

THE INCOME TAX APPELLATE TRIBUNAL  
“G” Bench, Mumbai  
Before Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)  
I.T.A. No. 4197/Mum/2017 (Assessment Year 2012-13)

ITO-1(3)(2) 5 <sup>th</sup> Floor Room No. 541 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Singhal General Traders Private Limited 7, Dariya Nagar House 1 <sup>st</sup> Floor, 69, M.K. Road Mumbai-400 020.  PAN : AANCS9812L
(Appellant)		(Respondent)

Assessee by	Shri G.C. Srivastava & Shri Savinay Kumar Dash
Department by	Ms. Bharti Singh
Date of Hearing	19.12.2019
Date of Pronouncement	24.02.2020

ORDER

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against order of learned CIT(A) dated 22.3.2017 and pertains to assessment year 2012-13.

2. The grounds of appeal raised by the Revenue read as under :-

1. On the facts and in the circumstances of the case and in law, whilst it is true that it is the obligation of the AO to conduct proper scrutiny of the material given the fact that the AO did not examine whether the transactions of receipt of share capital/ share premium are genuine, the obligation to conduct proper inquiry on facts would shift to Learned CIT(A) in view of the Hon'ble Delhi High Court decision in the case of CIT Vs Jansampark Advertising and Marketing (P) Ltd (ITA No. 525/2014).

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in directing the deletion of the sum brought to tax by the AO as unexplained income under Section 68 of the Income Tax Act, 1961 in respect of moneys credited in the books as share premium of Rs. 7,30,78,750/-

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in holding that the assessee proved identity, credit-worthiness and genuineness of moneys credited in the books as share

capital, including share premium, of Rs 7,30,78,750/-, just by submitting PAN, and acknowledgement of income-tax returns of the share holders, and that the share premium has been received through banking channel and duly supported by the board resolutions filed by the assessee company with Registrar of Companies(RoC).

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in holding that receipt of share capital / premium is capital in nature and thus cannot be brought to tax under section 68 of the Income - tax Act 1961 by relying on decision of Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd. Vs. Union of India & Ors [368 ITR 1(Bom)] where in issue is relating to income arising out of international transaction in the form of issue of share and not taxability of capital receipt U/s 68 of the Income-tax Act, 1961.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in holding that receipt of share capital/premium is capital in nature and thus cannot be brought to tax u/s 68 of the Income-tax Act, 1961 by relying on Instruction No.2 of 2015 vide F.No. 500/15/2014-APA-1 dated 29.01.2015 wherein the issue is regarding acceptance of the decision of Hon'ble Bombay High Court in Vodafone Case (Supra) the form of issue of shares and not taxability of capital receipt u/s 68 of the Income-tax Act, 1961.

3. Brief facts of the case are that the assessing officer observed that assessee has received unjustified share premium during the course of year. He noted that on perusal of submissions filed by the assessee it is seen that assessee had issued 3,84,625 shares on premium @ of Rs.190/- per share during the year. The assessee allotted 1, 63,500 shares to M/s Monitor Vyapaar Pvt. Ltd., 2,15,000 shares to Blackberry Vyapaar Pvt. Ltd. And 6,125 shares to R N Navrman Pvt. Ltd. The assessee was asked to justify the premium charged during the year. Thereafter the assessing officer noted following submissions of the assessee :-

“Company decided to issue shares at a premium of Rs. 190/- per share. The above share premium has been decided by the company in view of its financial position and expected prosperity. The above share premium is applicable to all the shareholder to whom shares allotted during the year. Share premium received from issue of shares is of capital in nature and forms part of the share capital of the company. The purchase of the share, after considering the various facts, agreed to purchase share at stipulated price and so this is as per mutual agreement. Allotted/purchase of the shares is a mutual agreement between shareholder and company. The company has received the amount of premium and this fact is confirmed by the respective shareholders.

Again there is, no provision in the Income-tax Act fixing the amount of premium. The share premium paid are well supported by share allotment letter and resolution passed by shareholder and company. The identity, creditworthiness and genuineness of the shareholders are proofed.

Vide letter dated 26.03.2015 assessee further submitted that:

That the company's book values of the Equity Shares as on 31.03.2011 was Rs.91/- per share for the face value of Rs.10/- per share which has been calculated as under:

Share capital as on 31.03.2011	2848000.00
Reserve and Surplus	<u>23138135.00</u>
Total :	<u>25986135.00</u>
No. of shares as on 31.03.2011	284800
Book Value per share	91.24

That the fund of the company valued upto 31.03.2011 was invested in the group companies namely:

- Vandana Ispat Limited
- Vandana Vidhyut Limited
- Vandana Energy and Mineral Limited
- Vandana Ispat & Power Limited

In the particular company Vandana Ispat Limited this company continuously earning good profit and therefore increase the value of book value. In the case of Vandana Vidhyut Limited currently there is an 8MV Bio Mass plant and further expansion of thermal power plant of 540 MV. In this company also the profit is to be expected in long term. Balance Sheet as on 31.03.2011 of Vandana Ispat Limited and Vandana Vidhyut Limited is enclosed herewith for ready reference. Therefore, premium command by the company is in view of book value and further growth in value of investment. Now in current year shareholders has accepted to purchase shares at a premium of Rs.190 per share. The company book values of the Equity Shares as on 31.03.2012 was increased to Rs.153/- per share for the face value of Rs.10/- per share which has been calculated as under:-

Share capital as on 31.03.2012	6694250.00
Reserve and Surplus	<u>96169516.00</u>
Total	<u>102863766.00</u>
No. of shares as on 31.03.2012	669425
Book Value per share	153.66"

4. However, the assessing officer was not convinced. He was of the opinion that it is unlikely that someone will invest at high share premium in a company which is loss-making. Though he noted that source of fund is fully explained the nature of share premium remains unjustified, he noted that the

company is making losses and there are no underlying asset. He referred to the ITAT decision regarding shell companies and also referred to Bombay High Court decision in the case of major metals Ltd in Writ petition No. 397 of 2011 and accordingly added the share premium Rs. 7,3078750 as addition under section 68.

5. Upon assessee's appeal in this regard Id CITA noted that only dispute is with regard to the justification of share premium. He Noted that the AO has accepted that source of fund is duly explained. Ld CITA distinguished the decisions relied upon by the assessing officer. He referred to submission of assessee as under :-

“The Appellant has submitted enough evidence to prove the identity and creditworthiness of the companies who have subscribed to share capital and premium and transaction of amount through banking channel. The Appellant has complied with all the requirement to prove:-

1. The genuineness of amount received towards share application and premium.
2. Identity of the creditor
3. Genuineness of the transaction and
4. Creditworthiness of the creditor by tiling following details :
  - “a) Copy of Ack. of the IT Return filed for A.Y. 2012-13.
  - b) Computation of Total Income.
  - c) Share application money account
  - d) Bank statement and
  - e) Balance Sheet as on 31.03.2012
  - f) Copy of resolutions passed by the assessee company for allotment for Equity Shares of Rs. 10/- each at a premium of Rs. 190/-per share and copy of resolutions passed by share applicant companies to subscribe the equity shares of Rs. 190/each at a premium of Rs. 190/-per share.”

6. Thereafter Ld CIT(A) noted that share price is a business consideration and the assessing officer cannot step into the shoes of businessman. In this regard Ld CIT(A) relied upon several case law. He further noted the following submissions of the assessee to buttress the point :-

“The appellant has further submitted that the Company is presently having investment activity. The Company is reporting loss because it is valuing investments at book value. Whereas, the intrinsic or fair market value is much more. While issuing shares, fair market value of the assets has to be

taken into account and the person paying the premium has factually benefited from the purchase of shares at premium. The Appellant had, during the course of assessment, given the fair market value of the investment held which proves the reasonableness of the premium. The loss is only a loss as per accounts as maintained as per Companies Act and as required by the Income Tax Department. This is by precedent and accounting standards, the valuation of closing stock has been at cost or market price, whichever is lower as accepted for Assessment purpose.

The securities, when sold, will result in huge profit by reason of value of investment at cost price. Thus, the revenue is never at loss so far as taxes are concerned because the profit will accrue and arise only when sale is made. The Appellant encloses the intrinsic value of the investment held, which was filed with Assessing Officer to prove that the premium charged and paid for by the buyers is not unreasonable or artificial, but in consonance with the correct value. The slight variation, if any, is by reason of prudent investment knowledge of the management of the Company, in which the subscriber has faith.

The Assessing Officer has accepted the factum of fair market value shown by the Appellant of the shares in paragraph 2.3 and 2.4 of the Assessment Order. However, he has rejected the explanation by giving 7 observations which were irrelevant, immaterial and given only for the sake of rejecting the claim, without any substantial finding against the Appellant. The vital finding of the Assessing Officer is that the source of fund is fully explained and therefore, in view of this, categorically upholding of the Appellant's genuineness. The other reasoning are baseless. The Appellant has also explained in the written submission on page 3 onwards the fallacy of reason given by the Assessing Officer.

The Appellant emphasises that the addition made by the Assessing Officer under section 68 of the Act, which has absolutely no application to the facts of the case, hence incorrect.”

7. Thereafter learned CIT(A) noted that section 56(2)(viib) was applicable from assessment year 2013 -14. Ld CIT(A) deleted the addition by concluding as under :-

“I have carefully considered the rival submission, facts of the case and the judicial decisions relied upon by the appellant. In the case, the AO has not doubted the nature of transactions relating to issue of share and charging of premium. In my opinion, the appellant has complied with all the requirements to prove the genuineness of the amount received towards the share application money and the premium, identity of the creditors, genuineness of the transactions and the creditworthiness of the creditor by filing relevant documents. Further the AO has not brought on record any evidence to show that the explanation of the appellant is not correct. The AO has only raised the issue of unreasonableness of the amount of premium so

received by the appellant @ Rs. 190/- per share. Therefore, the AO is not justified in making the addition u/s 68 of the IT Act.

As regards, the premium charged by the appellant is concerned; the AR submitted that the company is presently having investment activity. The Company is reporting loss because it is valuing investments at book value, whereas, the intrinsic or fair market value is much more. While issuing shares, fair market value of the assets has to be taken into account and the person paying the premium has factually benefited from the purchase of shares at premium. The Appellant had, during the course of assessment, given the fair market value of the investment held which proves the reasonableness of the premium.

As observed above, the AO has not doubted the genuineness of the receipt of the share premium but he formed the opinion that the exorbitant rate of share premium fixed by the appellant company and treated the same as taxable income. In this regard, CBDT Instruction No. 2/2015 dated 29.01.2015 is clear on the issue in which it has been held that premium on share issued was on account of capital account transaction and does not give rise to income. The Board's Instruction is reproduced as under:-

"In reference to the above cited subject, I am directed to draw your attention to the decision of the High Court of Bombay in the case of Vodafone India Services Pvt. Ltd. for AY2009-10 (WP No. 871/2014), wherein the Court has held, inter alia, that the premium on share issue was on account of a capital account transaction and does not give rise to income and hence, not liable to transfer pricing adjustment.

It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved. This may also be brought to the notice of the TTAT, DRP's and CsIT (Appeals).

This issues with the approval of Chairperson, CBDT."

I have gone through Vodafone India Services Pvt. Ltd. vs. Union of India & Others (2014) 368 ITR 01 (Bom HC), wherein it is held as under:-

"For all the above reasons, we find that in the present facts issue of shares at a premium by the Petitioner to its non-resident holding company does not give rise to any income from an admitted International Transaction. Thus, no occasion to apply Chapter X of the Act can arise in such a case"

In the case of Green Infra Ltd. ITA No. 7762/Mum/20i2 dated 23.08.2013, wherein it has been held that:-

"Considering the entire issue in the light of the material evidence brought on record in our considerate view, the Revenue authorities have erred in treating the share premium as income of the assessee u/s 56(1) of the Act. In our considerate view, for the reasons discussed hereinabove, we do not find it necessary to apply the provisions of sec. 68 of the Act. We, therefore, direct the AO to delete the addition of Rs. 47,97,10,000/-.

Considering the Board's Instruction No. 2/2015 vide F No. 500/15/2014-APA-I dated 29.01.2015 and respectfully following the jurisdictional High Court Bombay's decision in the case of Vodafone India Services Pvt. Ltd. vs Union of India & Others (2014) 368 ITR 01 (Bombay HC) and jurisdictional ITAT "G" Bench decision in the case of Green Infra Ltd. ITA No. 7762/Mum/2012 dated 23.8.2013. In view of the above facts and circumstances of the case, I am of the considered opinion that share premium amount received by the appellant is in the nature of capital and same cannot be assessed u/s 68 of the IT Act and therefore addition made by the AO is deleted. Grounds 1 to 11 are, therefore, allowed."

8. Against the above order revenues in appeal before us.

9. We have heard both the Council and perused the records .learned departmental representative relied upon the grounds of appeal and the order of the assessing officer. The learned DR further placed reliance upon following case laws :-

- Pr.CIT Vs. NRA Iron & Steel Pvt. Ltd.(Civil Appeal No. 29855 of 2018)(SC)
- Pr. CIT Vs. NDR Prompters Pvt. Ltd. (ITA No. 49 of 2018)(Delhi High Court)
- CIT Vs. Navodaya Castle Pvt. Ltd. (367 ITR 306)(Delhi)
- Novodaya Castle Pvt. Ltd. Vs. CIT (2015-TIOL-314-SC-IT) (SC)
- CIT Vs. MAF Academy(P) Ltd. (361 ITR 258)
- Rick Lunsford Trade & Investment Ltd. Vs. CIT (385 ITR 399)
- Rick Lunsford Trade & Investment Ltd. Vs. CIT (2016-TIOL-207-SC-IT)
- CIT Vs. Nipun Builders & Developers(P) Ltd. (350 ITR 407)
- CIT Vs. Nova Promoters & Finlease(P) Ltd. (342 ITR 169)
- CIT Vs. Ultra Modern Exports(P)Ltd. (220 Taxman 165)
- CIT Vs. Frostair(P) Ltd.(210 Taxman 221)
- CIT Vs. NR Portfolio Pvt. Ltd. (263 CTR 456)
- CIT Vs. Empire Builtech(P) Ltd. (366 ITR 110)
- CIT Vs. Focus Exports(P) Ltd. (228 Taxman 88)
- N.K. Proteins Ltd. Vs. CIT (2017-TIOL-23-SC-IT)
- N.K. Proteins Ltd. Vs. CIT (2016-TIOL-3165-AHM-IT)
- UDIT Kalra Vs. ITO (ITA no. 220/2019 & CM No. 10774/2019 dt. 8.3.2019)

10. Per contra Id counsel of assessee Shri GC Srivastava relied upon orders of the Ld CITA. He submitted that the companies who have applied for the

share at a premium are in active status at the site of Department of company affairs. He referred to decision of honourable Supreme Court in the case of principle Commissioner of income tax versus Rohtak chain company 110 Taxmann.com 59 passed after NRA Steel. He submitted that Hon'ble Supreme Court has also not interfered with the order of the honourable madhyapradesh HC High Court which is on identical subject. Learned counsel further submitted that the source of fund is fully explained and no doubt has been expressed by the assessing officer. Learned counsel further submitted that various case laws from honourable Bombay High Court including the following duly covered the issue in favour of assessee :-

- CIT versus Gagandeepdeep infrastructure private limited (80 Taxmann.com 272)
- Principal CIT Vs. Chain House International (P) Ltd. (98 taxmann.com 47)(MP) SLP dismissed by Supreme Court

11. We have carefully considered the submissions and perused the records. We note that the issue in dispute is the addition as undisclosed income u/s. 68 of the sums received as share premium. The assessing officer has categorically mentioned that there is no doubt about the genuineness of the source of fund. In other words he has accepted the identity, creditworthiness and genuineness of the sources of funds of the share applicants. The assessing officer has drawn adverse inference on the ground that the assessee company's performance does not command the justification for share premium. In this regard by referring to the observations about shell companies the assessing officer has contradicted himself by observing that the source of fund is duly explained. It is quite settled that in shell companies there is doubt about the source of funds. As regards the reliance of the assessing officer on the decision of Major Metals (supra) is concerned the same was with respect to the order of the settlement commission wherein the veracity of the funds were in doubt and in those circumstances honourable jurisdictional High Court has upheld the order of the settlement commission with regard to the absence of genuineness of the source of share premium. In the present case we note that assessee has

duly submitted all the necessary documents for the verification of the identity creditworthiness and genuineness of the share applicants as evident in the order of learned CIT(A) noted in paragraph 5 above.

12. As regards the examination of justification of share premium is concerned it is noted that the concerned provision in income tax law was brought into statute books in the form of section 56 (2)(vii)(b) . This was with effect from 2013-14. Honourable jurisdictional High Court in the case of M/s. Gangadeep Infrastructure (P) Ltd. (Income Tax Appeal No.1613 of 2014 decided in 20 March 2017) has duly held that the said provision is prospective. Hence the examination of this justification for the concerned assessment year is not in accordance with the jurisdictional High Court decision as mentioned above.

13. Furthermore identical issue was examined in detail by honourable jurisdictional High Court in the case of Pr CIT vs Apeak Infoteck (397 ITR 148) the exposition from honourable High Court are summarised as under :-

“Amendment to Section 68 of the Act by the addition of proviso thereto took place with effect from 1<sup>st</sup> April, 2013. Therefore, it was not applicable for the subject Assessment year 2012-13. So far as the pre-amended Section 68 of the Act was concerned, the same cannot be invoked in this case, as evidence was led by the Respondents- Assessee before the Assessing Officer with regard to identity, capacity of the investor as well as- the genuineness of the investment. Therefore, admittedly, the Assessing Officer did not invoke Section 68 of the Act to bring the share premium w tax. Similarly, the CIT(A) an consideration of facts, found that Section 68 of the Act cannot be invoked. In view of the above, it was likely that the Revenue may have taken an informed decision not urge the issue of Section 68 of the Act before the Tribunal. High Court may a/so point out that decision of High Court in Major Metals Ltd. vs. Union of India, 359 ITR 450 proceeded on its own facts to uphold the invocation of Section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers to shares of the Assessee - Company were not creditworthy in as much, as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000/- at premium - at Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by High Court in its writ-jurisdiction. In the present: case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this

case has been given by the Authorities that shareholder/share applicants were unidentifiable or bogus.

High Court found that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income, This conclusion was reached by the impugned order following the decision of this Court in Vodafone India Services Pvt. Ltd. (supra) and of the Apex Court in M/s. G.S. Homes and Hotel P. Ltd. (supra). In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income. It was further pertinent to note that the definition of income as provided under Section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1<sup>st</sup> April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assesses in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that High Court in Commissioner of Income Tax vs. M/s. Gangadeep Infrastructure (P) Ltd (Income Tax Appeal No.1613 of 2014 decided in 20 March 2017) has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1<sup>st</sup> April 2013 will not have retrospective effect and would be effective only from Assessment year 2013-14. In view of the above, Question No .B as proposed also does not give rise any substantial question of law as it is an issue concluded by the decision of High Court in M/s. Vodafone India Services Pvt. Ltd. (Supra) and in the Apex Court in M/s. G.S. Homes & Hotels P.Ltd. (supra). Thus not entertained.”

14. From the above decision of honourable jurisdictional High Court it is abundantly clear that in the present assessment year the assessing officer was not empowered in examining the justification of share premium and the decisions referred by the assessing officer has been duly held to be not applicable on the facts of this case. The decisions referred by learned DR are with reference to those cases where the source of funds have been doubted by the assessing officer or are not established beyond doubt. However in the present case there is no such doubt as the assessing officer has accepted that the sources of funds are duly explained. Further those decisions refer to the absence of the share applicants and/or their director at the given address. There is no such case made out by the Assessing Officer here. Furthermore some of the cases refer to notices returning unserved, which is not at all the

case here. Hence these decisions do not fructify the revenues case in the fact of the present case. The other decisions referred by learned counsel of the assessee duly support the case of the assessee as discussed above.

15. Accordingly in the background of aforesaid discussion and precedents, we do not find any infirmity in the order of learned CIT(A). Accordingly we uphold the same.

16. In the result appeal filed by the revenue stands dismissed.

Order has been pronounced in the Court on 24.2.2020.

Sd/-  
(RAMLAL NEGI)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 24/02/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

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BY ORDER,  
(Assistant Registrar)  
ITAT, Mumbai