(5) its total annual expenditure on operations is equal to or more then S\$200,000 in the immediately preceeding period of 24 months from the date the gains arise.

Yes

Yes

Yes

Yes

Salary & Employee benefits (in USD)

102 950

Administrative expenses & other operating expenses (in USD)

5 995 772

38 937 226

29 543 845

110 377 28

Annual expenditure (in USD)

5 995 772

39 040 176

29 543 845

110 377 28

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5.21 The support documents with reference to the above have all been furnished to the AO by both ICICI Bank and IRAS, Singapore. Even the balance sheets of Biometrix which are public documents available in public domain have also been furnished by IRAS Singapore to the AO. Neither the assessment order nor the remand report seek to dispute any of these facts. The India Singapore DTAA was first entered into on 24.09.1991 and the same is getting extended periodically. The DTAA has undergone amendments through various protocols. One such protocol is dated 29.06.2005. Article 3 of the said protocol lays down the tests to conclude whether an entity has come into existence lawfully in Singapore or created as a shell or a conduit. The chart referred to above was placed by the Appellant to demonstrate that the conditions laid down in Article 3 of the protocol gets duly satisfied. The financial statements of Biometrix as provided by the AO for the periods 30.09.2008, 30.09.2009, 31.12.2010 and 31.10.2011 was also placed again.

The Appellants have narrated in detail the sale turnover, cost of sales, other income besides annual expenditure during the above periods to demonstrate that it satisfies the threshold requirements of Article 3. The inference relating to repayment vide para 28 & 100 has no relevance-in testing the legal existence of Biometrix and is in fact beyond the scope of the present proceedings. The adverse inference drawn vide para 82 that the Reliance group based in India is controlling the affairs of Biometrix is sans any tangible evidence or material on record. The assessment order and the remand report have not questioned or disputed the satisfaction of the threshold requirements of Article 3 of the protocol. The DDIT (Inv) in its report dated 10.07.2012 states that Biometrix is statutory compliant. The assessment order does not bring to light any evidence or documents to prove that Reliance group of companies are controlling or managing or running the day to day affairs of Biometrix. Therefore, the observations vide para 28, 82 and 100, as rightly pointed by the Appellant, cannot militate against the Appellant as these are observations without proof or evidence. In these circumstances the genuine existence of Biometrix during the relevant period under the laws of Singapore stands proved.

The Loan transaction 5.22 The Appellants have submitted the following:

"The credit committee of ICICI Bank giving an in-principle approval on 28.06.2007 for a loan of USD 1.2 billion. This In-principle approval has been given based on the list of investees, running projects, valuation of the equities in the -project and putting in place a Put/Call arrangement with a non- disposal undertaking permitting the borrower to enter into suitable hedging arrangements.

ITA No.223 & 224/Mum/2016 Biometrix has passed a board resolution on 24.09.2007 to invest in CCPS of the Appellant.

In line with the terms and conditions issued by ICICI Bank, Singapore a put and call option agreement was entered into between Ekansha Enterprise P Ltd and Biometrix on 31.08.2007.

The board of directors of Biometrix passed a resolution on 05.09.2007 to accept the facility from ICICI Bank for the borrowing of USD 1.2 billion in three tranches.

On 07.09.2007, Biometrix and ICICI Bank entered into a Facility Agreement and on the same day, a deed of assignment of contract rights between Biometrix and ICICI Bank was entered into as a security for the company's liability to the bank.

Utilisation requests raised by Biometrix from 15.09.2007 and the disbursement of loan by ICICI bank from 19.09.2007. On 10.12.2007 security trustee agreement was entered into between Biometrix and Axis Bank. Through this agreement, Axis bank was appointed as security trustee for finance parties i.e. Biometrix the borrower and ICICI Bank, Singapore, Bahrain and Hong Kong branches - the lenders'.

5.23 The above would show that a proper arrangement had been conceived and entered into between ICICI Bank, Singapore and Biometrix. As the loan amount involved was quite substantial, as part of, the terms and conditions, ICICI Bank insisted Biometrix to enter into a put and call option agreement with Ekansha Enterprises Private Limited, a company belonging to Mukesh Ambani group. Since the loan amounts were substantial, ICICI Bank, Singapore de-risked itself by associating Bahrain and Hong Kong branches of ICICI Bank. A security trustee agreement was also entered into with Biometrix and Axis Bank. Biometrix had passed necessary resolutions to secure the loan and on application loan amounts have been disbursed by ICICI Bank. The disbursement process has already been dealt in detail in the earlier part of this order with reference to the swift messages and movement of the loan proceeds. The position taken by the Appellants in fact stands vindicated as the assessment order in various places had referred and confirmed the fact that there has been a loan disbursement by ICICI Bank, Singapore to Biometrix.

5.24 From the above, it therefore stands proved that Biometrix had sought a loan from ICICI Bank, Singapore and the same has been disbursed by ICICI Bank in line with its terms and conditions. Therefore, the source and genuineness of the loan from ICICI bank stands proved.

ITA No.223 & 224/Mum/2016 Investment in COPS issued by the Appellant 5.25 The Appellants have submitted the following.

"The investee companies are resident Indian companies and since CCPS were issued not to existing shareholders but to Biometrix, it required passing a special resolution through an EGM under section 81 of the Companies Act, 1956 and this was done by the Appellant on 20.08.2007. This was followed by a board resolution on 20.08.2007 authorizing to issue 7 crore CCPS to Biometrix Entering of an investment agreement on 31.08.2007 between Biometrix and Appellant identifying the investment, subscription amount, warranties of promoters and investors.

The Appellant passed special resolution on 20.08.2007 and the same was filed with the Registrar of Companies on 14.09.2007 The FIRC dated 21.09.2007 issued by HDFC Bank vide serial numbers 420599 evidencing receipt of INR 700 crore.

On 25.09.2007, the board of directors of the Appellant authorised allotment of CCPS and on 20.10.2007 Appellants filed Form 2 with ROC upon allotment of CCPS to Biometrix thus satisfying the conditions under section 75 of the Companies Act, 1956.

In compliance with section 84 of the Companies Act, 1956, on 25.09.2007 Appellants issued six preference share certificates for the value of Rs. 700 crores.

On 18.12.2007, the RBI acknowledged the filings made by the Appellants with RBI for allotment of CCPS to Biometrix".

5.26 The movement of funds from ICICI Bank through OCBC Bank into the bank account of the Appellant with HDFC Bank, Mumbai have already been dealt in detail earlier. None of the above have been disputed either in the assessment order or in the remand report.

5.27 Three important aspects needs attention and deliberation. The securement of the loan by Biometrix and its surrounding steps. Secondly, the movement of funds i.e. loan transforming into investments and finally the investments translating into CCPS. The Appellants have dealt with each of these aspects in detail and have placed evidence in support of each one of them. A cogent reading of all the three steps will prove that a sum of Rs. 700 crores obtained as loan by Biometrix (a non-resident and tax resident of Singapore) from ICICI Bank, Singapore was received by the Appellant as ITA No.223 & 224/Mum/2016 subscription to the CCPS and Appellants have duly issued the CCPS during the relevant assessment year. The Facility Agreement between Biometrix and ICICI Bank, Singapore stipulates a condition that the proceeds of the loan shall be utilized only for the purpose of investment in the CCPS of the Appellant and other group companies and accordingly Biometrix has invested the loan so obtained in the CCPS issued by the Appellant besides investing in other group companies. It is therefore clear that the loans advanced had been invested solely by Biometrix in the CCPS issued by the Appellant and other group companies. The matter does not rest there. Both Biometrix in Singapore and the Appellants in India had passed necessary resolutions as required under the relevant statutes governing the transaction. Both Biometrix and the Appellant are statutory compliant companies and the Appellants have disclosed the transactions under question at the appropriate juncture and time with the regulatory bodies such as ROC and RBI. These facts do not unfurl merely on the basis of the submissions of the Appellant or the

documents filed by them. Since most of these are documents relate to non-resident and a tax resident of Singapore, these have been secured by the AC from IRAS Singapore and ICICI Bank and later furnished to the Appellant on their request. The evidentiary value of these documents therefore cannot be doubted and further the assessment order or the remand report do not dispute the same. The Appellants had placed on record a complete matrix commencing from the loan request, correlating utilisation request, disbursement certificates, swift messages and FIRC to demonstrate the fact that the loan granted by ICICI Bank, Singapore to Biometrix has solely been invested by Biometrix in CCPS of the Appellant and other group entities of the Appellant. In the circumstances, I hold that the source and genuineness of the investment in the CCPS issued by the Appellant stands proved.

5.28 In fact, a similar analysis has been done by the AO in the assessment order. Para 48 to 55 very cogently appreciates these evidences in a sequence and para 55 gives a finding that the loan so availed by Biometrix has been utilised for investment in CCPS of the four Reliance group companies". For the sake of convenience paras 48 to 55 are extracted below:

48. ICICI Bank Singapore has disbursed a loan of USD 1.7 billion to Biometrix. As per information received from FT&TR division, the IRAS has provided swift messages showing that loan proceeds have been remitted to the Overseas Chinese Banking Corporation, Singapore, SG Bank Account No. 662001767301 of Biometrix. The date wise details of the disbursal are as under:

ITA No.223 & 224/Mum/2016 S.No	Date	Amount in USD
1	18.09.2007	38,35,00,000
2	03.10.2007	22,00,00,000
3	16.10.2007	57,66,25,325
4	12.12.2007	49,25,70,000
Total		167,26,95,325

49. The copies of Tax Residency Certificate and returns of income of Biometrix have been provided. The audited annual accounts of Biometrix for the following periods have also been provided.

S.No	Period Ended
1	30.09.2008
2	30.09.2009
3	31.12.2010
4	31.10.2011

50. As per the financial statements of Biometrix for the period ending September 2008 shows secured term loan of USD 170, 00, 00, 000 has been obtained to finance

the purchase of Company's Long Term Investment. The term loan is secured by (a) an exclusive charge over all the cash flows and assets (including the CCPS subscribed from the proceeds of the loan) of the company, both present and future; and

(b) assignment of option agreement with respect of sale/transfer of the CCPS.

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51. The financial statements of Biometrix also show Long Term Investments available for sale amounting to USD 165,01,25,325. These Long Term Investments are shown as available for sale and are CCPS in unlisted companies.

52. As per the details filed by ICICI Bank, it seen from the Terms & Conditions of the IC/CI Bank, while approving loan of USD 1.2 billion on 28.06.2007, a Special Purpose Vehicle (SPV) was to be set up by Reliance Mukesh Dhirubhai Ambani) group, which would invest in CCPS/CCDs of the infrastructure projects of the Reliance group. The SPV was supposed to enter into Put/Call arrangement for sale of the CCPS/CCDs with a Reliance (MDA) group company (Put Option Obligor). The Put Option Obligor in turn would provide Credit Support for meeting its obligations under the Put Option to the SPV by way of a Non-Disposable Undertaking (NDU) on RIL shares. The number of shares under the NDU was supposed to provide 1.75 times cover on the Put Option Obligation under the Put Agreement.

53. As per the proposed terms & conditions for the loan of USD 1.2 billion, the SPV was to enter into a Put& Call Option for sale/purchase of the CCDs / CCPS with the promoter group company (Put Option Obligor) as follows:

(a) Put Option: Subject to the applicable law, the SPV shall have the right to sell to the Promoter Group companies the CCDs/CCPS anytime post subscription of the CCDs/CCPS by the SPV.

(b) Call Option: Subject to the applicable law, the promoter group company shall have the right to purchase CCDs/CCPS anytime post subscription of the CCDs/CCPS by the SPV.

54. Thereafter Facility Agreements were entered into between ICICI Bank Limited and Biometrix. As per the Facility Agreements of September, 2007 and December 2007 between ICICI Bank Ltd., and M/s. Biometrix Marketing Pvt. Ltd., (the Borrower) it is seen that the "Original Lender" is ICICI Bank Ltd., Singapore Branch. It is also mentioned that the original lender is a company organized and existing under the laws of India (ICICI Bank Ltd.). Therefore, it is clear that the loan has been advanced to the borrower by ICICI Bank Ltd., through its overseas branches and ICICI Bank Ltd., Singapore has acted as an "Agent" for facilitating the loan.

55. The loans so availed by Biometrix has been utilized for investment in the CCPS of four Reliance Group companies ITA No.223 & 224/Mum/2016 Monitoring of the loan transaction by ICICI Bank

and valuation reports 5.29 Para 58 to 63 of the assessment order deals with this subject matter and to put it in a nut shell states that ICICI Bank had not monitored this loan transaction with due diligence and has not obtained proper valuation reports periodically so as to secure the loan. The Appellants in turn had contested this issue and had made elaborate submissions and in a nut shell meaning that there was no lack of diligence on the part of ICICI Bank as the covenants of debt cover and due payment of interest and repayment of principal were met.

5.30 At the very outset, this issue has no relevance in deciding the source of the investment. In fact, it concedes the fact that the loan was given by ICICI Bank to Biometrix. It is beyond the scope of assessment proceedings to find out whether the terms and conditions of a loan transaction between the lender and the borrower in terms of effective monitoring had been carried out or not. What is relevant and determinative is to prove the source of funding which stands proved in this case. The effectiveness or otherwise of monitoring the loan by the lender has no nexus to the aspect of source of funding which alone is the issue for decision. Further, even as per the assessment order and the reports of DDIT (Inv) the loans have been repaid by Biometrix. In the circumstances, it matters very little if there are any variations between the agreed terms and conditions and the actual implementation by ICICI Bank, Singapore. Nevertheless, since this issue has been dealt with in the assessment order and the Appellants has also contested the same, I shall proceed to deal with it.

5.31 According to the Appellants, the total debt cover which was required to be maintained as per the facility agreement at all times was 110% of the loan outstanding. The Appellants have filed a tabular statement showing the debt cover percentage to submit that at all points of time, it was much above the requirement and was ranging between 350% to 420% of the loan outstanding. The Appellants have also submitted that Biometrix been providing the CCP valuation report both under "A Value" and "B Value" methods and adopted the higher of the two in accordance with clause 18.4 of the facility agreement. In terms of the investment agreement, the Appellants are under an obligation to provide valuation report so as to aid Biometrix to submit CCP valuation report to ICICI Bank. Appellants therefore prepared valuation reports both under "A value" and "B value" methods and provided the same to Biometrix and Biometrix in turn took the higher of the two as per the terms of the Facility Agreement for ascertaining the debt cover. The Appellants in short submit that debt cover has been more than the requirement contemplated in the facility agreement. The AO in his remand report does not dispute this position. In the circumstances, the analysis by the AO in the assessment order does not in any manner dispute the source of funding and on the contrary concedes in a way that it is only ICICI Bank which funded Biometrix has no ITA No.223 & 224/Mum/2016 relevance to the dispute under question, especially when the entire loan has been repaid.

Other reasons in the assessment order 5.32 The assessment order has provided few more reasons while confirming the addition. These are dealt with below:

- 1) The contention of the AO that Biometrix was yet to be formed when the loan was sanctioned by ICICI Bank is factually wrong. The submission of the Appellant that Biometrix was incorporated on 15-05-2007 whereas ICICI Bank sanctioned the loan only on 28-06-2007 is evidenced by the materials on record and is not disputed by

the AO.

2) The observation of the AO that the money is only channelized through Singapore for unknown reasons and the investment is not Foreign Direct Investment since an Indian Bank through its overseas branch has financed Biometrix based on the security of the CCPS into which the loan proceeds was invested by Biometrix is neither here nor there.

Simply put, the AO appears to question the rationale for borrowing the money in Biometrix, Singapore and investing the same in Indian companies rather than the Indian companies directly financing their requirements from banks in India. I find in paragraph 20 of the Assessment Order wherein while discussing the report of the investigation wing it is observed that the borrowing was to be through an SPV in a tax efficient administration. Be that as it may, the structuring of this transaction would not lead to the conclusion of unexplained credits u/s 68 of the Act.

3) The next observation of the AO is that the transaction cannot be called "FDI" when the investment is made by taking loan from an Indian bank against security of shares located in India. There are proper regulations for an Indian headquartered bank to establish banking business in foreign countries through branches. Likewise many foreign head quartered banks are carrying on banking business through branches. The AO has mistakenly taken place of incorporation as criteria for determining the source of the loan. In any case, this is not a relevant criteria for the purposes of section 68. The observation only validates the nature and source as explained by the Appellant.

4) The next observation of the AO is that the transaction of Biometrix cannot be regarded as investment since there was no risks and benefits associated with the investment and the present transaction was only a mechanism for financing as the interest payable on the loan by Biometrix was paid by the same Indian companies. I find that the interest has not been paid by the Indian companies. The AO perhaps ITA No.223 & 224/Mum/2016 intends to state that since the interest on the loan borrowed by Biometrix from ICICI Bank, Singapore Branch was paid by Biometrix by selling certain portion of the investment in the CCPS to other Reliance group companies, the source of the interest is the sale proceeds from the sale of such investments. I find nothing unusual that obligations under the loan agreement have been discharged by selling a part of the investments financed by the loan. Interestingly, the finding of the AO that interest on the loan by Biometrix to ICICI Bank, Singapore Branch is met by selling a portion of the CCPS only reaffirms the indebtedness of Biometrix to ICICI Bank, Singapore Branch for investing in the CCPS.

5) The observation that the loan has been sanctioned only by ICICI Bank, India and not by ICICI Bank, Singapore branch and the non-receipt of information from IRAS and ICICI Bank, Singapore relating to bank statements and KYC cannot work to the detriment of the Appellant. Biometrix is a non-resident. IRAS Singapore is governed by the provisions of DTAA and the connected protocols. ICICI Bank Singapore is governed by banking secrecy norms and regulations as per Singapore laws. Non receipt of information based on DTAA and bank secrecy constraints cannot go against the Appellants. In fact, there is more than adequate evidence to prove source and genuineness of the investment. I have already referred to various paras in the assessment order wherein the AO in

unequivocal terms have acknowledged the source and genuineness of the investment especially vide para 48 to 55. After stating so, it is not open to the AO to hold that the investment is not genuine since bank statement could not be obtained. At one breath the AO finds the investment to be genuine and in the same breath without disputing the evidence on record makes observations to the contrary. This approach is not correct and proper.

6) The AO has also stated that the facts have forced him to lift the corporate veil and cited judicial precedents to bring home the point that legal entities which are closely connected may be aggregated and viewed as one concern. The AO has stated that Biometrix is inextricably related to the MDA group of companies and therefore it is a fit case for lifting the corporate veil. The power of the AO to lift the corporate veil is not in question. However, the entity with which the Appellant has transacted is a company established under the laws of Singapore. Its transactions with the Appellant are governed by the India- Singapore Double Taxation Avoidance Agreement. Biometrix is filing its tax returns in Singapore. It is not necessary to disregard such an entity, particularly when the final source would remain the same i.e. ICICI Bank, Singapore Branch which has been properly explained by the Appellant.

ITA No.223 & 224/Mum/2016 5.33 Remand report

1) The AO had filed a remand report dated 04.08.2015. Para 4A(iii) of the remand report states as follows: 'It was ascertained therein that the investment was made by the Biometrix out of loan taken from ICICI Bank, Singapore branch and not out of its own capital. It was also observed that the Biometrix has subsequently repaid the loan from the money raised by sale of Investment made by it in the CCPS of Reliance Gas Transportation Infrastructure Ltd., Reliance Ports & Terminals Ltd and Ekansha Enterprises Pvt. Ltd.

2) The remand report vide para 4A(v) states "Subsequently, the Investigation Wing vide its letter dated 05.02.2014 forwarded its report, informing that Biometrix has taken a loan of USD 1.7 billion from ICICI Bank, Singapore and the same was routed to India through FDI by way of investment in Compulsorily Convertible Preference Shares (CCPS) issued by four unlisted private limited companies of Mukesh Ambani's Reliance Group. It has also been informed that said loan was repaid by Biometrix out of sale proceeds/remittances from Mukesh Ambani's group companies. However, the information on source of interest payment on the loan by Biometrix was not clear as reply from Singapore Authorities to the FT&TR Reference was awaited."

3) Para 4A(vii) of the remand report states "The ICICI Bank secured the loan by creating exclusive charge over all cash flows and assets excluding the CCPS and CCDs invested in from the proceeds of the loan; (ii) Non disposal undertaking on the shareholding of the borrower company in a form and manner acceptable to ICICI Bank and (iii) assignment of Put Option with respect of sale/transfer of CCPS/CCDs."

4) Para 4A(viii) of the remand report states "An understanding was also entered with ICICI Bank, agreeing that the outstanding Put Option obligation shall be backed by a Non Disposable Undertaking on equity shares of RIL such that the same gives a cover of at least 1.75 times of the

outstanding Put Option obligation or face value of the outstanding CCPS/CCDs or the face value of the outstanding CCPS/CCDs, whichever is high."

5) Para 4A(ix) of the remand report states "Accordingly, on approval of the loan by the Credit Committee on 28.06.2007, Genemedix has set up a special Purpose Vehicle viz., Biometrix as subsidiary in Singapore for making investment in various infrastructure projects, whereby it invested 6530.35 crores by acquiring CCPS of four Reliance Group companies."

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6) Para 4A(x) of the remand report states "Considering the fact that complete information of the transaction was not provided by either the shareholders and/ or Biometrix of the investee companies before the Investigation Wing, a reference was made to FT&TR Division, CBDT, New Delhi to obtain information from Singapore Tax Authorities."

7) A perusal of the above shows again that the source and genuineness of the investment stands proved i.e. Biometrix securing the loan from ICICI Bank, Singapore and investing in the CCPS issued by the Appellant and other group companies. Two things are clear. The above referred paras admit of the clear link between the loan and the investment thus satisfying the source test and its genuineness. Secondly, there is no denial or dispute on any of the facts and contentions raised by the Appellant before me on the copious evidence including the swift message which proves the link of the loan and the investment has not been questioned or contested in the remand report.

8) Para 4A (xi) to (xiii) deal with the inability of IRAS and ICICI Bank to provide the bank statement because of the constraints of DTAA and the bank secrecy laws of Singapore. The same is again reiterated in para 4B(ii). The purpose of the bank statement is to prove the link between the loan and the investment. This gets proved more than abundantly through the swift messages wherein all the three banks viz., ICICI Bank, the lender, OCBC Bank, the bankers of Biometrix and HDFC Bank, Appellants' bank names and accounts appear demonstrating a smooth flow of funds and the loans transforming into investments. In the circumstances, para 4A(xiv) of the remand report stating that the AO had concluded that the amount received by the assessee is not an FDI but is unexplained cash credit is without any 5.34 Sections 68 of Income-tax Act, 1961 reads as under: -

"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the assessing officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year."

5.35 Thus, the conditions for applicability of section 68 are as under:-

- (i) Existence of books of account;
- (ii) A credit of sum in the books of account of an assessee; and

(iii) Absence of a satisfactory explanation or no explanation by the assessee about the nature and source of the sum credited.

ITA No.223 & 224/Mum/2016 5.36 Clearly, in the instant case, the conditions at (i) and (ii) above are existing. The appellant has offered extensive explanation. In addition there are several other pieces of evidence and documents available on record as discussed above. It is on the third condition that the A.O. has made the addition and concluded that the explanation is not satisfactory. It is this conclusion that needs to be objectively examined in this appeal.

5.37 Section 68 of the Act obligates an assessee to show evidence both on the nature and source of any sum credited in the books of the said assessee. It needs no elaboration that through a catena of decisions the Courts have laid down the following three fundamental tests which have to be established to discharge the burden under section 68 of the Act:

- Identity of the creditor • Creditworthiness of the creditor, and • Genuineness of the transaction.

5.38 Various courts have discussed the aspects of burden of proof that lies on assessee. Inference can be drawn about the nature of evidence offered, the circumstances explaining the credit and the actions of an assessee that would constitute reasonable discharge of that burden of proof. Some of those cases are mentioned hereunder.

i. Supreme Court in case of CIT v. P. Mohanakala [2007] 291 ITR 278 / 161 Taxman 169 held that the expression "assessee offers no explanation" means where the assessee offers no proper, reasonable and acceptable explanation as regards the sum found credited in the books maintained by the assessee. It further held that the opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material & other attending circumstances available on record. The opinion of the AO is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion.

ii. CIT vs Daulat Ram Rawat Mull (87 1 T 349) (SC): It was held that assessee was not required to prove the source of the source.

iii. 190 ITR 396 (Bom): It was held that the assessee having discharged the initial burden, by giving complete name and address of the bankers and confirmation letters, it was for the Income-tax Officer to show that the explanation rendered by the assessee was not true.

iv. CIT v. Lovely Exports (P.) Ltd. [Appeal No. 11993 of 2007, dated 11- 1-2008]:

ITA No.223 & 224/Mum/2016 If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in

accordance with law, but it cannot be regarded as undisclosed income of the assessee-company.

v. CIT v. First Point Finance Ltd. [2006] 286 ITR 477 (Raj.), CIT v. Bhawani Oil Mills (P.) Ltd. 49 DTR 212:

Where it is found that the investors are genuinely existing persons, they have filed confirmations in respect of investments made by them and their statements are also recorded, amount of share application money cannot be treated as unexplained cash credit and no addition can be made under section 68.

vi. Shree Barkha Synthetics Ltd. v. Asstt. CIT [2006] 283 ITR 377 / 155 Taxman 289 (Raj.), Uma Polymers (P.) Ltd. v. Dy.

CIT[2006] 101 TTJ 124 (Jodh.)(TM):

Where the share application money is received by the assessee- company through banking channel the assessee has only to prove the existence of person in whose name share application money is received. Once the existence of investor is proved it is no further burden of assessee to prove whether the person itself has invested the said money or some other person has made investment in name of that person. The burden then shifts on the Revenue to establish that such an investment has come from assessee-company itself.

vii. CIT v. Gangour Investment Ltd. [2009] 179 Taxman 1 (Delhi), CIT v. Victor Electrodes Ltd. [2010] 329 JTR 271 (Delhi), Dy. CIT v. Dolphine Marbles (P.) Ltd. [2011] 129 ITD 163/ 10 taxmann.com 75 (Jab.)(TM), Bharti Syntex Ltd. v. Dy. CIT 52 DTR 73 (Jp.):

Assessee-company filed letters of the share applicant companies wrote to the ACIT confirming that they had applied for shares in the asses see-company, giving details of draft, copies of resolutions passed by BOO of applicant- companies besides their bank statement/copies of acknowledgement of returns, certificates of incorporations and balance sheets of the applicant-companies wherein investment made in the assessee- company was shown, PAN, ROC certificate, it had discharged the onus which lay upon it under section 68 by establishing the ITA No.223 & 224/Mum/2016 identity and creditworthiness of each shareholder and, therefore, no addition could be made under section 68.

CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80F (SC) In this case assessee gave the names and addresses of the creditors. It was in the knowledge of the Revenue that the creditors were income-tax assesseees. The revenue apart from issuing notices under section 131 did not pursue the matter further. It did not examine the source of income of the alleged creditors to find out whether they were

creditworthy. Therefore, it was held that in these circumstances, assessee could not do any further and it had discharged the burden laid on it.

ix. Dy. CIT v. Rohini Builders [2002] 256 ITR 360 / [2003]1127 Taxman 523 (Guj.):

If the identity of the creditors is proved and the amounts are received by account payee cheques, the initial burden of proving credit is discharged and the source of credits need not be proved x. CIT v. Samtel Color Ltd. 64 DTR 46: In this decision given by the Delhi High Court, it was held that by bringing on record every possible information regarding the depositors included in the application form which included particulars of applicant/depositor, telephone No., particulars of demand draft/cheque through which the deposit was made, tax status of applicant and other deposit with the assessee, if any, assessee had discharged the initial onus laid on it under section 68 and addition could not be made merely for the reason that no confirmation letters were filed in respect of some of the depositors.

5.39 In view of the discussions in the above paras and the plethora of judicial pronouncements, I find that in the facts and circumstances of the instant case, identity of creditors namely Biometrix, the nature of the amount as well as the source of the source, namely ICICI Bank have been established.

5.40 For the reasons elaborated above, it is clear that the Appellants have proved the nature of the transaction which originated as a loan from ICICI Bank which was invested by Biometrix in the Appellant as CPPS. The nature of the transaction is a loan becoming an investment. As regards the source, Biometrix has invested this fund into the Appellant and other group ITA No.223 & 224/Mum/2016 companies as CCPS and Biometrix had borrowed the said fund from ICICI Bank, Singapore and ICICI Bank, Singapore has lend the money as per the terms and conditions of the Facility Agreement. The twin requirements viz., nature and source as envisaged in section 68 of the Act stands fulfilled and therefore the order of assessment making additions on account of this transaction needs to be set aside."

Aggrieved, now revenue is in second appeal before the Tribunal.

10. We have heard rival contentions and gone through facts and circumstances of the case. We have perused the case records and material placed before us. The facts not under dispute or controversy are that a sum of Rs.700 crores was received from Biometrix. As against this amount, the assessee has allotted 7.0 crores CCPS (Series A, B & C) of Rs. 100 each (face value of Rs. 10 each and premium of Rs. 90 each).Biometrix had borrowed the said amount on a loan basis from ICICI Bank, Singapore. Biometrix had utilized the proceeds of the loan from ICICI Bank, Singapore to purchase the compulsorily convertible preference shares issued by Reliance Gas Transportation Infrastructure Limited ('RGTEL'), Reliance Ports and Terminals Limited (RPTL"), and Reliance Utilities Private Limited ('RUL") ('the Assessee"). Now we will, for better cogency and appreciation of facts, place on record dates and events which on an apparent scrutiny would bring to light the

correct facts. Admittedly, most of the records relied on by the AO were not available with the assessee and since the impugned order indicates that the same had been sourced from Inland Revenue Authority of Singapore ('IRAS') and ICICI Bank India, assessee had filed an application before the AO and had secured copies of all the documents which would find reference hereunder. This is the list of Dates and Events as it takes place were placed by the assessee before us and not disputed by revenue:

ITA No.223 & 224/Mum/2016 S.No Date Event Nature of Source Document 1
15.05.2007 Incorporation of ICICI Internal Assessing Officer - Vol 2, Biometrix
Marketing Notes is Page 38 of Extract from Pte Ltd (formerly annexed as Minutes of
the Sixty-Fifth known as Orna Pte Exhibit 1. Meeting of the Credit Ltd) Committee
held on November 7,2007 2 28.06.2007 Credit committee of ICICI Internal
Assessing Officer - Vol 2, ICICI Bank approved Notes is Page 38 of Extract from loan
of USD 1.2 bn to annexed as Minutes of the Fifty-

SPV yet to be formed

Exhibit 2

Eighth meeting of the
credit committee held on
June 28, 2007

'The' extract of the minutes of the 58th Meeting of the Credit Committee held on 28.06.2007 is brought on record. This is certified by the AGM of the ICICI Bank Limited. The minutes deal special purpose vehicle (SPV) to be formed (The Bank might have gone ahead with an in-principle sanction without identifying the beneficiary of the loan thus specifying it as Special Purpose Vehicle yet to be formed). The AO has misconstrued in paragraph 100 to 105(iii) by assuming that Biometrix was formed only post the decision taken on 28.06.2007 whereas the material on record proves Biometrix had already been formed on 15.05.2007. Further the minutes bring out the following aspects clearly: it has taken cognizance of the fact of the host of businesses carried out by the Reliance MDA Group (Investee companies). It states that Reliance group had identified investment opportunities in infrastructure projects like RUL, RG TIL and RPTL. It factors the valuation report of Ernst & Young which had valued the equities in the project at about USD 8 Billion.

The minutes further state that the SPV would invest CCPS/ CCDs of the ITA No.223 & 224/Mum/2016 infrastructure projects and also stipulates that the SPV would enter into anytime Put& Call arrangement for sale of CCPS/CCDs with Reliance MDA Group Company and the put option obligor would provide credit support for meeting its obligation by way of a Non-Disposal Undertaking ("NDU"). In essence the minutes conclude the following:

It identifies the investees and projects;

It takes into account the valuation report where the equities in projects are valued at USD 8 billion That the loan to be sanctioned to the SPV would be invested in CCPS/CCDs, thus identifying the end use restriction.

It also mandated a Put & Call arrangement with one of the group entities and Biometrix and that the entity would provide a non-disposal undertaking of Reliance Industries Limited shares ("RIL shares") The proposed terms and conditions indicate the lender as ICICI Bank, Singapore, retaining their right to allocate the facility amongst its branches. It indicates the purpose towards subscription of CCPS& CCDs in existing infrastructure projects of Reliance MDA group and the loan arrangement was covered by a Put& Call arrangement. It puts a host of obligation on the borrower to ensure security of the loan and allow the borrower to enter into suitable hedging arrangement:

3 28.06.2007 Letter of Intent issued by Letter of Intent is Assessing ICICI Bank to Reliance annexed as Officer -

Holdings BV for USD 1.2
billion term loan facility

Exhibit 3

Vol 2.

ITA No.223 & 224/Mum/2016

The summary of terms and conditions indicate the SPV borrower as an entity which should be a 100% subsidiary of Reliance Holding BV The promoter group is shown as Mukesh Dhirubhai Ambani (MDA') Group The lenders as ICICI Bank, Singapore retaining the right to allocate the facility amongst its branches;

The purpose is to solely use towards CCPS/CCDs of existing infrastructure project of MDA group.

The loan was covered through Put& Call Option. The clause on security and hedging was similar to the proposed terms.

4	20.08.2007	Special resolution by General Meeting of the Appellant for further issue of share Capital under section 81(1A) of the companies Act, 1956 for issue of CCPS on private placement bases	Special resolution passed at the Extraordinary General Meeting (EGM) is annexed as	Company Records
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Exhibit 4

Facts show that since Biometrix is not an existing shareholder in the assessee Company, a special resolution as provided for under section 80 and 81 of the Companies Act, 1956 was passed which requires the approval of 75% of the shareholders for issues of CCPS on private placement basis to any person other than existing shareholders. This special resolution was passed by the assessee in its EGM on the above date thus facilitating the issue of CCPS to Biometrix.

ITA No.223 & 224/Mum/2016

5	20.08.2007	Board of Directors of Appellant authorize the issue of 7,00,00,000 CCPS.	Resolution passed at the Board Meeting of RUL is annexed as Exhibit 5	Company Records
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Taking forward the resolution dated 20.08.2007 passed in the EGM, the Board of Directors of the assessee authorized the issuance of 7.0 crores CCPS of Rs. 10/- each at a premium of Rs. 90/- (total 100) aggregating to 700 crores by way of private placement to Biometrix This resolution identifies the subscriber as Biometrix, the quantum and price of allotment and besides stipulating the terms and conditions of the CCPS.

6	24.08.2007	Resolution by Board of Directors of Biometrix to invest in CCPS of RGTIL, RUL & RPTL	Resolution passed at the Board Meeting of Biometrix is annexed as Exhibit 6	Assessing Officer - Vol 3, Page 164
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The Board of Directors of Biometrix had given authority to invest by subscribing to the issue of CCPS up to an aggregate of Rs. 5000 crores in one or more of the following infrastructure companies incorporated in India viz. RUL, RGTIL and the Appellant, including the Put& Call agreement in respect of CCPS.

ITA No.223 & 224/Mum/2016

7	31.08.2007	Investment agreement between the Appellant & Biometrix executed	Investment Agreement is annexed as Exhibit 7	Company Records
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This investment agreement has been entered into between the assessee and the investor Biometrix.

Clause 2(a) identifies the investment as a subscription to CCPS of 7.0 crores at an aggregate subscription of Rs 700 crores Clause 3 lays down the condition precedent for completion which includes company's warranties, promoter's warranties, investors warranties besides other terms and conditions Clause 4 deals with completion and post completion actions Clause 5 deals with obligations of the companies and promoters in execution and completion Clause 6 deals with representations, warranties and undertaking Clause 7 deals with valuation reports. It obligates the assessee to provide 2 valuation reports i.e. one as per the guidelines under Foreign Exchange Management Act and the other as per the Alternative Pricing Guidelines Methodology.

8	31.08.2007	Put & Call Option Agreement between Ekansha Enterprise Private Limited ("Ekansha") & Biometrix executed	Put & Call Option Agreement is annexed as Exhibit 8	Assessing Officer Vol4
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ITA No.223 & 224/Mum/2016

In terms of the Letter of Intent issues by ICICI Bank Singapore obligating a put and call option Agreement, between Biometrix and anyone of the Group Entities of Reliance MDA Group. To cover the loan arrangement, the investor namely Biometrix entered into a put and call option Agreement with Ekansha which is an entity belonging to the Reliance MDA Group.

Section 2 and 3 of this Agreement provides Biometrix the right to sell and Ekansha the right to purchase the CCPA held with Biometrix at a price as per the pricing guidelines of FEMA.

Purchase price is defined to be the price equal to the lower of (i) the greater of (A) the Valuation Price or (B) Alternate guideline Pricing Price or (ii) the Contract price.

Contract Price is defined as 20% IRR of the subscription price.

Valuation Price is defined as lower of the value determined by the statutory auditor and the Valuation Expert.

Alternative Pricing Guideline Price is based on the net asset value or the earnings per share of the assessee as per the FEMA Pricing Guidelines The purchase price should be the lower of all the above and therefore will always be as per the prevailing FEMA pricing guidelines.

Section 6 deals with a non-disposal arrangement under which Ekansha irrevocably and unconditionally agreed to be the sole legal and beneficial owner of the NDU shares, to be deposited in the DP Account with ICCI Bank. NDU share is defined as RIL shares and DP defined as depository participant shall mean ICCI Bank Limited, It also obligates Ekansha issues instruction to ICCI Bank to freeze the DP Account and not permit clearance of any encumbrance or disposal on the NDU shares.

Section 7 obligate a threshold maintenance value of the NDU shares which has to be 1.75 times of the loan borrowed by the investor viz. Biometrix.

ITA No.223 & 224/Mum/2016

9	05.09.2007	Board of Directors of Biometrix accept the term loan facility provided by ICICI Bank Singapore for USD 1.2 billion	Resolution passed at the Board meeting of Biometrix is annexed as Exhibit 9	Assessing Officer - Vol 3, Page 166
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Directors Resolution passed by The Board of Directors of Biometrix resolving to accept the facility from the ICICI Bank on the terms and conditions contained in the draft facility agreement for the borrowal of USD 1.2 Billion in three tranches.

10	07.09.2007	Facility Agreement between Biometrix and ICICI Bank was executed	Facility Agreement is annexed as Exhibit 10	Assessing Officer - Vol 3, Page 269
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Biometrix entered into a Facility Agreement with ICICI Bank Singapore and ICICI Bank Limited - Bahrain Branch (as Original Lenders) and with ICICI Bank Limited - Singapore (as Agent) for a single currency term facility of USD 1.2 billion. ICICI Bank has diversified the risk in this portfolio by sharing the facility between its Singapore Branch (USD 600 million) and Bahrain Branch (USD 600 million).

As per Section 2 of the Facility Agreement, The facility was made available to the borrower in three tranches of USD 275 million, USD 400 million and USD 525 million for the specific purpose of investing in the CCPS of RGTIL, RPTL and RUL in the ratio of approximately 33:8.5:7 respectively subject to certain conditions precedent mentioned there.

As per Section 3 of the Facility Agreement, the borrower may utilise the facility by delivery to the agent of a duly completed utilization request not later than the specified time.

Section 4 of the Facility Agreement deals with repayment, pre-payment and cancellation.

Section 5 of the Facility Agreement deals with costs of utilization i.e. calculation of interest, payment of interest, fees etc. Section 6 of the Facility Agreement deals with additional payment obligations like tax gross up, tax indemnity, mitigation and claims.

Section 8 of the Facility Agreement deals with representations, undertakings and events of default including valuation and valuation reports, requirements as to financial statements and financial covenants which are detailed below.

Clause 18. 1 of the Facility Agreement requires the borrower to supply to the agent

(i) Its audited financial statements within 120 days after the end of each of its financial year; (ii) its unaudited financial statements within 90 days after the end of each half of its financial year.

As per para 61(i) of the Assessment Order, Biometrix has supplied its audited financial statements for three years.

Clause 18.2 of the Facility Agreement requires the borrower to supply to the agent with each set of financial statements delivered pursuant to Clause 18.1, a CCPS valuation certificate signed by an authorised signatory and reported on by the borrowers auditor.

ITA No.223 & 224/Mum/2016 As per paragraph 61(u) of the Assessment Order, Biometrix has failed to supply the CCPS valuation certificate to ICICI Bank.

However, paragraph 61(iii) of the Assessment Order contradicts the conclusion drawn in paragraph 61(u) by listing the various valuation reports filed by Biometrix.

Clause 18.3 of the Facility Agreement requires the borrower to deliver to the agent the Cop valuation certificate on or before 15 January & 15 July of each year dated as of 31 December and 31 June respectively.

Clause 18.4 of the Facility Agreement requires the higher of A Value and B Value shall be used by the agent for the purpose of determining whether the borrower has complied with the applicable provisions of this Agreement.

Clause 18.5 of the Facility Agreement requires each set of financial statements delivered by the borrower pursuant to Clause 18.1 shall be certified by an authorised signatory and is prepared using applicable accounting policies on a basis consistent with earlier financial statements.

As per Clause 18.9 of the Facility Agreement, prior to the completion of any sale of CCPS by the borrower under the Option Agreement, the borrower shall deliver to the agent a copy of the valuation report which have been prepared and delivered to it in connection with exercise pursuant to the terms of the Option Agreement.

Clause 19 of the Facility Agreement lists the financial covenants. As per this clause, CCPS value means the higher of the A value and B value. A Value means the lower of the value determined by the statutory auditor and the valuation expert. B Value means the value of the CCPS as per FEMA pricing guidelines. Total debt cover means the proportion borne by the CCPS value to the debt due.

As per Clause 19.2, the borrower shall ensure that at all times total debt cover does not fall below 110%.

11	07.09.2007	Deed Of Assignment Of Contract Rights As Security For The Company's Liabilities To ICICI Bank Singapore & the other Finance Parties was executed	Deed of Assignment of Contract Rights is annexed as Exhibit 11	Asses Offic 3, Pa
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Biometrix and ICICI Bank, Singapore entered into an Assignment of Contract Rights Agreement whereby the right to exercise any present or future rights of the borrower under the Option Agreement and each Investment Agreement was assigned by Biometrix in favour of ICICI Bank, Singapore (refer Clause 3).

12	14.09.2007	Special Resolution passed u/s 81(1A) of the Companies Act, 1956 filed with the Registrar of Companies ("ROC")	Form 23 is annexed as Exhibit 12	Compan Record
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As per section 192 of the Companies Act, 1956, all special resolution passed at the meeting of the shareholders is required to be filed with the Registrar of Companies within 30 days of passing of such resolution.

Accordingly, the special resolution passed at the EGM to issue CCPS on private placement basis was filed with the ROC.

13	15.09.2007	Biometrix raising Utilization Request for USD 402,702,500 to ICICI Bank Singapore	Utilization Request letter is annexed as Exhibit 13	Assess Office 3, Pag
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The utilization request made by Biometrix on 15 September, 2007 pursuant to section 3 of the Facility Agreement was disbursed by ICICI on 19 September, 2007 and the same was used by Biometrix to invest in the CCPS of RUL on 11 October, 2007 and 17 October, 2007 as evidenced by the certificate of Foreign Inward Remittance issued by HDFC Bank Limited Serial Number 427679 dated 12.10.2007 and 429497 dated 18. 10. 2007.

14	19.09.2007	ICICI Bank disbursing the loan	Disbursement letter is annexed as Exhibit 14	Company Records
15	20.09.2007	Board of Directors of RUL authorize allotment of CCPS	Resolution passed at the Board meeting of RUL is annexed as Exhibit 15	Company Records

The Board of Directors of the assessee Company authorizes the issue of preference share certificates for 70000000 CCPS 16 21.09.2007 Amount received by Foreign Inward Company RUL from Biometrix Remittance Certificate Records issued by HDFC Bank is annexed as Exhibit As evidenced by the certificate of Foreign Inward Remittance issued by HDFC Bank Limited, Serial Number 420599 dated 21.09.2007, the assessee received INR 701.13 crores.

ITA No.223 & 224/Mum/2016 As required by Section 84 of the Companies Act, 1956, the assessee Company issued six preference share certificate to Biometrix.

18	04.10.2007	Excess Amount received by RUL from Biometrix refunded	Debit advise issued by HDFC Bank is annexed as Exhibit 18	Company Records
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As evidenced by the debit advise issued by HDFC Bank Limited dated 04.10.2007, the assessee refunded excess amount of INR 1 .13 crores back to Biometrix 19 15.10.2007 Valuation report issued by Valuation Company S.R.Batliboi & Co valuing the Report is Records equity share at Rs.5.25 per annexed as share as per FEMA regulations Exhibit 19 Pricing guidelines under FEMA is applicable for issue of shares by resident to nonresident.

Pricing guidelines vide RBI/2004-051207 A.P.(DIR series) circular No, 16 dated 0410.2004 issued by Reserve Bank of India ("RBI") in exercise of the powers under regulation 10A(b) and 10B of the Foreign Exchange Management (transfer or issue of security by a person resident outside India) Regulations, 2000 read with master circulars issued by RBI from time to time requires the issue

price should not be less than the fair valuation of shares done by Chartered Accountant as per the guidelines issued by the erstwhile Controller of Capital Issues in case of unlisted shares.

Clause 5 of the guideline issued by Controller of Capital Issues vide File no. S.1l(21) CCI(1Io/90) dated 13.07.1990 provides that the fair value in case of unlisted shares ITA No.223 & 224/Mum/2016 will be arrived at by the Chartered Accountant on the basis of Net Asset Value ("NAV") and Profit Earning Capital Value ("PECV").

The assessee obtained certificate in accordance with the above requirements.

20	15.10.2007	From filed with RBI for allotment of 7,00,00,000 CCPS to Biometrix on 11.10.2007	FC - GPR is annexed as Exhibit 20	Company Records
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Foreign Investment in India is governed by Section 6(3) of FEMA 1999 read with notification no. FEMA 20/2000 - RB dated 03.05.2000 as amended from time to time. Above regulation requires Form FC-GPR to be filed by a company issuing shares to a person resident outside India along with a certificate from the Company Secretary of the company accepting investment from person resident outside India, a certificate from Statutory Auditors or Chartered Accountants indicating the manner of arriving at the price of shares issued to the person resident outside India.

Accordingly, the assessee company filed form FC-GPR with RBI on 15.10.2007 21 10.12.2007 Security Trustee Agreement Security Assessing between Biometrix and Axis Trustee Officer - Vol Bank signed Agreement is 3, Page 495 annexed as Exhibit 21 Biometrix (as Borrower), Axis Bank Singapore (as Security Trustee), ICICI Bank Singapore, ICICI Bank Bahrain, ICICI Bank Hong Kong (as Lenders) and ICICI Bank Singapore (as Agent) entered into a Security Trustee Agreement whereby Axis Bank Singapore was appointed as Security Trustee to act as the Trustee for the ITA No.223 & 224/Mum/2016 Finance Parties in respect of the secured properties. Under this Agreement, the Agent authorised and directed the Security Trustee to exercise all rights, interests and powers under the Security document and enforce the Security created by the Security document.

22	18.12.2007	Acknowledgment from RBI accepting the forms upon allotment of CCPS to Biometrix	Acknowledgment Letter is annexed as Exhibit 22	Company Records
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The form FC-GPR filed by the assessee Company with RBI upon issue of 70000000 was acknowledged by RBI on 18.12.2007.

23	20.10.2007	Filing of forms with ROC upon allotment of CCPS by RUL to Biometrix	Form 2 is annexed as Exhibit 23	Company Records
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Pursuant to Section 75 of Companies Act, 1956, the company is required to file return of allotment with the ROC within 30 days of allotment enclosing the particulars of securities allotted and details of the allottee. Accordingly, the assessee company filed return of allotment consequent upon allotment of 70000000 CCPS on 20.09.2007.

24	15.03.2008	CCPS converted into dematerialised form in NSDL	Company Records
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ITA No.223 & 224/Mum/2016

Biometrix dematerialized the physical preference share certificates issued upon allotment of CCPS 25 15.01.2008 Valuation Certificate Valuation Report Assessing submitted by Biometrix as on December Officer - Vol to ICICI Bank 31, 2007 to April 4 15, 2011 are annexed as Exhibit As required by the Investment Agreement entered into between the Investee companies and Biometrix, the assessee, RUL and RGTIL delivered valuation reports prepared by Ernst & Young (valuation expert) and the Statutory Auditors. Under the free Discounted Cash Flow (DCF') method and the valuation report was prepared by S. R. Batliboi and Co (Chartered Accountant) as per FEMA pricing guidelines. The valuation report prepared by the Valuation Expert and Statutory Auditor was the A Value and valuation report prepared by SR. Batliboi was the B Value respectively as per Clause 19.1 of the Facility Agreement between Biometrix & ICICI Bank, Singapore. Based on the above valuation report, considering the higher of the A Value and B Value, Biometrix submitted the CCPS Valuation report as per Clause 18.3 of the Facility Agreement entered into with ICICI Bank, Singapore duly reported on by its Statutory Auditor. The CCPS valuation report was submitted disclosing the total debt cover as given below:

S.No	Date of Valuation Report	CCP	Valuation as of	Debt Percentage	Cove
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1	January 15, 2008	December 31, 2007	421.2
2	January 9, 2009	December 31, 2008	403.2

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3	June 30, 2009	March 31, 2009	353.07
4	January 15, 2010	December 31, 2009	393.12
5	October 15, 2010	June 30, 2010	413.17
6	April 15, 2011	December 31, 2010	310.57

11. Ld. CIT DR Shri Dhamija argued on behalf of Revenue. He contested that it is the case of the AO that the Respondent Indian entity had not filed the entire evidence to be able to explain the nature, source and genuineness of the investments made by Biometrix a company incorporated under the laws of Singapore. The AO on the basis of the inquiry report from the Singapore High Commission and the investigation done by the investigation wing had rightly concluded that the so called investor company Biometrix which was shown to have invested into the Respondent Company in the form of CCPS was not having adequate funds of its own and acted as a mere conduit/shell to route investment from unknown sources in the respondent company. The respondent company has tried to explain the nature of the transaction, the source of investment by Biometrix to be a loan sanctioned by ICICI Bank, Singapore and it is claimed that the whole investment has come through proper banking channels and more than adequately documented. The respondent is taking objection to AO asking the source of the investment made by the company Biometrix. It is submitted that that the nature of enquiry undertaken by the income tax authorities would vary from case to case, depending on the nature of the material furnished to them by the assessee, when called upon to do so. In this case, the material in the form of addresses and documents pertaining to Biometrix were enquired into thoroughly by the AO. He found that what was the source of funds into the accounts of Biometrix was not known. Furthermore, the AO's efforts to get the information from Singapore Revenue Authorities through reference were unsuccessful. The assessee made no attempt to assist the AO in these proceedings ITA No.223 & 224/Mum/2016 and did not file the documents evidencing the source of money which had come into the books of the respondent. While it is true that the AO did look into the investigation report and other material so gathered during the course of assessment proceedings, the material provided about the Biometrix's financial and fiscal standing was sketchy. On this basis the inferences drawn by the AO were justified and warranted that the

respondent did not fulfill the requirements of section 68 of the Act.

12. He also submitted the facts and circumstances of each case, which are to be weighed and examined as to whether a particular ratio decided in a particular case could be applied. As noted above, the initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68 of the Act. These are: (i) Identity of investors; (ii) their creditworthiness/investments and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, only then the Department is required to undertake further exercise as discussed above. In the instant case, no such documents are filed and no steps taken by the assessee which could establish the aforesaid three ingredients. The respondent has not even furnished basic requirements of i.e. cheque number, date, amount(s), details of drawee bank etc. for the money received from Biometrix. The bank account of Biometrix was also not produced. Hence the respondents claim regarding investment by the Biometrix remained unverifiable. The AO has noted that the bank statements of Biometrix have not been furnished. However, the AO had secured copies of the swift messages from IRAS, Singapore. A look at the swift messages shows that the three banks involved in the transaction viz., ICICI Bank, Singapore - the lender to Biometrix, OCBC Bank, Singapore - the bankers of Biometrix, and HDFC Bank, Mumbai - the bankers of the assessee into whose account OCBC Bank, Singapore had remitted the monies from the bank account of Biometrix towards subscription of the CCPS issued by the respondent. It is clear that these swift messages alone in the absence of Bank statement of Biometrix cannot be taken as the explanation for the source of money coming in the books of the respondent in the form of CCPS. It is ITA No.223 & 224/Mum/2016 submitted that if the CCPS were quoted in stock exchange and the subscription was open to public at large, the respondent could not have control over the subscription and also could not make a verification of the subscribers as subscription can be done by any person. But whenever the issue is subscribed without quoting it on stock exchange by limited or private limited company, the presumption is very strong against the assessee that subscription is available only to the closely connected persons of the assessee. . The view is supported by the decision of the Hon'ble Delhi High Court Cit vs. MIS. Neelkanth Ispat Udhyog Pvt. Dt. 30 July, 2012 ITA 427/2012 wherein the Hon'ble Court has observed: -

"Once the inference is against the assessee that the issue is subscribed by its closely connected persons, the onus is upon the assessee to prove the identify (sic. identification) of the subscribers and their creditworthiness. Their Lordships of the Hon'ble Calcutta High Court in the case of Bola Shankar Cold Storage. Vs.. JCIT have examined the judgment of the Apex Court in the case of Steller Investment Ltd. and that of the Hon'ble Delhi High Court in the case of Sophia Finance Ltd. and have held that in the case of Steller Investment Ltd. the ratio laid down by the Full Bench of the Delhi High Court was not overruled and it still holds the field. Whenever the issue was subscribed by closely connected persons of the assessee and the assessee has failed to prove the identity and creditworthiness, the addition u/s 68 can be made in the hands of the assessee".

13. He argued that section 68 of the Act has been amended by Finance Act 2012, w.e.f. 01-04-2013 whereby the onus is on the assessee to prove source of source in the case of receipt of share

subscription to the satisfaction of the AO. Reliance is placed on the decision of ITAT, Kolkata Bench in the case of Subhlakshmi Vanijya(P.) Ltd. v. CII, [2015] 60 taxmann.com 60 (Kol. Trib) whereby amendment to section 68 of the Act by insertion of proviso by Finance Act, 2012 was held to clarificatory in the case of closely held companies in which public are not substantially interested and applicable with retrospective effect. The Hon'ble Delhi ITA No.223 & 224/Mum/2016 High Court in the case of Commissioner Of Income Tax v Focus Exports Pvt. Ltd. on 16 September, 2014 ITA No. 218/2012 Date of Decision 16th September, 2014 has noted that:

"Referring to the term identity reference was made to the observations of the Assessing Officer in the remand report that the word identity meant the "condition or fact of a person or a thing being that specified unique person or thing". PAN number or card is relevant but cannot be blindly and without considering surrounding circumstances in all cases be sufficient to treat as a discharge of the onus. Identity is not established by stating that the payment was made through a bank account. On the question of creditworthiness and genuineness, it was observed as under.-

"On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions. Proof or evidence to show the circulation in money was clearly rejected in view of the statutory provision of Section 68 of the Act and on the question of doctrine of source of source or origin of origin it was observed:-

ITA No.223 & 224/Mum/2016 "We are conscious of the doctrine of source of source or origin of origin and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues. Doctrine of source of source or origin of origin cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the

third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However, when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the 'transaction' and that it was not entirely an arms length transaction, resort or reliance to the said doctrine may be counter-productive and contrary to equity and justice. The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus, no assessee should be harassed and harried but any dishonest façade and smokescreens which masquerade as pretence should be exposed and not accepted."

It has also been held:-

"What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be ITA No.223 & 224/Mum/2016 sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them.

In view of the aforesaid discussion the substantial question of law framed in the two appeals is answered in favour of Appellant- Revenue and against the Respondent- assessee. The appeal is accordingly allowed to the extent indicated above. The Appellant is also entitled to costs which is assessed at Rs. 20, 000/-. "

14. He further stated that in the instant case, the assessee could not place any evidence on record to prove the identity, credit worthiness and genuineness of the transaction with so called subscriber Biometrix and the AO was justified in treating this investment as unexplained and made the addition u/s 68 of the Act. In view of the aforesaid discussion, it is submitted that the unmistakably apparent, patent, and conspicuous facts regarding the onus to establish the identity, creditworthiness and genuineness of the transactions were ignored by the first appellate authority. In the facts of the present case, section 68 of the Act was rightly invoked by the AO. It is submitted that the grounds of appeal raised above may kindly be answered in favour of the appellant Revenue and the addition u/s 68 of the Act made by the AO be upheld and confirmed.

15. On behalf of the assessee Id. Sr. Advocate Shri N.Venkatraman argued. He, in view of the above facts, argued that section 68 of the Act obligates every assessee, if explanation is sought for, to show proof both on the "Nature" and the "Source" of any sum found to be credited in the books of the said

assessee. A proviso was introduced to the said section w.e.f 01.04.2013 obligating not only the assessee but ITA No.223 & 224/Mum/2016 the resident person in whose name such credit is recorded in the books of the company to offer their explanation about the nature and source of the sum so credited. The proviso would apply only to such assessee company not being a company in which the public are substantially interested. It was explained that this section would apply only for such transactions which involve a resident assessee. It would not apply to a non-resident and neither the assessee nor the non-resident is under any obligation to disclose the nature and source of the sums found to be credited in the books of the assessee. He referred to the clarification issued by the CBDT dated 26.11.2001 to M/s. Chaturvedi and Shah, Chartered Accountants and copy marked to the CCIT, Mumbai wherein it was clarified that it is not possible to take any action under the Act unless there is linkage between remittance and any source of income in India thus clarifying there is no obligation on the assessee to show or prove the nature and source of the amounts credited in the Books in the case of non-resident. In other words even the amended section introducing the proviso to section 68 of the Act applies only to a resident investor and not a non-resident investor to explain the nature and source of the sums so credited. Hence, he argued that the proceedings attempting to enquire into the nature and source of funding by Biometrix, a non-resident and a tax resident of Singapore is completely without jurisdiction and therefore liable to be set aside.

16. He argued on merits that the AO has travelled and exercised powers beyond his jurisdiction, assessee proceeds on the reason that the twin tests contemplated under section 68 viz. "Nature" and "Source" are more than adequately satisfied in the instant case. As regards the nature of the sums received by the assessee, the analysis of the list of dates and events would more than abundantly show that the sums have been received for issuance of CCPS, which sums have been borrowed by Biometrix from ICICI Bank, Singapore. In other words the nature of the sums received is a consideration of the investor viz. Biometrix out of the loans borrowed from ICICI Bank for issuance of CCPS by the assessee. As regards the source of the sum, the sums have been received by the assessee from Biometrix a non-resident entity, a tax ITA No.223 & 224/Mum/2016 resident of Singapore and Biometrix had sourced these sums in the form of a loan from ICICI Bank, Singapore. He narrated that careful scrutiny of the list of dates and events would lead to an irresistible conclusion both on facts and in law that there is a seamless inseparable link or connection of the loans advanced by ICICI to Biometrix which Biometrix in the capacity of an investor has invested in the assessee company as against which assessee had issued 7.0 crores of CCPS. The perfect linkage unfolds itself so naturally if one would go through the list of dates and events right from the proposal and issuance of letter of intent by CCIT, the nature, the tests clearly gets passed as the evidence on record would show that the loan facility to Biometrix is meant only for an investment in the assessee's company CCPS. The Bank has advanced it as a loan to Biometrix. The approval documents, utilization, disbursement certificates and the FIRC's would clearly evidence the fact that the sums provided as loans by ICICI Bank, Singapore to Biometrix had alone been invested in the assessee's company. In fact the letter of intent dated 28.06.2007 make it clear that the loans advanced shall solely be invested by Biometrix in assessee's company for issuance of CCPS. The special resolution in the EGM and the Board Resolution by the respective boards evidently convey that the loan sourced by ICICI Bank, Singapore by Biometrix is meant only for investment in the assessee Company CCPS. The statutory Compliance and disclosure to the regulatory bodies such as

RBI and ROC by the assessee also go to show that the linkage has been duly reported to the Regulators. It was further argued that the Revenue without furnishing any basis or evidence and without dislodging or discrediting, the unassailable evidence available in its record as gathered meticulously by it from IRJAS, Singapore and ICICI Bank has without reasons and basis had unilaterally concluded that the investments of Biometrix in the assessee company is not a genuine transaction of investment and therefore an unexplained cash credit in terms of section 68 of the Act.

17. Ld. Senior Counsel further argued that Biometrix is not a Shell or Conduit for the reason that the Government of Republic of Singapore and the Government of Republic of India had entered into double taxation avoidance agreement ("DTAA") ITA No.223 & 224/Mum/2016 on 20.04.1981 which is getting extended periodically. This DTAA had undergone a few amendments through various protocols. One such protocol was signed on 29.06.2005. Article 3 of the protocol introduced few tests to conclude whether an entity had come into existence lawfully or created as a shell or a conduit company only to derive undue benefits and advantages out of the treaty. He filed the relevant data which would satisfy the threshold requirement of tests laid down through Article 3 of the protocol and a synopsis of which is provided hereunder:

As per financial statements for the period ending 30-09-2008 30-09-2009 31-12-2010 31-10-2011 Positive tests: An entity is a shell/conduit company if:

(1) its affairs were arranged with the primary purpose to take advantage of the benefits in Article of the this Protocol; No No No No (2) any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities; No No No No Turnover (in USD) 121 433 1 067 440 4 221 643 422 675 Cost of Sales (in USD) - 121 433 - 1 064 580 -4 213 555 - 421 531 Other income (in USD) 896 910 15 045 208 369 3 123 231 (3) its total annual expenditure on operations is less than S\$200,000 in the immediately preceding period of 24 months No No No No salary & Employee benefits (in USD) 102 950 Administrative expenses & other operating expenses (in USD) 5 995 772 38 937 226 29 760 302 110 377 287 Annual expenditure (in USD) 5 995 772 39 040 176 29 760 302 110 377 287 Negative tests: An entity is deemed not to be a shell/conduit company if:

(4) it is listed on a recognised stock exchange of the Contracting State; or

No No No No

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(5) its total annual expenditure on operations is equal to or more

than S\$200,000 in the immediately preceding period of 24 months from the date the gains arise

salary & Employee benefi	Yes	Yes	Yes	Yes
ts (in USD)		102 950		
Administrative expenses & other operating expenses (in USD)	5 995 772	38 937 226	29 543 845	110 377 287
Annual expenditure (in USD)	5 995 772	39 040 176	29 543 845	110 377 287

It was stated that the financial statements of Biometrix provided by the AO for the periods 30.09.2008, 30.09.2009, 31.12.2010 and 31.10.2011 is being filed and assessee filed the same in the paper book annexure 25. According to him scrutiny of the above data would indicate that Biometrix had passed the requisite tests stipulated under the protocol and the turnover, cost of sales and other income for the period September 2008 to October 2011 would show that the business carried out is neither negligible nor NIL and not discontinuous in nature. It is also evident that total annual expenditure on operation is more than S\$ 200,000 during the period September 2008 to October 2011. Since the annual expenditure on operation is more than S\$ 200000 the protocol allowed an inference that the entity is not deemed to be a shell or a conduit company. Considering the business operations and the annual expenditure on operations, it would go to prove that the affairs were not arranged with the primary purpose to take advantage of the benefits in Article 1 of the protocol.

18. Ld. Counsel further made argument without prejudice, that the protocol dated 29.06.2005 was introduced only for the purpose of determining taxability on capital gains. Article 1 of the protocol has deleted paragraph 4, 5 and 6 of Article 13 (Capital Gains) and the same had been replaced by substituted paragraph 4 which reads as under:

'Gains derived by a resident of a contracting state from the alienation of any property other than those mentioned in paragraphs 1,2 and 3 of this Article shall be taxable only in that state' ITA No.223 & 224/Mum/2016 According to him the AY under question is 2008-09 and sale of CCPS had in fact happened only in the AY2012-13. The protocol test if at all needs to be applied to find out the status of taxability of capital gains only in that year and not in AY 2008-

09. The assessee had proceeded to place on record the material facts as is evident from the financial statements that would go to prove that Biometrix as a genuine entity and had carried on business thus meeting the test laid down in the protocol also.

19. Ld. Counsel also referred to valuation of the CCPS and stated that according to the AO, Biometrix had sold the CCPS at a lesser value than the values determined by the valuation experts under the Facility Agreement and which was provided by Biometrix to ICICI Bank. According the AO, the following RGTIL CCPS were purchased by

RPTL at prices much below the values determined by the valuation experts under the Facility Agreement on the basis of valuation reports obtained for the specific purpose of purchase of the RGTIL CCPS as detailed below:

S.No	Date	Value per RGTIL CCPS as per FEMA Pricing Guidelines for transfer from non-resident to resident (Rs.)	Price at which RPTL purchased the RGTIL CCPS from non-resident (Rs.)
1	29-12-2008	77.72	75.00
2	25-06-2009	88.00	81.55
3	24-12-2009	92.80	85.88
4	31.05.2010	123.63	90.24

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It was explained that the entire analysis and finding on this issue is misconceived both on law and in facts. The issue under consideration for the purpose of section 68 of the Act is to explain the nature and source of the sums credited in the books of the assessee. This has been explained more than adequately in the above paragraphs. The sale and purchase of CCPS by Biometrix and RPTL respectively has no relevance and even the remotest connection to pass the contemplated tests under section 68 of the Act. Any reliance on this segment of the transaction is totally alien and extraneous and in no way would aid in finding out the nature and source of the sums credited. In fact, an analysis on this segment of the transaction, namely sale of the CCPS by Biometrix, leads to a tacit concession by the AO that the nature and source has indeed been explained and unless the investment has come into the books of RPTL, the post investment scenario and its analysis would never have been a subject matter of contemplation. He also explained that the total debt cover which is required to be 110% as per the Facility Agreement was at all times maintained by Biometrix.

The total debt cover at different points in time prior and post the sale of RGTIL CCPS is tabulated below:

S.No	Date	Event	Debt Cover Percentage
1	31-12-2007	Valuation	421.23
2	29-12-2008	Sale of RGTIL CCPS	
3	31-12-2008	Valuation	403.24

4	31-03-2009	Valuation	353.07
5	25-06-2009	Sale of RGTIL CCPS	
6	24-12-2009	Sale of RGTIL CCPS	
7	31-12-2009	Valuation	393.12
8	31-05-2010	Sale of RGTIL CCPS	
9	30-06-2010	Valuation	413.17

Hence, it is clear from the above analysis, that the debt cover percentage was around 400% both prior and post the sale of RGTIL COPS as against the required debt cover of 110% as per the Facility Agreement. The sale of RGTIL COPS based on valuation reports prepared as per FEMA Pricing Guidelines prescribed by RBI in no way was a no cause of concern for ICICI Bank as a lender of the loan. The ITA No.223 & 224/Mum/2016 Facility Agreement conceives the following valuation and the higher of the two valuations were considered for the purpose of debt cover purposes. A Value' means the lower of value determined by the statutory auditors of the investee companies and the value determined by the valuation expert. "B Value" means the net asset value or the earnings per share or any other valuation methodology prescribed under the Pricing Guidelines of FEMA. Consequently, Biometrix had provided the CCPS Valuation Report prepared in terms of the above methodology and considering the higher of the "A Value" and "B Value" as required by clause 18.4 of the Facility Agreement. The investment Agreement between the assessee and Biometrix also envisage preparation of the valuation reports by the assessee under both the methodologies.

20. Ld. Counsel stated that the valuation reports based on which RPTL purchased the RGTIL COPS are prepared in accordance with the FEMA Pricing Guidelines prescribed by RBI whereas the valuation report and valuation certificate submitted by Biometrix to ICICI Bank are as per the requirement of the Facility Agreement.

21. In view of the above undisputed facts Ld. Counsel explained that the AO wrongly presumed the ownership of Biometrix as referred to in paragraph 6 of the assessment order. The balance sheet of Biometrix as furnished by the AO to the assessee indicates that the Reliance Genemedix Plc owns 99% and Strasbourg Holdings P Ltd owns 1% but not mentioned in the assessment order. Again the details furnished vide paragraph 7 is factually wrong as they do not relate to Biometrix as is evident from the balance sheet of Biometrix furnished by the AO. He argued that paragraph 10 of the assessment order refers to the investigation conducted by the investigation wing and the report furnished by DDIT (Inv)-Unit- 11(1) dated 10.07.2012. The extract of the report as reproduced in paragraph 10 are enough to drop the present proceedings in toto as the report concedes the following facts:

ITA No.223 & 224/Mum/2016 "That Biometrix had secured a loan of USD1.7 million from ICICI Bank, Singapore for investing in shares in the form of COPS. It has secured the loan with an option agreement to sell the CCPS to Ws. Ekansha, a group company or Reliance Industries Limited.

Biometrix has repaid the loan to ICICI Bank through the money raised by sale of CCPS to RGTIL, RPTL and Ekansha.

RGTIL, RPTL and Ekansha have filed details and explained the sources of money paid to Biometrix for acquiring the CCPS."

In view of this he argued that when the identity of the investor, the nature of the investment and the process steps carried out for investing the funds is self-evident and well known, the contemplated test of nature and source under section 68 of the Act gets fully satisfied. The transaction under question is a financial investment obtained as a loan and invested as CCPS. How does the size of the premises matter here? The transaction is not relating to a manufacturing plant requiring an elaborate factory and other arrangements nor provision of services using high capacity infrastructure tools. The only question that can come up for consideration is the genuineness of Biometrix. From the data provided by the AO in the form of financial statements, the assessee have already placed on record the threshold tests contemplated under Article 1 and 3 of the Protocol dated 29.06.2005 under the India Singapore DTAA have been completely satisfied and Biometrix is neither a shell or conduit in terms of the above test on the basis of application of data, as found in the balance sheet. Vide paragraphs 18 to 23 of the assessment order, the parties involved in the transaction had been identified, the nature and source of funds duly described, due reference has been made to the investment agreements, option agreement, assignment of contract rights agreement and the statement of charge filed with IRAS, Singapore. Paragraph 20 also states that the report of the DDIT on the perusal of the documents filed show that the whole transaction has been done through a SPV from a tax efficient jurisdiction.

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22. Ld. Counsel also drew our attention to paragraph 33 which brings on record the various documents secured by the CIT Mumbai from IRAS, Singapore. The assessee has already placed on record the list of dates and events on the basis of these records and documents, provided later to the assessee by the AO on the basis of an application dated 15-4-2015. The proceedings concede to the fact that Biometrix is a tax resident of Singapore and information provided by IRAS, Singapore does not dispute the legal and genuine existence of Biometrix. Unless the Protocol tests envisaged vide Article 1 and 3 of the India Singapore DTAA are passed, IRAS would not have approved the tax residency and legal existence of Biometrix. The Revenue officials of Singapore had not drawn any adverse inference against Biometrix as is evident from the list of documents and records furnished. The genuineness of a non-resident entity, if at all, can be doubted or proved by the Revenue officials who have legal superintendence over such entity. Vide paragraph 39 concedes that whatever possible documents that could be provided under due process of law have been provided by ICICI Bank and expressed inability to provide the bank account statement as per the Banking Act of Singapore, it is surprising that vide paragraph 38, the assessing officer holds that the investee companies including the assessee ought to have provided these bank statements of Biometrix. In

spite of the fact that (i) the executed loan agreement between ICICI Bank and Biometrix, (ii) copies of disbursement notices, (iii) copies of actual swift remittance advices by which the loan was disbursed by ICIC Bank to Biometrix and (iv) the audited financial statements of Biometrix evidencing the availing of term loan of USD 1.7 billion are on record and have been perused and after conceding that Biometrix has availed a loan from ICICI Bank and invested the same in the CCPS issued by the assessee. The Assessing Officer has recorded the lack of some documents namely,

(i) the loan account statements of ICICI, (ii) KYC documents of ICICI and (iii) OCBC bank statements showing the credit of the loan (all pertaining to Biometrix) as one of the reasons for not being satisfied about the genuineness of the transaction of the investment in the CCPS. There is such an overwhelming and concrete evidence for the loan of USD 1.7 billion and its investment of the loan in the CCPS of the ITA No.223 & 224/Mum/2016 assessee, non-receipt of these documents in no way diminishes the value of the evidence already available. It is crystal clear from the foregoing discussions that it cannot be the case that only if these documents are available, it will prove the genuineness of the loan taken by Biometrix. These documents are only one more paper which will show that the loan has been provided by ICICI Bank to Biometrix. The non-receipt of these documents in no way can be construed as lack of evidence for availment of loan by Biometrix. The assumptions vide paragraph 43 to 46 that the transaction under question namely the investment of Biometrix in the assessee for issuance of CCPS would constitute international transaction stands negative by the decision of the Division Bench of the Hon'ble Bombay High Court in the case of Vodafone India Services Private Limited vs. Union of India and others pursuant to which the transfer pricing officer had dropped the proceedings vide order dated 29- 01-2015 against the assessee.

23. Paragraphs 47 to 55 is again a sequential capture of the pattern of the transaction bringing, to light the source of source of the funds, the source of the funds, the methodology resorted to for investing the funds in the assessee's entity by Biometrix and the requisite safeguards undertaken in the form of investment agreements, put and call option agreements and assignment of contract rights agreement thus once again bring to the fore the identity of the parties, the actual sources of funding besides the genuineness of the transaction. In fact, once the identity of the party and the source of funding is known, it would automatically lead to the inference that the transaction is only genuine. The presumption vide paragraph 58 that the SPV is yet to be formed based on the extract of the minutes of the Credit Committee dated 28-06-2007 is factually incorrect. Biometrix has come into existence with effect from 15-05-2007 and therefore on the date of preparing of the minutes of the credit committee, the SPV was in fact in existence. The prudent commercial decision taken by the contracting parties cannot be questioned especially in a scenario where unless the loan transforms into an investment and necessary CCPS are issued, collaterals being the very instrument invested i.e. CCPS cannot be ITA No.223 & 224/Mum/2016 placed as a security. The observation vide paragraphs 103 and 104 are strange and overlooks the actual transactional pattern. It is not possible to give collateral without creating the instrument of CCPS in the first instance. CCPS can be issued only when investment flows into the Appellant entity and investment has flown in this transaction against a loan sanctioned by ICIC Bank, Singapore. The findings vide paragraph 105 is intended to tarnish and to cause calculated prejudice as these have been rendered without of any

iota of evidence or proof. When the documents stare at ones face showing that the loans have been advanced by ICICI Bank, Singapore and the Facility Agreement has been entered into between ICICI Bank, Singapore involving de-risking partners like ICICI Bank, Bahrain, how is it open to the assessing officer to conclude that ICICI Bank, India has advanced the loans. However, for the purpose of section 68 of the Act without prejudice to the fact that the findings are absolutely false, this finding itself vindicates the stand as to the nature and source for the purpose of section 68 of the Act.

24. Further, the test under section 68 of the Act is proving the nature and source and not whether something is a viable instrument or not. It is a figment of imagination to state that Indian entities have serviced the interest after conceding the fact vide paragraph 100 that the CCPS were sold and the collection proceeds were utilised for servicing the interest by Biometrix. This finding at paragraph 105(U) is grossly mischievous. The findings vide paragraph 105(iii) and (iv) as to whether the transaction is loan or investment, as long as the genuineness of the transaction is not under question, and when both loan and investment are recognised forms of transactions for the purpose of section 68 of the Act these findings can extend no assistance to the Revenue to presume or draw adverse inferences. As to whether a transaction is an investment or a loan is monitored by the regulator RBI under the provisions of FEMA. These investments have been disclosed as Foreign Direct Investment and the regulator has acknowledged the same. It is settled law that an assessing officer cannot be substituting himself as any other regulator like RBI so as to construe adversely an approved transaction by the regulator. The finding is ITA No.223 & 224/Mum/2016 without jurisdiction and certainly travelling beyond the realms of Act. The remand report of the AO and comments of the assessee are clearly reproduced in the appellate order of First Appellate Authority and the same is being reproduced for the sake of clarity as under:-

"4.9 Remand Report----- 4.91 In the course of the hearing held on 29-05- 2015, my predecessor had sought to clarify on few issues. The Appellants had clarified and placed the documents and evidence in support of the same which were already on record. My predecessor permitted the Appellant to file further submissions on the clarification sought for during the hearing. In pursuance of the same, the Appellants filed further submissions on 29/05/2015 and the same are extracted below:

This Appeal was heard today (29.05.2015) by the Hon'ble Commissioner of Income Tax (Appeals), Mumbai - 8. The matter was argued extensively and the Appellants placed on record written submissions along with Annexures and Support Documents and an executive summary in two sets.

The Annexed Documents are all documents and records furnished by the Assessing Officer obtained from the IRAS, Singapore and ICICI Bank. Appellants filed an application dated 15.04.2015 seeking copies of all these documents and the same was furnished to the Appellants by the assessing Officer on the strength of this application.

A copy of the said application dated 15.04.2015 filed before the assessing officer is hereto annexed as EXHIBIT-A. During the hearing Appellants placed reliance on the opinion dated 26.06.2001 to Overseas Indians Economic Forum issued by Mr. P. Chidambaram, former Finance Minister of India. This opinion finds place between page 449 and 453 of the Paper Book filed on behalf of Reliance Utilities Private Limited and from page 469 to 473 of the Paper book filed on behalf of Reliance Ports and Terminals Limited. Page 450 was missing and ITA No.223 & 224/Mum/2016 therefore the same is hereto annexed as EXHIBIT- B. (For the sake of convenience the entire opinion is annexed.) The Appellants referred to a host of documents starting from the Loan Proposal, Letter of Intent, Investment Agreement, Put and Call Option Agreement, Facility Agreement, Assignment of Contract Rights Agreement, Security Trustee Agreement to show a seamless linkage demonstrating the fact that the Lender ICICI Bank has provided a loan of USD 1.20 Billion to borrower Biometrix, Singapore and this money has been invested into COPS with the Appellants and the other entities of the Reliance Mukesh Dhirubhai Amabani Group viz. Reliance Ports and Terminals Limited, Reliance Utilities Private Limited and Reliance Gas Transportation Infrastructure Limited.

The Appellants also placed on record, the utilization request of Biometrix seeking availment of the loan, Disbursement letter issued by ICICI Bank, Singapore and the swift message of wire transfer issued by ICICI Bank, Singapore effecting the transfer or crediting the loan amount to the account of Biometrix and the corresponding Foreign Inward Remittance Certificates (FIRCs) issued by the bankers of the investee i.e. the Appellants banks confirming the amount loaned by ICICI Bank, Singapore into Biometrix has been invested with the Appellants against issuance of CCPS thus satisfying the sole intended purpose as contemplated by Section 2 clause 3 of the Facility Agreement (Page 179-- 181 and Page 181 - 183 of the Written Submissions of RUL and RPTL respectively).

The Appellant had placed all the records in support of the above submission except the Swift messages issued by ICICI Bank, Singapore.

To recapitulate, the linkage is as follows:

At the first instance, Biometrix had placed a utilization request to avail the sanctioned loaned amount in tranches.

ITA No.223 & 224/Mum/2016 Disbursement Certificate issued by ICICI Bank agreeing to transfer the amount to Biometrix.

The swift message or wire transfer message of ICICI containing the following information viz. The name and address of ordering customer as Biometrix and the name of the Bank of Biometrix to which the credit has been given i.e. Overseas Chinese Banking Corporation Limited (OCBC). Since it is a Dollar transfer, the same is done through Correspondent Banks viz. Bank of New York and J.P. Morgan Chase Bank as intermediaries.

Copy of the FIRC (Page 276 Page 275-276 of the written submissions of RUL and RPTL respectively) issued by HDFC Bank Ltd. (Appellant's Bankers) confirming the receipt of the amount credited by Biometrix towards investment against which CCPS were issued.

The Appellants also place on record a complete matrix co-relating utilization request, disbursement certificate, swift message and the FIRCs to demonstrate the unassailable fact that the loan granted by ICICI Bank, Singapore to Biometrix has been invested by Biometrix with the Appellants and other group entities of Reliance Mukesh Dhirubhai Ambani Group against which corresponding CCPS had been issued. A compilation of the utilisation request, disbursement letters, wire transfer swift messages and the FIRCs is hereto annexed as EXHIBIT-C. During the Hearing, the Appellants referred to the Assignment of Contract Rights Agreement dated 07.09.2007 entered into between Biometrix and ICICI Bank (Page 249 - 263 and Pages 251 265 of the written submissions of RUL and RPTL respectively). The Appellant's refer to clause 1.2.3 defining contracts as follows which is at Page 250 and Page 252 of the Written Submissions filed by RUL and RPTL respectively:

ITA No.223 & 224/Mum/2016 1.2.3. 'Contracts' means the Option Agreement and the Investment Agreements as from time to time amended or and reference to a "Contract"

means any one of the Contracts.

Article 1.2.6 defines Option Agreement, Article 1.2.7 defines RPTL Investment Agreement and Article 1.2.9 defines RUL Investment Agreement (Page 251 and Page 253 of the Written Submissions filed by RUL and RPTL respectively) as under:

Option Agreement means the put and call option agreement dated 30.08.2007 made between Ekansha Enterprise Private Limited (1) and the borrower (2) respecting the grant of certain put and call options in respect of certain CCPS RPTL Investment Agreement means the subscription agreement dated 30.08.2007 between the Borrower (1) and RPTL (2) respecting the subscription by the borrower of CCPS to be issued by Reliance Ports and Terminals Limited.

RUL Investment Agreement means the subscription Agreement dated 30.08.2007 between the Borrower (1) and RUL (2) respecting the subscription by the borrower of CCPS to be issued by Reliance Utilities Limited.

Appellants also drew attention to Article 3 - Assignment (Page 252 and Page 254 of the written submissions filed by RUL and RPTL respectively) wherein it is very clear that the assignment relates to borrower's (Biometrix) present and future rights, title and interest in under and to and the full benefits of each contract (Investment Agreement and Option Agreement) including all rights and benefits in respect of

amounts receivable by or accruing to the borrower.

It is respect-fully prayed that Honourable Commissioner of income Tax (Appeals) may kindly take on record these Additional Submissions and documents and may kindly read these submissions as part and parcel of the ITA No.223 & 224/Mum/2016 Written Submissions filed today and set aside the Assessment Order dated 31.03.2015 and allow the Appeal.

4.9.2 These submissions of the Appellant were forwarded by my predecessor to the AO u/s. 250(4) to enable him file a remand report. The AO filed the remand report dated 04-08-2015 which is reproduced below:

Kindly refer to the above.

Vide above referred letter, your goodself has forwarded copies of written submissions and other documents filed by the assessee, with a direction to make further enquiry u/ s.250(4) of the Act on the addition of 700,00,00000 made under Sec.68 of the I.T Act; 1961 in the assessment order dated 31.03.2015. Your goodself has also asked this office to give reasonable opportunity to the assessee before finalizing the remand report.

Before considering the documents, your kind attention is drawn to the fact that the AO had provided ample opportunity to the assessee vide order sheet notings dated 29.12.2014 & 27.03.2015 etc., to submit all the details and documentary evidences etc., in relation to the investment of 700 crores made by Biometrix Marketing Pvt. Ltd., Singapore in Compulsorily Convertible Preference Shares of the assessee company. All relevant information and explanations offered by the assessee company have been duly considered by the Assessing Officer during the assessment proceedings and also mentioned said fact in the assessment order. Thus, the assessee has availed sufficient opportunity to make its submissions in the matter, hence, it is not a case, where the assessee has been deprived of an opportunity to substantiate and prove the genuineness of the transaction in question. Thus, the additions made were on the facts of the case at the time of passing the assessment order.

A. Remand Report:

ITA No.223 & 224/Mum/2016 Brief Facts of the Case and investigation/enquiries made upto the date of Assessment Order:

As can be observed from the Assessment order, the Assessing Officer reopened the assessment for A.Y.2008-09 after receipt of Commercial Intelligence from the Indian High Commission, Singapore wherein the First secretary (Economic), High Commission of India, Singapore vide his letter dated 10.08.2012 reported the transaction of investment of USD 1627.24 million (6530.35 crores) by Biometrix Marketing Pte. Ltd., (Biometrix) in four Mukesh Ambani group Indian companies. In said report, it was informed that Biometrix has paid-up capital of Singapore Dollars 1,10,000 only and said entity is located in a single room, which was closed most of

the time. Further, it has also been reported that said premises was subsequently occupied by another concern viz., Rikvin. The shareholders of said company were Mumbai based Shri Atul Shantikumar Dayal and Shalin Narain Tandon, wherein the first has 100% holding in Biometrix.

It was reported that the investment was the largest FDI from Singapore to India and the investment made by Biometrix was beyond its proportion as it has a meager equity/share capital of Singapore Dollar 1,10,000 and this raised suspicion over the huge investment made by Biometrix in Indian companies and it was considered necessary that the ultimate source need to be ascertained.

On receipt of said intimation, the Investigation Wing of the Income Tax Department, Mumbai has carried out its investigation in the matter and subsequently the material gathered by the Investigation Wing was forwarded to the Assessing Officer to look into the matter and take appropriate action. It was ascertained therein that the investment was made by the Biometrix out of loan taken from ICICI Bank, Singapore branch and not out of its own capital. It was also observed that the Biometrix has subsequently repaid the loan from ITA No.223 & 224/Mum/2016 the money raised by sale of Investment made by it in the CCPs of Reliance Gas Transportation Infrastructure Ltd., Reliance Ports & Terminals Ltd and Ekansha Enterprises Pvt. Ltd.

On the basis of the above material in possession, the Assessing Officer reopened the assessment for A.Y.2008-09 on 04.01 .2013, after recording his satisfaction that income to the tune of 700 crores has escaped assessment.

Subsequently, the Investigation Wing vide its letter dated 05.02.2014 forwarded its report, informing that Biometrix has taken a loan of USD 1.7 billion from ICICI Bank, Singapore and the same was routed to India through FDI by way of investment in Compulsorily Convertible Preference Shares {CCPS) issued by four unlisted private limited companies of Mukesh Ambani's Reliance Group. It has also been informed that said loan was repaid by Biometrix out of sale proceeds/remittances from Mukesh Ambani's group companies. However, the information on source of interest payment on the loan by Biometrix was not clear as reply from Singapore Authorities to the FT&TR Reference was awaited.

It has been noticed from the details filed ICICI Bank Ltd., that Mukesh Ambani's Reliance group had approached the ICICI Bank for financial assistance by way of foreign loan for the purpose of expansion and diversification of various RIL group cases. The Credit Committee of ICICI Bank sanctioned the disbursal of USD 1.2 billion on 28.06.2007 and further amount of USD 0.5 billion on 07.11.2007. It was also found that Reliance group was the promoter and the actual borrower would be a 100% subsidiary by Reliance Life Sciences BV to be set up in a tax efficient jurisdiction.

The ICICI Bank secured the loan by creating exclusive charge over all cash flows and assets excluding the COPS and CODs invested in from the proceeds of the loan; (ii) Non disposal undertaking on the shareholding of the borrower ITA No.223 & 224/Mum/2016 company in a form and manner acceptable to ICICI Bank and (iii) assignment of Put Option with respect of sale/transfer of CCPS/CODs.

An understanding was also entered with ICICI Bank, agreeing that the outstanding Put Option obligation shall be backed by a Non Disposable Undertaking on equity shares of RIL such that the same gives a cover of at least 1.75 times of the outstanding Put Option obligation or face value of the outstanding CCPS/CODs or the face value of the outstanding CCPS/ooos, whichever is high.' Accordingly, on approval of the loan by the Credit Committee on 28.06.2007, Genemedix has set up a Special Purpose Vehicle viz. Biometrix as subsidiary in Singapore for making investment in various infrastructure projects, whereby it invested 6530.35 crores by acquiring CCPS of four Reliance Group companies.

Considering the fact that complete information of the transaction was not provided by either the shareholders and/or Biometrix of the investee companies before the Investigation Wing, a reference was made to FT&TR Division, CBDT, New Delhi to obtain information from Singapore Tax Authorities.

In response, Inland Revenue Authority of Singapore (IRAS) forwarded the information vide letters dated 12.05.2014 & 19.06.2014 providing following information:

Biometrix's certificates of residence List of directors & employees of Biometrix Financial Statements & I.T Returns of Biometrix Director's Resolution/KYC documents ICICI Bank Statements with details of inward creditors (not for transaction of investment in CPPS) ITA No.223 & 224/Mum/2016 Disbursement related documents Principal & Interest repayment related documents Credit Appraisal Notes Facility Documents etc., From the information it was noticed that the ICICI Bank loan was disbursed to Overseas Chinese Banking Corporation, Singapore.

Since complete information sought has not been received, another reference seeking further information has been sent to the FT&TR Division, CBDT, New Delhi. However, in response to said request, the IRAS provided the bank statement only from the period 01.01.2008 onwards, citing that the information pertaining to earlier period could not be provided as per Singapore Exchange of Information Protocol.

During the assessment proceedings, the AO noticed that the directors of Biometrix viz., Shri Dipesh Pramod Kumar Modi and Shri Ranade Vinay Arvind are residents of India and accordingly summons UI s.131 of the Act were issued, in response to which no-one attended, but Shri Ranade Vinay Arvind informed that he is residing in

Singapore, hence it is not possible for him to attend.

Thus, the Assessing Officer appears to have left with no option, but to summon the Competent Authority of ICICI Bank, Mumbai. However, the bank has also expressed its inability to produce the crucial bank account statement of Biometrix i.e., OCBC Bank Account and/or ICICI Bank account reflecting disbursal of loan.

The Assessing Officer, after taking into consideration the entire facts of the case including the submission of the assessee and information received from ICICI Bank, RBI etc., came to the conclusion that the amount received by the assessee is not a FDI but is unexplained cash credit.

ITA No.223 & 224/Mum/2016 B. Assessing Officer's Comments:

On the basis of discussion made at length in the assessment order from para 73 to 105, the A.O was of the considered opinion that the nature and genuineness of the transaction of investment of CCPS in the assessee company amounting to Rs.700,00,00,000 was not explained. Therefore, the A.O invoked Section 68 of the Income Tax Act, 1961 and considered the entire amount of Rs.700,00,00,000 as unexplained cash credit in the hands of the assessee company and accordingly added the same to the total income of the assessee company and initiated penalty proceedings u/s.271(1)(c) of the Income Tax Act, 1961 for furnishing inaccurate and/or concealment of particulars of income.

It is to further submit that the assessee company and the ICICI Bank have expressed their inability to produce the Bank Account statement of Biometrix to which the loan was disbursed i.e., Overseas Chinese Banking Corporation, Singapore. Even before your goodself, the assessee has placed several other documents but has failed to produce the said crucial document. It is understood that the IRAS has expressed its inability to furnish said document/information owing to certain limitations on it as the information pertained prior to 1998, however, it is surprising that the assessee, being a Reliance group company, and at such a point of time, where the AO made an addition of Rs.850 crores suspecting the transaction to be non-genuine in absence of certain important documentary evidences and the approach of the Indian lender bank in safeguarding its interest in lending a huge amount to a newly created overseas company through its overseas branch, still not come forward with relevant extract and/or copies of such bank account statement to refute the conclusions drawn by the Assessing Officer and holding the amount to be unexplained cash credit u/s.68 of the Income Tax Act, 1961.

ITA No.223 & 224/Mum/2016 While remanding the matter to the undersigned, your goodself has asked to make further inquiries with respect to additions made under section 68 of the Act. As mentioned in para 4(8) above, the assessing officer has tried all possible avenues for gathering information before making the additions. Apparently, the AO has explored all possible sources for enquiry for deciding the issue under consideration. While remanding the matter, no directions are given for making any specific enquiry by your goodself. In the light of the above, it is requested that

this office may kindly be, given suitable directions with regard to further investigation, if any, to be carried out by this office so that further necessary action can be taken."

25. We find that the assessee filed reply in receipt of the remand report no. Dy.CIT-3(3)(1) /Remand Report/RULI2015-16 dated 4th August 2015 filed by the DCIT- 3(3)(1), Mumbai. We find that a sum of Rs.700 crores was received by the assessee from Biometrix, a non-resident and a tax resident of Singapore by way of subscription to the Compulsorily Convertible Preference shares ("CCPS") issued by the assessee during the relevant assessment year and against the above remittance by Biometrix, the assessee has allotted 7.0 crore CCPS (Series A, B & C) at Rs.100 each (face value Rs. 10 + premium Rs. 90 per CCPS). That for the purpose of the above investment, Biometrix had in turn sourced the funds from ICICI Bank, Singapore by way of a loan. That Biometrix had invested the loan so obtained from ICICI Bank, Singapore in the CCPS issued by the assessee and other Group Companies. That Biometrix has come into existence as an incorporated entity from 15.05.2007. That the standard test laid out in Article 1 & 3 of the protocol signed on 29.06.2005 as part of the India Singapore DTAA gets duly satisfied in the case Biometrix and consequently, Biometrix is not a shell/conduit company. That on 28.06.2007, the Credit Committee of ICICI Bank gave an in-principle clearance approving a loan of USD 1.2 Billion. The extract of the minutes evidently identifies the list of investees, the running projects, valuation of the equities in the project, the nature of the loan to be sanctioned in form of CCPS/CCD and putting in place a Put & Call arrangement ITA No.223 & 224/Mum/2016 with a non-disposal undertaking and permitting the borrower to enter into suitable hedging arrangements. That on the same day a letter of intent was issued by ICICI Bank to Reliance Holding BV for USD 1.2 Billion term loan facility on the terms and conditions referred to supra. That the shareholders of the assessee passed a special resolution at an Extraordinary general meeting under section 81 of the Companies Act, 1956 on 20.08.2007. This special resolution was followed by a Board Resolution of the assessee on 20.08.2007 authorizing to issue 7.0 crores of CCPS to Biometrix. On 24.08.2007 board resolution was passed by Biometrix to invest in CCPS of the investee companies viz. Reliance Gas Transportation Infrastructure Limited ('RGTIL'), Reliance Ports and Terminals Limited ('RPTL'), Reliance Utilities Limited (RUL'), (Assessee) up to an aggregate of Rs. 5000 crores. The Investment Agreement was entered into between the assessee and Biometrix identifying the investment, subscription amount, warranties of the company, promoters and investors etc. On 31.08.2007, a Put and Call Option Agreement was entered into between Ekansha Enterprise Private Limited (Ekansha) and Biometrix as per the terms and conditions of the letter of intent issued by ICICI Bank, Singapore. The Put and Call Option Agreement contained a non-disposal clause through which Ekansha would be the sole legal and beneficial owners of the NDU shares to be deposited in the DP account with ICICI Bank and Ekansha had to maintain a threshold value of NDU shares which had to be 1.75 times of the loan borrowed by Biometrix. On 05.09.2007, the Board of Directors of Biometrix passed a resolution to accept the facility from ICICI Bank for the borrowal of USD 1.2 billion in 3 tranches. On 07.09.2007 Biometrix and ICICI Bank entered into a facility agreement. That Section 2 of the above referred Facility Agreement allowed to provide to the borrower, a loan in 3 tranches of USD 275 million USD 200 million and USD 225 million and for the specific purpose of investing in the CCPS of RGTIL, RPTL and RUL(assessee) in the ratio of approximately 33:8.5:7. On 07.09.2007, a deed of assignment of contract rights between Biometrix and ICICI Bank was entered into as a security for the company's liability to the Bank. On 14.09.2007, the special resolution passed by the assessee was

filed with the Registrar of Companies vide ITA No.223 & 224/Mum/2016 Form 23. On 15.09.2007, Biometrix raised utilization request for USD 402,702,500 to ICICI Bank Singapore. On 19.09.2007, the above loan amount was disbursed by ICICI Bank, Singapore. The FIRC (Foreign Inward Remittance Certificate) dated 21.09.2007 issued by HDFC Bank, serial No. 420599 dated 21.09.2007 evidence receipt of INR 701.13 crores by the assessee and on 20.09.2007, the Board of Directors of the assessee authorized issuance of preferential share certificates aggregating to Rs. 700 crores. S. R Batliboi and Co. valued the equity shares at Rs. 14.14 per share in terms of the pricing guidelines vide RBI/2004-05/207A.P (DIR Series) circular No. 16 dated 04.10.2004 read with Regulation 10A(b) and 10B of the Foreign Exchange Management (Regulation) 2000. On 10.12.2007, Security Trustee Agreement was entered into between Biometrix and Axis Bank through which Axis Bank was appointed as security trustee for finance parties viz. Biometrix the borrower and ICICI Bank, Singapore, Bahrain and Hong Kong the lenders. On 15.03.2008, the CCPS were converted into dematerialized form in NSDL. Between 15.01.2008 and 15.04.2011, periodical valuation reports (COP Valuation Report as per clause 18.3 of the Agreement) prepared by Ernst and Young (Valuation Expert) and the Statutory Auditors were submitted by Biometrix to ICICI Bank.

26. We find that AO in his remand report admitted that after carrying out investigation in the matter and on the basis of material gathered by the investigation wing of the Income Tax Department, it has been ascertained that the investment in RUL was made by Biometrix out of the loan taken from ICICI Bank, Singapore. The word 'ascertain' means "find out as a definite fact". There is also an admission that Biometrix has subsequently repaid the loan to ICICI Bank, Singapore. Thus the AO clearly concedes that the source of source of the investment made by Biometrix in the CCPS issued by the assessee is the money taken as loan by Biometrix from ICICI Bank, Singapore. Para 4(A)(v) remand report is again an admission and confession both on the source and the source of source of investment and the impugned proceedings initiated u/s 68 of the Act is without any basis. What is mandated u/s 68 of the Act is the source of funds of the money raised by the assessee and not the ITA No.223 & 224/Mum/2016 repayment of the loan taken by the investor for making investment into the assessee especially after conceding the fact that the loans taken by the investor has been repaid which fact has also been confirmed by ICICI Bank. Consequently, any reference to interest payment and awaiting information from Singapore authorities is clearly out of place, irrelevant lending no credibility to the proceedings. Para 4(A)(vi) to Pare 4(A)(x) of the report are facts ascertained by the revenue, lending only credence to the fact that Biometrix borrowed money for the purpose of investment in the CCPS issued by assessee. Further para 4(A)(xiii) and (xiv) of the remand report observes that ICICI Bank has expressed its inability to produce the bank account statement of Biometrix i.e. Overseas Chinese Banking Corporation ("OCBC Bank") account and/ or ICICI Bank account reflecting disbursement of the loan. The remand report has failed to take cognizance of the following evidence already on record. This is nothing but an additional piece of document or evidence in the light of documentary evidences such as facility agreement between Biometrix and ICICI Bank Singapore, utilization request made by Biometrix to ICICI Bank Singapore, disbursement letter issued by ICICI Bank Singapore to Biometrix, swift messages upon disbursement of loan by ICICI Bank Singapore to Biometrix approving, sanctioning and disbursing the said loan. However, even the expected evidence stated vide Para 4(A)(xiii) about proof of reflection of disbursement of loan in OCBC Bank account of Biometrix from ICICI Bank Singapore is

also on record. The assessee have already filed the swift message issued by ICICI Bank, Singapore crediting the loan disbursement into the bank of Biometrix with OCBC Bank, Singapore. The said swift messages are as under:-

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27. Another fact that HDFC Bank in India which is assessee's banker while issuing FIRC to the assessee has also provided the swift message of OCBC Bank evidencing the movement of funds towards investment from the said bank account of Biometrix with OCBC Bank, Singapore into assessee bank account. The said swift messages are also part of this order. As regards para 4(B)(ii) of the remand report records the finding that both ICICI Bank and IRAS had expressed inability to furnish the bank account statements of Biometrix with OCBC Bank, Singapore. The Paragraph records the fact that Singapore IRAS expressed limitation in furnishing prior to 2006. To clarify this is due to the terms agreed between Republic of Singapore and not furnishing of one of the documents due to restriction in an international treaty cannot be a ground for adding the amount of investment by Biometrix as an unexplained credit. It is surprising as to how ICICI Bank can be expected to provide the bank statement of Biometrix with OCBC Bank, Singapore. Anyhow, when this is not possible for them, the assessee cannot be mandated to comply with the impossible. Further, what is sought for is evidence confirming the disbursal of loan to the said account. The swift messages evidencing the fact that amounts have been disbursed by ICICI Bank, Singapore to the bank account of Biometrix with OCBC Bank, Singapore and further that OCBC Bank has disbursed the said money to the bank account of HDFC Bank of the assessee is already on record. This is additional information over and above the voluminous evidence already available on record proving the source of funds and also the source of source of funds. However, the disbursal of the loans from the respective bank accounts at each stage till it is finally credited to the HDFC Bank account of the assessee stands clearly proved. To reiterate, ICICI Bank, Singapore has disbursed the loan into the bank account of Biometrix with ICICI Bank, Singapore. Swift message clearly establishes that OCBC Bank, Singapore has in turn disbursed the money into the bank account of the assessee which is HDFC Bank. The swift message provided by HDFC Bank evidencing the disbursement from and out of the bank account of Biometrix with OCBC Bank is also on record. Consequently, even the remotest presumption will be legally not maintainable. As regards safeguards of the loan by ITA No.223 & 224/Mum/2016 the lender viz., ICICI Bank, Singapore, the bank has taken more than abundant care in ensuring that its risk is covered and mitigated through various clauses in the Facility Agreement which at this point in time is not relevant in the light of the express concession both vide para 10 of the assessment order and vide Para 4(A)(iii) of the remand report conceding the fact that Biometrix had in fact taken a loan and repaid the same in full.

28. Now the transaction under question is an investment of Rs. 700 crores by Biometrix into the assessee Company in the form of Compulsory Convertible Preference Shares ("CCPS"). We are of the view that the assessee has shown the relevant materials on records for the AO to get satisfied on the nature, source and genuineness of the investment transaction. In our view it remains undisputed that it is Biometrix which had invested into the assessee in the form of CCPS. Admittedly assessee

has placed on record the complete sequence of transaction including the transfer of funds from the bank account of Biometrix into the bank account of assessee and the corresponding allotment of CCPS by the assessee and finally furnishing and filing the statutory declarations and forms both with the Reserve Bank of India ("RBI") and the Registrar of Companies ("ROC"). The Revenue has not disputed this position at any point in time including before the Tribunal. These all documents relating to Biometrix, the borrower or the beneficiary of the loan and ICICI Bank, Singapore, the lender of the loan and all these documents were part of the AO's files, copies of which were applied by the assessee and again furnished. The essence of the matter is that ICICI Bank, Singapore had sanctioned a loan of USD 1.7 Billong to Biometrix for it to invest inter-alia into the assessee in the form of CCPS. We find that the AO conceded that "Investigation conducted by the Investigation Wing", as follows:

"So, as per the report of DDIT(Inv), Unit 11(1), Mumbai M/s Biometrix Marketing Pte. Ltd. (Biometrix) based in Singapore had made investments to the tune of Rs. 6530 crores in the form of Compulsorily Convertible ITA No.223 & 224/Mum/2016 Preference Shares (CCPS) in the following four Reliance Group Companies.

(page 703 of the paper book) (emphasis supplied)

S.No	Name of the Company	No. Of CCPS	Amount of CCPS
1.	MIs Reliance Ports & Terminals Ltd	8,50,00,000	850,00,00,000
2.	MIs Reliance Utilities Ltd	7,00,00,000	700,00,00,000
3.	M/s Reliance Gas Transportation Infrastructure Pvt Ltd.	31,28,44,149	31,28,44,14,900
4.	MIs Relogistics Infrastructure Ltd	18,51,91,300	18,51,91,30,000

29. We also find that the DDIT(Inv)-Unit 11(1), Mumbai conducted enquiries in this case and vide his report dated 10.07.2012 he has given the following findings:

"The investment in shares (CCPS) in India, through FDI route was not out of equity capital of M/s Biometrix Marketing P Ltd., but was out of loan of USD 1700 million from ICICI Bank, Singapore, which was secured with options agreement to sell the shares to M/s. Ekansha, a group company of M/s. Reliance Industries Limited (RIL)." (page 702 of the paper book) (emphasis supplied) We find that ICICI Bank Singapore has disbursed a loan of USD 1.7 billion to Biometrix. As per information received from FT&TR division, the IRAS has provided swift messages showing that loan proceeds have been remitted to the Overseas Chinese Banking Corporation, Singapore, SG Bank account No. 662001767301 of Biometrix. The date wise details of the disbursement are as under:

(page 711 of the paper book)

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SL No.	Date	Amount in USD
1.	18.09.2007	38,35,00,000
2.	03.10.2007	22,00,00,000
3.	16.10.2007	57,66,25,325
4.	12.12.2007	49,25,70,000
	Total	1,67,26,95,325

As per the financial statements of Biometrix for the period ending September 2008 shows secured term loan of USD 1,70,00,00,000 has been obtained to finance the purchase of Company's Long term investment. (page 712 of the paper book) The remand report also details out facts as under:-

"4(A)(vii) The ICICI Bank secured the loan by (i) creating exclusive charge over all cash flows and assets excluding the CCPS and CCDs invested in from the proceeds of the loan; (ii) Non disposal undertaking on the shareholding of the borrower company in a form and manner acceptable to IC/CI Bank and

(iii) assignment of Put Option with respect of sale/transfer of CCPS/CCDs. "

(page 170 of the paper book) (emphasis supplied) We have also raised a query as to whether Biometrix had repaid the loan to ICICI Bank even though this question may not be relevant to decide the fate of the proceedings under section 68 of the Act. The Revenue conceded the fact that these loans have been repaid and this stands also proved independently through the findings rendered at various stages. Even the report of DDIT(InV)-Unit 11(1), Mumbai records the following findings:

"17 (ii) Subsequently, the CCPS held by Biometrix were purchased by three companies of the Mukesh Ambani group. The principal amount of loan from ICICI Bank was also repaid out of remittances from Mukesh Ambani group."

(page 705 of the paper book) (emphasis supplied) ITA No.223 & 224/Mum/2016 We find that Complete financial flow commencing from ICICI Bank finding its way ultimately to the assessee as CCPS investment and this is proved by the swift messages issued by ICICI Bank, Singapore to the bankers of Biometrix and the swift messages issued by the bankers of Biometrix to the bankers of the assessee are already forming part of the AO's record, copies of which were duly obtained. The assessee even during the hearing placed on record a financial chart to demonstrate the sequence

commencing from the date of utilization request by Biometrix till its ultimate credit into the assessee's bank account. The very same chart is being reproduced as under:-

The swift messages covering the entire transaction have been placed on record. It is made clear that all the swift messages are forming part of the this Appellate order& the details of which can found in pages 76 to 81.-

30. To sum up the whole issue in the present appeal by Revenue, is about the source, nature and genuineness of the transaction to determine whether the addition made by the AO under section 68 of the Act is sustainable. Admittedly, in this case, ITA No.223 & 224/Mum/2016 there is no dispute that the assessee issued Compulsory Convertible Preference Shares (CCPS) and the same was subscribed by Biometrix Marketing Private limited, Singapore (Biometrix). It is also not in dispute that for making this investment Biometrix borrowed the money from ICICI Bank, Singapore. All the documents relating to Biometrix were procured by the AO from Inland Revenue Authority of Singapore and ICICI Bank. At every stage, the conclusions reached by the Revenue and CIT(A) are based on these materials on record. We are now required to re-

appreciate the very same materials on record. The authenticity of these materials on record is not in dispute before us. No new materials were relied upon either by the Revenue or by the assessee before us. The assessee argued before us and filed detailed submissions and brought out various aspects of the case based on the very same materials on record which stands undisputed during the entire proceedings viz.,

- a) That Biometrix invested in the CCPS issued by the assessee;
- b) That Biometrix borrowed from ICICI bank, Singapore;
- c) That Biometrix secured the loan given by ICICI Bank, Singapore by assigning the investment agreement and put and call option agreement entered into with the investee companies and option obligors respectively;
- d) That Biometrix has repaid the loan to ICICI Bank out of remittance from Mukesh Ambani group;
- e) That the transaction in question can never be construed as bogus transaction;
- f) That complete financial flow commencing from ICICI Bank finding its way to the assessee disclose the nature source and genuineness of the transaction;
- g) That contemporaneous transactional documents also disclose the nature source and genuineness of the transaction;
- h) That Biometrix genuinely existed in Singapore and was not a shell/ conduit company;

i) That Biometrix maintained adequate debt cover ratio and fulfilled the various covenants under the Facility Agreement; and

j) That the assessee made all the filings with the relevant regulators viz., Registrar of Companies and Reserve Bank of India.

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31. With this, we proceed to deal with the grounds of appeal raised by the Revenue. We will deal with the second and fourth ground of appeal first. The Revenue's ground is that Biometrix is a shell/conduit company. The ld. DR argued before us that Biometrix was incorporated just few months before this investment transaction and was liquidated in 2011 and therefore Biometrix is a shell entity. The ld. Counsel for the assessee argued that Biometrix was a tax resident of Singapore and to ascertain whether an entity is a shell/ conduit company in Singapore, the various tests laid down in India Singapore DTAA is the only relevant factor and that all the positive and negative tests laid down therein is fulfilled by Biometrix during every year of its existence. The Revenue has not contested this position. The CIT (A) has upheld that Biometrix is not a shell/ conduit company. We concur with the finding of the CIT(A) though we are of the considered view, that that this issue is not at all relevant for the purpose of section 68 of the Act in the facts and circumstances of the case, since it is abundantly clear from the materials on record that Biometrix was to be an SPV. Next, we will deal with the fifth and sixth ground of appeal by the Revenue. It concerns as to how Biometrix sold the CCPS at lower than the market value disclosed by them to ICICI Bank. The CIT(A) has dealt with these and observed that the debt-cover ratio at all times was more than that prescribed in the Facility Agreement based on the higher of two different valuation reports furnished using different methods of valuation and that the loan has been repaid by Biometrix to ICICI Bank and hence these issues are not relevant for the purpose of section 68 of the Act. We are unable to fathom as to how these events that relate to periods post the investment are relevant for ascertaining the source nature and genuineness of the investment transaction under section 68 of the Act and hence concur with the finding of the CIT(A).

32. The third ground of appeal which was vehemently argued by the ld. DR is non-availability of bank statement of Biometrix from ICICI Bank was actually invested in the CCPS issued by the assessee. The ld. Counsel for the assessee on the other hand furnished a chart showing the flow of funds from ICICI Bank, Singapore ITA No.223 & 224/Mum/2016 to Biometrix and from Biometrix to the assessee based on evidence in the form of utilization requests, disbursal certificate, swift messages and foreign inward remittance certificate. It was also brought to our notice the AO in the assessment order has recorded reasons for the non-availability of bank statements of Biometrix viz., ICICI Bank has not furnished the statements due to banking secrecy laws under the Banking Act of Singapore and Inland Revenue Authority of Singapore has not furnished the bank statements since the exchange of information protocol was effective only for periods starting 01-01-2008 and not for earlier periods. The ld. CIT(A) has also linked the flow of funds from ICICI Bank, Singapore to the bankers of Biometrix viz., OCBC Bank, Singapore and from OCBC Bank, Singapore to the bankers of the assessee viz., HDFC Bank, India based on the swift messages and held that what can be ascertained by bank statements can as well be satisfactorily ascertained from the swift messages. It

was also argued by the Revenue that due to non-availability of bank statement there is a possibility that monies other than the monies borrowed by Biometrix from ICICI Bank having been invested in the CCPS issued by the assessee. The Id. Counsel for the assessee brought to our notice the audited financial statements of Biometrix which is on record to prove that only one credit entry is found in the books of Biometrix proving the fact only once money entered Biometrix in the form of loan from ICICI Bank and the same borrowed money stands invested in the CCPS issued by the assessee. In our considered view, the bank statement of the assessee and the foreign inward remittance certificate issued by HDFC Bank, Mumbai showing the receipt of money from Biometrix is on record. What is not on record is the bank statement of Biometrix. However, the other materials on record viz., the swift messages and audited financial statements of Biometrix clearly prove that Biometrix borrowed from ICICI Bank and invested the same money in the CCPS issued by the assessee. We are convinced from the materials available on record that Biometrix borrowed from ICICI Bank and invested the same in the CCPS invested by the assessee. Regarding the first ground of appeal questioning the deletion of the addition made under section 68 of the Act, we hold that on review of the materials available on record, we are satisfied that the ITA No.223 & 224/Mum/2016 requirements of section 68 of the Act viz., nature, source and genuineness of the transaction including the identity and the creditworthiness of the investor, are fulfilled. Few questions of law raised by the Revenue are not dealt with for the reasons stated below:

- a) The initial onus is upon the assessee to establish three things to obviate the mischief of section 68 of the Act viz., identity of investors; creditworthiness of investors and genuineness of the transaction. The assessee is in agreement with this proposition and has not contested the same. So, we do not find it necessary to record a finding on this.
- b) The onus is on the assessee to prove the source of the source in case of receipt of share subscription to the satisfaction of the AO.

The assessee has shown with the materials available on record the source of the source obviating the necessity to dwell on this question of law as well.

33. Now, we will go through precedents cited before us. We find that the burden of proving the source of cash credit is on the assessee. When a cash credit entry appears in the assessee's books of accounts, it is assessee's legal obligation to explain the source of such credit entry. This has been clearly held by Hon'ble Supreme Court in the case Sreelekha Banerjee vs. CIT (1963) 49 ITR 112 (SC). But, if the assessee offers an explanation about the cash credit, the department can put the assessee to proof of his explanation and if assessee fails to tender evidence or brukes an enquiry, then the AO is justified in the rejecting the explanation and holding the income from undisclosed sources or unexplained cash credit. But, Hon'ble Supreme Court in the case Parimisetti Seetharamanna vs. CIT (1965) 57 ITR 532 (SC) has held that the burden of proof casted upon the assessee to prove the source, the nature and the character and the credit would apply to a case where the source of receipt is disclosed by the assessee and there is no dispute about the truth of that disclosure and, in such event, the revenue would not be entitled to raise any inference that the receipt is assessable to tax as undisclosed income or unexplained cash credit on the ground that the

assessee failed to lead all the evidences in support of his contention that it is not ITA No.223 & 224/Mum/2016 within the taxing provision. Similarly, Hon'ble Guwahati High Court in the case Nemi Chand Kothari vs. CIT (2003) 264 ITR 254 (GAUH) held that the assessee where established the identity of the creditor and also shown, in accordance with the burden, which rested on him u/s 106 of the Evidence Act, 1872 that the amounts had been received by him by way cheques from the creditors which was not in dispute. Once the assessee had established these facts, the assessee must have taken to have proved that the creditor had the credibility to advance the loan. Thereafter the burden shifted to AO to the contrary. The failure on the part of the creditor to show that their sub-creditor had credit worthiness to advance the said loan amount to the assessee, could not, under the law be treated as income from undisclosed sources particularly, when there was neither direct or circumstantial evidence on record that the said loan amount actually belong to, or were owned by, the assessee.

34. Further, Hon'ble Supreme Court in the case Sreelekha Banerjee (supra) has also held that if the explanation given by the assessee shows that the receipt was not of an income nature, the department cannot act unreasonably and reject the explanation to hold that it was income. If, however, the explanation is unconvincing one which deserved to be rejected, the revenue can reject it and draw inference that the amount represents income either from sources already disclosed by assessee or from some undisclosed sources. But in the present case before us the assessee has directly established the nexus of loan taken by Biometrix from ICICI Bank, Singapore and this was invested in the CCPS issued by assessee and this is proved by the swift messages (above reproduced) that the money has actually travelled to assessee. Here the assessee is able to prove the source of the source despite the fact the assessee cannot be presumed to have special knowledge about the source of source or the origin of origin. It is to be mentioned that the case is discussed in the above were almost all decided under the provisions of 1922 Act. But, we find that it was held in every case, where a person is sought to be taxed for something which, he claims, does not belong to him, the findings of fact and the material on record must support the claim of the revenue. Moreover there should be some direct nexus ITA No.223 & 224/Mum/2016 between the confusion of fact arrived at by the revenue and the primary facts upon which that conclusion is based. This view is taken by Hon'ble Supreme Court in the case CIT vs. Daulat Ram Rawatmull (1973) 87 ITR 349 (SC). But in the present case this is not the case of revenue rather the assessee able to prove conclusively that the CCPS issued by it to Biometrix is directly financed by ICICI Bank, Singapore. In view of these facts and circumstance and precedents cited above, we are of the considered view that the Assessing Officer has made this addition of unexplained cash credit without any basis and CIT (A) has rightly deleted the same on the basis of evidences and facts. We confirm the order of CIT(A) and the appeal of Revenue is dismissed.

35. As conceded by both the sides, the facts are exactly identical in the appeal of Reliance Ports & Terminals Ltd in ITA No.223/M/2016 for the AY 2008-09 and hence taking a consistent view, we confirm the order CIT(A) in this appeal also and the appeal of Revenue is also dismissed.

36. In the result, both the appeals of Revenue are dismissed.

Order pronounced in the open court on 03-02-2017.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated:- 03-02-2017

Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI