IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.4014/Del/2011
Assessment Year : 2007-08

Assistant Commissioner of Income Tax, Central Circle-18, New Delhi.	Vs.	M/s Montage Enterprises Pvt.Ltd., C-5, Shashi Garden, Near Pocket-5, Gurudwara, Mayur Vihar, Phase-1, Delhi – 110 091. PAN : AACCM8173H.
(Appellant)		(Respondent)

Appellant by : Ms. Paramita M. Biswas, CIT-DR.
Respondent by : Shri M.P. Rastogi, Advocate.

Date of hearing : 17.12.2018
Date of pronouncement : 14.01.2019

ORDER

PER G.D. AGRAWAL, VICE PRESIDENT :-

This appeal filed by the Revenue is directed against the order of CIT(A)-III, New Delhi dated 30.06.2011 for the Assessment Year 2007-08.

2. Ground No. 1 of the Revenue's appeal read as under:-

> *"1. On the fact and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs. 18,00,00,000/- made by way of disallowance of excessive licence fee paid to M/s Uflex Ltd.*

3. At the time of hearing before us it was pointed out by the learned counsel that this issue is squarely covered in favour of assessee by the decision of ITAT in assessee's own case in the

immediately preceding year i.e. assessment year 2006-07 vide order dated 31st May, 2016. He stated in the preceding year that the ITAT accepted the payment of license fee of ₹2 Crore per month from 1st February, 2006. The above order of ITAT is approved by the Hon'ble jurisdictional High Court vide order dated 6.11.2017 and also by the Hon'ble Apex Court. He stated that when in the immediately preceding year payment of licence fee of @ ₹2 Crore per month is accepted by the ITAT which is approved by the Hon'ble High Court and Supreme Court. There is no justification for allowing of license fee @ 50 Lac per month.

4. The learned DR on the other hand relied upon the order of the Assessing Officer and she stated that the assessee has not even produced the copy of lease agreement between the assessee and M/s Flex Industries Limited. When the assessee had not even produced the primary document, the AO was fully justified in disallowing the increase in the license fee from ₹50 Lac per month to ₹2 Crore per month. She, therefore, stated that the order of the AO may be sustained and the order of the CIT(A) should be reversed.

5. We have carefully considered the arguments of both the sides and perused the material placed before us. The facts of the case are that the assessee is a manufacturing company engaged in the business of manufacturing and trading of flexible packaging material in roll and pouch form. The assessee had three units at Malanpur, Jammu and Noida. The Malanpur unit was taken on lease and license basis from M/s Flex Industries Limited (FIL) whose name is subsequently changed to M/s Uflex Limited. During the year under consideration, the assessee paid the license fee of ₹24 Crore @ ₹2 Crore per month. In the immediately preceding year i.e. assessment year 2006-07, the AO

had found that the assessee had paid the license fee @ ₹50 Lac per month for the period from April, 2005 to September, 2005 and @ 2 Crore per month for the period October, 2005 to March, 2006. While passing the assessment order for assessment year 2006-07, the AO did not agree with the increase of license fee from ₹50 Lac per month to ₹2 Crore per month. Accordingly he allowed the license fee @ ₹50 Lac per month resulting in the addition of ₹9 Crores. The same was deleted by the CIT(A). However, the ITAT after considering the facts of the case and the submission of both the sides found that there was no justification for increase of the license to ₹2 Crore per month from 1st October, 2005 but it found it appropriate to accept the license fee of ₹2 Crore per month from 1st February, 2006. The conclusion of the ITAT in para 17 of its order dated 31st May, 2016 in ITA No. 2106/Del/2010 reads as under:-

> "*It is therefore just and proper to consider the license fee for the period from 01.03.2005 to 31.01.2006 at Rs. 50 Lacs per month and Rs. 2 crores for the remaining months from 01.02.2006 to 31.03.2006. To meet the ends of justice we therefore confirm the addition to an extent of Rs. 6 crore. Accordingly ground No. 3 raised by the revenue in assessment year 2006-07 stands partly allowed.*"

6. The assessee accepted the order of ITAT while the Revenue aggrieved with the order of the ITAT filed appeal before the Hon'ble High Court. The High Court vide order dated 6.11.2017 in ITA No. 892/2016 upheld the order of the ITAT. The relevant finding of the jurisdictional High Court reads as under:-

> *"7. As far as the second issue, i.e. the enhancement of licence fee is concerned, the facts are that the Assessee was originally paying Rs. 50 lakhs per months licence fee to M/s Flex Group of Companies. During the Assessment Years in question, the fee was revised mid-term to Rs. 2 crores per month. The AO add Rs. 9 crores, upon an*

understanding that the licence fee increased was arbitrary. The CIT(Appeals), however, deleted this entire amount. The Revenue's Appeal succeeded substantially to the extent of Rs. 6 crores.

8. Having regard to these circumstances, the Court finds no justification to interfere with the ITAT's findings, which are also factual as far as this issue goes."

7. The Revenue filed the SLP before the Hon'ble Apex Court which was dismissed by their Lordships vide order dated 26.10.2018. Thus the issue of increase of the license fee from ₹50 Lac per month to ₹2 Crore per month was examined by the ITAT in the immediately preceding year. The ITAT after considering the facts and submissions of both the parties deem it appropriate to allow the increase of license fee from 1st February, 2006. The order of ITAT is approved by Hon'ble High Court and Supreme Court. Therefore, from 1.4.2006 some licence fee i.e. @ ₹2 crore per annum is to be allowed. So far as the contention of the learned DR with regard to furnishing of lease agreement is concerned, it would be relevant to the preceding year and not to the year under consideration because the license fee was increased by the lease agreement in the preceding year. After considering the agreement and entire material, the issue of increasing the license fee is considered by all the authorities in the preceding years therefore, respectfully following the decision of ITAT (which is approved by Hon'ble High Court and Supreme Court) in the immediately preceding year, we hold that the CIT(A) was fully justified in allowing the license fee @ ₹2 Crore per month in the year under consideration. The ground no. 1 of the Revenue appeal is accordingly rejected.

8. Ground nos. 2 and 3 of the Revenue's appeal reads as under:-

"2. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs. 2,00,67,589/- made by the Assessing Officer u/s 68 of the Income Tax Act, 1961 on account of unverifiable and unconfirmed advances received by the assessee from customers.

3. On the facts and in the circumstances of the case, the CIT(A)has erred in law and on facts in admitting additional evidences without giving opportunity to the AO as provided under Rule 46A of the Income Tax Rule, 1962."

9. At the time of hearing before us the learned counsel for the assessee stated that this issue is also squarely covered in favour of the assessee by the decision of the ITAT in its own case in the immediately preceding year. The above order of the ITAT is accepted by the Revenue as no substantial question of law was raised before the Hon'ble Jurisdictional High Court in this regard. The learned DR on the other hand stated that from page 12 para 10 of the assessment order, it is evident that the assessee had received the advance of more than 14 Crore from customers which was outstanding as on 31st March, 2007. The Assessing Officer has added the advance received from three parties only because in their cases, the advance was received in cash. The Assessing Officer has also observed that the assessee was asked to produce these parties for verification and examination which was not done by the assessee. She further stated that before the CIT(A) the assessee has produced the copy of account of above three parties for subsequent year on the basis of which the CIT(A) allowed the relief. She stated that copy of account of subsequent year were never produced before the AO therefore, the same was additional evidence and if the CIT(A) had admitted additional evidence, he should have allowed an opportunity to the AO to examine the same. She therefore stated that the admission of additional evidence and reliance thereon by the CIT(A) without allowing any opportunity to the

Assessing Officer is in violation of Rule 46A. She accordingly submitted that the order of the CIT(A) on this point may be reversed and that of AO may be restored.

10. The learned counsel for the assessee on the other hand stated that this issue is also squarely covered in favour of the assessee by the decision of ITAT in assessee's own case for assessment year 2006-07. He also stated that the copy of the account of the customer from the assessee's books of account of subsequent year cannot be said to be additional evidence and therefore, there was no violation of Rule 46A.

11. We have carefully considered the submissions of both the sides. We find that the ITAT has considered this issue in the immediately preceding year. The relevant portion of the ITAT order is reproduced below for ready reference:-

> *"**18. Ground No. 5** raised by the revenue for assessment year **2006-07** pertains to deleting the addition of Rs. 2,32,13,640/-made under section 68 of the act on account of unverifiable and unconfirmed advances from customers.*
>
> *18.1. The Ld.AO observed that during the year under consideration the assessee had received Rs. 3,85,32,962/- he observed that the assessee had claimed cash sales of Rs. 2,658.86 Lacs during the year under consideration on account of advances from customers. The sales are in the form of on sales or across the counter sales. The Ld.AO had asked the assessee to furnish confirmation in respect of the parties from whom the assessee has claimed to have received advances. As the parties were not verifiable the AO made the addition of Rs. 2,32,13,640/-*
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> *19. Aggrieved by the order of the Ld.AO the assessee preferred an appeal before the ld.CIT (A).*

19.1. The Ld.CIT (A), after noticing all the evidences gave a categorical finding in paragraph 10.3 of his order to ld.CIT (A) has observed that all the parties are regular customers purchasing goods from last many years from the assessee. In respect of the advances received, the assessee company has applied goods to these parties. The Ld.CIT (A) has also taken note of the available confirmations 5. The Ld.CIT (A) has also taken note of the remand report of the ld.AO placed at page 576 of the paper book filed by the revenue. The Ld.CIT (A) has observed that as the AO in the remand report has not made any adverse observations/remarks, the Ld.CIT (A) deleted the addition.

20. Aggrieved by the order of Ld.CIT (A), the revenue is in appeal before us now.

20.1 We have perused the orders of the authorities below and the relevant pages of the paper book preferred by Ld.CIT (A). It is observed from the remand report and the assessment order that the assessee has filed Ledger accounts of the concerned parties before the AO. The trade customers as appearing in the list are the regular customers making purchases from the assessee from past many years it is evident from the Ledger account for the current as well a subsequent years shows that the assessee has been supplying goods to these parties in the normal course of the business and therefore the realisation of proceeds thereof is an ongoing process during the course of the business activity. The only finding of the AO that the assessee has not been able to produce confirmations from few of the parties cannot be the basis to arrive at a conclusion that these are unverifiable and unconfirmed.

20.2 In view of the above findings and observations we are of the considered opinion to uphold the findings of the Ld. CIT(A). Accordingly ground No. 5 raised by the revenue for assessment year 2006-07 stands dismissed."

12. From the perusal of the above order of the ITAT, it is evident that in the preceding year, the CIT(A) had allowed the opportunity to the AO and has decided the issue only after taking into consideration the remand report submitted by the Assessing Officer. However, in the

year under consideration, the CIT(A) has allowed no opportunity to the AO to examine the copy of account of the customer in subsequent years and no remand report is called for. In view of the above, we deem it appropriate to set aside the order of the CIT(A) on this point and restore the matter back to the file of the AO. We direct the assessee to produce the copy of account of above three customers for subsequent years before the AO thereafter the AO will examine whether the above three parties are the regular customers and the assessee has supplied the goods to those parties in the normal course of business and whether these advances have been adjusted against such supply of goods. If it is so than the observation of ITAT in para 20.1 of the above order would be squarely applicable and no addition would be made for trade advances received by the assessee. Needless to mention that AO will allow adequate opportunity of being heard to the assessee. With these observations, ground nos. 2 and 3 of the Revenue's appeal are allowed for statistical purposes.

13. Ground Nos.4 & 5 of the Revenue's appeal read as under :-

> *"4. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.20,00,00,000/- made by the Assessing Officer u/s 68 of the Income Tax Act, 1961 on account of bogus share capital.*
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> *5. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in placing reliance on the decision of the Hon'ble Supreme Court in the case of M/s Lovely Exports (P) Ltd. without appreciating that the facts of this case are different from the facts in the case of M/s Lovely Exports (P) Ltd."*

14. The facts relating to these grounds of appeal are that during the course of assessment proceedings, the Assessing Officer found that the assessee has received the sum of ₹20,00,00,000/- from M/s Adhyay Equi Pref Pvt.Ltd. (in short AEPP) against the allotment of 10,00,000 equity shares of ₹10/- each at a premium of ₹190/- per share. The Assessing Officer treated this as unexplained cash credit for the following reasons :-

> *"I have carefully considered the whole issue and the explanation put forth on behalf of the assessee. However, the following peculiarities have been noticed in this matter :*
>
> *i. The amount of premium charged per share in this case is Rs.190/-. The amount of premium charged is much higher than the general market trend of that time.*
>
> *ii. The assessee company has not issued shares to any other person or company during the year and therefore, the premium charged is not comparable with any instance so as to justify the assessee's claim.*
>
> *iii. The benefits accruing to M/s Adhyay Equi Pref Pvt.Ltd. by acquiring shares of the assessee company at such a high premium have not been satisfactorily explained.*
>
> *iv. The reasons why M/s Adhyay Equi Pref Pvt.Ltd. chose to invest a heavy amount of Rs.20,00,00,000/- at a such a high premium in the assessee company have not been properly explained.*
>
> *v. The amount of Rs.20,00,00,000/- has been paid by M/s Adhyay Equi Pref Pvt.Ltd. through cheques between the period from 20.2.2007 to 13.3.2007. From a perusal of the concerned bank account of this company, it is noticed that as on 19.2.2007, the credit balance was nil. On*

21.2.2007, there are credits of Rs.3,00,00,000/- by way of two cheques but full description of the source is not there. It is after this period that the funds have started flowing into the bank account of M/s Adhyay Equi Pref Pvt.Ltd. and out of those funds, the payments have been made to the assessee company. In many cases of credit entries, only cheque numbers have been mentioned and the exact nature of source of these funds is not clear. Under these circumstances, the financial worthiness of M/s Adhyay Equi Pref Pvt.Ltd. is not satisfactorily established and resultantly genuineness of transactions made with the assessee company is also not satisfactorily established.

vi. It is also noticed from the perusal of the bank account of M/s Adhyay Equi Pref Pvt.Ltd. that the credit balance in the bank account after payment to the assessee company remained at much lower levels. As on 14.3.2007, there was credit balance of only Rs.7,200/-, as on 26.3.2007 it was only Rs.82,200/- and even on 31.3.2007 it was just Rs.6,82,200/-.

vii. It is also noticed that M/s Adhyay Equi Pref Pvt.Ltd. is a Kolkata based company. There are many other companies of Kolkata from which many closely related companies of the assessee pertaining to M/s Flex/Uflex group had declared to have received share capital during the past some years, especially during A.Y. 2006-07. All these shares were issued at heavy premium and while completing the assessment proceedings in the cases of such closely related companies of the assessee, it was held after detailed inquiries that the companies (from which share capital was received) were used by the Flex group for channeling back its own funds in the form of share capital of the assessee companies. Under these circumstances and in view of the discussion supra it is evident that the assessee's transactions with M/s Adhyay Equi Pref Pvt.Ltd. during the year under consideration are not genuine."

15. The assessee gave explanation with regard to each and every point before the learned CIT(A), which is reproduced from pages 14 to

18 of the order of learned CIT(A) and the same is also reproduced hereunder for ready reference :-

> *"1. The first objection of the ld.AO is that the shares has been allotted to the impugned companies at a high premium from Rs.190/-.*
>
> *During the year under consideration the assessee has allotted 10,00,000 equity shares to M/s Adhyay Equi Pref Pvt.Ltd. and a detailed letter dated 23.12.2010 to premium has been submitted by appellant before ld.AO. Copy attached at Page No.167 to 188 of Paper Book.*
>
> *That regarding the alleged high rate of premium @ Rs.190/-, it is contended that the premium charge is not very high. The valuation of share of appellant company was done by an independent Chartered Accountant and accordingly the value of share, on the basis of Net Asset Value (NAV) linked to book value multiple, comes to Rs.200.52 per share.*
>
> *That the value per share based on the price ratio earning per share comes to Rs.364/- and on the basis of the discounted cash flow method comes to Rs.310.77 per share.*
>
> *The value of shares was decided after a long deliberations with the investor, and ultimately, value based on NAV linked to book value multiply method was chosen, which comes to Rs.200.52 per share and accordingly, the shares were issued at a premium of Rs.190/- per share.*
>
> *2. The second observation of the AO is that the assessee has not issued shares to any other person during the year under consideration, so that get a comparable instance to justify the assessee's claim.*

That in this regard it has been submitted before the AO as well that the assessee had also received an amount of Rs.5,00,00,000/- as share application money from M/s D.J. Infotech Pvt.Ltd. against allotment of 3,12,500 shares of Rs.10/- per share and a premium of @ Rs.150/- per share.

Since, the value of shares of the appellant company was determined to be Rs.200/- per share and accordingly the same were allotted at a premium of Rs.190/- to M/s Adhyay Equi Pref Pvt.Ltd., the assessee didn't accept the share application money from M/s D.J. Infotech and had subsequently refunded the same, the details whereof have provided to the AO as also attached at Page No.194 to 195 of Paper Book.

3. The third observation of the AO is that benefits accrued to M/s Adhyay Equi Pref Pvt.Ltd. by acquiring the shares of the assessee, at such a high premium have not been satisfactorily explained.

That it was explained to AO vide letter dated 23.12.2009 (copy attached at Page No.172 to 174) that the price of the shares on the selected method as on December 2009 (the month in which assessment was completed) comes to Rs.450/- per share, which means that the shares acquired @ Rs.200/- per share appreciated further by Rs.250/- within a span of just 2-3 years. The fact has also been noted by AO in the Order in Para-13 itself. (Figure of Rs.250/- wrongly mentioned and is to be read as Rs.450/-).

4. Regarding 4th objection of AO, as to why M/s Adhyay Equi Pref Pvt.Ltd. chose to invest heavy amount of Rs.20 crores at such a high premium, it is submitted that the said decision was taken by its management as is evident from the board resolution passed to this effect.

Further, the assessee reiterates its contention that the premium charged is not very high. As a matter of fact, out of the three valuations, the investor company was offered the lowest rate.

So far as the reasons for investment @ Rs.200/- per share is concerned it is submitted that the price of share as per three different method, generally adopted as mentioned in the valuation report, ranges between Rs.200/- to Rs.360/- per shares. The investment is made by the investor company at Rs.200/- (i.e. at the lowest valuation). Apart from this as already explained above the value of share on the basis of selected method as on Dec. 2009 comes to Rs.450/- per share. Hence, there are justifiable reasons with the investor company to invest in the equity share of the appellant company.

Without prejudice to the above, even if it is assumed that the premium charged is very high, it is humbly submitted that this is the discretion of the investor company. As far as the assessee is concerned, neither it has any control or influence over the investor company nor it is concerned about that.

5. The 5th observation of AO is that the amount of Rs.20.00 crores has been paid to M/s Adhyay Equi Pref Pvt.Ltd. through cheques between the period from 20.02.2007 to 13.03.2007. Further, the AO observed that as on 19.02.2007, the credit balance was Nil. On 21.02.2007, there are credit of Rs.3.00 crores by way of two cheques but full description of the source is not there. Further, it was observed by the AO after this period, the fund started flowing in the bank account of Investor Company and out of these fund, the payment have been made to the assessee company. That in many cases of credit entries only cheque Nos. have been mentioned and exact nature of source of these funds is not clear.

That first of all, the assessee is not supposed to establish the source of source. (Please refer to judgment of Guwahati High Court in the case of Nemichand Kothari 264 ITR 254). The assessee has received payment towards Share Application Money from M/s Adhyay Equi Pref Pvt.Ltd. by way of account payee cheque and issued the equity shares against the same. Accordingly, as per the requirement of Section 68, the assessee has fulfill its onus as to the nature and source of credit in the books of account of the assessee.

Secondly, the assessee has submitted complete bank statement of the shareholder company from February, 2007 to March 31, 2007. On 5th February, there is an opening credit balance of Rs.2 lacs, there are almost 23 credit entries and more than 20 debit entries before 19th February, 2007. All amounts have been received from A/c payee cheques only. Incidentally on 19th February, 2007, there is Nil balance, so, to say that there was no transaction in the bank account prior to the release of cheque to the appellant company is not correct at all. In addition to this, in the bank statement itself, there are hand written narration by the shareholder company. So far as, the credit entries are concerned, the narration contains the name of the party as well as nature of payment received by shareholder company.

That it is also on record that the statement of Directors of the Investor Company were recorded and it has also been informed by the Investor Company that in addition to the statement recorded by the director of investor company, the details as required by ld.AO had also been submitted vide letter dated 24.12.2009. The copy of the same has been collected by the assessee company and the copy thereof is attached herewith.

Regarding the money received by investor company in peacemeal and paid to the assessee company, it is submitted that naturally, the investor as soon as realized money by selling their investment and recovered from debtors etc., kept on depositing in its bank account and subsequently paid share application money to the assessee.

That it may kindly be noted that there is no cash deposit in the bank account of the investor. As already explained, the investor has paid share application money out of sale of its existing investments or realization of sundry debtors/loans and advances. It is thus clear that the investing companies had its own sources of monies to subscribe to the equity capital of assessee company.

6. Regarding the objection of AO that the credit balance in the bank account of M/s Adhyay Equi Pref Pvt.Ltd., after payment to the assessee company, remained at much lower level, it is submitted that the fact that maintaining credit balance is the sole prerogative of the investor company and is not within the domain of assessee company.

With due respect, it is further submitted that by virtue of this fact, it can not be said that the funds so deposited in the investor's bank account in any way belong to the assessee company and the genuineness of the transaction and creditworthiness of the investor can be doubted.

7. In Para – (vii), the AO had observed some transactions of Flex/Uflex Group and Kolkata based companies from whom Flex/Uflex Group had received share capital in the Asst. Year 2006-07.

The AO had stated that M/s Adhyay Equi Pref Pvt.Ltd. is also a Kolkata based company and the appellant and Uflex group are closely related.

That the AO had not stated that is amongst the other Kolkata based companies from where Uflex group received share capital. In fact from the perusal of Adhyay Equi Pref Pvt.Ltd., it may kindly be observed that this investor company had never invested in Uflex Group Companies.

It is also submitted that the appellant is entirely a different company and does not have any kind of relation either ownership or otherwise with Flex/Uflex group. That there is no basis for this apprehension of AO.

It is beyond the understanding of assessee as to how Flex Group is related to the assessee. Flex Group is entirely different to assessee and none of live or non live entity of Flex Group is shareholder or director or in any manner exercise control on the appellant. What Flex Group is doing is entirely their affairs and business and has nothing to do with the assessee company. Similarly, what assessee

does is nothing to do by Flex Group. We are unable to understand how Flex Group or its Companies are related to the appellant."

16. Learned CIT(A), after considering the above explanation and the evidences furnished by the assessee before the Assessing Officer and also the legal position came to the conclusion that the assessee has discharged the onus which lay upon it to explain the cash credit in the form of share capital. Accordingly, learned CIT(A) deleted the addition of ₹20,00,00,000/- made by the Assessing Officer. The Revenue, aggrieved with the order of learned CIT(A), is in appeal before us.

17. At the time of hearing before us, learned CIT-DR stressed upon the points raised by the Assessing Officer which are also reproduced above in paragraph 14. She further stressed that the shares were issued at a high premium of ₹190/- per share for which suitable justification was not given and that the balance in the bank account of the alleged shareholder was negligible and there was credit of the money in the bank account immediately before issue of cheques to the assessee for allotment of shares. In view of these facts, the Assessing Officer was fully justified in arriving at the conclusion that the assessee has not been able to discharge the onus of proving the cash credit of ₹20,00,00,000/- in its account. She, therefore, submitted that the order of learned CIT(A) should be reversed and that of the Assessing Officer may be restored. In support of her contention, she relied upon the following decisions :-

(i) Suman Gupta Vs. CIT – (2013-LL-0122-69)(Supreme Court).

(ii) PCIT Vs. Bikram Singh – ITA No.55/2017 (Delhi).

(iii) Blessing Construction Vs. ITO – (2013) 32 taxmann.com 366 (Gujarat)/(2013) 214 Taxman 645 (Gujarat).

(iv) Toby Consultants (P) Ltd. Vs. CIT – (2010) 324 ITR 338 (Delhi).

(v) Sanraj Engineering Pvt.Ltd. Vs. CIT – ITA No.79/2016 (Delhi).

(vi) Naresh Chandra Jain Vs. CIT – ITA No.335 of 2009 (Allahabad).

(vii) CIT Vs. Precision Finance (P) Ltd. – (1995) 82 Taxman 31 (Calcutta)/(1994) 208 ITR 465 (Calcutta)/(1994) 121 CTR 20 (Calcutta).

18. The learned counsel for the assessee, on the other hand, relied upon the order of learned CIT(A). He stated that before the learned CIT(A), the assessee has explained each and every allegation levelled against the assessee by the Assessing Officer. He stated that the shares of ₹10/- each were issued for ₹200/- each i.e., at a premium of ₹190/- per share. That the valuation of shares of the assessee company was got done through the expert viz., Chaturvedi & Partners, Chartered Accountants. That the said expert had valued the shares by adopting three different methods viz., Net Asset Value (NAV), Earnings Per Share (EPS) and Discounted Cash Flow (DCF) method. That as per NAV method, the value of the shares was determined at ₹200.52 per share. As per EPS method, the value of the shares was determined at ₹363.60 per share and as per DCF method, the value of the shares was determined at ₹310.77 per share. Copy of such valuation report was furnished before the Assessing Officer and he has not pointed out any defect therein. He also stated that the said valuation report is produced before the ITAT in the assessee's paper book from pages 194 to 213. With regard to low cash balance in the assessee's bank account, he stated that the AEPP is an investment company and it gets its money either invested in the shares of other companies or as loans

in the other companies. Before investing in the assessee's company, AEPP has liquidated its investment with the other company and details of each and every cheque credit in their bank account before issue of cheque to the assessee has been explained by AEPP and copy of such explanation was furnished before the Assessing Officer and is also given at pages 156 to 159 of the assessee's paper book. He further stated that the director of AEPP appeared before the Assessing Officer and his statement was recorded by the Assessing Officer on 23rd December, 2009. Admittedly, AEPP is assessed to income tax on regular basis. If the Assessing Officer had any doubt about the credit in their bank account, he should have asked the explanation from the director of AEPP who appeared before the Assessing Officer rather than doubting the genuineness of the investment made by them with the assessee company. He referred to the statement of the director of AEPP and pointed out that the director of AEPP has admitted having applied for 10 lakhs equity shares at a premium of ₹190/- per share. He has also explained why his company chose to purchase the shares at such a high premium. He also affirmed that his company AEPP is assessed to tax and the Board of Directors of their company have approved the purchase of shares from the assessee company. That the director of AEPP stated before the Assessing Officer that the shares allotted by MEPL i.e., the assessee company had not been sold by them but they are still holding the shares. The learned counsel further stated that the assessee has produced the following evidences for discharging the onus which lay upon it for explaining the credit :-

"(i) Confirmation certification from Adhyay Equipref Pvt.Ltd.

(ii) Copy of Form No.18 filled with ROC for address proof.

(iii) Copy of PAN card number allotted.

(iv) Copy of audited annual accounts with annexure as on 31.03.2007.

(v) Certificate of sources of funds in the hands of share applicant company.

(vi) Copy of UTI bank statement of shareholder.

(vii) Memorandum of Articles of Association together with certificate of incorporation of applicant company.

(viii) Copy of extract of board meeting for investment of money in MEPL.

(ix) Copy of application for allotment of shares.

(x) Copy of Form 2 for allotment of shares.

(xi) Copy of allotment register with certificate & distinctive no. of shares.

(xii) Certificate true copy of resolution passed by Board of Directors for allotment of shares to Adhyay Equi Pref Pvt.Ltd."

19. That Hon'ble Jurisdictional High Court in the case of CIT Vs. Oasis Hospitalities P.Ltd. – [2011] 333 ITR 119 (Delhi) has laid down the guidelines for examining the cash credit in any assessee's books of account. They have laid down that the burden is upon the assessee to explain the nature and source of share application money and, to discharge such burden, the assessee has to prove the identity of the shareholder, genuineness of the transaction and creditworthiness of the shareholder. They have also laid down that what evidence is to be produced by the assessee to prove the identity of the shareholder, genuineness of the transaction and creditworthiness of the shareholder. That the evidences furnished by the assessee clearly establish that the assessee has duly discharged the onus which lay upon it. Similar view is reiterated by Hon'ble Delhi High Court in the case of CIT (Central)-III Vs. Anshika Consultants Pvt.Ltd. in ITA No.467/2014, judgement dated 16th April, 2015.

20. He stated that the facts of assessee's case are identical to the facts before the Hon'ble Delhi High Court in the above the case. That in the case of the assessee also, the assessee has furnished all necessary details to prove the identity, genuineness and creditworthiness of the share applicant but the Assessing Officer did not care to consider the same. The share applicant is assessed to income tax and its PAN details, balance sheet etc. were furnished before the Assessing Officer. If the Assessing Officer was not satisfied about the details furnished by the assessee, he could have made further enquiry specially when the share applicant is assessed to income tax and the director of the said company had appeared before the Assessing Officer. However, the Assessing Officer ignored all the evidences furnished by the assessee and did not make any enquiry on his part and merely on the basis of presumption and suspicion made huge addition of ₹20 crores which has rightly been deleted by the learned CIT(A). Hence, the order of learned CIT(A) should be sustained on this point.

21. We have carefully considered the arguments of both the sides and perused the material placed before us. We have also gone through the decisions relied upon by both the sides. We find that Hon'ble Jurisdictional High Court in the case of Oasis Hospitalities P.Ltd. (supra) has laid down the guidelines for examining the cash credit. The relevant portion of their Lordships decision reads as under :-

> *"11. It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove :*

(a) the identity of shareholder;

(b) the genuineness of transaction; and

(c) the creditworthiness of shareholders.

12. In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the Assessing Officer to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc., can be furnished.

The genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers of that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, the genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be copies of the shareholders register, share application forms, share transfer register, etc.

As far as creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by producing the bank statement of the creditor/subscriber showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there have to be some cogent reasons and materials for the Assessing Officer and he cannot go into the realm of suspicion."

22. From the above, it is evident that the initial burden is upon the assessee to explain the nature and source of share application money received by him. In order to discharge this burden, the assessee is

required to prove – (a) the identity of the shareholder, (b) genuineness of the transaction and (c) creditworthiness of the shareholder. Their Lordships have also laid down how the identity of the shareholder is to be proved, how the genuineness of the transaction is to be proved and how the creditworthiness of the shareholder is to be judged.

23. Their Lordships of Hon'ble Jurisdictional High Court in the case of Anshika Consultants Pvt.Ltd. (supra) reiterated the above position and held as under :-

> *"6. The onus cast upon the assessee under Section 68 of the Act to satisfy the department about the true identity of an investor, its creditworthiness and genuineness of a transaction was explained by the Supreme Court in CIT Vs. Lovely Exports (P) Ltd., 216 CTR 295,. Whilst, the AO acted legitimately in enquiring into the matter, the inferences drawn by him were not justified at all in the circumstances of the case. Whether the assessee company charged a higher premium or not, should not have been the subject matter of the enquiry in the first instance. Instead, the issue was whether the amount invested by the share applicants were from legitimate sources. The objective of Section 68 is to avoid inclusion of amount which are suspect. Therefore, the emphasis on genuineness of all the three aspects, identity, creditworthiness and the transaction. What is disquieting in the present case is when the assessment was completed on 31.12.2007, the investigation report which was specifically called from the concerned department in Kolkata was available but not discussed by the AO. Had he cared to do so, the identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants would have been apparent. Even otherwise, the share applicants' particulars were available with the AO in the form of balance sheets income tax returns, PAN details etc. While arriving at the conclusion that he did, the AO did not consider it worthwhile to make any further enquiry but based his order on the high nature of the premium and certain features which appeared to be suspect, to determine that the amount had been routed from the assessee's account to the share applicants' account. As held concurrently by*

the CIT (Appeals) and the ITAT, these conclusions were clearly baseless and false. This Court is constrained to observe that the AO utterly failed to comply with his duty considers all the materials on record, ignoring specifically the most crucial documents. We place these observations on the record and direct a copy of the judgment to be furnished to the concerned income tax authorities for appropriate action towards reflecting these observations suitably in service record of the concerned AO to avoid such instances in the future."

24. So far as this legal issue is concerned that the initial burden is upon the assessee to explain the nature and source of the credit in the assessee's books of account and what assessee has to do in order to discharge such burden, there is no dispute. Therefore, now in each case, the facts are to be examined so as to arrive at the conclusion whether the assessee has been able to discharge the initial burden of credit in his books of account. In the light of above guidelines of Hon'ble Jurisdictional High Court, we proceed to examine the facts of the assessee's case.

A. Identity of the shareholder –

25. As per Hon'ble Jurisdictional High Court in the case of Oasis Hospitalities P.Ltd. (supra), to prove the identity of the shareholder, if the shareholder is a company, then the details in the form of registered address or PAN identity etc. can be furnished. We find that in the case under appeal before us, the assessee has furnished the copy of PAN details of the share applicant i.e. AEPP, certificate of incorporation of AEPP along with memorandum and articles of the said company. Shri Palash Ghosh, director of AEPP also appeared before the Assessing Officer. In view of the above, we have no hesitation to hold that the assessee has proved the identity of the share applicant.

B. Genuineness of the transaction –

26. Hon'ble Jurisdictional High Court in the case of Oasis Hospitalities P.Ltd. (supra) held that when the money is received by cheque and is transmitted through banking channels or other indisputable channels, the genuineness of the transaction would be proved. Other documents showing the genuineness of the transaction could be copies of shareholder's register, share application form, share transfer register etc. In the case under appeal before us, we find that the entire sum of ₹20 crores has been received by the assessee by way of cheques. The assessee has also furnished the share application form, copy of form No.2 for allotment of shares to AEPP, copy of allotment register with certificate and distinctive number of shares. Thus, as per the above decision of Hon'ble Jurisdictional High Court, the assessee has duly discharged the onus of establishing the genuineness of the transaction. The Assessing Officer has doubted the genuineness of the transaction on the ground that the share premium is very high i.e., the share of the face value of ₹10/- per share has been issued at ₹200/- per share i.e., at a premium of ₹190/- per share. We find that before the Assessing Officer, the assessee has filed the valuation of its shares from a firm of Chartered Accountants. The Chartered Accountants have valued the value of the assessee company shares by three different methods –

(i) As per Net Asset Value (NAV) method - ₹200.52 per share
(ii) As per Earnings Per Share (EPS) method - ₹363.60 per share
(iii) As per Discounted Cash Flow (DCF) method - ₹310.77 per share

27. This valuation report is filed before the Assessing Officer and he has not given any adverse comments on the same. Thus, the assessee has duly furnished the justification for the issue of shares at a high

premium. We further find that Hon'ble Jurisdictional High Court in the case of Anshika Consultants Pvt.Ltd. (supra) has considered the issue of high premium and observed as under :-

> *"Whether the assessee company charged a higher premium or not, should not have been the subject matter of the enquiry in the first instance. Instead, the issue was whether the amount invested by the share applicants were from legitimate sources. The objective of Section 68 is to avoid inclusion of amount which are suspect. Therefore, the emphasis on genuineness of all the three aspects, identity, creditworthiness and the transaction. What is disquieting in the present case is when the assessment was completed on 31.12.2007, the investigation report which was specifically called from the concerned department in Kolkata was available but not discussed by the AO. Had he cared to do so, the identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants would have been apparent. Even otherwise, the share applicants' particulars were available with the AO in the form of balance sheets income tax returns, PAN details etc. While arriving at the conclusion that he did, the AO did not consider it worthwhile to make any further enquiry but based his order on the high nature of the premium and certain features which appeared to be suspect, to determine that the amount had been routed from the assessee's account to the share applicants' account. As held concurrently by the CIT (Appeals) and the ITAT, these conclusions were clearly baseless and false."*

28. In this case also, the Assessing Officer based his conclusion simply on the basis of high premium and that on few dates, there was very less balance in the bank account of the share applicant. He altogether ignored the report from the Chartered Accountants firm giving the valuation of the share of the assessee company which is clearly justifying the high premium. The assessee furnished the details of credit in share applicant's bank account which are placed in the assessee's paper book furnished before us also from pages 156 to 159

and we find that details of each and every cheque credited in AEPP's bank account before issuing cheques to the assessee is furnished. The AEPP is assessed to tax, its annual accounts are furnished before the Assessing Officer, the extract of Board's Resolution by AEPP for investment in the assessee company is furnished, the director of AEPP appeared before the Assessing Officer whose statement was recorded. However, the Assessing Officer ignored all these evidences, did not make any further enquiry had he any doubt into the genuineness of the transaction and simply on the basis of presumption and suspicion made the addition of ₹20 crores. In our opinion, on the facts of the assessee's case, the decision of Hon'ble Jurisdictional High Court in the case of Oasis Hospitalities P.Ltd. (supra) as well as Anshika Consultants Pvt.Ltd. (supra) are squarely applicable and, respectfully following the same, we hold that the assessee has proved the genuineness of the transaction.

C. Creditworthiness –

29. As per Hon'ble Jurisdictional High Court in the case of Oasis Hospitalities P.Ltd. (supra), the creditworthiness would be proved by producing the bank statement of the share applicant showing that it has sufficient balance in its account to enable it to subscribe to the share capital. In the case under consideration before us, the assessee has produced the bank account of AEPP. Though there were credits in the said bank account before issuing cheques to the assessee, however, AEPP has furnished the details of each and every cheque received by it and credited in its bank account. Such details were furnished before the Assessing Officer and copy of the same is also produced before us at pages 156 to 159 of the paper book. Moreover, AEPP is assessed to income tax, its PAN details were furnished before the Assessing Officer. The director of AEPP appeared before the

Assessing Officer and the Assessing Officer asked questions relating to creditworthiness of the company. Question No.12 and reply thereto would be relevant. We reproduce the same herein below :-

> *"Q12. What is the net worth of your Company? Was any cash deposited in the bank account before depositing the share application money to M/s Montage Enterprises Pvt.Ltd.?*
>
> *Ans. The net worth of our Company is more than Rs.100.00 Crores.*
> *No, there is no cash deposit in the Bank Account before making the payment for Share Application Money to M/s Montage Enterprises Pvt.Ltd."*

30. Thus, the director of AEPP stated that the net worth of AEPP is more than ₹100 crores and there is no cash deposit in the bank account of AEPP before making the payment for share application money to MEPL i.e., the assessee. The assessee has furnished the copy of audited balance sheet of AEPP, from which, we find that the share capital of AEPP including reserves and surplus is ₹103.64 crores and the investment in shares of various companies by AEPP is ₹95.32 crores. In our opinion, these facts clearly establish the creditworthiness of AEPP.

31. In view of the above, we, respectfully applying the above two decisions of Hon'ble Jurisdictional High Court to the facts of the assessee's case, hold that the assessee has been able to discharge the burden of proving the share application money received by it from AEPP and therefore, learned CIT(A) rightly deleted the addition made by the Assessing Officer. We uphold the order of learned CIT(A) on this point and reject ground Nos.4 and 5 of the Revenue's appeal.

32. Ground No.6 of the Revenue's appeal reads as under :-

"On the faces and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of claim for deduction of Rs.2,71,73,987/- u/s 80-IB on account of Self Cenvat Credit availment."

33. At the time of hearing before us, it is stated by the learned counsel for the assessee that this issue is squarely covered in favour of the assessee by the decision of ITAT in assessee's own case for assessment year 2006-07. Learned DR, on the other hand, relied upon the order of the Assessing Officer.

34. We have heard both the sides and perused the material placed before us. The facts of the case are that the Assessing Officer during the course of scrutiny has noticed that in the profit & loss account, the assessee has credited a sum of ₹2,71,73,987/- on account of Self Cenvat Credit Availment. The Assessing Officer was of the opinion that such credit cannot be considered to be income from industrial undertaking and therefore, he excluded the same while allowing deduction u/s 80IB to the assessee in respect of its manufacturing unit at Jammu. On appeal, learned CIT(A) allowed the same. Aggrieved with the same, the Revenue is in appeal before us.

35. We find that the identical issue has been considered by the ITAT in assessee's own case for assessment year 2006-07 vide ITA No.2106/Del/2010 and similar disallowance made in the last year was deleted by the ITAT. We further find that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Dharam Pal Prem Chand Ltd. – [2009] 317 ITR 353 (Delhi), wherein their Lordships held as under :-

> *"Held, (i) that the authorities below found that the refund of excise duty was pivoted on the manufacturing activity carried on by the assessee. The concurrent finding of the authorities was that the assessee had adopted an incorrect accounting methodology. The assessee had on the payment of excise duty debited the profit and loss account and upon receipt of refund credited the profit and loss account. The net effect on the profit and loss was nil on account of the methodology followed by the assessee. Therefore, there was no reason to exclude the amount of refund of excise duty in arriving at "profit derived" for the purpose of claiming deduction under section 80-IB."*

36. No contrary decision or Hon'ble Jurisdictional High Court or Hon'ble Apex Court is brought to our knowledge. We, therefore, respectfully following the above decision of Hon'ble Jurisdictional High Court as well as of ITAT in assessee's own case, uphold the order of learned CIT(A) on this issue and reject ground No.6 of the Revenue's appeal.

37. Ground No.7 of the Revenue's appeal reads as under :-

> *"On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding the excise duty refund is a capital receipt in nature and not liable to tax."*

38. At the time of hearing before us, it is stated by the learned counsel that this ground is only an alternative ground by which the assessee has claimed the refund of Cenvat as a capital receipt. He, however, stated that if the finding of learned CIT(A) for considering this as income eligible under Section 80IB is accepted, then this ground would become academic. We find that the assessee in the year under consideration has treated the refund of Cenvat as revenue receipt and has claimed the same to be entitled for deduction u/s 80IB. This claim has been accepted by the learned CIT(A) and also upheld by us while

rejecting ground No.6 of the Revenue's appeal. That before the learned CIT(A), the assessee had raised an alternative ground claiming the excise duty refund as a capital receipt. Learned CIT(A), following the decision of Hon'ble High Court in the case of Shree Balaji Alloys & Ors. Vs. CIT – [2011] 239 CTR (J&K) 70, accepted the assessee's claim and held that excise duty refund is capital in nature. At the time of hearing before us, the learned counsel for the assessee has pointed out that this claim of the assessee has also been accepted by the ITAT in other years in assessee's own case. However, in our opinion, in the year under consideration, the receipt can either be revenue receipt or capital receipt. It cannot be both. The assessee, in its account, has claimed the refund of excise duty as revenue receipt and considered the same while computing its income from industrial undertaking and claimed the deduction u/s 80-IB on the same. The claim was disallowed by the Assessing Officer. However, before learned CIT(A), the assessee contended that the same should be part of income. Meaning thereby, the assessee reiterated its claim before the appellate authorities i.e., before the CIT(A) as well as before us that it is a revenue receipt and part of income from eligible industrial undertaking so as to be eligible for deduction u/s 80-IB. This claim of the assessee has been accepted by the learned CIT(A) and the order of learned CIT(A) has been upheld by us by rejecting ground No.6 of the Revenue's appeal. Thus, the assessee's claim that it is revenue receipt is approved by the learned CIT(A) as well as by us. Therefore, in our opinion, learned CIT(A) was not justified in holding this same income to be capital receipt in the year under consideration. In view of the above, we reverse the finding of the learned CIT(A) on this point and allow ground No.7 of the Revenue's appeal.

39. However, before we part with the matter, we may clarify that we have not expressed any opinion on merits, whether the refund of

excise duty is a revenue receipt or capital receipt. We have decided this issue on the limited ground that when the assessee has claimed it to be a revenue receipt and this claim has been accepted by the appellate authority, then simultaneously, the same cannot be held to be a capital receipt. However, if in any subsequent year, the assessee claims it to be a capital receipt and the same is disputed by the Revenue, then the appellate authority would decide the same on merits. With this observation, ground No.7 of the Revenue's appeal is allowed.

40. In the result, the appeal of the Revenue is partly allowed.

Decision pronounced in the open Court on 14.01.2019.

Sd/-	Sd/-
(K. NARASIMHA CHARY)	**(G.D. AGRAWAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

SH/VK.

Copy forwarded to: -

1. Appellant : **Assistant Commissioner of Income Tax, Central Circle-18, New Delhi.**
2. Respondent : **M/s Montage Enterprises Pvt.Ltd., C-5, Shashi Garden, Near Pocket-5, Gurudwara, Mayur Vihar, Phase-1, Delhi – 110 091.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar