

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No.117/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2012-13)

Asst. CIT-1(3)(1), Room No. 564, 5 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	M/s. Robinsons Cargo & Logistics Pvt. Ltd. Canara Bank Building, 15/17, Adi Marzan Path, Ballard Estate, Mumbai-400 001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAGCS 9709 K		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Ram Tiwari
प्रत्यर्थी की ओर से/Respondent by	:	Shri Rajeev Wagle
सुनवाई की तारीख / Date of Hearing	:	22.01.2018
घोषणा की तारीख / Date of Pronouncement	:	28.03.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against the order by the Commissioner of Income Tax (Appeals) dated 30.10.2015 and pertains to the assessment year 2012-13.

2. The grounds of appeal read as under:

“Whether on facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs.5,65,31,290/- made u/s. 68 of the Act on the account of share premium charged by the appellant assessee without

considering the decision of the Bombay High Court in Major Metals vs. Union of India (WP No. 397 of 2011 (19 taxmann.com 176) (2012, Bom) on similar facts.”

“Whether on facts and circumstances of the case and in law, the CIT(A) was justified in deleting the entire addition of Rs.5,65,31,290/- made u/s. 68 of the Act on the amount of share premium, despite the fact that the assessee itself had accepted the AO's working of share premium at Rs.27.92 per share and accordingly, the addition u/s. 68 should be restricted to Rs.3,35,29,962/- and not Rs.5,65,31,290/- which was the total premium charged.”

3. Brief facts of the case are as under:

The assessee company was incorporated in 2010. Before the incorporation of the assessee company M/s. Robinsons Cargo & Logistics Pvt. Ltd., there was a Partnership Firm by the name M/s. Robinsons Air Services with Vazirani Family Members only as the Partners. M/s. Robinsons Air Services was converted into a company i.e. M/s. Robinsons Cargo & Logistics Pvt. Ltd. under Part-IX/Section 565 of Companies Act, 1956 on 4.1.2010. In M/s Robinsons Air Services, the Partners of the firm had given loans & the same stood at Rs.10,34,73,000/- as on 31.3.2009. During the F.Y. 2011-12 an amount of Rs.9,10,88,385/- was repaid to the directors on account of their unsecured loans & an amount of Rs.4,50,00,043/- was paid to them towards the repayment of their loans by issuing Rs.5,72,374/- equity shares of Rs. 10 each at a premium of Rs.68.62/-.

4. Separately, the assessee took over a Business Division of M/s. Robinsons Global Logistics (P) Ltd for a consideration of Rs.1,97,69,628/-. The consideration of Rs.1,97,69,628/- was paid by the assessee to M/s Robinsons Global Logistics (P) Ltd by issuing Rs.2,51,458/- equity shares of Rs. 10/- each at a premium of Rs.68.62/- per share.

5. Thus, the share capital of the company as on 31.3.2012 stood at Rs.2,32,38,320/- comprising of 23,23,832 equity shares of Rs. 10/- each. The share premium account as on 31.3.2012 stood at of Rs.5,65,31,290/- (i.e. share premium of Rs. 68.62/- in respect of 8,23,832 shares issued as stated above). Out of the above 8,23,832 equity shares issued during the year, 2,51,458 equity shares were issued to a group concern viz M/s Robinsons Global Logistics (P) Ltd against business transfer as stated in Para 6 above & 5,72,374 equity shares were issued to the Promoters (i.e. Vazirani family) in lieu of their loans outstanding to the extent of Rs.4,50,00,044/- as stated above.

6. In this background, the Assessing Officer enquired the justification of issue of shares at a premium. He was not satisfied with the assessee's explanation. He concluded as under:

5.5 In view of all above mentioned facts and circumstances of the case the shares issued at a premium of Rs.68.62 cannot be justified merely on the ground that this influx is from the related parties and considered to be of capital receipt in nature and hence out of the purview of taxation. However, as per section 68 any amount which is credited in the books of the assessee and the nature and the source thereof as explained by the assessee in the opinion of the Assessing Officer is unsatisfactory then the amount can be construed to be unexplained cash credit. In this specific instance the amount of Rs.5,65,31,290/- is grossly unjustified to be an allowable share premium and hence an amount of Rs.5,65,31,290/- is hereby added back to the total income of the assessee u/s. 68 r.w.s. 56(1)(viib) of the Income Tax Act, 1961.

7. Against the above order, the assessee appealed before the Id. Commissioner of Income Tax (Appeals). The Id. Commissioner of Income Tax (Appeals) noted that there was no inflow of any money towards shares during the year as the shares were

issued against loans and also against transfer of assets. The assessee's submission in this regard before the Id. Commissioner of Income Tax (Appeals) was as under:

4.4 The issue of shares at a premium by private limited companies is not controlled by any authority whatsoever. The issue of share premium of private limited companies has been addressed by the Income Tax Act, 1961 for the first time in terms of S. 56(2)(viib) w.e.f. 1.4.2013 & applicable from A. Y. 2013-14 only & not prior to that. It may be noted that there was no section existing in the Income Tax Act, 1961 upto A. Y. 2012-13 where under share premium received on issue of equity shares could be taxed as an income of the Company concerned except where the identity & capacity of the shareholder was doubtful.

4.5 In the present case, as far as 5,72,374 equity shares issued to the Directors /Promoters were concerned, there was no question of proving identity & capacity of the Directors/Promoters since the loans from the Directors/Promoters of the company were already existing in the books of accounts of the company for many years & the same were converted into equity shares at a premium as stated above. The loans outstanding were capital receipts not attracting Income Tax & just by converting them into a equity share capital, it cannot turn into a revenue receipt taxable under I. T Act, 1961. The loans were a liability appearing on the liability side of the balance sheet & as a share capital also (after conversion) it appeared on the liability side of the balance sheet of the company.

4.6 As far as 2,51,458 equity shares issued to M/s Robinsons Global Logistics (P) Ltd are concerned, they were issued against the consideration in the form of business transfer & the net assets of Rs. 1,97,69,628/- were received by the Company against the issue of the shares at a premium. Here again, there was no question of proving identity & capacity since the net assets worth Rs.1,97,69,628/- were received by the Company where against equity shares were issued at a premium as stated above.

4.7 The appellant submitted that in the absence of any inflow of any money during the F. Y. 2011-12, Section 68 could not have been invoked at all by the Assessing Officer & as such, the addition made by the Assessing Officer to the tune of Rs.5,65,31,290/- u/s 68 needs to be deleted in Toto on this count itself. In support of the above submissions, the appellant relied on various case laws including the judgments in –

1. Vodafone India Services (P) Ltd. Vs UOI - 2014] 368 ITR 1 (Bom)
2. Shell India Markets P, Ltd. Vs. ACIT - 2014] 369 ITR 516 (Bom)

4.8 Without prejudice, the Assessing Officer himself had arrived at the fair share premium amount of Rs.27.92 per share of Rs. 10 each. And hence, what could have been added, if at all, u/s. 56(2)(viib) of the I T Act, 1961 was the difference between the share premium of Rs.68.62/- charged by the Appellant & share premium of Rs.27.92/- calculated by the Assessing Officer. Thus, the Assessing Officer could have added only Rs.40.70/- per share of Rs. 10 each aggregating to Rs.3,35,29,962/- only (i.e. Rs.40.70 X 8,23,832) & not Rs.5,65,31,290/- which was the total premium charged by the Appellant.

8. Upon consideration of the submissions, the Id. Commissioner of Income Tax (Appeals) accepted the submissions that section 56(2)(viib) was not applicable for the concerned assessment year. He also found that section 68 was not applicable as the identity, creditworthiness and genuineness was satisfied. He referred to the decision of the ITAT, Mumbai in the case of *Green Infra Ltd. vs. ITO* (in ITA No. 7762/Mum/2012 dated 23.8.2013 for A.Y. 2009-10) and *ACIT vs. Gagandeep Infrastructure Pvt. Ltd.* (ITA No. 5784/Mum/2011 dated 23.4.2014 for A.Y. 2008-09). The Id. Commissioner of Income Tax (Appeals) concluded as under:

5.8 In the present case, Assessment Year involved is 2012-13 and therefore Section 56(1)(viib) of the I T Act, 1961 is not applicable. In view of this clear legal position, the dispute regarding justification of premium is meaningless. The matter has to be considered only u/s 68 of the I T Act, 1961. The Assessing Officer has not doubted the transaction in any manner as there was nothing worth investigation for the simple reason that no money was introduced in the books of appellant. The appellant company came into existence on conversion of a partnership concern M/s Robinsons Air Services and partners of the erstwhile firm M/s Robinsons Air Services has advanced loans to this Firm. After conversion from firm into a company, appellant company allotted shares at premium to the partners of erstwhile firm in lieu of part of outstanding loans. Similarly, appellant company purchased assets from another Group concern M/s Robinsons Global Logistics (P) Ltd and consideration for assets sold was paid by allotting shares at premium. Thus, it is a case of restructuring of Group concerns and not of cash credit covered by Section 68 of the IT Act, 1961. It was held in *Shirish Maniar Vs. ITO* (2008) 167 Taxman 81 (Mag)(Mum) that if in account showing credit balance, there is no transfer of money either through cash or

cheque during the year under A consideration, the addition u/s 68 of the IT Act, 1961 cannot be made.

9. Against the above order, the Revenue is in appeal before us.

10. We have heard both the counsel and perused the records. We find that in this case, the assessee company has issued shares at a premium against the outstanding balance in loan account and also against the transfer of assets by a corporate entity. Hence, there is no inflow of cash money as such. The identity and creditworthiness of the share applicants are not in doubt. It is the lack of full justification of share premium that has led to addition u/s. 68 read with section 56(2)(viib) of the I. T. Act. It is to be noted here that section 56(2)(viib) has been inserted by Finance Act, 2012 w.e.f. 01.04.2013, the same reads as under:

Income from other sources.

56. (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

(viib) *where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:*

Provided that this clause shall not apply where the consideration for issue of shares is received—

- (i) *by a venture capital undertaking from a venture capital company or a venture capital fund; or*
- (ii) *by a company from a class or classes of persons as may be notified by the Central Government in this behalf.*

Explanation.—*For the purposes of this clause,—*

- (a) *the fair market value of the shares shall be the value—*

- (i) *as may be determined in accordance with such method as may be prescribed; or*
 - (ii) *as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher;*
- (b) *"venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of Explanation 1 to clause (23FB) of section 10;*

11. The above provision is applicable from assessment year 2012-13. It has been held by the Hon'ble jurisdictional High Court in the case of *CIT vs. Gagandeep Infrastructure Pvt Ltd* [2017] 394 ITR 680 (Bom) that such amendment in section 68 by Finance Act, 2012 with effect from 01.04.2013 is effective from assessment year 2013-14 only. Hence, clearly addition u/s. 56(2)(viib) cannot be sustained for the assessment year 2012-13 which is the case here. In such factual background, the addition in this case has been rightly held by the Id. Commissioner of Income Tax (Appeals) to be not sustainable. The Revenue has only raised the applicability of the decision of Hon'ble jurisdictional High Court in the case of *Major Metals vs. Union of India* (WP No. 397 of 2011 (19 taxmann.com 176) (2012, Bom). However, the facts of that case were that the Hon'ble jurisdictional High Court approved the settlement commission's finding that the huge unjustified share premium and share application money received from bogus shareholder is liable for addition u/s. 68. In the present case, there is no case that the shareholders are bogus.

12. Another ground raised by the Revenue is that when the assessee himself has accepted the Assessing Officer's working of share premium at 27.92, the entire addition should not have been deleted. However, once it is noted that the addition on account of unjustified share premium u/s. 56(2)(viib) cannot be made in the present assessment year, on the touch stone of Hon'ble jurisdictional High Court cited above, this ground raised by the Revenue is also liable to be dismissed.

13. Thus, in the present case, the Assessing Officer has not doubted the identity, creditworthiness and genuineness of the transaction. Shares have been issued to erstwhile partners of the firm, taken over, against their outstanding in loan account. Shares have also been issued to a group company on taking over of assets. Hence, no addition u/s. 68 is permissible. Further the addition u/s. 56(2)(viib) is not sustainable for the relevant assessment year. Hence, the Id. Commissioner of Income Tax (Appeals) has rightly deleted the addition made by the Assessing Officer u/s. 68 r.w.s. 56(2)(viib).

14. Accordingly, in the background of the afore-said discussion and precedent, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). Accordingly, we uphold the same.

15. In the result, this appeal filed by the Revenue stands dismissed.

Order pronounced in the open court on 28.03.2018

Sd/-

(Amarjit Singh)

न्यायिक सदस्य / Judicial Member

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 28.03.2018

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai