

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND  
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA NO. 351/MUM/2016 : A.Y : 2012-13**

Exind Trading Pvt. Ltd.,  
10, Shirin Manzil, 18/24, St. Marry  
Road, Mazgaon, Mumbai 400 010.  
**PAN : AABCE3859K** (Appellant)

Vs. ITO-6(2)(4),  
Mumbai (Respondent)

**Appellant by : Shri Dharmesh Shah  
Respondent by : Shri Rajeev Gubgotra**

**Date of Hearing : 20/08/2019  
Date of Pronouncement : 07/11/2019**

**ORDER**

**PER SHAMIM YAHYA, ACCOUNTANT MEMBER**

This appeal by the assessee is directed against the order of CIT(A) dated 02.11.2015 and pertains to assessment year 2012-13.

2. The grounds raised read as under :-

*"1. The learned CIT(A) erred in law and in facts in confirming the addition of Rs.3,42,00,000 on account of share capital and premium treating the same as unexplained cash credits u/s 68 of the Act.*

2. *The learned CIT(A) erred in law and in facts in confirming the addition of Rs.34,600/- on account of stamp duty paid on allotment of shares in connection with increase in authorised share capital.*

3. *The learned CIT(A) erred in law and in facts in confirming interest u/s 234B of the Income Tax Act, 1961."*

3. The brief facts of the case are that the Assessing Officer, in this case, noted that during the year assessee-company has shown only business loss of Rs.31,243/- and that the assessee-company has issued shares to Mediorals Laboratory Pvt. Ltd. The shares issued, 85,500 in number, had a face value of Rs. 10/- and were issued at premium of Rs.390/- totalling to a sum of Rs.3,42,00,000/-. The Assessing Officer examined the credibility of the above. He was of the opinion that the assessee-company was having earnings per share of only Rs.1.37. He also found that the aforesaid sum introduced in the form of share capital and share premium has been used in reduction of long term borrowings of Rs.4,50,00,000/-. The Assessing Officer asked for Valuation Report about the shares issued. The Assessing Officer was of the opinion that the Discounted Cash Flow method used was based upon projected/estimated revenue, which was totally unrealistic. The Assessing Officer was of the opinion that because of negative net worth and huge loan liability, no new shareholder would bring in share premium, that too, to square off existing loan liability. Examining the present case on the cornerstone of Section 68 of the Act, the Assessing Officer was of the opinion that the intrinsic value of the share does not justify the premium. He was of the opinion that the surrounding circumstances and preponderance of probability would also need to be taken into account inasmuch as assessee had no business, it had poor EPS, funds were not utilised in assessee's business or income generating areas and funds were diverted. The Assessing Officer further rejected assessee's

contention to summon the investor on the ground that it is not the identity or capacity of the investor, but the nature of transaction, which was subject matter of discussion. Thereafter, the Assessing Officer discussed the *modus operandi* of companies receiving bogus share capital. In this regard, he referred to the decision of Kolkata Bench of the Tribunal in the case of *Bisakha Sales Pvt. Ltd., Kolkata vs CIT in ITA No. 1493/Kol/2013*. He further referred to the decision of Hon'ble Supreme Court in the case of *CIT vs Durga Prasad More, 82 ITR 540 (SC)*. Thereafter, the Assessing Officer referred to a host of decisions and finally concluded as under :-

*“6.2 In view of the discussion as above, the gist of the facts that emerge are recapitulated hereunder for the sake of ready reference and ease of understanding :-*

*a. The valuation report filed by the assessee to justify the charging of share premium is not reliable as the estimated Revenue of operation is at large variance from the actual Revenue of operation in particularly in next two years. The Basis of arriving at the figure of Discounted Cash Flow is not ascertainable.*

*b. EPS of the company is NEGATIVE; in the year before, in the year of receipt of share premium and even in the year thereafter.*

*c. The assessee company does not have any business activities after the receipt of share premium. The credit appearing in subsequent year is on account of “Export advance written back” and “Interest income”.*

*d. Fund is utilized in repaying existing long term borrowings.*

*6.3 In view of the facts and circumstances of the case, submission made by the assessee; and applying the ratio laid down in judicial pronouncement in various cases as discussed above, the sum of Rs.3,42,00,000/- brought in by the assessee in its books of account as share capital and share premium, the nature of which is not satisfactorily explained, is treated as unexplained*

*credit within the meaning of section 68 of the Income Tax Act and taxed as income of the year. Penalty proceedings u/s. 271(1)(c) are hereby initiated for furnished inaccurate particulars of its income.*

*7. During the course of assessment proceedings the assessee was duly asked to file the details of expenses incurred in connection with increase in authorised capital. It was also asked to why the same be not treated as capital expense and disallowed as business expenses in view of the decision of the Hon'ble Supreme court in the case of M/s. Brookbond India Ltd. Vs CIT as reported in 225 ITR 798 (SC). The assessee through its AR submitted that a sum of Rs.34,600/- was paid as stamp duty on allotment of share in connection with increase in authorised share capital. The AR admitted that same may be disallowed. Accordingly, a sum of Rs.34,600/- is disallowed as being capital in nature, and added back to the total income of the assessee."*

4. Against the above order of Assessing Officer, assessee appealed before the learned CIT(A). The learned CIT(A) confirmed the action of the Assessing Officer. He found that there was no business, no assets, no stock belonging to the said company. The learned CIT(A) reiterated the reliance upon the decision of Kolkata Bench of the Tribunal in the case of *Bisakha Sales Pvt. Ltd. (supra)*. He also referred to the decision of Hon'ble Supreme Court in the case of *Durga Prasad More (supra)*. He finally upheld the action of Assessing Officer by holding that the issue of share capital, share premium and accommodation entries are a very cleverly contrived guise of unexplained credit within the meaning of Section 68 of the Act. Against this order, assessee is in appeal before us.

5. We have heard both the counsels and perused the record. The learned counsel for the assessee submitted that the assessee has submitted all the necessary details regarding share capital and share premium. Regarding addition of share capital and share premium, he submitted that the same was

not justified. In this regard, he referred to a catena of case laws, including that of Hon'ble Bombay High Court in the case of *ACIT vs Gagandeep Infrastructure Ltd.*, 394 ITR 680 (Bom.) and *CIT vs Green Infra Ltd.*, 392 ITR 7 (Bom.). He further submitted that the decision of Kolkata Bench of the Tribunal is not at all applicable. The learned counsel for the assessee further submitted that the issue of applicability of Section 78 of the Companies Act, 1956 has not been considered by the learned CIT(A) and the Assessing Officer. Hence, he claimed that the said issue does not arise from the grounds raised for adjudication before the Tribunal. The learned counsel for the assessee further submitted that Section 78(1) and 78(2) of the Companies Act, 1956 are independent and cannot be read together. He further referred to the following case laws :-

- i. PCIT vs Apeak Infotech, 397 ITR 148 (Bom.)
- ii. Asiatic Oxygen Ltd. vs DCIT, 49 ITD 355 (Kol.)
- iii. Vodafone India Services Pvt. Ltd. vs. Union of India & Ors., (368 ITR 1) (Bom.)
- iv. CBDT Instruction No. 2/2015 dated 29.01.2015
- v. ACIT vs Rajesh Digital Media Pvt. Ltd., ITA No. 6251/Mum/2017 dated 20.02.2019
- vi. CIT vs Allahabad Bank Ltd., 73 ITR 745 (SC)
- vii. DCIT vs Finproject India (P) Ltd., 171 ITD 82 (Mum.)
- viii. Credit Suisse Business Analysis (India) Pvt. Ltd. vs ACIT, (72 taxmann.com 131)

6. The learned counsel for the assessee submitted that no adverse inference can be drawn in respect of Section 78(1) of the Companies Act, 1956. The learned counsel submitted that the share premium amount in this case remains at Rs.3,33,45,000/-. Hence, he claimed that there is no violation of Section 78(2) of the Companies Act, 1956. In this regard, he referred to the decisions of Mumbai Bench of the Tribunal in the case of *DCIT vs Finproject*

*India (P.) Ltd., 171 ITD 82 and Credit Suisse Business Analysis (India) Pvt. Ltd vs ACIT, 72 taxmann.com 131.* Further, the learned counsel submitted that even if there is a violation of Section 78(2) of the Companies Act, 1956, there is no provision under the Income Tax Act to tax such receipts.

7. *Per contra*, the learned Departmental Representative (DR) submitted that the issue of share premium and applicability of Section 78(2) of the Companies Act, 1956 was very much dealt with by the Kolkata Bench of the Tribunal in the case of *Bisakha Sales Pvt. Ltd.(supra)*. He referred to the following observations in the said case law :-

*“7.9 We further find that the Hon'ble Apex Court in the case of Bharat Fire & General Insurance Ltd. v. CIT [1964] 34 Cos. 683 has held that prior to the enactment of section 78 premium received on issue of shares were profits. Now section 78 of the Act provides that aggregate value of share premium should be transferred to an account to be called the securities new account. Section 78(2) of the Act provides that share premium account may be utilized for the following purpose :—*

- (a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares :*
- (b) in writing off the preliminary expenses of the company;*
- (c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or*
- (d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company*

*7.10 From the above it is apparent that but for the restriction provided u/s 78(2) the amounts credited in the share premium account would take the character of the profit and consequentially would be liable to be taxed as such. But the adherence to section 78(2) gives the share premium account the characteristic of capital receipt. In the present case before us we find that*

*there is no examination as to whether the company has ever adhered to the prescription of the Companies Act in this regard. If the company has not adhered to the prescription of the Act, the amount involved was liable to be taxed as revenue receipt.”*

Referring to the above, the learned DR submitted that the Assessing Officer and the learned CIT(A), both have relied upon the decision in the case of *Bisakha Sales Pvt. Ltd.(supra)*. Hence, he submitted that it cannot be contended now by the assessee’s counsel that taxability of share premium on account of non-compliance of Section 78(2) of the Companies Act, 1956 was not a matter under consideration. Furthermore, the learned DR relied upon the orders of the authorities below. He submitted that the assessee-company has received huge share capital and share premium and used the entire amount in paying off its long term loan. Hence, he submitted that orders of the authorities below should be upheld.

8. On careful consideration, we find that the authorities below, in their order have referred to the fact that the assessee’s operations and financials do not command such share premium, and that the entire amount received in the garb of share premium has been diverted. Hence, they have treated the transaction as colourable device. Here, we find that the share of Rs.10/- had been issued at a premium of Rs.390/-. The entire amount raised, i.e. Rs.3.42 crores has been used to pay long term liabilities. We find that the contention of the learned counsel for the assessee that the issue of compliance of Section 78 of the Companies Act, 1956 or diversion of share premium cannot be considered is not justified in view of the reliance by the authorities below on the decision of the Kolkata Bench of the Tribunal in the case of *Bisakha Sales Pvt. Ltd. (supra)* wherein this issue was duly considered as reproduced

hereinabove. The authorities below have referred to apex court decision in the case of *Durga Prasad More (supra)* to buttress the point that the apparent is not real, that it is in fact and substance not share premium and that corporate veil has been put to use in a scheming manner. We find that the distinguishing feature of this case is that, not only the assessee's finances and operations do not justify the share premium, but the entire share premium raised has been diverted in paying off long term loan of the assessee. Hon'ble Apex Court in the *Bharat Fire & General Insurance Co. vs CIT, (1964) 34 Comp Cas 683* has observed that but for section 78 of the Companies Act share premium was profits available. Hon'ble Apex Court in *CIT vs Allahabad Bank Ltd., 73 ITR 745 (SC)* has held that after Companies Act, 1956, share premium cannot be used for purpose other than Section 78(2) of the Companies Act, 1956. It is to be noted that these decisions have been rendered by Hon'ble Supreme Court in the context of Income Tax Appeals. In none of the decisions referred by learned Counsel of the assessee, these decisions have been distinguished. Hence the decisions referred by learned counsel of the assessee do not fructify the assessee's case in this regard in view of the direct Supreme Court decision on the issue and case made out.

9. As held by Hon'ble Apex Court in the case of *Oriental Insurance Co. Ltd. vs Meena Varyal, 5 SCC 428*, an *obiter dictum* of Supreme Court is binding on subordinate courts in absence of direct pronouncement on that question elsewhere by Supreme Court. We further find that Hon'ble Supreme Court in the case of *ACIT vs Saurashtra Kutch Stock Exchange Ltd., 262 ITR 146 (SC)* has expounded that non consideration of Hon'ble Supreme Court decision whether cited or not can lead into an order of the Tribunal to be suffering from mistake

apparent from record. From this it implies that it is incumbent upon subordinate courts to follow the law laid down by the Hon'ble Supreme Court.

10. We find that in the present case, the above case laws are apparently applicable. The assessee-company, having raised share premium, has diverted the same in paying off long term loans. The mandate of the above Hon'ble Supreme Court decision is duly applicable. Hence the submission of the learned counsel of the assessee that utilisation of share premium amount in paying off loans is irrelevant is not legally sustainable. It is also settled law that substance prevails over form. It is undisputed that share premium amount has been actually utilised for paying off loan. Furthermore, we note that the transaction is between group concerns. The learned counsel for the assessee submitted that these concerns belong to a reputed group and they are not fly by night operators. This makes it amply clear that for paying off the loan of the assessee-company, a group company has accommodated by introducing money in the form of share premium. In substance, it is not at all share premium. It is, in fact, a misuse of the corporate veil. Assessee-company has no obligation to pay back the amount received as share premium in any event. However, we also find that in this regard learned counsel of the assessee has made various submissions which were not before the Assessing Officer and hence the same were never dealt with in the order of the authorities below.

11. In our considered opinion, the interest of justice demands that this aspect of adjudication needs to be remitted to the file of the Assessing Officer. The Assessing Officer shall examine this aspect in view of our observation and the Hon'ble Apex Court's decisions referred above. The Assessing Officer shall

also consider the submissions of the learned counsel for the assessee and give the assessee proper opportunity of being heard.

12. In the result, this appeal by the assessee stands allowed for statistical purposes.

13. Before parting, we may add that the decision of the Hon'ble Bombay High Court in the case of *Vodafone India Services Pvt. Ltd. vs Union of India & Ors.*, 368 ITR 1 (Bom.) and the CBDT Circular No. 2/2015 dated 29.01.2015 are not applicable in the specific facts of the present case and also inasmuch as the same were in the context of and with respect to determination of arm's length price in the context of international transaction. Furthermore, the Hon'ble Bombay High Court decision in the case of *DCIT vs Apeak Infotech*, 397 ITR 148 (Bom.) is also not applicable on the specific facts of the present case and also as the Hon'ble Apex Court decision in the context of Section 78 of the Companies Act, 1956 referred hereinabove was not the subject matter of consideration there.

14. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 7<sup>th</sup> November, 2019.

Sd/-  
**(RAVISH SOOD)**  
**JUDICIAL MEMBER**

Sd/-  
**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

Mumbai, Date : 7<sup>th</sup> November, 2019

\*SSL\*

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "E" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai