IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.4770/M/2017
Assessment Year: 2010-11

M/s. Konkan Barge Builders P. Ltd., 201, Dalamal Chambers, New Marine Lines, Mumbai - 400020 **PAN: AAACK2529F**	Vs.	Income Tax Officer-6(3)(4), Room No.524, 5th Floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai - 400020
(Appellant)		(Respondent)

ITA No.4564/M/2017
Assessment Year: 2010-11

Income Tax Officer-6(3)(4), Room No.524, 5th Floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai - 400020	Vs.	M/s. Konkan Barge Builders P. Ltd., 201, Dalamal Chambers, New Marine Lines, Churchgate, Mumbai - 400020 **PAN: AAACK2529F**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Vijay Mehta, A.R.
Revenue by : Shri Manoj Kumar Singh, D.R.
Shri Abhirama Kartikeyan, D.R.

Date of Hearing : 12.07.2019
Date of Pronouncement : 03.10.2019

O R D E R

Per Rajesh Kumar, Accountant Member:

The above titled cross appeals have been preferred by the Revenue as well as the assessee against the order dated 03.04.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment

year 2010-11 arising out of the order passed by the AO under section 143(3) read with section 147 of the Act dated 13.01.2016. We will first dispose of the appeal of the Revenue.

ITA No.4564/M/2017

2. The grounds raised by the Revenue are as under:

"1. On the facts and in the circumstances of the case and in law, the id. CIT(A) erred in deleting the addition made on account of treatment of share capital/share premium/share application to the tune of Rs. 1,52,22,098 received from foreign entity, SPI Securities Inc. U.S., St. James Court Suite, 308, St. Denis Street, Port Louis, Republic of Mauritius as unexplained cash credit u/s 68 of the Act without appreciating the fact that the assessee company has failed to furnish the details for receipt of such high premium/share even though the book value per share of the assessee is very much less as compared to the premium fixed.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,52,22,098/- on account of share capital / share premium / share application without appreciating the fact that the AO has specifically noted in the order that as per RBI norms for FDI, any investment in shares of an Indian Company, the valuation has to be done on the basis of DCF method whereas, the assessee has carried out valuation of business by mixing three methods, i.e. DCF, PE & NAV method, so as to suit the requirement of the company and is not reflective of real and genuine valuation of the business.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate the fact that the financial capacity of shareholders are suspicious and the nature of transaction that is, charging huge share premium is beyond any logical sense in the absence of income / negative net worth shown year after year.

4. The Appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored.

5. The Appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary."

3. The only common issue raised in the grounds of appeal is against the deletion of addition by Ld. CIT(A) as made by the AO on account of share capital/share premium/share application to the extent of Rs.1,52,22,098/- received from foreign entity M/s. SPI Securities Inc. Mauritius, US St. James Court Suite,

308, St. Denis Street, Port Louis, Republic of Mauritius as unexplained cash credit under section 68 of the Act.

4. The facts in brief are that the assessee filed the return of income on 02.09.2010 declaring income at nil which was processed under section 143(1) of the Act. Thereafter the case of the assessee was reopened under section1 47 of the Act after recording reasons to believe and the notice under section 148 dated 30.03.2014 was issued and served upon the assessee. The assessee company is engaged in the business of repair and maintenance of small ship/barges. The case of the assessee was reopened on the ground that assessee has received huge share premium amounting to Rs.1,52,22,098/- during F.Y. 2009-10 relevant to A.Y. 2010-11. The AO noted that since no scrutiny assessment was done for this year, therefore, the issue of share premium amount received by the assessee has not been examined. The AO observed that assessee is an unlisted company and the nature of share application received is not substantiated. The AO also called for the information by issuing notice under section 133(6) of the Act dated 21.02.2014 to the assessee after obtaining permission from CIT regarding share premium received and valuation thereof which was replied by the assessee vide letter dated 03.03.2014. Thereafter, the AO once again issued notice under section 133(6) of the Act calling for details related to issue of shares which was again replied by the assessee vide letter dated 01.04.2017 inviting the attention of the AO to the fact that it had already filed the details vide letter dated 03.03.2014 filed in response to notice issued under section 133(6) on 21.02.2014. The assessee was supplied copy of reasons recorded under section 148(2) of the Act. The AO has

sought to reopen the assessment on the ground that valuation method adopted by the assessee for the purpose of issuing shares at premium was not in accordance with the valuation method directed by Reserve Bank of India and that in absence of any income generating activity as well as negative net worth shown year after year, the assessee could not explain the share premium credited in the books of accounts resulting into escapement of income. The assessee filed objections to the reasons recorded vide letter dated 27.10.2014 which was disposed of by the vide letter dated 09.01.2015. During the course of assessment proceedings the AO called for various details of foreign entity who had been issued shares by the assessee at a premium. In the reassessment proceedings, the AO rejected the basis of valuation of shares. The AO also issued notice under section 133(6) of the Act to Arunabh Aggarwal who had invested in capital as well as gave loan to foreign entity who invested in the shares of assessee company in order to verify the source of source. The assessee submitted before the AO that provisions of section 68 of the Act were not applicable to the assessee. However, the said contentions of the assessee was rejected and added the share premium of Rs.1,52,22,098/- to the income of the assessee by framing the assessment under section 143(3) read with section 147 of the Act dated 13.01.2016.

5. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after considering the contentions of the assessee by observing and holding as under:

> "7.*2* I have carefully perused the assessment order and the submission of the appellant. I am unable to agree with the finding of the AO, especially since the

appellant has satisfactorily cleared the three essential tests of the pre proviso Section 68 of the Act as laid down by the Act/ Courts, namely the identity of the creditor, the genuineness of the transaction and the capacity of the nonresident investor (creditor)/ all of which have been established.

The identity was established on furnishing the name/ address/ tax residency certificate/ and these details have been cross confirmed by no less than the MRA itself. Genuineness of the transaction is beyond doubt as bank details have been submitted ; bank statements of both the appellant and the nonresident share holder corroborate the transaction ; bank statements of the nonresident share holder have been procured independently by the MRA and given to the AO ; confirmatory letter about the investment by SPI Inc/ Mauritius in shares of Konkan Barge Builders Pvt. Ltd/ Mumbai is filed by the 'First Island Trust Company/ Republic of Mauritius ; details of increase in share capital along with share premium have been filed by the assessee company with documentary evidence like return of income/ audited balance sheets of the assessee company which have been duly reported to the ROC . Audited accounts and financial statements of the nonresident share holder for the accounting years ending 31/12/2009 and 31/12/2010 have also been independently provided to the AO by the MRA/ and which clearly reflect the holding of the impugned 252 and 452 shares/ as on 31/12/2009 & 31/12/2010, respectively. All these material establishes the genuineness of the transactions as also the fact of sufficient creditworthiness of the investor (nonresident creditor) to have acquired the impugned 252 shares from explained funds. The appellant has complied with the provisions of FEMA and RBI Regulations and Guidelines. The RBI has taken on record the KYC details of the nonresident creditor/ the FCGPRs in the prescribed Forms/ as well as the valuation report of the independent valuer/ as also the Certificate issued by the CA. Thereafter/ the RBI has acknowledged the fact of issue of 252 Shares at Premium of Rs 59,900 per share to the non resident share holder. After taking into consideration all the above/ I am of the view that the appellant has fully discharged the onus cast upon it by virtue of Section 68 of the Act. I therefore hold that the assessing officer was not justified in adding the amount of Rs 1,52,22,098/-, being share premium, as unexplained credits under section 68 of the Act Accordingly/ the said addition is deleted. Ground of Appeal No. 2 is allowed to the extent of deletion in toto, on merits, of the amount of Rs.1,52,22,098/-, which was added as unexplained credits. Therefore, ground no.2 of the appeal is allowed."

6. The Ld. D.R. vehemently submitted before us that the order of Ld. CIT(A), deleting the addition on merit as made by the AO on account of share premium received during the year from a foreign entity ,was bad in law as there was no basis of allotment of shares at such a high rate when assessee was not doing any business and was having negative net worth from year to year. The Ld. D.R. submitted before the Bench that 252 shares of face

value of Rs.100 were issued at a premium of Rs.59,900/- to a foreign entity namely M/s. SPI Securities Inc. Mauritius, US St. James Court Suite. The Ld. D.R. submitted that the valuation report filed by the assessee which was prepared by M/s. Anmol Skhri Consultants P. Ltd. dated 03.10.2009 ,the said valuer has arrived at the valuation of Rs.59,835/- by following different method. The Ld. D.R. argued that as per RBI norms on FDI, any investment in shares of Indian company ,valuation has to be done on the DCF method whereas in the present case the business valuation purportedly carried out was a mix of three methods namely DCF, PE and NAV. The Ld. D.R. submitted that mere filing of evidences of receipt of payment from foreign entity and confirmation from the said entity would not ipso facto justify the issuance of shares at a high premium. The Ld. D.R. relied heavily on the order of AO and prayed before the Bench that the addition on merit as deleted by the Ld. CIT(A) may kindly be set aside and the order of AO be restored.

7. The Ld. A.R., on the other hand, relied heavily on the order of Ld. CIT(A) by submitting that the Ld. CIT(A) after appreciating all the evidences and law applicable to the case of the assessee passed a very speaking and reasoned order. The Ld. A.R. submitted that the assessee has filed various documents to evidence the nature, source, identity, genuineness and creditworthiness of the M/s. SPI Securities Inc. a foreign entity. The Ld. CIT(A) on the basis of said documents recorded a finding that assessee has satisfied the essential ingredients of the proviso to section 68 of the Act and details provided by Malaysian Revenue Authority also clearly reflected holding of impugned shares in the audited accounts. The Ld. CIT(A) also

noted that the assessee has complied with the provisions of FEMA and RBI regulations, guidelines as RBI taken on records of KYC details of non resident, and held that assessee has discharged the onus cast upon it by provisions of section 68 and deleted the addition made by the AO of Rs.1,52,22,098/- on account of share premium. The Ld. A.R. submitted that the AO has accepted the share issued to non resident investor but only questioned the share premium. The Ld. A.R. stated that the AO having accepted the nature of transaction can not add the share premium by doubting the genuineness of transactions under section 68 of the Act. The Ld. A.R. submitted that high value of share premium would not affect the genuineness of the transaction because issuing share at a premium is purely a prerogative of the board of directors and the authority vested with it to decide upon valuation and discretion of investor and there is no bar under law to issue share at a high premium. The Ld. A.R. submitted that there is no controversy of any kind whatsoever in respect of share premium and accounting thereof in the books of accounts as well as those of the non investors as in both the cases the financials were duly audited. The Ld. A.R. submitted that the AO has completely failed to bring any evidence on record to justify the invocation of provisions of section 68 of the Act. The AO has completely failed to disapprove and rebut the evidences placed by the assessee on record. The Ld. A.R. also submitted that the amendment to section 68 and 56 of the Act brought about Finance Act, 2012 are not retrospective in nature and hence the newly inserted provisions are not applicable to A.Y. 2010-11, the year under consideration. The Ld. A.R. also distinguished the case laws

relied upon by the AO and submitted that the said decisions were rendered under different facts. In defence of his argument the Ld. A.R. relied heavily on the following decisions:

a. DCIT v. Piramal Realty P. Ltd. [ITA no. 2317/Mum/2017 dated 16.11.2018] [pages 154-176 of APS]
b. DCIT v. Varsity Education Management P. Ltd. [ITA no. 691/Mum/2016 dated 24.10.2018] [pages 177-208 of APB]
c. Jasamrit Constructions P. Ltd. v ITO [ITA no.1091/Mum/2016 dated 08.02.2018] [pages 209-227 of APB]

Finally, the Ld. A.R. submitted that the order of Ld. CIT(A) may kindly be affirmed in view of the facts of the case vis-à-vis ratio laid down in the above decisions.

8. We have heard the rival submissions of both the parties and perused the material on record. In the instant case, the assessee has issued 252 equity shares of face value of Rs. 100/- each at a premium of Rs.59,900/- to a foreign entity named M/s. SPI Securities Inc. The AO has made the addition under section 68 of the Act in respect of amount of share premium only i.e. the AO added Rs.1,52,22,098/- by stating that there is no justification for issuing shares at a very high premium especially when the assessee was not having any business and having a negative net worth in the balance sheet. According to the AO, the assessee should have followed the DCF method for making valuation and ascertaining the price for issuing shares whereas the assessee has followed a mixture of three methods namely DCF, PE and NAV. The Ld. CIT(A) deleted the addition after holding that assessee has satisfied the three ingredients i.e. identity, creditworthiness of investor and genuineness of the transaction on the basis of evidences filed by the assessee and

even held that the assessee has duly complied with FEMA and RBI norms in seeking the FDI from foreign entity. For the sake of ready reference we would like to reproduce below the evidences filed before the Ld. CIT(A) by the assessee:

> "a. Submissions made to RB! for reporting of foreign investments from SPI Security Inc.
> b. Letter of allotment of registration number from RBI
> c. Tax Residency Certificate of SPI Security Inc.
> d. Written confirmation from SPI Security Inc.
> e. Financial Statements of SPI Security Inc audited by an independent auditor in Mauritius
> f. Return of income filed by SPI Security Inc. before the Mauritius Revenue Agency.
> g. Memorandum and articles association of SPI Security Inc.
> h. Bank Statements of SPI Security Inc.
> i. No objection certificate received from Mauritius Revenue Agency for strike off of name of SPI Security Inc.
> j. Letter from Mauritius Registrar of Companies confirming removal of name of SPI Security Inc.
> k. Form 2 filed with the Indian Registrar of Companies for allotment of shares
> l. Audited financial statements of the assessee
> m. Board of Resolutions of the assessee for allotment of shares."

In our opinion, the Ld. CIT(A) has correctly appreciated the facts of the case and came to the conclusion that assessee has satisfied all the ingredients of provisions of section 68 of the Act. We find that assessee has even proved the source of source as the AO issued notice to Mr. Arunabh Aggarwal who invested in the capital and gave loan to foreign entity. Even the Malaysian Tax Authorities have confirmed the transactions. We are quite convinced with the arguments of the Ld. A.R. that prior to the insertion of new provisions in section 68 and 56 of the Act as brought out by the Finance Act, 2012, the new provisions are not applicable retrospectively and therefore would not have any application in A.Y. 2010-11 in the year under consideration. The case of the assessee is also squarely covered by the decision relied upon by the Ld. A.R. in the case of DCIT vs. Piramal

Reality Pvt. Ltd. in ITA No.2713/M/2017 wherein it has been held that the issuing of shares at a high premium can not be the basis for doubting the genuineness of the transaction for the purpose of section 68 of the Act. The relevant paras are extracted below:

> "10. Now, in the present case of the assessee, the main crux of the facts that the assessee filed sufficient evidences viz, return of income, share allotment, annual return, details including name, address and PAN of the shareholder which are not negated by the AO. The AO in the present case has himself assessed the preference shareholder for the assessment year under consideration and after scrutiny has passed the order u/s 143(3) of the Act around the same date and has neither made any addition nor made any adverse remarks. The AO has not questioned the preference share capital to the extent of the face value but has only questioned the share premium. By this action of the AO himself, the 'nature' of transaction as that of 'preference share allotment' is proved beyond doubt and merely because he feels that the share premium is high the genuineness of the transaction cannot be doubted for the purpose of section 68 of the Act.
> 11. We find that in the given facts of the case the decision of Hon'ble Jurisdictional High Court in case of Gagandeep (supra) squarely applies to the assessee's case. The decision of Hon'ble Jurisdictional High Court in case of CIT vs Green Infra Ltd 78 taxmann.com 340 is squarely applicable to the case of the assessee. Despite being the specific argument of the CIT-DR that the share premium defies commercial prudence, Hon'ble Jurisdictional High Court has held that genuineness of the transaction is proved since the entire transaction is recorded in the books of the assessee and the transaction has taken place through banking channels. The decision of the Hon'ble High Court has specifically held that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. The Tribunal after examining the ingredients of section 68 of the Act held that the addition of share premium under section 68 of the Act cannot be sustained. We hereunder reproduce the relevant paragraph of the decision of Hon'ble Jurisdictional High Court in ease of Green Infra (supra) for ready reference:
> 3.Regarding question no.(ii):
>
> > (a)Before the Tribunal, the Revenue raised a new plea viz. that the so called share premium has also to be judged on the touchstone of Section 68 of the Act which provides for cash credit being charged to tax. The impugned order of the Tribunal allowed the issue to be raised before it for the first time, overruling the objection of the respondent assessee.
> >
> > (b)The impugned order examined the applicability of Section 68 of the Act on the parameters of the identity of the subscriber to the share capital, genuineness of the transaction and the capacity of the subscriber to the share capital. It found that the identity of the subscribers was confirmed by

virtue of the Assessing Officer issuing a notices under Section 133(6) of the Act to them. Further, it holds that the Revenue itself makes no grievance of the identity of the subscribers. So far as the genuineness of the transaction of share subscriber is concerned, it concludes as the entire transaction is recorded in the Books of Accounts and reflected in the financial statements of the assessee since the subscription was done through the banking channels as evidenced by bank statements which were examined by the Tribunal. With regard to the capacity of the subscribers the impugned order records a finding that 98% of the shares is held by IDFC Private Equity Fund which is a Fund Manager of IDFC Ltd. Moreover, the contributions in IDFC Private Equity FundII are all by public sector undertakings.

(c) Mr.Chhotaray the learned counsel for the Revenue states that the impugned order itself holds that share premium of Rs.490/ per share defies all commercial prudence. Therefore it has to be considered to be cash credit. We find that the Tribunal has examined the case of the Revenue on the parameters of Section 68 of the Act and found on facts that it is not so hit. Therefore, Section 68 of the Act cannot be invoked. The Revenue has not been able to show in any manner the factual finding recorded by the Tribunal is perverse in any manner.

(d) Thus, question no.(ii) as formulated does not give rise to any substantial question of law and thus not entertained".

12. In view of the aforesaid, we are of the view that valuation is not relevant for determining genuineness of the transaction for the purpose of section 68 of the Act. We are of the view that CIT(A) has rightly deleted the addition on account of the share premium relying on the decision of Hon'ble Jurisdictional tribunal in case of Green Infra Ltd. Vs. ITO (2013) 145 ITR 240. It is a settled position that what is apparent is real unless proved otherwise. It is a settled legal position that "apparent is real" and the onus to prove that the apparent is not the real is on the party who claims it to be so as held by Hon'ble Supreme Court in case of CIT Vs. Daulat Ram Rawatmull (1973) 87 ITR 349.

13. In the present case, the overwhelming evidence proves that the 'nature' of receipt is share premium. The audited accounts of both parties, the statutory since it was the department which claimed that the share premium is not in fact so, despite the statutory forms viz. Form 2 for return of allotment and Form 20B for annual return filed with the ROC all show the 'nature' as share premium. If the Department wants to contend that what is apparent is not real, it is the onus of the department to prove that it was Assessee's own money which was routed through a third party. Only then can the provisions of section 68 of the Act be invoked. This aspect is considered in the decision of Mumbai Tribunal in case of Green Infra Ltd. Vs. ITO (2013) 145 lTD 240, wherein Tribunal has held that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. The said decision has

been affirmed by Hon'ble Jurisdictional high Court in case of Green Infra Ltd (Supra).

14. The Ld. Counsel for the assessee made another argument that the power of carrying valuation is not envisaged by the Legislature for the purpose of Section 68 of the Act. He argued that, wherever the Legislature intended to give the power to determine the value to the AO, it either prescribes Rule for valuation of a particular thing or vested upon the AO the power to refer to the Valuation officer. The power of AO to make a reference to the Valuation Officer is contained in section 142A of the Act. Section 142A of the Act as it stood for the year under consideration reads as under:

> "142. (1) For the purposes of making an assessment or reassessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 6911 or the value of any bullion, jewellery or oilier valuable article referred to in section 69A or section 6911 or fair market value of any property referred to in sub-section (2) of section 56 is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him".

15. We have considered the issue and find that this section does not cover section 68 of the Act. Thus, the Legislature does not envisage any sort of valuation for the purpose of section 68 of the Act. Indeed, valuation of preference shares is a completely different exercise as compared to valuation of equity shares. The AO makes the mention of the reserves and loss while challenging the charge of share premium on preference shares. "Reserves" could be relevant for valuing equity shares. They are not relevant for valuing preference shares. Preference shareholders get priority over the equity shareholders in terms of payment of dividend and during winding up. They get only a fixed rate of dividend. The redemption amount depends on the terms of issue. The conversion depends on the terms of issue. The terms of issue are relevant for valuing preference shares. Even the present Rule 11UA of the Income Tax Rules 1962 are applicable only to section 56(2) of the Act, requires valuation of preference shares by the merchant bankers. The AO has not even attempted to do any sort of valuation of preference shares. His addition is based entirely on conjectures and surmises. It is a settled law that the assessment cannot he made on mere suspicion, conjectures and surmises."

9. Similarly, the other two decisions cited by the Ld. A.R. in the case of DCIT vs. Veracity Educational Management Pvt. Ltd. and Jasamrit Constructions P. Ltd. v ITO (supra), the similar ratio has been laid down. Finally, after considering the facts of the present case in the light of the ratio laid down in the various decisions as stated above, we are of the considered view that order passed by Ld. CIT(A) is correct and is accordingly upheld on this issue.

10. The appeal of the Revenue is dismissed.

11. Since we have decided the issue on merit in favour of the assessee by dismissing the appeal of the Revenue in ITA No.4564/M/2017, the assessee's appeal is rendered academic and needs no adjudication.

12. In the result, assessee's appeal as well as Revenue's appeal is dismissed.

Order pronounced in the open court on 03.10.2019.

Sd/-	**Sd/-**
(Ram Lal Negi)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 03.10.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.