

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR

श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 736/JP/2018
निर्धारण वर्ष / Assessment Year :2009-10

I.T.O., Ward 2(2), Jaipur.	बनाम Vs.	M/s Trugold Buildtech Pvt. Ltd., 203, Ambabari, Jhotwara, Jaipur.
स्थायी लेखा सं./जीआईआर सं./ PAN/GIR No.: AACCT 6983 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Shri Karni Dan (JCIT)
निर्धारिती की ओर से / Assessee by : Shri S.L. Poddar (Adv.)

सुनवाई की तारीख / Date of Hearing : 05/02/2019
उदघोषणा की तारीख / Date of Pronouncement : 01/04/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

This is an appeal filed by revenue against the order of Id.CIT(A)-I, Jaipur dated 23/03/2018 for the A.Y.2009-10 in the matter of order passed U/s 148/144 of the Income Tax Act, 1961 (in short the Act).

2. Rival contentions have been heard and record perused.
3. In this appeal, the revenue is aggrieved by the order of the Id. CIT(A) deleting the addition of Rs. 73,50,000/- made by the Assessing Officer on account of share premium.

4. The facts in brief are that the assessee is a private limited company and is engaged in the business of trading of clothes. Original return was filed on 29.09.2009 declaring loss of Rs. 1,54,628/-. Subsequently on receipt of information from ITS/AIR/CIB/I&CI the Learned Assessing Officer issued notice u/s 148 on 30.03.2016 on the ground that assessee allegedly received Rs. 73,50,000/- share application money/premium on substantially higher value without any justification. A copy of notice u/s 148 is available on paper book page no. 1. The assessee furnished the return of income electronically on 27.04.2016 and also furnished a hard copy on 29.04.2016. The Assessing Officer has completed the assessment u/s 148/144 of the Income Tax Act, 1961 16.12.2016 determining total income at Rs. 73,50,000/- by making addition of the alleged shares premium u/s 68 of the Act and treating the share premium of Rs. 73,50,000/- as income of the assessee.

5. By the impugned order, the Id CIT(A) has deleted the addition after observing as under:

“3.3.2 Determination:

- (i) *I have duly considered the submissions of the appellant, assessment order, remand report of the AO, rejoinder of the appellant to the remand report of the AO and the material placed on record. It is noted that during the year under consideration the appellant has issued 15000 equity shares of face value of Rs. 10/- each at a premium of Rs. 490/- each i.e. 15000 equity shares were issued for a total*

consideration of Rs. 75 lakh including share capital of Rs. 1,50,000/- and share premium of Rs. 73,50,000/-. In the assessment order, it has been observed by the AO that the appellant company has failed to prove the identity, creditworthiness of the share applicants and the genuineness of these transactions. It was further observed by the AO that there was no justification of such a high premium charged by the appellant company vis-a-vis its financial statements. The AO has discussed the provisions of section 56(1) of the Act on page no. 15 of the assessment order, and was of the view that the instant transactions under consideration were duly covered under the provisions of section 56(1) of the Act, though a specific provision was inserted in subsection 2 of section 56 subsequently. However, the AO has made an addition of Rs. 73,50,000/- u/s 68 of the Act by observing that the receipt of share capital and share premium was part of a device of colourful transaction by way of which a sum of Rs. 73,50,000/- was introduced into the books of accounts of the appellant company in the form of share premium attached to the share capital. It was also observed by the AO that there was no justification for premium of Rs. 490 per equity share. It was also held by the AO that the appellant company has failed to prove the identity, creditworthiness of the share applicants and the genuineness of the transaction.

- (ii) *It is to be noted that though the AO has discussed the provisions of section 56 of the Act but did not invoke these provisions but has made addition u/s 68 of the Act. It appears that the AO was confused whether the provisions of section 56 or 68 are applicable to the facts of the instant case under consideration. It is strange that the AO has accepted the share capital but did not accept the share premium though the same were received together. I fail to understand that how*

the creditworthiness, identity of the share applicants and genuineness of the transactions could be accepted by the AO for share capital but not for the share premium, though the transactions were composite one. It appears that the AO has invoked the provisions of section 56(2) of the Act in the guise of section 68 of the Act as only share premium was added to the income of the appellant.

(iii) It would be appropriate to examine the applicability of the provisions of section 56 of the Act to the facts of the instant case under consideration, which reads as under:-

"56. Income from other sources.

(1) "Income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the head. "Income from other sources", if it is not chargeable to income tax under any of the heads specified in section 14, items A to E."

(iv) The provisions of Section 56(1) the Act can be invoked to tax income of every kind which is not chargeable to tax under any head specified in section 14, under the head 'Income from other sources'. Therefore, provisions of sec 56(1) are not applicable. Further the amended provisions of sec 56 (2) of the Act specify the various income to be assessed under this section. The premium on shares has been included u/s sec 56(2) (viii b) of the Act w.e.f. 01.04.2014, which is reproduced as under:

"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:-

(i) dividends

(ia) to (vii a)...

(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:"

- (v) *A corresponding amendment has also been made in the definition of income u/s 2(24) of the Act w.e.f. 01.04.2013. The relevant portion reads as under:-*

"(xvi) any consideration received for issue of shares as exceeds the fair market value of the share referred to in clause (viib) of sub-section (2) of Section 56;]"

- (vi) *It is to be noted that to tax the income under the Act, it must come under the definition of income as provided u/s 2(24) of the I.T. Act, 1961. There were amendments in section 2(24) of the Act and in section 56(2) of the Act w.e.f. 01.04.2013, which are not applicable to A.Y. under consideration. By these amended provisions, any consideration received for issue of shares that exceeds the fair market value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be taxable as income as per clause (viib) of section 56(2) of the Act. The CBDT vide Circular No. 3 of 2012 dated 12.06.2012 has also mentioned that provisions of section 56(2) (viib) will be applicable from A.Y. 2013-14 onwards. It would be appropriate to reproduce the relevant portion of above referred CBDT Circular as under:-*

"Share premium in excess of fair market value to be treated as income In the Finance Bill, 2012, it had been proposed [section 56(2), as sub-clause [(viib)] that in case of a company, not being a company in which the public are substantially interested, which receives, in any previous year, from any person being a resident, any consideration for issue of shares and the consideration

received for issue of such shares exceeds the face value of such shares, then the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax. An exemption was provided in a case where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.

(i) It has now been further provided that such excess share premium is included in the definition of "income" under sub-clause (xvi) of clause (24) of section 2.

(ii) Considering that the proposed amendment may cause avoidable difficulty to investors who invest in start-ups where the fair market value may not be determined accurately, it is proposed to provide an exemption to any other class of investors as may be notified by the Central Government.

*These amendments will take effect from 1st April, 2013 and will, accordingly, **apply in relation to the assessment year 2013-14 and subsequent assessment years.***

(vii) The provisions of sec 56(2) (viib) of Income-tax Act, 1961 are applicable w.e.f. 1st April, 2013 and will accordingly apply in relation to AY 2013-14 and subsequent assessment years. The income as mentioned in section 56(2) (viib) of the Act is included in definition of section 2(24) of the Act w.e.f. 01-04-2013. Therefore, the provisions of these sections cannot be made applicable prior to A.Y. 2013-14.

*(viii) **Reliance is placed on the judgement dated 30.10.2017 of Hon'ble ITAT, Jaipur in the case of M/s. Motisons Buildtech Pvt. Ltd. Vs ACIT in ITA No. 481 /JP/2017 for AY 2009-10, wherein the appeal of the revenue on the same issue was dismissed. Further, the above judgement was followed by the Hon'ble ITAT, Jaipur in its judgement dated 06.11.2017 in the case of M/s. Rainbow Buildcon Pvt. Ltd Vs ACIT in ITA No.491/JP/2017 for the A.Y. 2009-10.***

(ix) *It may be mentioned that section 68 of the Act provides that if any sum found credited in the books of an assessee maintained and explanation offered by the assessee is not satisfactory in the opinion of the AO, then such sum credited be charged to income-tax as the income of the assessee of that previous year. It would be appropriate to reproduce the provisions of section 68 of the Act as under:-*

“Section 68 - Cash Credits: *Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the (Assessing) Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.”*

(x) *Thus, the sum received by the appellant, towards share application and share premium could have been taxed as income u/s 68 of the Act in the previous year in which such sum has been received by the appellant. It is noted that in its written submissions, it has been claimed by the appellant that the share capital as well as share premium was received by it during the FY 2007-08 relevant to the AY 2008-09 and not in the instant year under consideration. It may be mentioned that during the assessment proceedings, it was stated by the appellant that the share capital was received during the FY 2007-08 relevant to AY 2008-09 and the shares were issued during the FY 2008-09 relevant to AY 2009-10 as is evident from para No. 8(d) on page No. 13 of the assessment order. However, it appears that the same was ignored by the AO. It is to be noted that during the appellate proceedings, the appellant has filed a number of documents as additional evidences including share applications, bank statement of the appellant etc., relating to the issue under consideration, which along with written submission of the appellant were forwarded to the*

AO for its comments and for making necessary enquiries, if any. However, it appears that no enquiries were made by the AO even during the remand proceedings though sufficient time of more than 5 months were allowed to it. It is pertinent to mention here that in its remand report, the AO could not controvert the above submissions of the appellant but only stated that:

"In compliance to the letter u/s 133(6) the assessee has furnished written reply on 12.06.2014 (copy enclosed). In the reply the assessee itself accepted that the share premium was received during the A.Y. 2009-10 and no details has furnished during assessment proceedings. Hence the allegation of the assessee is incorrect."

- (xi) It may be mentioned that the above reply of the appellant, as relied upon by the AO, could be used for initiating proceedings u/s 147 of the Act but not for making addition u/s 68 of the Act as the same is not supported with any corroborative evidence. The AO must ascertain the year in which the such sum was received by the appellant and the AO should have made necessary verification in this regard. For making addition u/s 68 of the Act, the sum must have been credited in the books of accounts of the appellant, during the year under consideration and there is no evidence on record, which may establish that the share capital as well as share premium was received during the year under consideration and thus, there cannot be any justification for the AO to make the impugned addition. If any action has to be taken u/s 68 of the Act, then the same has to be taken in the FY 2007-08 relevant to the AY 2008-09, in which the said sum was received by the appellant and not in the year under consideration. It is noted from the balance sheet of the appellant as on 31.03.2008 that the appellant has shown share application money of Rs. 75 lac under the head 'Current Liabilities & Provisions' in*

Schedule-E to the balance sheet which clearly establish that the amount for issue of share capital was received during the FY. 2007-08 relevant to the AY 2008-09 and not during the FY 2008-09 relevant to the AY 2009-10 i.e. the year under consideration.

(xii) *It may be mentioned that in the case of ITO Vs Standard Leather (P.) Ltd. [2016] 76 taxmann.com 109 (Kolkata - Trib.), the similar issue was before the Hon'ble Tribunal and it was held therein that:*

*“Similarly in the case of Dy. CIT v. Amod Petrochem (P.) Ltd. [2008] 307 ITR 265 (Guj, it was held that as per section 68, there should be cash credits of previous year. The section provides for a deeming fiction of treating the sum found credited in the books of an assessee maintained for any previous year, being charged to income-tax as the income of the assessee of that previous year, provided (i) the assessee offers no explanation as to the nature and source of the credits, or (ii) the explanation offered by the assessee is not, in the opinion of the assessing officer, satisfactory. **The crux of the issue, therefore is, there have to be credits of any sum in the books of an assessee maintained for any previous year, only then the sum so credited can be brought to tax as the income of the assessee of that previous year; in other words, first of all, there have to be credits in a previous year and only in the assessment relatable to that previous year, namely, year of credit, the sum can be brought to tax.** In CIT v. Usha Stud Agricultural Farms Ltd. [2008] 301 ITR 384/[2009] 183 Taxman 277 (Delhi), it was held that since it is a finding of fact recorded by the Commissioner (Appeals) that the credit balance appearing in the accounts of assessee, did not pertain to the year under consideration, under these circumstances, the assessing officer was not justified in making the impugned addition under section 68 and as such no fault could be found with the order of the Tribunal which had endorsed the decision of Commissioner (Appeals). In Mahabir Prasad Prem Chand Jain v. ITO [1988] 40 Taxman 35 (Mag.)(Delhi), it was held that amounts found in the books of assessee were in existence much prior to the beginning of the accounting period corresponding to the relevant*

*assessment year and the same could not, therefore, be treated as the income of assessee earned during the relevant previous year. In Nuchem Ltd. v. Dy. CIT [2004] 87 TTJ 166 (Delhi - Trib.), it was held that revenue had failed to prove that the amounts were credited to the books of account of the assessee in the year under consideration. These amounts were brought forward from earlier years and it is settled law that the addition under section 68 could be made only if the amount was credited in the accounts of the assessee in the relevant financial year. In **Shri Vardhman Overseas Ltd.'s case (supra)**, it was held that no new amount had been credited by assessee in its account during the year under consideration. Therefore, applicability of section 68 is also ruled out and addition could not be made under section 68. In view of above there is reason to interfere in the order of Commissioner (Appeals). Hence, this ground of Revenue is dismissed. [Para 13]" (emphasis supplied)*

(xiii) *In the case of M/s. Sooraj Leathers Vs ITO in I.T.A.No.305/Mds./2016, it was held by Hon'ble Tribunal that:*

"If the liabilities are old, no credit has been made in so far those credits in the books of accounts in the assessment year under consideration, Sec.68 cannot be applied."

(xiv) *In the case of Glen Williams Vs ACIT in ITA No. 1078/Bang/2014, it was held by Hon'ble Tribunal that:*

13. *We have given a careful consideration to the rival submissions. On almost identical facts, the Hon'ble Delhi High Court in the case of Shri Vardhaman Overseas Ltd. (supra), has clearly laid down that neither section 41(1) nor section 68 of the Act can be applied. On the applicability of section 68, we are of the view that those provisions will not apply as the balances shown in the creditors account do not arise out of any transaction during the previous year relevant to AY 2009-10. The provisions of sec. 68 are clear inasmuch as they refer to "sum found credited in the books of account of an assessee maintained for any previous year". Since the credit entries in question do not relate to previous year relevant to AY 2009-10, the same cannot be brought to tax*

u/s. 68 of the Act. The proper course in such cases for the Revenue would be to find out the year in which the credits in question were credited in the books of account and thereafter make an enquiry in that year and make an addition in that year, if other conditions for applicability of section 68 are satisfied.”(emphasis supplied.)

(xv) *In view of the above discussion and looking to the totality of facts and circumstances of the case, it is held that the AO was not justified in making addition of Rs. 73.50 Lac u/s 68 of the Act, during the year under consideration, as the such sum was not received by the appellant during the previous year relevant to the assessment year under consideration and hence, the addition made by the AO is hereby deleted.”*

6. Against the above said order of the Id. CIT(A), the revenue is in further appeal before us wherein following grounds have been taken by the revenue.

“On the facts and in the circumstances of the case and in law the Ld. CIT (Appeals)-I. Jaipur has erred in:-

- “1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was justified in deleting the addition of Rs. 73,50,000/- made by the AO on account unexplained credit of share premium?*
- 2. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was not justified in ignoring the fact that the assessee has declared share application money receipt in balance sheet for F.Y. 2008- 09 relevant to A.Y. 2009-10?*
- 3. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was not justified to appreciate the facts that the assessee has credited the share application money during A.Y. 2009-10 (in balance sheet)?*

4. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was not justified in ignoring the facts that the assessee has not filed bank statement and confirmations of share application money/share premium received during assessment proceeding?”*

7. It was argued by the Id DR that the assessee has not satisfactorily explained the genuineness and creditworthiness of the applicants with regard to the amount of share premium paid by them. He has further submitted that the receipt of share capital and share premium was part of device of colourable transaction by which the assessee introduced Rs. 73.50 lacs into books of account in the form of share premium attached to the share capital. He has further contended that the Id. CIT(A) was not justified in deleting the said addition merely on the ground that the credit in the books of the assessee was in the preceding assessment years 2008-09.

8. On the other hand, the Id AR of the assessee has contended that the credit in the books of account did not arise out of any transaction entered by the assessee during the relevant assessment year 2009-10 under consideration. Since the amount was not received during the year under consideration but was already in the books of account and mere carry forward during the year under consideration, the Id. CIT(A) was justified in deleting the addition on the ground that there was no fresh credit during the year under consideration.

9. We have considered the rival contentions and carefully gone through the orders of the authorities below as well as the remand report called by the Assessing Officer and rejoinder filed by the assessee. From the record, we found that after reopening of the assessment, the Assessing Officer made enquiry with regard to share capital and share premium so received by the assessee. However, not satisfied with the assessee's contention and having not furnished documents required by the Assessing Officer and not appearing before the Assessing Officer, the Assessing Officer passed order U/s 144 of the Act and made addition of Rs. 73,50,000/- on account of share premium so received by the assessee. However, no addition was made on account of share capital. By the impugned order, the Id CIT(A) deleted the same by observing that the share capital and share premium was received by the assessee in the preceding year and not during the year under consideration, therefore, no addition can be made during the year under consideration. From the record, it appears that before the Id. CIT(A), the assessee has filed audited balance sheet to show that the amount of share capital and share premium was received during the preceding year and not during the current year under consideration. Thereafter, the Id. CIT(A) has deleted the addition by observing that the action U/s 68 of the Act cannot be taken in the assessment year 2009-10 under consideration in so far as the

amount was received in the preceding year. As per the balance sheet placed on record, it appears that the assessee had shown share application money in Schedule-G under the head current liabilities and provisions. We also found that the additional evidence filed before the Id. CIT(A) was sent by him to the Assessing Officer for his comments and the Assessing Officer in his remand report stated that in compliance to the letter U/s 133(6) of the Act, the assessee has furnished written reply on 12/6/2014 and in the reply, the assessee has accepted that the share premium was received during the A.Y. 2009-10 and no details has been furnished during the assessment proceedings. However, the findings recorded by the Id. CIT(A) is contrary to the observation of the Assessing Officer in his remand report. Therefore, in all the fairness, we restore the matter back to the file of the Assessing Officer for deciding the issue afresh after considering the audited balance sheet of the assessee for the year under consideration as well as the balance sheet for the preceding year. If the Assessing Officer found that the amount on account of share capital and share premium was received and credited in the preceding year, no addition is warranted during the year under consideration in terms of various decision of Hon'ble Courts as relied on by the Id. CIT(A) in his order. Accordingly, the Assessing Officer is to decide the issue afresh in terms of our above direction.

10. In the result, appeal of the revenue is allowed for statistical purposes in terms indicated hereinabove.

Order pronounced in the open court on 01st April, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 01st April, 2019

*Ranjan

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

1. अपीलार्थी / The Appellant- The I.T.O., Ward 2(2), Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Trugold Buildtech Pvt. Ltd., Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 736/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar