

**IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI**  
**BEFORE SHRI M. BALAGANESH, AM AND SHRI AMARJIT SINGH, JM**

**I.T.A. No.3861/M/2016**  
**(Assessment Year: 2010-11)**

ITO-15(2)(2) Room No.15B, Ground Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s. New Era Advisors P. Ltd. R. No. 802, TTC Industrial Area, Thane Belaur Road, Mahape, Navi Mumbai- 400701.
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**I.T.A. No.5360/M/2016**  
**(Assessment Year: 2010-11)**

M/s. New Era Advisors P. Ltd. R. No. 802, TTC Industrial Area, Thane Belaur Road, Mahape, Navi Mumbai- 400701.	Vs.	CIT(A)-21 3 <sup>rd</sup> Floor, B, Wing, Room nO.8, Mittal Court, Nariman Point, Mumbai.
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. : AABCN2448P		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Revenue by:	Shri B. Srinivas (DR)
Assessee by:	Shri Vipul Joshi & Ms. Dinkle Haria (AR)

**Date of Hearing:** 08/11/2019  
**Date of Pronouncement:** 29/01/2020

**ORDER**

**PER AMARJIT SINGH, JM:**

The revenue as well as assessee has filed the above mentioned appeals against the order passed by the Commissioner of Income Tax



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(Appeals)-21, Mumbai [hereinafter referred to as the “CIT(A)”]  
relevant to the assessment year 2010-11.

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2. The revenue as well as assessee has filed the above mentioned appeals against the order passed by the Commissioner of Income Tax (Appeals)-21, Mumbai (hereinafter referred to as the “CIT(A)”) relevant to the assessment year 2010-11.

3. The revenue has raised the following grounds: -

- “1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has dismissed all the grounds of appeal raised by the appellant and further granted relief of Rs.2,46,43,987/- added u/s 115-0 of the I.T. Act, without appreciating the fact that the appellant had not raised the said ground before the Ld. CIT(A).*
2. *The appellant prays that the order of CIT(A) on the above directions be set aside and that of the assessing officer be restored.*
3. *The appellant craves leave to amend or alter any of the aforesaid grounds or add a new ground of appeal, which may be necessary at any time before or at the time of hearing of appeal.”*

4. The assessee has raised the following grounds: -

- “1. *The Id Appellate Authority (AA) Commissioner of Income Tax (A)-21, Mumbai, has dismissed Appeal No. CIT (A)-21//IT-100/2012-13. without offering sufficient opportunities of being heard and the impugned order was passed ex parte.*
2. *The AA has erred in taxing the assessee company u/s 56 (1) of the Income Tax Act. 1961 under the head at "Income from Other Sources" the Share Premium amount of Rs.10.66,23.000 received by the assessee Company.*



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*3. The AO has also erred in upholding the interpretation of section 78 (2) of the Companies Act 1956 made by the AO wherein the AC has held the company responsible for violation of section 78 (2), while the fact remains that the assessee company has not violated section 78 (2) of the companies Act 1956 in the utilization at Share Premium received.*

*4. The appellant craves to leave, add, alter, amend or modify any or all of the above grounds of appeal on or before the date of hearing.”*

**5.** The brief facts of the case are that the assessee filed its return of income on 04.10.2010 declaring total income to the tune of Rs.4,00,190/- for the A.Y. 2009-10. The return was processed u/s 143(1) of the I.T. Act, 1961. The case was selected for scrutiny, therefore, notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee was engaged in the business of Trading & Investing in shares and securities. The assessee company was incorporated on 04.02.2000. The assessee company nowhere generated business income as per the main object of the company as notified in the Memorandum and Articles of Association of the company in the year under consideration. The receipt shown in the profit and loss account includes commission received in sum of Rs.9,39,741/- and profit on sale of investments of Rs.7,36,978/-. Against these receipts, the assessee claimed various expenses under the heads administrative and other expenses and depreciation amounting to Rs.11,21,530/- and Rs.1,914/- respectively. After claiming the expenses, the net profit was disclosed in sum of Rs.4,00,190/-. On verification, it was found that the assessee



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introduced the share capital and share premium. The assessee company was incorporated on 04.02.2000 and collected the huge premium in sum of Rs.10,66,23,000/- on allotment of shares face value of Rs.10 each at a premium of Rs.990/- per share. The share capital and share premium was received by assessee company from various parties as under described at page 2 of the assessment order.

The table marked portion is as under:-

Name of the Company	Number of Non-convertible pref.share	Face Value	0% non convertible pref. share	Share Premium Per Share	Share Premium Account	Total Amount Received
Clifton Securities P. Ltd.	3000	10	30000	990	2970000	3000000
Doldrum Investment & Finance P. Ltd.	9800	10	98000	990	9702000	9800000
Gyaneshwar Trading & Finance Co. Ltd.	2700	10	27000	990	2673000	2700000
Sidh Housing Development Co. Ltd.	5000	10	50000	990	4950000	5000000
Nicco Securities Pvt. Ltd.	2800	10	28000	990	2772000	2800000
Olympus Vision Pvt. Ltd.	7000	10	70000	990	6930000	7000000
Oshin Investments & Finance P.Ltd.	4000	10	40000	990	3960000	4000000
Maharashtra Polybuteness Ltd.	64000	10	640000	990	63360000	64000000
Sunciti Financial	5000	10	50000	990	4950000	5000000



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Services P. Ltd.							
Yogi Sung Won India Ltd.	4000	10	40000	990	3960000	4000000	
Manjula Dave	50	10	500	990	49500	50000	
Lata Dave	100	10	1000	990	99000	100000	
Swati P. Dave	100	10	1000	990	99000	100000	
Gopal Dave	150	10	1500	990	148500	150000	
	107700		1077000		106623000	10770000	

6. The Ld. CIT(A) on perusal of the balance-sheet of the assessee observed that the share premium amount has been utilized for making investments and loan and advances thereby violating the provisions of Section 78 of the Companies Act 1956 which specified the manner in which the share premium amount could be utilized. The assessee gave the justification for premium charged as under.:-

*“Business Relationship: New Era Advisors Pvt. Ltd is a promoter company of Maharashtra Polybutenes Ltd (MPL) and holds 2,50,00,000 equity shares which is 16.04% of total issued equity of MPL. The equity shares of MPL are listed at the BSE Ltd. The preferential shares were allotted to MPL on 24-03-2010 and the quoted closing price of MPL shares as on 23-03-2010 on the BSE was Rs.108.10. Thus the valuation of the shares of AAPL held by New Era as on the date of allotment of preference shares was Rs.27 crore. There are just 14 allottees.*

*Book Value: Apart from having sizable chunk in the MPL equity New Era had made other investments also. The book value per share was Rs.736 on 31-03- 2009. The actual audited book value of share as on 31-03-2012 is Rs.3561. This book value is based on the shown capital and reserves and surplus, but it does not include the actual recoverable amount on the debts. In case of UIL secured debts the actual recoverable amount as on 30-06-2008 was Rs.86.55 crore while the book value of the investment is Rs.9.54 crore only. Considering this the actual book value would be much higher.*

*Future Business Plans: New Era has initiated talks with IFCI Ltd to purchase secured debts of Unimers India Ltd, which New Era did later.*



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*Unimers India Ltd (UIL) is a Navi Mumbai based company and manufactures EPDM Rubber with a total capacity of 10000 MTs per annum. UIL has closed its manufacturing activities for last several years and the EPDM rubber plant is not under use. New Era has purchased some secured debts of UR from IFCI Ltd and had plans to acquire more secured debts of UIL from other financial institutions like IDBI (we have already submitted documentary evidence regarding this on one of the previous hearings) as well as New Era had plans to acquire UIL. Apart from UIL investment, New Era had plans to purchase some other debts and businesses also. New Era had plans to purchase secured debts of Alcobex Metals Ltd. The company had plans to acquire a future technology company which was engaged in the manufacturing of LED light products. Maharashtra Polybutenes Ltd is engaged in the manufacturing of specialty chemicals and is interested in the business expansion. New era and Maharashtra Polybutenes Ltd had arrived on a consensus regarding the acquisition on debts/assets/equity or total acquisition of UIL through a Memorandum of Understanding (MOU). By virtue of this MOU, New Era is under obligation to sell the UIL plant and machinery to MPL at cost basis. The manufacturing plant of Unimers India Ltd is the only one of its kind in India. There are no additional EPDM capacities are coming up in India in near future and the replacement cost of such plant is exorbitantly prohibitive. If this EPDM plant and technology is acquired by MPL, it would tremendously help MPL to sky rocket its top line as well as bottom line. The management of MPL was convinced with the New Era proposal as for MPL it was a good opportunity to invest in New Era and acquire the EPDM Plant along with the technology, technical support system, stores and spares etc of UIL. Looking to the valuation of the EPDM plant and machinery and the technology the opportunity cost of the investment made by MPL in New Era is in favour of MPL, and hence MPL agreed to pay the premium on preference shares with a specific object to acquire the EPDM Rubber Plant through New Era. Sunciti Financial Services Pvt Ltd, one of the preference share holders is also an associate company of New Era.*

*Redemption and benefits to share holders : As per the terms of the allotment of preference shares the shares will be redeemed at the issue price of Rs.1000 plus an additional minimum premium of Rs.500/-. The premium amount may be increased with mutual agreement. In addition to this all the preference shareholders will be entitled to get 20% of net realization value in the UIL deal. Incidentally, the present recoverable amount from UIL is Rs.86.55 crore against the secured debts. A copy of a letter dated 29-10-2010 from IFCI specifying the recoverable amount is attached as Annexure-1.*



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*The debts of Unimers India Ltd purchased by New Era are secured by first charge on the assets of UIL. These assets which are covered by the charge are situated at, 2/2, TTC Industrial Area, (D Block), Thane Belapur Road, Turbhe, Novi Mumbai -400705, and include more than 30 acres of industrial land, EPDM Rubber Plant and machinery, stocks, debtors etc. Terms and conditions of allotment of preference shares is attached as Annexure 2.*

*Conversion to Equity: New Era at its consent and with the consent of equity/preference shareholders may convert the preference capital in the equity. All of the above facts were considered while determining the share premium and in view of all the above mentioned facts the premium of Rs.990 is just and fair and represents its true and fair market value.*

*Copies of minutes of Board of Directors sanctioning the allotment of preference shares and increasing the share capital are attached as Annexure 3 and 4 respectively.*

*Point No.2c of your letter is the same as point No.2 a, so please refer to point a above.*

*d. Copies of share application form are attached as Annexure 5A to 5U.*

*e. Copies of counterfoil of preference share certificates are attached as Annexure 6A to 6G.*

*f. The company does not have any share registrar and transfer agent.*

*g. The company is a private limited company and has allotted preference shares to only 14 applicants. No public document was issued for issue of preference shares. So there are no expenses incurred for the issue of shares. Revenue stamps of applicable value have been affixed on the share certificate.*

*h. Two of the allottees namely Sunciti Financial Services Pvt Ltd and Maharashtra Polybutenes Ltd have two common directors namely Mr. Brijmohan Rathi and Mrs. Sangeeta Rathi*

*i. The company has not raised funds through Equity route and as the preference shares were privately placed and no public documents were issued for this. The fund was raised from select associate companies and business associates. New Era's plans of acquiring UIL as well as debts of other companies/businesses were discussed with the potential investors as mentioned in para 2(a) above and they were willing to invest in New Era. No project report was required for this purpose. New Era has already acquired the debts of UIL from IFCI Ltd on 01-10-2010 and all the rights in the debts have been assigned to New Era. The recoverable*



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*amount from UIL is Rs.86.55 crore as on 30-06-2008. New Era is in the process of taking next step in this matter.*

*The UIL debts were assigned to New Era and a copy of Deed of Assignment signed by and between IFCI Ltd and New Era dated 01-10-2009 is attached as Annexure -7. Annual Audited financials as at 31-03-2010,31-03-2011 and 31-03- 2013 are attached as Annexure 8, 9 and 10 respectively.*

*3 Section 78 of the Companies Act, 1956 states that the premium received on issue of shares should be credited to separate account called security premium account and company has credited all the sum received towards premium in such account and in the balance sheet as on 31-03-2010 it is shown in Schedule-2 under the head RESERVE & SURPLUS the amount is Rs.13,43,43,000 which also includes Rs.10,66,23,000/- of security premium received during the year. The company can utilize this reserve amount towards redemption of fully paid shares and writing of preliminary expenses etc as per Section 78 of the Companies Act. The company has not violated any of the provisions of Section 78. As per the terms and conditions of the allotment of preference shares the shares will be redeemed at the issue price of Rs.1000 plus a minimum premium of Rs.500 per share. The option of converting preference shares in to equity shares is also open. The funds have been used for the purpose for which it has been raised. The premium received has been transferred to security premium account and has not been used for any purpose other than as mentioned in Section 78. Thus, the share premium received should not be treated as income u/s.56(1).*

*Copy of bank statement along-with reconciliation has already been given on 27-11-2012 but the same are attached again for your convenience as Annexure 11A to 11P.*

*5. There is no appeal pending for last three preceding assessment years."*

**7.** The Ld. AO called for information from the share subscribers u/s 133(6) of the Act and all the share subscribers duly filed details and explanations and confirmed all the transactions made with the assessee company directly before the Ld. AO. This fact is recorded by AO in para no.5.4 of his order. The Ld. AO observed that the assessee company did not justify the receipt of share premium @



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990/- in the instant case and accordingly resorted to tax the premium amount of Rs.10,66,23,000/- as income chargeable u/s 56(1) of the Act on the following grounds:-

*“The valuation adopted in this case is unrealistic and for which no supporting evidence exists. The realistic figures and actual achievements do not reflect any such valuation.*

*It is only common sense that past performance should be given suitable weightage for the valuation of a company and its shares. Furthermore, no correspondence or any documentary evidence has been brought on record in the course of the assessment proceedings to justify the higher valuation of the shares.*

*No authentic documentary evidence has been filed to justify the basis on which premium is charged.*

*The only reason given is as per terms of the issue and no such terms have been brought on record despite specific query and sufficient opportunity given.*

*No weightage has been given nor any reason assigned for non consideration of past or future performance of the company for the valuation purposes or its promoters or directors.*

*As already discussed the company does not possess any patent, copy right, intellectual property rights etc, which could be considered as hidden assets which could have enhanced the value of the shares of the company and therefore justified to some extent the charging of very high premium for allotment of shares.*

*All the assets held as on date by assessee are volatile with no certainty of realization or realizable values as contended by assessee.*

*Determination of virtual certainty that sufficient future taxable income will be available is a matter of judgment based on convincing evidence and will have to be evaluated on a case to case basis. Virtual certainty refers to the extent of certainty, which, for all practical purposes, can be considered certain. Virtual*

*certainty cannot be based merely on forecasts of performance such as business plans. Virtual certainty is not a matter of perception and is to be supported by convincing evidence. Evidence is a matter of fact. To be*



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*convincing, the evidence should be available at the reporting date in a concrete form.*

*Thus, the assessee company has totally failed to justify the charging of the premium and therefore the receipt of money amounting to Rs.10,88,23,000/-. Even otherwise, the assessee company has failed to submit the relevant information which is mandatory under law to prove genuineness, purpose and justification for a transaction. The assessee has not been able to prove beyond reasonable doubt, the genuineness of the transaction.”*

**8.** The Ld. AO further observed that the share premium collected as on 31.03.2010 amounting to Rs.10,66,23,000/- was not utilized for the purpose of the objectives for which the same was collected and as such conditions specified in Section 78(2) of the Companies Act, 1956 has been violated. Accordingly, he concluded that the amount brought into the books of accounts of the assessee in the form of share premium is not a share premium within the meaning of the provisions of Section 56 of the Act and hence the same need to be treated as income for the purpose of income tax act.

**9.** The Ld. AO also observed that as per the schedule from the balance-sheet raised during the year, the assessee has introduced fresh share capital with a premium amounting to Rs.10,66,23,000/- for which assessee was asked to furnish the details for justification for charging a premium and also its utilization in accordance with provisions of Companies Act, 1956. Based on the explanation furnished by assessee, the Ld. CIT(A) concluded that the legal position with regard to applicability of provisions of Section 2(22)(a) and clearly held that the Section 115(O) of the Act is attracted.



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Therefore, observed that in the instant case, the share premium account was not utilized for specific purpose mentioned under Section 78 (2) of the Companies Act, 1956. He also observed that there is a prohibition on the distribution of the share premium account as dividend under the said act and correspondingly the same would have to be treated as reduction of share capital attracting the provisions of the Companies Act in relation thereto. He finally concluded that any distribution of share premium account which is not in accordance with the provisions of Section 78(2) of the Companies Act, 1956 will amount to a reduction of share capital. Therefore, the redemption of preference share capital for above reasons in this case constitute dividend within the meaning of provisions of Section 2(22)(a) of the Act which attracts dividend distribution tax u/s 115O of the Act. Since the assessee failed to pay the dividend distribution tax as required u/s 115O of the Act, the same was also levied by Ld. AO together with the interest u/s 115P of the Act while completing the assessment. The notice was given and after the reply of the assessee, the AO was of the view that the share premium amounting to Rs.10,66,23,000/- as on 31.03.2010 was utilized for non-specified purposes in violation of provisions of Section 78(2) of the Companies Act, 1956 and held as dividend distribution within the meaning of provisions of Section 2(22)(a) of the Act. The assessee failed to pay the dividend distribution tax u/s 115O of the Act. Accordingly, dividend



distribution tax u/s 115O of the Act was imposed on an amount of Rs.10,66,23,000/-. The interest was also charged u/s 115P of the Act.

**10.** Before the Ld. CIT(A), the assessee reiterated the assertion made before the Ld. AO with regard to taxability of proceed of share premium u/s 56(1) of the Act. As regards as the applicability of the provisions of Section 56(1) of the act r.w. Section 115O and 115P of the Act, the assessee submitted the following conditions should be fulfilled before the said provisions could be applied.:-

- (i) there should be distribution;
- (ii) there should be accumulated profits;
- (iii) there should be a release to shareholders; and
- (iv) the release should be of all or any part of the assets of the company.

The assessee submitted that in this case there is no distribution of accumulated profits which has resulted into release of all or any of the assets of the company. There is no distribution of any dividend by the assessee company to its shareholder and therefore the provisions regarding the dividend distribution tax u/s 115O of the Act and provisions of Section 115P of the Act does not arise.

**11.** The Ld. CIT(A) upheld the addition made in sum of Rs.10,66,23,000/- u/s 56(1) of the I. T. Act. However, he dismissed the action of the Ld. AO for applying the provisions of Section



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2(22)(a) r.w. Section 115O of the Act by agreeing with the assessee that there was absolutely no distribution of the assets to the shareholder by assessee company warranting invocation of provisions of Section 2(22)(a) of the Act. Aggrieved by this order of the Ld. CIT(A) both the assessee as well as the revenue are in appeal before us.

**12.** We have heard the rival submissions and perused the material available on record. Primary facts stated hereinabove remain undisputed and hence the same are not reiterated herein for the sake of brevity. We find that the CIT(A) observed in para no. 13 of his order that in the instant case the Ld. AO had not made any addition in respect of share premium u/s 68 of the Act. The Ld. CIT(A) further observed that the assessee had duly furnished that all the transactions regarding all the documents relating to receipt of share capital and share premium together with the confirmation from the respective share subscribers before the Ld. AO. We also observed that the identity of the share subscribers, creditworthiness of the share subscribers and genuineness of the entire transactions stood clearly established. The assessee also mentioned that the learned CIT(Appeals) observed that the entire transaction carried out together with the receipt of share premium cannot be termed as unrealistic and cannot be termed as not genuine. We find that the Ld. CIT(A) having given the said observation had proceeded to agree with the addition



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made by Ld. AO u/s 56(1) of the Act on the only ground that the assessee had violated the provisions of Section 78(2) of the Companies Act 1956 which specifies the manner of utilization of share premium account. In this regard, what is relevant for the purpose of assessment is whether the receipt of share premium by the assessee could be termed as income policy within the meaning of provisions of income tax act. We find that the provisions of Section 78(2) of the Companies Act, 1956 specifies the manner of utilization of share premium account for specified purposes which are relevant only for compliance with the provisions of the Companies Act, 1956 and have agreed absolutely no relevance for the purpose of Income Tax Act, 1961. In the instant case, there is absolutely no dispute with regard to receipt of share premium by assessee at Rs.990/- per share was duly justified. There is no dispute that all the necessary documents were duly filed before the AO and all the share subscribers have directly replied to the notice issued u/s 133(6) of the Act by Ld. AO. It is not in dispute that the money was received from 10 corporate share holder group companies of the assessee. We find that the Ld. CIT(A) had given categorical finding that the entire transactions cannot be termed as unrealistic and cannot be termed as not genuine. The issue of utilization of share premium account for not specified purposes had come up before the co-ordinate bench of this tribunal in the case of **DCIT Vs. Finproject India (P.) Ltd. (2018) 171 ITD 82 (Mum)** wherein it was held as under: -



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“7. We have considered rival contentions and perused the material on record . We have observed that the assessee is engaged in the business of manufacturing of soles for footwear and had set up manufacturing unit at Jaipur, Rajasthan for said manufacturing .The assessee is stated to be promoted by two foreign companies who are its shareholders namely Asian Compound Ltd., Hongkong and Finproject Asia Ltd., Hongkong . Both the above entities are non-resident which is undisputed between rival parties as is emerging from material on record before us. In the audited financial statements filed before the tribunal for the relevant period by the assessee which is placed in paper book/page 101-141, both these companies are stated to be holding companies of the assessee company wherein Asian Compounds Limited, Hongkong is holding company directly holding 98.99% equity shares of the assessee company as at 31-03-2012, while Finproject Asia Limited,Hongkong is also stated to be holding company indirectly of the assessee company to whom also shares were allotted during the previous year relevant to impugned assessment year. During the relevant previous year , the assessee has issued 41,86,583 equity shares at consideration price of Rs. 20 per equity shares consisting of face value of Rs. 10 of each equity share and premium of Rs. 10 for each equity shares , to the following non-resident entities:-

Subscribed by	Number of Shares	Face Value	Equity share capital	Share Premium per share	Share premium account	Total amount received
Asian Compounds Limited, Hongkong	10,37,315	10	10,37,315	10,	10,37,3150	2,07,46,300
Asian Compounds Limited, Hongkong	31,07,428	10	31,07,4280	10	31,07,4280	6,21,48,560
Finproject Asia Ltd. , Hongkong	10,358	10	1,03,580	10	1,03,580	2,07,160
Finproject Asia Ltd., Hongkong	31,482	10	3,14,820	10	3,14,820	6,29,640
Total	41,86,583		4,18,65,830		4,18,65,830	8,37,31,660

*The Revenue had invoked provisions of Section 56(1) wherein additions were made in the hands of the assessee by the AO towards share premium charged by the assessee to the tune of Rs. 4,18,65,830/- . The*



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*learned CIT-A deleted the said additions towards share premium as were made u/s. 56(1) of the Act. The Revenue is not aggrieved by the said relief granted by learned CIT-A with respect to the deletion of additions made u/s. 56(1). However, without prejudice in alternate the AO also confirmed additions u/s 68 on the grounds that the share premium charged is in excess of the intrinsic valuation of shares because in the opinion of the AO, the assessee is not only required to explain the „source“ of credit entry but also its „nature“ which as per AO the assessee could not explain. The learned CIT(A) also deleted the said addition u/s 68, wherein the learned CIT(A) relied on the decisions of Vodafone India Services Limited(supra), decision of ITAT, Mumbai in the case of Green Infra Limited(supra) and CBDT instruction no. 2/2015 dated 29.01.2015. The learned CIT(A) while deleting the addition noted that the assessee has received share premium from non-resident companies and no single Indian shareholder is involved. This finding of fact arrived at by learned CIT(A) so far as receipt of share premium by assessee from non-resident entities is not disputed by Revenue and is not in challenge before us which has attained finality. It is pertinent to mention here that Section 56(2)(viib) which was placed in statute by Finance Act, 2012 w.e.f. 01-04-2013 is applicable for consideration received by a company in which public are not substantially interested, from a person who is resident while in the instant appeal before us, this finding of fact that shares were issued by the assessee to two non-resident entities is not in dispute and per se Section 56(2)(viib) has no applicability as the assessee received consideration for issuance of shares from non-resident entities. The learned CIT(A) held that treating share premium received by the assessee as income is not justifiable even u/s 68 of the Act keeping in view factual matrix of the case. The Revenue is aggrieved by the deletion of the addition by learned CIT(A) within the provisions of Section 68 of the Act, for the reasons as are emanating from the Revenue’s ground of appeal taken before the tribunal that the assessee did not satisfactorily explained the „nature“ of share premium and the assessee could not justify the excess premium received compared to the intrinsic value of shares. Thus, main grievance of the Revenue is w.r.t. share premium being received of Rs. 10 per share as against face value of shares of Rs. 10 each, wherein as per Revenue the said share premium of Rs. 10 per equity shares is not supported by intrinsic value of the shares leading to bringing it within the regime of taxability as income within the deeming fiction of Section 68 of the 1961 Act. The assessee has placed its audited financial statements on record which are placed in paper book/page 101-141. The assessee has also filed its certificate of incorporation issued by MCA which shows the date*



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*of incorporation of the assessee as 06-01-2010, which is placed in the file. The Directors Report (page 104/pb) states that this is 2nd Annual Report of the company. The company has set up a manufacturing unit for manufacturing soles for footwear at Jaipur, Rajasthan. The assessee company is promoted by two non-resident entities who have subscribed to the shares of the assessee company. The majority shareholding of the assessee company to the tune of 98.99% is held by Asian Compound Limited, Hongkong who is its parent company directly and shares are also held by Finproject Asia Limited, Hongkong who is assessee's holding company indirectly (page 138/pb). The assessee has issued equity shares to its holding company namely Asian Compound Limited, Hongkong as well to said Finproject Asia Limited, Hongkong Limited of Rs. 10 each at premium of Rs. 10 each during the impugned year under consideration, details are tabulated in table above. The perusal of audited financial statement reveals that the share capital at the end of the preceding previous year viz. 31-03-2011 was Rs. 48.47 lacs while reserves and surplus were to the tune of Rs. 77.79 lacs. The assessee share capital as at the end of the current previous year i.e. 31-03-2012 was Rs. 4.67 crores while reserves and surplus were to the tune of Rs. 6.09 crores. The assessee has achieved turnover of Rs. 3.49 crores for the financial year ended 31-03-2011 with profit before tax of Rs. 1.12 crores while for the financial year ended 31-03-2012, the turnover was Rs. 7.78 crores with profits before tax of Rs. 1.73 crores. The assessee has made provisions for payment of income-tax in its audited financial statements for both the said years and the income declared by the assessee for the impugned assessment year 2012-13 was Rs. 1.55 crores in the return of income filed with the revenue. Thus, as is evident from audited financial statements placed on record before us, neither the assessee incurred any loss during the first two years of its existence nor do it have any accumulated losses in its books of accounts as at 31-3-2011 as well as at 31-03-2012, as is alleged by AO in assessment order which is a perverse finding of fact arrived at by the AO that the assessee is making losses and has accumulated losses in its balance sheet and these finding of fact arrived by the AO needs to be discarded. The AO has questioned and disputed the fair value arrived at by the assessee of the equity shares on these perverse finding of facts as to losses in both the years as well accumulated losses held by it, wherein both these observations of the AO to discard fair value of shares adopted by the assessee are perverse finding of facts arrived at by the AO which cannot be relied upon to prejudice assessee. On perusal of the audited financial statements, it is also revealed that the assessee only issued one class of shares viz. Equity shares of the face value of Rs. 10 each and it never issued any*



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*preference shares till the end of the financial year 2011-12. It also transpires from the audited financial statements placed on record that the assessee's investments as on 31-03-2011 and 31-03-2012 were at „Nil“ . The AO has given finding of fact that the assessee has issued preference shares as well the assessee had made investment in volatile companies to prejudice assessee by discarding valuation of shares arrived at by the assessee , which finding of fact are again perverse finding of facts which need to be discarded . Thus, errors had been made by the AO in recording perverse finding of facts not supported by the material/evidence on record to discredit fair valuation of shares arrived at by the assessee by adopting approved valuation method viz. DCF method which valuation was certified by a qualified chartered accountant . It is not shown before the Bench by learned DR that these perverse finding of facts as were arrived at by the AO were indeed correct finding of facts recorded by the AO and the assessee is hiding the correct facts from the authorities . The AO also erred in holding that there is a violation of Section 78 of the 1956 Act by holding that the assessee ought to have utilised the proceeds of share premium for certain specified purposes as is stipulated in the said Section 78 of the 1956 Act viz. paying up unissued shares of the company as bonus shares, writing off preliminary expenses , buy-back of shares etc. as are specified in the said section 78 of the 1956 ( see preceding para wherein Section 78 of the 1956 Act is reproduced). The AO erred in not distinguishing what is meant by utilisation of the funds being proceeds of share premium raised for the specified approved purposes as per terms and condition of invitation to offer issued by the assessee for raising share capital , and the creation of „Share Premium Account“ in the books of accounts for share premium received to be reflected as part of „Reserves & Surplus“ as stipulated u/s 78 of the 1956 Act which is to be applied for certain specified purposes as specified in Section 78 of the 1956 Act. The proceeds of the funds raised towards share premium account can only be utilised for the purposes specified as per agreed terms and conditions of invitation to offer for issuing securities by the issuing company with the shareholders, such as in the instant appeal before us is stated to be for setting up of manufacturing unit for soles for footwear and business purposes , while application of „Share Premium Account“ which was created in books of accounts is more concerned with protection of capital base in the tax-payer company and reflection of true and fair view of affairs of the taxpayer company which entails writing off „Share Premium Account“ from books of accounts to be set off against specified purposes which can be for applying towards issuance of bonus shares, writing off of preliminary expenses , buy back of shares etc as specified*



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*u/s 78 of the 1956 Act, so thus utilisation of proceeds of funds raised towards share premium in accordance with terms and conditions agreed with shareholders as per invitation to offer by the assessee and application of share premium account created in books of accounts for specified purposes u/s 78 of the 1956 Act by writing off/knocking against the said specified purposes by book entry as application of „Share Premium Account“ for non specified purposes such as writing off normal losses against Share Premium Account will not reflect true and fair view of affairs of the taxpayer company and similarly paying dividends despite losses in the books of the tax-payer company out of „Share Premium Account“ will erode capital base of the taxpayer company, thus these are altogether different concepts which AO ought to have understood in right perspective, while AO erred in making such erroneous conclusion that the assessee did not utilised the funds raised through share premium for specified purposes u/s 78 of the 1956 Act without any basis and understanding the rational for both concepts which are altogether meant for different purposes , while the assessee did rightly utilised the proceeds of funds raised towards share premium for setting up manufacturing unit for manufacturing soles for footwear at Jaipur and business purposes as the funds were stated to be entrusted by the shareholders for the said approved purposes of setting up the said unit / business purposes as per terms and conditions of the invitation to offer , and the assessee do transfer share premium raised to „Share Premium Account“ under the head „Reserves and Surplus“ in books of accounts as is mandated u/s 78 of the 1956 Act . Section 78 of the 1956 Act allows application of Share Premium Account for certain specified purposes by way of write off/knocking against issuance of bonus shares, writing off preliminary expenses , buy-back of shares etc by book entry . Thus as is emerging from material on record, the conclusions arrived at by AO so far as violation of Section 78 of the 1956 Act by the assessee were wrong and misconceived and are hereby rejected/discarded. Now, coming to the allegation of the AO that share premium being higher than the intrinsic worth/fair value of the equity shares, the assessee has supported the said fair value of equity shares being Rs. 20 per equity share as against face value of Rs.10 per equity share with a certificate issued by a chartered accountant using DCF method which is an approved method as prescribed by RBI . The AO has arrived at wrong finding of facts as to the losses in the last two years as well accumulated losses in the audited financial statements while the assessee is in profits since its inception as well there are no accumulated losses in the audited financial statements which are placed in paper book filed with tribunal. The assessee“s valuation is discredited by the*



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*AO using these perverse finding of fact . The tax-payer while issuing shares to non resident investors create an foreign obligation for India in favour of third country and as per RBI/FEMA requirements, the tax-payers are required to issue shares using valuation methods which are approved method ( DCF is approved method of valuation) and the consideration for issuance of shares has to be necessarily equal to or above fair value arrived at by such approved method because otherwise the taxpayer will create an foreign obligations for India in favour of third country at a consideration price received which is below fair value of shares computed by an approved method of valuation which will be loss to India as it will create higher foreign obligation of India in favour of third country represented by fair value of shares wherein the consideration price received for issue of shares was lower than fair value of shares, thus to plug this loss to India , FEMA/RBI stipulate that issue price of shares should be equal to or more than fair value arrived at by approved method viz. DCF. The guidelines issued by RBI vide RBI/2009-10/445 A.P.(DIR series ) Circular no. 49 dated 04- 05-2010 as was applicable during the relevant period is placed in paper book at page 80-86. The CA has arrived at value of Rs. 20 per equity share which consisted of face value of Rs. 10 and share premium of Rs. 10 per share using DCF method which is an approved method specified by RBI in its circular dated 04-05-2010(page 46/pb). The AO tried to demolish this fair value of Rs. 20 per equity share by basing its decision based on perverse finding of facts which are already discarded by us. Thus, the assessee was on the right side of the law by issuing equity shares at a value of Rs. 20 per equity shares so far as FEMA/RBI compliances are concerned. RBI has also accepted the said fair price of shares supported by CA Certificate using DCF method and FC-GPR form filed by the assessee through its banker Axis Bank was accepted by RBI and taken on record, which is placed in file(pb/44-45). The assessee has filed its bank statements as well FIRC issued by its bankers as an evidences which are placed in file. Thus based on material on record before us, no fault lies with the assessee in issuing equity shares of face value of Rs. 10 each at share premium of Rs. 10 each so far as compliances under FEMA/RBI are concerned. It is pertinent to mention that Section 56(2)(viib) r.w.s. 2(24)xvi) of the 1961 Act were placed in statute by Finance Act, 2012 w.e.f. 01-04-2013 and the said sections are relevant for issuance of shares to residents while in the instant case , undisputedly equity shares were issued by the assessee to non-resident in the instant case. Thus the said section 56(2)(viib) r.w.s. 2(24)(xvi) of the 1961 Act are not made applicable to the shares issued to non residents mainly to encourage foreign investments .The Revenue has accepted the receipt of share*



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*capital from both the above stated foreign investors to the extent of the face value of the equity shares issued to the tune of Rs. 4.19 crores and as per Revenue ingredients of Section 68 stood complied with so far as equity shares issued by the assessee to the tune of Rs. 4.19 crores comprising face value of equity shares issued to these two non-resident entities. Thus, the Revenue has accepted compliance of provisions of Section 68 of the 1961 Act to the extent of face value of equity shares issued to these two non resident entities and as per Revenue version their identity, creditworthiness and genuineness of the transactions by way of raising of equity share capital at the face value to the tune of Rs. 4.19 crores stood proved , the only grievance of Revenue being share premium to the tune of Rs. 4.19 crores being in excess of intrinsic value of share so issued is an income chargeable to tax within provisions of Section 68 of the 1961 Act. The assessee has also received External Commercial Borrowing (ECB) to the tune of Rs. 7.50 crores from the said holding company namely Asian Compounds Limited, Hongkong during the previous year relevant to the impugned assessment year which was also accepted by Revenue and no additions were made by Revenue by invoking provisions of Section 68 of the 1961 Act w.r.t. ECB raised by the assessee and once again identity , creditworthiness and genuineness of transaction of raising ECB to the tune of Rs. 7.50 crores from its holding company Asian Compounds Limited, Hongkong stood proved. This holding company namely Asian Compounds Limited, Hongkong is also the major subscriber of the equity shares issued by the assessee during the previous year relevant to impugned assessment year (see table above). The learned CIT(A) has rightly relied upon decision of Hon`ble Bombay High Court in the case of Vodafone India Services Private Limited v. UOI reported in (2014) 368 ITR 1(Bombay) which was further reiterated by Hon`ble Bombay High Court in Vodafone India Services Private Limited v. UOI reported in (2014) 369 ITR 511(Bombay) to hold that issue of shares at share premium by the taxpayer to non resident holding companies is on account of capital transactions and does not give rise to an income chargeable to tax. Section 56(2)(viib) r.w.s. 2(24)(xvi) of the 1961 Act were introduced by Finance Act, 2012 w.e.f. 01-04-2013 and had applicability to the receipt of consideration towards shares from resident entities and has no application when consideration towards shares are received from non-resident entities which are excluded in order to encourage foreign investments. The learned DR erred in making contentions that the said decision of Hon`ble Bombay High Court is relevant for TP proceedings while in Vodafone case, Hon`ble Bombay High Court has held that TP provisions as are contained in chapter X are machinery provisions while there has to be firstly an*



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*income chargeable to tax and then only machinery provisions can be applied. The issue of shares at share premium by tax-payer to nonresident holding entities was held to be on account of capital transaction which were not found to be having character of income chargeable to tax. CBDT has also accepted this position vide instruction no. 2 /2015 dated 29-01-2015 . Thus, this contention of learned DR that decision of Hon`ble Bombay High Court in the case of Vodafone India Services Private Limited(supra) is not applicable to the facts of the instant appeal is hereby rejected. The Revenue has already accepted the share capital to the tune of face value of equity shares amounting to Rs. 4.19 crores raised by the assessee from these two non-resident holding companies during the year as no additions were made , wherein by implication ingredients of Section 68 were deem to have been fulfilled and even ECB to the tune of Rs. 7.50 crore raised by the assessee from Asia Compound Limited , Hongkong during the impugned assessment year was accepted by Revenue and ingredients of Section 68 was accepted to be fulfilled by the assessee as no addition has been made by Revenue. The incriminating information used by the AO to discredit the valuation of Rs. 20 per equity shares arrived at by assessee using DCF method is based on perverse finding of facts recorded by the AO , which findings of the AO are already rejected by us. Thus, we have no hesitation in confirming/sustaining well reasoned appellate order of learned CIT(A) keeping in view factual matrix of the case and hence no addition is warranted towards share premium of Rs.4,18,65,830/- received by the assessee from its holding companies namely Asian Compounds Limited, Hongkong and Finproject Asia Limited, Hongkong, who are non resident entities as the said share premium is on account capital transaction and is not an income within charging Sections of the 1961 Act . So far as deeming fiction of Section 68 of the 1961 Act is concerned , there is no reliable incriminating finding of fact available on record justifying our interference to the well reasoned order of learned CIT(A) which we sustain. Thus, the appellate order of learned CIT(A) stood confirmed. Revenue fails in this appeal which stood dismissed. We order accordingly.”*

**7.** There is absolutely no dispute in the instant case that the amount and share premium account were utilized by assessee for its business purposes. Respectfully following observations and respectfully following the judicial precedent hereinabove we direct the



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Ld. AO to delete the addition made in sum of Rs.10,66,23,000/- u/s 56(1) of the Act. Accordingly, the ground nos. 2 & 3 raised by assessee are allowed.

**8.** Ground No.1 raised by assessee was stated to be not pressed at the time of hearing. Accordingly, the same is treated is hereby dismissed is not pressed.

**9.** The ground no. 4 raised by assessee is general in nature.

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**10.** We find the revenue has challenged the action of the Ld. CIT(A) dismissing the invocation of provisions u/s 115O of the Act. We find that the main grievance of the revenue seems to be that relief has been granted by Ld. CIT(A) without there being any specific ground raised by the assessee before the Ld. CIT(A). In this regard, it is pertinent to note that Ld. AO had addressed the entire issue of receipt of share premium and taxability of share premium of Rs.10,66,23,000/- u/s 56(1) of the Act as well as invoking the dividend distribution tax in terms of 2(22)(a) r.w. Section 115O of the Act in the assessment order. The primary reason for making such additions u/s 56(1) was due to non compliance of provisions of Section 78(2) of the Companies Act, 1956 in the opinion of Ld. AO. We find that the observation of the Ld. AO for levying the dividend distribution taxed u/s 115O of the Act is dependent upon this primary



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finding that the provisions of Section 78(2) of the Companies Act, 1956 has been violated by assessee hence both the issues are inter-connected. Therefore, there is no dispute that the assessee has challenged this entire aspect of taxability of share premium. The assessee has duly challenged before the Ld. CIT(A) that there was no violation of provisions of Section 78(2) of the Companies Act, 1956 by it. We find that the Ld. CIT(A) had granted relief to the assessee on the aspects of the dividend distribution tax by observing as under.:-

*“17 The Assessing Officer has also held that the share premium amount utilized in violation of Section 78 of the 1956 Act amounts to reduction of capital. This is redemption of capital and therefore deemed dividend under section 2(22)(a) of the Income Tax Act. The assessing officer therefore directed that dividend distribution tax u/s 115O and 115P is chargeable. It is seen that this section refers to the accumulated profits which in the present case stood at only Rs.662,969/- as on 31.3.2010. Thus the amount of Rs.10,66,23,000/- is not the accumulated profits. Further, while the utilization of premium may be deemed to be reduction of capital, it does not imply that there is distribution of assets to the shareholders. The action of assessing officer to apply section 2(22)(a) of the Income Tax Act is therefore not upheld.*

**11.** We have already held that there was no violation of provisions of Section 78(2) of the Companies Act, 1956 by assessee in the instant case and even if it be so, the same would not have any relevance for the purpose of Income Tax Act, 1961. Hence once there was no violation of provisions of Section 78(2) of the Companies Act, 1956, the revenue ground automatically vanishes. Accordingly, the grounds raised by revenue are dismissed.



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12. In result, appeal filed by the revenue is hereby dismissed and appeal filed by the assessee is hereby ordered to be partly allowed.

Order pronounced in the open court on 29/01/2020

Sd/-

(M. BALAGANESH)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 29/01/2020

Sd/-

(AMARJIT SINGH)

JUDICIAL MEMBER

Vijay Pal Singh/Sr. PS

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील)/ The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार

(Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai