

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH : KOLKATA

[Before Hon’ble Shri A T Varkey, JM, & Shri M.Balaganesh, AM]

I.T.A No. 2270/Kol/2016

Assessment Year : 2012-13

ITO, Ward-10(4), Kolkata

-vs-

M/s Trend Infra Developers Pvt. Ltd.

(Appellant)

[PAN: AADCT 6373 M ]

(Respondent)

I.T.A No. 2273/Kol/2016

Assessment Year : 2012-13

ITO, Ward-10(4), Kolkata

-vs-

M/s Happy Bagans Pvt. Ltd.

(Appellant)

[PAN: AACCH 3712 K ]

(Respondent)

For the Appellant : Shri Altaf Hussain, Addl. CIT Sr. DR

For the Respondent : Shri Manish Tiwari, FCA

Date of Hearing : 26.09.2018

Date of Pronouncement : 26.10.2018

**ORDER**

**Per M.Balaganesh, AM**

1. These appeals by the Assessee arise out of the common order of the Learned Commissioner of Income Tax(Appeals)-4, Kolkata [in short the ld CIT(A)] in Appeal Nos. CIT(A)/Kolkata-4/10387 &10393/15-16 dated 29.09.2016 against the order passed by the ITO, Ward-10(4) , Kolkata [ in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 12.03.2015 for the Assessment Year 2011-12. Both the appeals involve identical issue and hence disposed off by this

common order for the sake of convenience. With the consent of both the parties, the appeal in I.T.A. No. 2273/kol/2016 is taken up and both the parties fairly agreed that the decision rendered thereon would equally apply to the other appeal in I.T.A. No. 2270/kol/2016 also in view of the identical facts except with variance in figures.

2. The only effective issue to be decided in this appeal (i.e. I.T.A. No. 2273/Kol/2016) is as to whether the ld. CIT(A) was justified in deleting the addition made towards share premium in the sum of Rs. 2,88,92,100/-, in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee company raised share capital and share premium during the year under appeal. The ld. AO observed that since there was no substantial business activity carried on by the assessee, the assessee company cannot command huge share premium. Accordingly he sought to verify the veracity of the share capital and share premium raised by the assessee. The assessee submitted that it is engaged in the business of trading and investment in shares of limited companies. The assessee raised share capital and share premium from the following share holders:

|                                |                          |
|--------------------------------|--------------------------|
| Atlantic Merchants Pvt. Ltd.   | Rs. 3,50,000/-           |
| Ayush Vinimay Pvt. Ltd.        | Rs. 1,57,00,000/-        |
| Matarani Marketing Pvt. Ltd.   | Rs. 20,00,000/-          |
| Positive Properties Pvt. Ltd.  | Rs. 80,00,000/-          |
| Skylight Trade Links Pvt. Ltd. | Rs. 20,00,000/-          |
| Zenstar Commotrade Pvt. Ltd.   | Rs. 9,00,000/-           |
| <b>Total</b>                   | <b>Rs. 2,89,50,000/-</b> |

Out of total sum of Rs. 2,89,50,000/- a sum of Rs. 57,900/- was attributed towards share capital and remaining sum of Rs. 2,88,92,100/- was attributed towards share premium. Notice u/s 133(6) of the Act were issued to all the share holders which were duly replied

by them directly before the Id. AO. The Id. AO observed that reply sent by the share holders were almost identical in style and submitted almost at the same point of time. Even address of the registered office of some of the companies were same with common directors. Accordingly, the Id. AO alleged on the connivance of the assessee with the shareholder companies. The summons u/s 131 of the Act was issued to the directors of the assessee company to examine the receipt of premium and the assessee was also directed to produce the directors of the share holder companies for examination of identity, genuineness of transactions and creditworthiness of the investors. The Id. AO observed that the summons issued u/s 131 of the Act remained partially complied and the assessee did not produce the directors of the investor companies before the Id AO. For non-compliance of the summons u/s 131 of the Act in part, by not producing the directors of the share holder companies, the Id. AO concluded that the share premium raised by the assessee in the sum of Rs. 288,92,100/- as unexplained cash credit u/s 68 of the Act. The Id. AO however accepted the receipt of share capital in the sum of Rs. 57,900/- from the very same shareholders as genuine in the assessment.

3.1. The assessee pleaded before the Id. CIT(A) that it had furnished various documentary evidences substantiating the share capital along with share premium. The documents so furnished inter alia included copies of income tax return acknowledgement of shareholders, the statement of source of funds, audited financial statements, copies of relevant bank statements in respect of accounts from which share application monies were paid , PAN, address of share subscribers for the year ended 31.03.2012. The assessee also furnished a copy of return filed, allotment of shares in form no. 2 filed with ROC. The assessee filed certificate of incorporation of all the shareholders companies together with share allotment letters issued to them. The assessee also submitted each of the assessee subscriber company was regularly assessed to income tax and the payments towards share capital and share premium amounts were made by them to the assessee through their respective bank accounts. It was also

submitted that the notice issued u/s 133(6) of the Act to the share subscribers independently were duly complied with by them before the Id. AO. Even the details called for u/s 131 of the Act were also complied with by the assessee. It was also submitted that from the perusal of the bank statement, it could be seen that there were no cash deposits made prior to the issue of cheques to the assessee company. It was pleaded that apart from the aforesaid documents, confirmations together with explanation with regard to immediate source of payment of share application monies were also furnished before the Id. AO. It was pleaded that the assessee also placed on record the following details of investible funds available with the share subscriber companies to make the investment in the assessee company.

| <u>Name of the Company</u>    | <u>Investible Funds available as per Financials</u> | <u>Amount Invested in the appellant company</u> |
|-------------------------------|-----------------------------------------------------|-------------------------------------------------|
| Atlantic Merchants Pvt. Ltd.  | 49,16,00,000/-                                      | 3,50,000/-                                      |
| Ayush Vinimay Pvt. Ltd.       | 9,96,45,000/-                                       | 1,57,00,000/-                                   |
| Matarani Marketing Pvt. Ltd.  | 37,54,98,800/-                                      | 20,00,000/-                                     |
| Positive Properties Pvt. Ltd. | 3,42,00,000/-                                       | 80,00,000/-                                     |
| Skylight Tradelinks Pvt. Ltd. | 1,86,00,000/-                                       | 20,00,000/-                                     |
| Zenstar Commotrade Pvt. Ltd.  | 49,38,00,000/-                                      | 9,00,000/-                                      |
| Total                         |                                                     | 2,89,50,000/-                                   |

It was submitted that from the aforesaid documents and evidences, the identity and creditworthiness of the share subscribers stand conclusively proved together with the genuineness of the transaction. It was submitted that the share subscribers had even established the source of source of funds in the instant case. No lacuna, infirmity, falsity or defect was established or proved in the evidences placed on record nor was the Id. AO able to prove any falsity in the explanation furnished by the share applicants in respect of source and/or the source of source of investments. The assessee placed reliance on the decision of various High Courts including Hon'ble Jurisdictional High Court in support of its contentions. The assessee specifically argued before the Id.

CIT(A) that the allotment of shares at a premium cannot be considered as sham or income of the assessee. It was pleaded at a preliminary level that the receipt of share capital and share premium is on capital account and that the same cannot be subject to tax as income. Specific submissions were also made in the context of introduction of section 56(2)(viib) inserted by the Finance Act, 2012 with effect from 01.04.2013 which reads as under:

*“(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 to clause (23FB) of section 10];*

It was pleaded that the aforesaid provisions cannot be made applicable for the year under appeal. Accordingly, it was argued that the issuance of shares of premium cannot be brought to tax under any section of the Income Tax Act up to assessment year 2012-

13. Submissions were also made with specific reference to a proviso inserted by the Finance Act, 2012 w.e.f. 01.04.2013 in section 68 which reads as under:

*“[Provided that where the assessee is a company ( not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless –*

- (a) The person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
- (b) Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:”*

The Ld. CIT(A) observed that the Id. AO had adjudicated the issue with a pre-determined state of mind that the share premium received by the assessee is not genuine. He also observed that the Id. AO held that the shareholders did not exist and the transactions were accordingly an eye wash only for bringing the black money of the assessee only into the company in the garb of share capital and share premium. The Ld. CIT(A) gave a categorical finding that each of the share subscribers are regularly assessed to income tax and that the investments made by each of them were duly and fully reflected in their audited books of accounts as well as in their income tax returns which are part of the paper book. The notices u/s 133(6) of the Act issued by the Id. AO to each of the share subscribers also stood duly complied with. He held that each of the share applicants maintained bank statement which are part of the paper book, from where, it is evident that all the transactions were routed through proper banking channels and duly reflected in their respective books of accounts which proves the genuineness of the transaction beyond doubt. He also observed that all the share applicants explained their respective source of funds in their replies to 133(6) notice directly before the Id. AO and that the net worth of each of the share subscribers are far higher than the amount of investments made by them in the assessee company, which

clearly proved the creditworthiness of the share subscribers to make investments in the assessee company. He held that the very fact that notices u/s 133(6) were duly served on the respective share subscribers and that they were duly replied with by them directly before the Id. AO, proves their identity beyond doubt. Hence, he held that all the three ingredients of section 68 namely the identity of the share subscribers, creditworthiness of the share subscribers and genuineness of the transaction were proved in the instant case by the assessee.

3.2. He also held that the provision of section 56(2)(viib) of the Act is applicable only from assessment year 2013-14 and the same cannot be made applicable for earlier assessment year. The Ld. CIT(A) gave a categorical finding that the Id. AO had not doubted the identity and creditworthiness of the share subscribers and the genuineness of the transactions in respect of receipt of share capital in the sum of Rs. 57,900/-. While that is so, how can the same be doubted for the purpose of receipt of share premium alone. Accordingly he deleted the addition made on account of share premium to the tune of Rs. 2,88,92,100 /- for the year under appeal. Aggrieved the revenue is in appeal before us.

3.3. We have heard the rival submissions. The fact stated hereinabove remain undisputed before us by either of the parties and hence the same are not reiterated for the sake of brevity. At the outset, we find that the assessee had received share capital of Rs. 57,900/- from six shareholders and Rs. 2,88,92,100/- from the very same shareholders towards share premium. The share capital received by the assessee has been duly accepted by the Id. AO within the ken of section 68 of the Act. However, share premium component has been doubted by the Id. AO. We find that the assessee in the instant case had duly complied with by furnishing the complete details of share subscribers to prove their identity, genuineness of the transaction and creditworthiness of share subscribers beyond doubt. These are duly supported by the documentary

evidences which are enclosed in the paper book. The ld. AO had not found any falsity or any adverse inference of the said documents. We find that the Ld. CIT(A) had placed heavy reliance on these documents and had granted relief to the assessee. All the share subscribers are duly assessed to income tax and the transaction with the assessee company are duly routed through banking channels and are duly reflected in their respective audited balance sheets which are also placed on record before us. In any case, once the receipt of share capital has been accepted as genuine within the ken of section 68 of the Act, there is no reason for the ld. AO to doubt the share premium component received from the very same shareholders as bogus. We held that all the three necessary ingredients of section 68 had been duly complied with by the assessee with proper documentary evidences. We find that notices issued u/s 133(6) have been duly complied with. The only grievance of the ld. AO was that the assessee could not produce the directors of the share subscribing companies. In our considered opinion, for this reason alone, there cannot be any addition u/s 68 of the Act as held by the Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation Pvt. Ltd. reported in 159 ITR 78 (SC). We find that the decision of Hon'ble Delhi High Court in the case of Novo Promoters and Finelease Pvt. Ltd. reported in 342 ITR 169 (Del) vehemently relied upon by the ld. DR before us, is not applicable in the instant case, as in the facts before the Hon'ble Delhi High Court, the notices u/s 133(6) have not been duly complied with. Hence the decision rendered by the Hon'ble Delhi High Court in the case referred to supra is not applicable to the facts of the instant case and is factually distinguishable..

3.3.1. We find that the reliance placed by the ld. AR in the decision of Hon'ble Bombay High Court in Pr. CIT vs. Apeak Infotech reported in 88 Taxmann.com 695 dt 08.06.2017 wherein the question raised before the Hon'ble Bombay High Court are as under:

*“A. Whether on the facts and circumstances of the case and in law, the Tribunal was correct to uphold the decision on Commissioner of Income Tax (Appeals) that the share premium received by the assessee-company cannot be taxed under Section 68 of the Act*

*ignoring the ratio laid down by this Court in its decision reported in the case of Major Metals Ltd. vs. Union of India [2013] 359 ITR 450 (Bom)?*

*B. Whether on the facts and circumstances of the case and in law, the Tribunal as well as the Commissioner of Income Tax (Appeals) was right in deleting addition made by the Assessing Officer, by holding that the share premium receipt is capital in nature?"*

The Hon'ble Court held as under:

*Regarding Question A:*

- (a) *The issue raised by the Revenue in this question is to bring to tax the share premium received under section 68 of the Act. We find that the issue of bringing the share premium to tax under section 68 of the Act was not an issue which was urged by the appellant Revenue before the Tribunal. The only issue which was urged before the Tribunal as recorded in para 11 of the impugned order is the addition of share capital and share application money in the hands of the assessee as income under section 28(iv) of the Act. We find that the Commissioner of Income-tax (Appeals) did consider the issue of applicability of section 68 of the Act and concluded that it does not apply. The Revenue seems to have accepted the same and did not urge this issue before the Tribunal. Mr. Bhoot, learned counsel appearing for the Revenue also fairly states that the issue of applicability of section 68 of the Act was not urged by the Revenue before the Tribunal.*
- (b) *It is a settled position in law as held by this court in CIT v. Tata Chemicals Ltd. [2002] 122 Taxman 643/256 ITR 395 (Bom.) that in an appeal under section 260A of the Act, the High Court can only decide a question if it had been raised before the Tribunal even if not determined by the Tribunal. Therefore, no occasion to consider the question as prayed for arises.*
- (c) *In any case, we may point out that the amendment to section 68 of the Act by the addition of proviso thereto took place with effect from April 1, 2013. Therefore, it is not applicable for the subject assessment year 2012-13. So far as the pre-amended section 68 of the Act is concerned, the same cannot be invoked in this case, as evidence was led by the respondents-assesseees before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment. Therefore, admittedly, the Assessing Officer did not invoke section 68 of the Act to bring the share premium to tax. Similarly, the Commissioner of Income-tax (Appeals) on consideration of facts, found that section 68 of the Act cannot be invoked. In view of the above, it is likely that the Revenue may have taken an informed decision not to urge the issue of section 68 of the Act before the Tribunal.*
- (d) *We may also point out that decision of this court in Major Metals Ltd. v. Union of India [2012] 19 taxmann.com 176/207 Taxman 185/[2013] 359 ITR 450 Bom. proceeded on its own facts to uphold the invocation of section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers to shares of the assessee's company were not creditworthy inasmuch as they did not have financial standing which would enable*

*them to make an investment of Rs. 6,00,00,000 at premium at Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by this court in its writ jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this case has been given by the authorities that shareholder/share applicants were unidentifiable or bogus.*

- (e) *In the above view Question No. A is not being entertained in view of the decision in Tata Chemical Ltd. (supra). Accordingly, the question (A) is not entertained.*

*Regarding Question B :*

- (a) *We find that the impugned order of the Tribunal upheld the view of the Commissioner of Income-tax (Appeals) to hold that share premium is capital receipt and therefore, cannot be taxed as income. This conclusion was reached by the impugned order following the decision of this court in Vodafone India Services (P.) Ltd. (supra) and of the apex court in G. S. Homes and Hotel (P.) Ltd. (supra). In both the above cases the court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income.*
- (b) *It is further pertinent to note that the definition of income as provided under section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from April 1, 2013 and thus, would have, no application to the share premium received by the respondentâ€™ assessee in the previous year relevant to the assessment year 2012-13. Similarly, the amendment to section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject assessment year 2012-13 and cannot be invoked. It may be pointed out that this court in CIT v. Gagandeep Infrastructure (P.) Ltd. [\[2017\] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 \(Bom.\)](#) has while refusing to entertain a question with regard to section 68 of the Act has held that the proviso to section 68 of the Act introduced with effect from April 1, 2013 will not have retrospective effect and would be effective only from the assessment year 2013-14.*
- (c) *In view of the above, question No. B as proposed also does not give rise to any substantial question of law as it is an issue concluded by the decision of this court in Vodafone India Services (P.) Ltd. (supra) and in the apex court in G. S. Homes and Hotels (P.) Ltd. (supra). Thus not entertained.*

*Therefore, all the six appeals are dismissed. No order as to costs.”*

3.3.2. In view of the aforesaid observations in the facts and circumstances of the case and respectfully following the judicial precedent relied upon hereinabove, we hold that the Ld. CIT(A) had rightly granted relief to the assessee in the peculiar facts and

circumstances of the case, which in our considered opinion, does not require any interference. Accordingly, grounds raised by the revenue are dismissed.

4. In the result, both the appeals of the revenue are dismissed.

**Order pronounced in the Court on 26.10.2018**

Sd/-  
[A T Varkey]  
Judicial Member

Sd/-  
[ M.Balaganesh ]  
Accountant Member

Dated : 26.10.2018

SB, Sr. PS

Copy of the order forwarded to:

1. ITO, Ward-10(4), Kolkata, P-7, Chowringhee Square, 3<sup>rd</sup> Floor, Kolkata-700069
2. i) M/s Trend Infra Developers Pvt. Ltd.,  
ii) M/s Happy Bagans Pvt. Ltd.  
having address at 13, K.B. Sarani, Block-C303, Dum Dum, Kolkata-700080
3. C.I.T(A)-  
5. CIT(DR), Kolkata Benches, Kolkata.
4. C.I.T.- Kolkata.

True copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches