

PIN THE INCOME TAX APPELLATE TRIBUNAL

"H" BENCH, MUMBAI

**BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER**

ITA no.3539/Mum/2018
(Assessment Year: 2009-10)
ITA no.3540/Mum/2018
(Assessment Year: 2010-11)

Deputy Commissioner of Income Tax,
Central Circle-5(2), Mumbai

..... Appellant

v/s

M/s Kaygee Investments Pvt Ltd
203A, Vastu Prestige, New Link
Road, Andheri (W), Mumbai
PAN-AAACK2876M

..... Respondent

Assesseeby : Sh. Srinivas, CIT-DR

Revenue by :Sh. Hari S. Raheja/ Sh Mani Jain, ARs

Date of Hearing -13.06.2019

Date of Order - 31.07.2019

ORDER

PER: MANJUNATHA G.

These two appeals filed by the Revenue are directed against separate, but identical orders of the CIT(A)-53, Mumbai dated 07.03.2018 and they pertain to the assessment years 2009-10 and 2010-11. Since, facts are identical and issues are common, for the

sake of convenience, these appeals were heard together and are disposed off, by this consolidated order.

2. The assessee, has more or less filed common grounds of appeal for both assessment years. For the sake of brevity, grounds of appeal filed for assessment year 2009-10 are as under:-

"i. Whether on the facts and circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs. 9,58,27,305/- made under section 68, being investment in shares of assessee company?."

ii. Whether on the facts and circumstances of the case and in law, the Ld CIT(A), failed to appreciate that the share applicant had no credit worthiness to make the impugned investment?."

3. The brief facts of the case are that a search and seizure operation under section 132(1) of the Income Tax Act, 1961 was conducted in the case of IPCA Laboratories Ltd., and others on 23.12.2014. During the course of search, certain incriminating materials were found and seized. Further, a statement under section 132(4) was recorded from various persons, including directors of the company in respect of share capital received from M/s Apsara Trex Pvt. Ltd., for which it was stated that amount of share capital invested in assessee's company by M/s Apsara Trex Pvt. Ltd., is non genuine transaction which was raised to re-root assessee own unaccounted income in the books of accounts. It was further stated

that the amount of share capital received from Apsara Trex Pvt. Ltd., amounting to Rs. 26,86,84,880/- was offered as additional income.

4. Consequent to search, the case of the assessee was centralised with DCIT, Circle 5(2), Mumbai, accordingly notice under section 153(A) of the Act, dated 4.5.2016 was issued and duly served upon the assessee. In response, the assessee had filed a return on 15.6.2016 declaring total income of Rs. 32,71,009/-. Thereafter, the case has been selected for scrutiny and notices under section 143(2) and 141(1) of the Act, were issued. In response to notice, the authorized representative of the assessee appeared from time to time and filed various details, as called for. During the course of assessment proceedings, the AO noticed that during the financial year 2008-09 relevant to assessment year 2009-10 the assessee had issued 9,745 equity shares with face value of Rs. 10 @ Rs. 17,735/- therefore, called upon the assessee to file necessary evidences including Valuation Report if any, for justification of shares issued with a huge premium of Rs. 17,735/-. In response, the assessee has filed various details including name and address of the subscriber, PAN number alongwith financials to prove that transactions between the parties are genuine which are supported by necessary evidences. The assessee had also filed Valuation Report from valuer in support of

shares issued at premium. The AO after considering the submissions of assessee and also taken note of statement recorded from various persons including Shri. Chandresh Kumar Jain, one of the Directors of Apsara Trex Pvt. Ltd., company came to the conclusion that M/s Apsara Trex Pvt. Ltd., is a sham company which is created mainly for providing accommodation entries. The AO further observed that the statements recorded from various persons including directors and employees of Apsara Trex Pvt. Ltd., also support the view taken by the department, during the course of search as per which this company has been used to plug in assessee's unaccounted money into the books of accounts in the form of share capital which is evident from fact that M/s Apsara Trex Pvt. Ltd., does not have any credible business activity and also have financial strength to explain huge investment in shares of assessee's company. The shares have been subscribed with a huge premium of Rs. 17,725/- for share for which no explanation has been offered. The AO had also taken support from the statement of Prem Chand Godha, Director of assessee company to come to the conclusion that the company has accepted the fact that it has received amount from Apsara Trex Pvt. Ltd., which is a non-genuine transaction and accordingly, he opened that the assessee has failed to prove genuineness of transaction and also creditworthiness of parties, more particularly in the light of

facts brought out during the course of search proceedings and accordingly by relied upon judicial precedents including the decision of Hon'ble Supreme Court in the case of **CIT vs. P. Mohankala (2007) 291 ITR 278 SC** made additions of Rs. 17,28,27,575/-as unexplained cash credit under section 68 of the Income Tax Act, 1961.

5. Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A). The assessee has filed elaborate written submissions on the issue which has been reproduced at para 4.7 on page 9 to 19 of learned CIT(A) order. The sum and substance of the arguments of the assessee before the CIT(A) are that the AO has made additions of share capital received from M/s Apsara Trex Pvt Ltd., only on the basis of statement of certain persons ignoring all evidence filed including identity of subscriber, genuineness of transactions and creditworthiness of the party. The assessee further submitted that although the director of the assessee company Shri. Premchandra Godha, in his statement recorded under section 132(4) admitted that share capital received from Apsara Trex Pvt Ltd., had been offered as additional income, but such admission has been retracted before the AO by filing necessary evidences including the details above the transactions between the parties and also filed necessary evidences to prove creditworthiness of the parties. The

assessee had also explained circumstances under which the statement has been given during the course of search.

6. The CIT(A) after considering the submissions of the assessee and also taken note of various evidences filed by the assessee held that out of total share capital of Rs. 17,28,27,575/- received from Apsara TrexPvt Ltd., a sum of Rs. 15,53,00, 000/- has been received in financial year 2007-08 relevant to assessment year 2008-09 and hence to that extent additions could not be made under section 68 of the I.T. Act, 1961 for impugned assessment year, because the provisions of section 68 applies only to the creditors which are found in the books of accounts of the assessee for which no explanation has been offered or explanation offered by the assessee is not satisfied to the AO, then the same can be considered as unexplained income of that assessment year. In so far as, the remaining amount of share capital received from the subscriber, the CIT(A) observed that the assessee has explained with necessary evidences to prove identity, genuineness of transactions and creditworthiness of the subscriber. The assessee had also explained source of source which is evident from the financial statement filed during appellate proceedings which clearly proves M/s TrexPvt. Ltd., has source of income to explain investment in assessee company. The CIT(A) has also negated

observations of the AO with regard to subsequent amalgamation of M/s Apsara TrexPvt. Ltd., with Godha family and held that subsequent transactions between M/s Apsara TrexPvt. Ltd., and Godha family has nothing to do with transactions between the assessee and the subscriber. The CIT(A) had also negated observations of the AO in the light of statement of Shri. Premchandra Godha and other persons recorded during the course of search and held that mere admission is not sufficient enough to held that particular receiptis income unless, it is supported by circumstantial evidences. In this case, the AO has made additions merely on the basis of statements of certain persons without there being any further evidences to justify his action,therefore, he opened that the AO was erred in making additions towards share capital received from M/s Apsara TrexPvt. Ltd., under section 68 of the I.T. Act, 1961. The relevant finding of the learned CIT(A)are as under:-

"4.9However, there are peculiar facts that must be taken judicial note of. It is noted that Apsara TrexPvt. Ltd., invested in the shares of the appellant company. An amount of Rs. 15,53,00,000/- was invested in AY 2008-09 and credited as share application money and thus clearly cannot be part of any addition u/s 68 since this amount was received and credit entry is shown in the assessee's books in AY 2008-09. Since the credit of this amount appears in the balance sheet as on 31.3.2008, it falls outside the purview of section 68 in AY 2009-10. Thus this contention of the appellant is legally correct and is accepted.

4.10. it is further observed that M/s.ApsaraTrexPvt.Ltd. raised funds by way of issue of shares at premium in earlier years as is seen from its financials for FY 2004-05 & 2005-06. Thus, as on 31-03-2006 it already had share capital and reserves raised of Rs. 17,31,52,000/- by way of share capital and premium. Such raising of funds had been accepted in the scrutiny assessment u/s 143(3) for AY 2005-06 dated 19.2.2017. There is explicit mention of raising of share capital of Rs 41 lakhs along with share premium of Rs 365,40,000/- in the assessment order. Thus, once the funds raised by M/s.Apsara TrexPvt.Ltd. has been accepted in the past, it forms the source for the subsequent investment by it in the appellant company and cannot be ignored. If there were any doubts regarding the funds raised by M/s.Apsara TrexPvt.Ltd. the recourse was to make the addition in those assessment years in which the funds were raised by M/s.Apsara Trex Pvt Ltd. It is also noted that the period during which the funds were raised were much prior to the transaction with the appellant company. Shri Premchand Godha was nowhere related with the affairs of M/s.Apsara TrexPvt.Ltd. in the years in which the funds were raised by it. Thus the source of funds is explained.

4.11 There is another aspect which merits attention. There is an allegation that the Godha family acquired shares of M/s.ApsaraTrexPvt.Ltd. at par even though its net asset value was much more. It is also alleged there were transactions outside the books in respect of the acquisition of the shares of M/s.Apsara TrexPvt. Ltd. Details were called in this regard in respect of shares acquired in M/s.Apsara TrexPvt.Ltd.. The shares were acquired from November 15, 2007 onwards by the Godha family members. It is seen that these transactions have been sourced by the individuals of the Godha family from their own funds and paid to the shareholders of M/s.Apsara TrexPvt.Ltd. Shri Prashant Godha, Shri Nikhil Prakash Jain and Shri Atul Nirmal Jain became directors of M/s.Apsara TrexPvt.Ltd. only in FY 2007-08. There is no role of the appellant company in these transactions. The individuals of Godha family and the appellant company are two distinct legal entities and cannot be treated as one for the purpose of making an assessment. If justified and evidence was found, addition could have been made in the hands of the Godha family members who acquired the shares of M/s. Apsara Trex Pvt Ltd. at less than the fair value as alleged by the assessing officer and the shareholders of M/s.ApsaraTrexPvt.Ltd. who are alleged to have received consideration not recorded. However, this does not mean that the addition can be sustained in the hands of the appellant company.

4.12. No doubt, there is an acceptance by Shri Premchand Godha this statement recorded in the course of search that the source of investment in appellant company is unverifiable and hence additional income is offered in the hands of the appellant. However, such statement cannot be considered in isolation without considering the legal aspects and the factual position relevant to the transaction. If an addition is not legally admissible in the hands of the appellant, a mere admission cannot be the sole basis for the same. It is noted that in the statement recorded on 24.12.2014, Shri Atul Jain in answer to Q 22 stated that the major investment by M/s.Apsara TrexPvt.Ltd. was in M/s Kaygee Investments P. Ltd. and was sourced out of its share capital and reserves. It was further stated that the books of M/s.Apsara TrexPvt.Ltd. from 1.4.2007 was kept in corporate office of M/s Kaygee Investments P. Ltd. at B 28 Bukhanwala Chamber, 6th Floor, Link Road Andheri West. He did state that the investment was based on the valuation report made by M/s NatvarlalVyapari & Co. Further he also did state that shares of M/s.Apsara TrexPvt.Ltd. were acquired by Godha family at face value and the erstwhile owners of M/s.Apsara TrexPvt.Ltd., were compensated outside books though he did not give any details of the same. Thus there is no admission nor any details of unaccounted money being introduced by way of share capital in the appellant company.

4.13. In the statement recorded on 23.12.2014 Shri Premchand Godha was asked, inter alia, regarding investments made in the appellant company. Regarding source of such investments, in answer to Q 21 he stated that it is out of the reserves of the investing companies. His statement was again recorded on 24.12.2014 and again on 25.12.2014. It is in the statement recorded on 25.12.2014 that Shri Premchand Godha made the offer of Rs 26,86,84,880/- as additional income which is the basis for the addition made by the assessing officer. No specific incriminating evidence was found in the course of search to substantiate the addition made.

4.14 To conclude, the amount of Rs. 15,53,00,00/- was invested in AY considered u/s 68 in AY 2009-10, Further, the amounts received as share application money is sourced out of share capital and reserves of the investor company. Such funds as share capital and reserves were raised by the investor much earlier and at a time when it was not under control of Godha family. Even if credence is given to allegation that the Godha family understated the purchase value of shares of the investor and paid out of books to the erstwhile owner/ shareholders of the investor companies, remedy lies in taking appropriate action in the hands of the shareholders and not the appellant company. In these facts the additions made of Rs. 17,28,27,575/- u/s.68 of the I.T. Act is deleted. Grounds of Appeal No. 1 & 2 are allowed."

7. Ld. DR submitted that the learned CIT(A) was erred in deleting the additions made by the AO towards share capital under section 68 of the I.T. Act, 1961 without appreciating the fact that the AO had brought out various facts during search proceedings in the case of IPCA Laboratory Limited and Others Group on 20.3.2014, where the directors of the company had categorically admitted that share capital received from M/s Apsara Trex Pvt. Ltd., is not genuine transactions and which is used to plug in own unaccounted income of the assessee into books of accounts. The learned DR further submitted that the AO had also brought out clear facts in the light of the statements recorded from Directors of M/s Apsara Trex Pvt. Ltd., where they have categorically admitted that the company had a shell company which is mainly involved in providing accommodation entry to various beneficiaries. No doubt, the assessee has filed various documents including the identity of the subscribers, but that by itself would not be sufficient to get out of shadow of the provisions of section 68 of the Act, and what is relevant is to prove three ingredients including identity, genuineness of transactions and creditworthiness of the parties. In this case, although there is no doubt about identity of the parties, but remaining two aspects i.e. genuineness of transactions and creditworthiness of the subscriber is in doubt. The conduct of the parties and subsequent event of

amalgamation of subscriber companies into assessee group clearly prove the intention of the parties to use this company as conduit for conversion of unaccounted income in the guise of share capital. The CIT(A) without appreciating these facts, simply deleted the additions made by the AO.

8. The Id. AR for the assessee, on the other hand, strongly supported the orders of the CIT(A) submitted that the CIT(A) had appraised facts in right perspective in light of various evidences filed by the assessee during the course of appellate proceedings, where the observations made by the AO had been completely negated. The Id. AR further submitted that there is no dispute with regard to the identity of the party, because the AO has never disputed identity. The AO had made additions towards share capital only on the ground that genuineness of transactions is in doubtful, because the assessee has issued shares at a huge premium without any corresponding business activity and financials to support such a huge valuation. But, fact remains that the assessee has filed complete details to prove genuineness of transactions and also explained issue of shares at a premium by filing necessary Valuation Reports. As regards the statement of directors of subscriber company, it was categorically explained that they were never stated that the transactions between the parties was non genuine.

Similarly, in respect of statement of Premchand Godha, director of assessee company, it was explained before the AO that under what circumstances the admission of additional income had been given. The AO ignoring all evidences filed by the assessee, made additions only on the basis of statement of directors and employees of subscriber company and statement of Shri. Premchand Godha, ignoring other crucial aspects including subsequent retraction of said statement by the directors. In this regard, he relied upon various judicial precedents including the decision of Hon'ble Supreme Court in the case of ***CIT vs. Lovely Exports Pvt. Ltd., (2008) 216 CTR 195.***

9. We have heard both the parties, perused the materials on record and gone through orders of the authorities below. The AO has made additions towards share capital received from Apsara TrexPvt. Ltd., amounting to Rs. 17,28,27,575/- on the ground that although identity of the parties was not in doubt, but genuineness of transactions and creditworthiness of subscriber was not proved with necessary evidences. The AO has brought out various facts in his assessment order in the light of search conducted in the case of IPCA Laboratories Limited on 23rd December, 2014 and subsequent statements recorded from various persons including director of the assessee Shri. Premchand Godha and also directors and employees

of subscriber company, that M/s Apsara TrexPvt. Ltd., is shell company which was mainly involved in providing accommodation entries of share capital to various beneficiaries. The AO has also taken support from statement recorded from Shri. Premchand Godha, during the course of a search as per which he had categorically admitted that amount of share capital received from M/s Apsara TrexPvt. Ltd., is a non-genuine transaction and accordingly he would offer the same as additional income for tax. Except this, the AO has not brought out any other independent evidences to prove that the transactions between the parties is not genuine. On the other hand, the assessee has filed complete documents including name and address alongwith PAN number of the subscriber, including their income tax ITR acknowledgment ledger account of the subscriber alongwithbank statement, audited financials of the subscribers for two years, copy of return of allotment in form 2 filed with MCA, extract of minute book of the assessee approving allotment of shares to M/s Apsara TrexPvt. Ltd., copy of share certificate and assessment order passed in the case of M/s Apsara TrexPvt. Ltd., for assessment year 2005-06. The assesseehad also filed share valuation certificate of the assessee company from independent valuer justifying issue of shares at huge premium. All these part of assessment records, and the AO never

disputed the fact that the assessee has filed above documents in order to discharge its onus cast upon under section 68 of the Income Tax Act, 1961. In spite of furnishing complete evidences in respect of share capital received from M/s Apsara Trex Pvt. Ltd., the AO disbelieved all evidences and came to the conclusion that transactions between the parties is sham transactions which was used to plug in assessee's own unaccounted income into books of accounts in the form of share capital. The above finding of the AO is primarily based on statements of directors and employees of the subscriber company and the statement of Shri. Premchand Godha, director of the assessee company. The AO had also taken support of subsequent event of amalgamation of M/s Apsara Trex Pvt. Ltd., with Godha group.

10. Provisions of section 68 of the Act, deals with cases where any sum found credited in books of accounts of a assessee for which no explanation has been offered or explanation offered by the assessee, in the opinion of the AO is not satisfied, then sum found credited in may be treated as income of the assessee for that assessment year. Therefore, in order to fix any credit within the ambit of section 68 of the act, then the AO needs to satisfy about identity, genuineness of transactions and creditworthiness of parties. In this case, identity of parties is not in doubtful. The

remaining aspect of genuineness of transactions and creditworthiness of subscriber, although the AO has doubted the above two aspects, but learned CIT(A) has negated observations of the AO with regard to genuineness of transactions and creditworthiness of parties. We further noted that the Id. CIT(A) recorded a categorical finding that out of total share capital received from the subscriber amounting to Rs. 17,28,28,575/- a sum of Rs. 15, 53,00,000/- has been received in financial year relevant to assessment year 2008-09 and the same was outside the purview of provisions of section 68 of the Income Tax Act, 1961 and said findings of the learned CIT(A) has not been challenged by the Revenue. We further noted the above findings of the Id. CIT(A) further supported by the decision of Hon'ble Delhi High Court in the case of CIT VS. Usha Stud Forms Limited (2008) 301 ITR 384, where it was categorically held that amount of credit received in earlier financial year and brought forward to subsequent year cannot be treated as unexplained credit under section 68 of the Income Tax Act, 1961. As regards remaining amount of share capital, the Id. CIT(A) has recorded a categorical finding in his order at para 4.10 as per which M/s Apsara Trex Pvt. Ltd., has explained the source of investment in assessee company with financial statements of earlier years. The Id. CIT(A) further recorded that M/s

Apsara TrexPvt. Ltd., had issued shares with premium for assessment years 2004-05 and 2005-06 and the same has been utilized for making investment in the shares of assessee company. The Id. CIT(A) observed that assessment proceedings of the subscriber company had been completed under section 143(3) for assessment year 2005-06, where the AO had accepted financial statement without any additions either towards source of funds or investments in share capital of assessee company. Similarly, other observations made by the AO with regard to subsequent amalgamation of M/s Apsara TrexPvt. Ltd., with Godha family, the CIT(A) had negated the observations of the AO in the light of the evidences filed by the assessee that subsequent arrangement between the Godha family and M/s Apsara TrexPvt. Ltd., has nothing to do with transactions between the assessee and the subscriber company. Similarly, the Id. CIT(A) had negated observations of the AO with regard to statement of Shri. Premchand Godha recorded during the course of search and held that such statement cannot be considered in isolation without considering legal aspects and factual position relevant to the transactions. He, further observed that if an addition is not legally admissible in the hands of the assessee, mere admission cannot be sole basis for the same. We find that the above findings of the Id. CIT(A) is based on

appraisal of facts and also supported by various judicial precedents including the decision of Hon'ble Supreme Court in the case of ***Pullangod Rubber Products Company Limited vs. State of Kerela and Others 91 ITR 18*** where the court held that although admission is a best piece of evidence, but that itself is not a conclusive evidence unless said admission is supported by corroborative evidences.

11. In this case, on perusal of facts available on record, we find that the assessee has discharged its onus cast upon under section 68 of the Act, by filing enormous details about transactions, including identity, genuineness of transactions and creditworthiness of the subscriber. We further noted that the assessee had also explained subsequent transactions between the parties in the light of the decision of Hon'ble Bombay High Court, where the Hon'ble High Court has approved amalgamation between the Godha family and M/s Apsara Trex Pvt. Ltd, therefore, the same cannot be considered as sham transactions merely for the reason that the company has been amalgamated with the assessee group. Further, the assessee had filed various evidences in order to prove genuineness of transactions between the parties and also explained the statement of parties recorded during the course of search cannot be read in isolation with facts of the present case. Therefore,

we are of the considered view that the AO was incorrect in making additions towards share capital under section 68 of the Income Tax Act, 1961 in respect of amount received from M/s Apsara TrexPvt. Ltd., ignoring evidences filed by the assessee. We are further of the opinion that the Hon'ble Supreme Court in the case of ***CIT vs. Lovely Exports Pvt. Ltd., 2008 216 ITR 195*** categorically held that if the alleged share capital is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the AO is free to proceed to reopen their individual assessments in accordance with law, but it cannot be recorded as undisclosed income of the assessee company. This legal proposition is further supported by the decision of Hon'ble Supreme Court in the case of ***CIT vs. Goa Spung and Power Limited*** in tax appeal no. 16 of 2012, where a similar view has been expressed. As regards issue of shares at huge premium, the assessee has explained the same with necessary evidences including Valuation Report from the registered valuer, where the value of the share is much higher or equivalent to shares issued to M/s Apsara TrexPvt. Ltd. In any case, the proviso inserted to section 68 by the Finance Act, 2012 w.e.f. 01.04.2013 is considered to be prospective in nature as held by Hon'ble Bombay High Court in the case of ***CIT vs Gagandeep Infrastructure Limited (2017) 394 ITR 680*** where the Hon'ble

Bombay High Court held that proviso inserted to section 68 w.e.f. 01.04.2013 is considered to be prospective in nature and applicable from assessment year 2013-14 onwards. The Id. CIT(A) after considering all these aspects has rightly deleted the additions made by the AO towards share capital received by M/s Apsara Trex Pvt. Ltd., under section 68 of the Income Tax Act, 1961. We do not find any error in the findings of the Id. CIT(A) and hence, we are inclined to uphold findings of the Id. CIT(A) and dismissed appeal filed by the Revenue.

ITA No. 3540/Mum/2018

12. The facts and issue involved in this appeal is identical to the facts and issue which we have already considered in ITA No. 3539/Mum/2018 for assessment year 2009-10. The reasons given by us in preceding paragraphs shall *mutatis mutandis* apply to this appeal also. Therefore, for detailed reasons given by us in ITA No. 3539/Mum/2018, we are of the considered view that the Id. CIT(A) has rightly deleted the additions made by the AO towards share capital received from **M/s Shreya Tie Up Pvt.Ltd.,.** Hence, we are

inclined to uphold findings of the Id. CIT(A) and dismissed the appeal by the Revenue.

13. In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced in the Open Court on.31.07.2019.

Sd/-

**(RAVISH SOOD)
JUDICIAL MEMBER**

Sd/-

**(G. MANJUNATHA)
ACCOUNTANT MEMBER**

MUMBAI, DATED: 31.07.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

SH

By Order

(Dy./Asstt.Registrar)

ITAT, Mumbai