IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

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

ITA No. 3268/Mum/2017
Assessment Year : 2012-13

The ITO-5(2)(3), MUMBAI	Vs.	M/s.Millionaire Commodities Pvt. Ltd., a-32, Haji Allarakha Building, 3rd , 9th Khetwadi Lane, MUMBAI [PAN : AAHCM3086G]
(Appellant)		(Respondent)

Appellant by : Shri D.G.Pansari,
Shri Chaudhary Arun Kumar Singh,

Respondent by : Shri Kiran Mehta &
Shri Ravi Dasija,

Date of Hearing : 10-07-2020		Date of Pronouncement : 10-07-2020

O R D E R

PER RAJESH KUMAR, A.M:

This appeal filed by the Revenue is directed against the order of the CIT(A)-10, Mumbai, dated 16-01-2017.

2. The Revenue has raised the following Grounds:

"1 i) Whether on the facts and circumstances of the case and in the law, has the Ld.CIT(A) justified in deleting the quantum addition of Rs.2,15,00,000/- made by the AO without going into the source of income of share applicant's and its credibility?

ii) The ld.CIT(A) also erred in not taking cognizance of nature of profit projection shown by the assessee business earlier and future while deciding the issue of share premium receipts.

2. The appellant prays that the order of the Ld.CIT(Appeals) be set aside and the order of the AO be restored."

3. The only issue raised by the Revenue in this appeal is against deleting the quantum addition of Rs.2,15,00,000/- by the CIT(A),as made by the AO on account of share premium and share application money made u/s.56(1) of the Income Tax Act.

4. The facts in brief are that, the assessee-company has filed return of income on 25-09-2012, declaring total loss of Rs.26,75,333/-, which was processed u/s.143(1) of the Act and the case was selected for scrutiny and notices were duly issued and served on the assessee.

5. During the course of assessment proceedings, AO observed that assessee-company has issued 2,15,000 equity shares of Rs.10/- each at a premium of Rs.90/- per share, aggregating to Rs.2,15,00,000/- during the year. Accordingly, the AO asked the assessee to furnish the details of share applicants along with share application forms along with the returns and confirmations from the investors and justification for issuing shares at such a higher premium. The assessee filed necessary details before the AO along with share valuation report. According to the AO, assessee could not prove the genuineness and the creditworthiness of the applicants and thereafter, issued notices u/s.133(6) of the Act. The details share application money are as under:

Sr.No	Name	Share Application Money
1	Smart Realcol Pvt. Ltd	50,00,000
2	Spectrum Propcon Pvt Ltd	60,00,000
3	Smart Prime Metacast Pvt Ltd.,	40,00,000
4	Swastic Realmart Pvt Ltd.,	25,00,000
5	Raghav Multitrade Pvt. Ltd	40,00,000
	Total	2,15,00,000

5.1. Thereafter, the AO bifurcated the total receipts into share capital and share premium, which came to Rs.21,50,000/- and Rs.1,93,50,000/- respectively. The AO rejected valuation report of the assessee on the ground that during the year the assessee sustained loss and therefore there was no justification for premium. The AO further observed that assessee has not furnished the details and documents with regard to the issue and filing of compliances with ROC. The AO finally held that the said shares were issued by the assessee-company at higher than the market value of the assessee and therefore assessed the entire share application money and share premium u/s.56(1) of the Act as 'income from other sources' by making the assessment u/s.143(3) of the Act, vide order dt.28-03-2015. Without prejudice to the same, the AO also observed and recorded that since the assessee has failed to prove the genuineness of the investors, the provision of Section 68 of the Act could also be invoked.

6. In the appellate proceedings, the Ld.CIT(A) allowed the appeal of assessee, after considering the reply of assessee and various case law relied upon, by observing as under:

> *"5.2. I have carefully considered the facts of the case and submissions of the ld.AR. I have also gone through the decisions relied on by the AO and the ld.AR. First of all let me point out the taxability of share premium in the hands of the assessee It has been held in several decisions including the decision in the Vodafone India Services Pvt. Ltd that the share premium is the balance sheet entry and is capital in nature. No capital receipt is taxable as income until it is expressly provided in the Act. The relevant part of the decision of Vodafone India Service Pvt. Ltd., (2014) 368 ITR 1(Bombay) is reproduced as under:-*
>
> > *25. But we have examined the issue afresh. The word income for the purpose of the Act has a well understood meaning as defined in Section 2(24) of the Act. This even when the definition in Section 2(24) of the Act is an inclusive definition. It cannot be disputed t income will not in its normal meaning include capital receipts unless it is so specified, as in Section 2(24) (vi) of the Act. In such a case, Capital*

Gains chargeable to tax under Section 45 of the Act are, defined to be income. The amounts received on issue of share capital including the premium is undoubtedly on capital account. Share premium have been made taxable by a legal fiction under Section 56(2)(viib) of the Act and the same is enumerated as Income in Section 2(24)(xvi) of the Act. However, what is bought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case what is being sought to be taxed is capital not received from a non-resident i.e. premium allegedly not received on application of ALP. Therefore, absent express legislation, no amount received, accrued or arising on capital account transaction can be subjected to tax as Income. This is settled by the decision of this Court in Cadell Weaving Mill Co. v. CIT [2011] 249 ITR 265/116 Taxman 77 was upheld by the Apex Court in CIT v. D.P Sandu Bros. Chember (P.) Ltd. [2005] 273 ITR 1/142 Taxman 713. This Court has in Cadell Weaving Mills Co. (supra) inter alia, observed as under:—

'It is well settled that all receipts are not taxable under the Income tax Act. Section 2(24) defines "income". It is no doubt an inclusive definition. However, a capital receipt is not income under section2(24) unless it is chargeable to tax as capital gains under Section 45. It is for this reason that under section 2(24)(vi) that The Legislature has expressly stated, inter alia, that income shall include any capital gains chargeable under section 45. Under Section 2(24)(vi), the Legislature has not included all capital gains as income. It is only capital gains chargeable under Section 45 which has been treated as income under Section 2(24). If the argument of the Department is accepted then all capital gains whether chargeable under section 45 or not, would come within the definition of the word "income" under section2(24). Further, under section 2(24)(vi) the Legislature has not stated that "any capital gains" will be covered under the word income. On the contrary, the Legislature has advisedly stated that only capital gains which are chargeable under Section 45 of the Act could he treated as income. In other words, capital gains not chargeable to tax under section 45 fall outside the definition of the word 'income" in section 2(24) of the Act. It is true that section 2(24) of the Act is an inclusive definition. However, in this case, we are required to ascertain the scope of Section 2(24)(i) and for that purpose we have to read the sub section strictly. We cannot widen the scope of sub section by saying that the definition as a whole is inclusive and not exhaustive. In the present case, the words "chargeable under section 45' are very important. They are not being read by the Department. These words cannot be omitted. In fact, the prior history shows that capital gains were not chargeable before 1946. They were not chargeable between 1948 and 1956. Therefore, whenever an amount which is other wise a capital receipt is to be charged to tax, section 2(24) specifically so provides.'

In view of the above, we find considerable substance in the Petitioner's case that neither the capital receipts received by the Petitioner on issue of equity shares to its holding company, a non-resident entity, nor the alleged short-fall between the so called fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act.

5.2.1. Thus, the premium received is a capital receipt and is not taxable as income. However, after amendment by Finance Act, 2012, share premium is taxable as "income from other sources"

under sec.56(2)(viib) if the shares exceed the fair market value. But this amendment is applicable with effect from 1.4.2013 and is relevant to A.Y 2013-14 onwards but not to the assessment year under consideration. The relevant provisions of the Act are reproduced as under:-

> *[(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:*
>
> *Provided that this clause shall not apply where the consideration for issue of shares is received-*
>
> *(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or*
>
> *(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.*
>
> *Explanation. —For the purposes of this clause,—*
>
> *(a) the fair market value of the shares shall be the value—*
>
> *(1) as may be determined in accordance, with such method as may be prescribed-'; or*
>
> *(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,*
> *whichever is higher;*
>
> *(b) 'venture capital company", "venture capital fund" and 'venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of "[Explanation] to clause (23FB) of section 10;]*

5.2.2. It was also held by ITAT Mumbai in the case of Green Infra Ltd. 145 lTD 240 that –

> *"No doubt a non est company or a zero balance company asking for a share premium of Rs.490/- per share defies all commercial prudence but at the same time we cannot ignore the fact that is the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the share holder whether they want to subscribe to such a heavy premium. The revenue authorities cannot question of charging of such huge premium without any bar from any legislated law of the land.....*

Accordingly relief was given to the assessee by the Honorable ITAT in this case by following above decision in the case of Vodafone India Services Pvt. Ltd.

5.2.3 In view of the above discussion it is evident that share premium

in the instant case is not taxable for the assessment year under consideration since it is a capital receipt. However, the same can be brought to tax as deemed receipt u/s 68 if there is a credit in the books of account (the provisions talk of any sum found credited") and the same is not explained by the assessee to the satisfaction of the AO with reference to identity and creditworthiness of the person who paid the money or made investment and genuineness of the transaction. The provisions of sec.68 are reproduced as under:-

Cash credits.

68. Where any sum is found credited in the books[9]of an assessee maintained for any previous year, and the assessee offers no cxplanation[9] about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory the sum so credited may° be charged to income-tax as the income of the assessee of that previous year :

93[Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited: and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

***Provided further** that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.]*

5.2.4. In view of the above background let us examined the case of the appellant. The appellant has received the share application and with a premium of Rs. 90- from five concerns. The AO has made a disallowance of entire share application money i.e. premium value as well as value on par doubting the genuineness of the transaction. The disallowance was, in fact, made by Ac u/s 56(1)(viib) of the Act. As mentioned above this is a new provision which introduced by Finance Act 2012 and effective from 01/04/2013 relevant to A.Y 2013-14 and is meant for treating share premium as income from other sources premium charged is more than the fair market value. Since, the instant case is for A.Y.2012-13 these provisions of treating premium as income from other source are not applicable. If at all, only the deemed provisions of sec.68 will apply wherein if the appellant fails to give any explanation to the satisfaction of the AO on the credits found in the books of account with regard to identity, creditworthiness of the creditors and genuineness of the

transaction, the AC can make disallowance as these are deemed provisions. Since, the appellant has furnished all the details like confirmation letters, copies of ITR copies of audited accounts and bank statements of all the five parties who have contributed to the share capital of the company and return of allotment filed with ROC and the Board resolution of the company for issue and allotment of shares, in my considered opinion the appellant has fulfilled this condition also. Thus, the disallowance is not called for in either of the provision.

5.2.5. To sum up, as the investment is not from any bogus concerns and as the provisions of section 56(1)(viib) are not applicable to the appellant for the year under consideration and as the appellant has fulfilled the requirements of section 68 of the Act, in my considered view the disallowance of investment in shares by the above parties is not in order. I therefore delete the addition. The ground is allowed".

7. Ld. DR submitted before the Bench that the Ld.CIT(A) failed to appreciate the facts of the case in the correct perspective and wrongly allowed the appeal of assessee. Ld. DR also submitted that the AO has made the addition primarily on the ground that the shares were issued at a premium of Rs.90/- of the face value of Rs.10/- despite the fact that the assessee was incurring losses in his business and there was no *locus standi* to issue shares at such exorbitant premium. Ld. DR therefore submitted that the valuation report filed by the assessee in support of its valuation of equity shares is also wrong and was rightly rejected by the AO. Ld.DR submitted that the premium was rightly added to the income, u/s. 56(1)(viib) of the Act as being in excess of market value of the shares. Ld.DR also referred to without prejudice observations and findings given by the AO in the assessment order, wherein the AO has said that since the premium charges are in excess of intrinsic value of the shares, the provisions of Section 68 of the Act could also be applied and thus, the said amount is covered under the provisions of Section 68 of the Act and as the same was not explained in terms of Section 68 of the Act and accordingly,

liable to be added u/s.68 of the Act also. Finally Ld.DR prayed that the order of CIT(A) be reversed and that of the AO be restored.

8. Ld.AR , relying heavily on the order of CIT(A), submitted that the AO made addition u/s.68 of the Act, which was not applicable to the instant year as the new provisions as contemplated u/s 56(1)(viib) of the Act as introduced by the Finance Act, 2012, effective from 01-04-2013, meaning thereby that the said amendment is applicable from AY.2013-14, whereas the year-in-question is only AY.2012-13. Ld.AR further submitted that Ld.CIT(A) is correct in not applying the provisions of Section 56(1)(viib) of the Act, therefore, heavily relied on the order of CIT(A) by praying that the appeal of Revenue may be dismissed.

9. After hearing both the parties and perusing the material on record particularly the impugned order of the Ld.CIT(A), we observe that the issue has been dealt with in length in the appellate order, wherein the Ld.CIT(A) has categorically held that the provisions of Section 56(1)(viib) of the Act are not applicable to the year under consideration, since new provision is introduced by the Finance Act, 2012, which is effective from AY.2013-14. We further find that the Ld.CIT(A) after considering the assessee's contentions and submissions has given finings that the provisions of Section 68 of the Act were also satisfied by the assessee. Ld.CIT(A) has noted as assessee has filed the confirmation letters, copies of ITRs, copies of bank statements of five parties, who invested share capital. Besides, the assessee has filed the allotment letters, returns as filed with the AO along with Board's resolution for allotment of shares. Under these circumstances, we do not find any reason to interfere with the order of

Ld.CIT(A), which otherwise appears to be quite reasoned and correct. Accordingly, the appeal of Revenue is dismissed.

Order pronounced in the open court on

Sd/-	**Sd/-**
(RAM LAL NEGI)	(RAJESH KUMAR)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 10- 07-2019

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai
4. आयकर आयुक्त / CIT, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक
पंजीकार (Dy./Asst. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai