

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.543/M/2018
Assessment Year: 2012-13**

M/s. Frohar Trading Pvt. Ltd., L/7, A-001 Pratiksha Nagar, New MHADA Colony, Sion, Mumbai-400022 PAN: AACCF0551A	Vs.	Income Tax Officer 6(3)(1), 5 th Floor, 524, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**ITA No.544/M/2018
Assessment Year: 2012-13**

M/s. Fulton Corporation Pvt. Ltd., L/7, A-001 Pratiksha Nagar, New MHADA Colony, Sion, Mumbai-400022 PAN: AACCF0551A	Vs.	Income Tax Officer 6(3)(1), 5 th Floor, 524, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vishnu Aggarwal, A.R.
Revenue by : Shri Leena Srivastav, D.R.

Date of Hearing : 04.01.2021

Date of Pronouncement : 06.04.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by two different assesseees against the orders even dated 03.04.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13. Since the

issues raised in both the appeals are common, therefore these are being disposed off together for the sake of brevity and convenience. First we shall take up ITA No.543/M/2018. The ground raised by the assessee are as under:

“1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in adding the share capital money of Rs.27,98,10,900/- u/s 68 of the Income Tax Act 1961, without considering the facts of the case.”

2. The only issue raised by the assessee is against the order of Ld. CIT(A) confirming the addition of Rs.27,98,10,900/- as made by the AO towards share capital money under section 68 of the Act.

3. The facts in brief are that the assessee filed return of income on 19.02.2013 showing an income of Rs.1050/- which was processed under section 143(1) of the Act. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served upon the assessee. The AO observed that assessee had share capital of Rs.1 lakh comprising 10,000 equity shares of Rs.10 each and during the year issued 5,81,180 shares with face value of Rs.10 each at a premium of Rs.490 thereby increasing the paid up capital by Rs. 58,11,800 and share premium by Rs.27,98,10,000/-. According to the AO these transactions were suspicious and unnatural and accordingly called upon the assessee to prove the identity, creditworthiness and genuineness of the transactions. The assessee filed before the AO the necessary evidences in the form of names and addresses of the shareholders, mode of payment by way of cheques, investments transferred to the assessee from the investors in lieu of allotment of shares and confirmation from the said shareholders. However, the AO was not convinced

with the genuineness of these transactions and added the entire amount as unexplained cash credit in the books of the assessee.

4. In the appellate proceedings also the Ld. CIT(A) dismissed the appeal of the assessee by upholding the order of AO that assessee has failed to prove the genuineness of these transactions.

5. The Ld. A.R. submitted before the bench that both the authorities have failed to appreciate the true character of these shares transactions. The ld AR submitted that the assessee has not received any money in consideration of allotment of shares and only received any sum of money. The ld. AR submitted that provisions of section 68 of the Act are applicable to a case of money credited in the books of accounts of the assessee and not to a barter system for discharge of consideration. In defence of his argument the Ld. A.R. relied on the following decisions:

1. ITO vs. Bhagwat Markcom (P) Ltd. 109 taxmann.com 330 (Kolkata – Trib.)
2. ITO vs. Saffron Comtrade Pvt. Ltd. ITA 2029/Kol/2016 (Kolkata Trib.)
3. ITO vs. Kaner Investments Ltd. ITA 2095/Kol/2017 (Kolkata Trib)
4. ITO vs. Aryvarat Construction Pvt. Ltd. ITA 2203/Kol/2017 (Kolkata Trib)
5. ITO vs. Sarvlok Vanijya Pvt. Ltd. ITA 501/Kol/2017 (Kolkata Trib)
6. ITO vs. Vishwadham Traders P. Ltd. ITA 803/Kol/2017 (Kolkata Trib)
7. Access Global Limited vs. ITO ITA 13/Kol/2018 (Kolkata Trib)
8. ITO vs. Anand Enterprises Ltd. ITA 1614/Kol/2016 (Kolkata Trbi)
9. ABA Earthline Communications Ltd. vs. ITO ITA 1141/Kol/2017 (Kolkata Trbi)

10. ITO vs. Sunglow Dealcom Pvt. Ltd. ITA 2178/Kol/2016 (Kolkata Trbi)
11. DCIT vs. P.N. Memorial Neuro Centre & Research Ltd. ITA 1383/Kol/2015 (Kolkata Trbi)
12. ITO vs. DSR Impex Pvt. Ltd. ITA 2087/Kol/2017 (Kolkata Trbi)
13. Jatia Investment vs. CIT Ltd. 206 ITR 718 (Cal-HC)
14. ITO vs. V.R. Global Energy (P) Ltd. 113 taxmann.com 31 (SC)
15. V.R. Global Energy (P) Ltd. vs. ITO 96 taxmann.com 647 (Madras HC)
16. ACIT vs. Paras Healthcare P. Ltd. ITA 2207/Del/2012 (Delhi Trib)

6. The Ld. D.R., on the other hand, relied heavily on the order of authorities below.

7. We have heard the rival submissions of both the parties and perused the material on record. The primary contention of the Ld. A.R. before us was that the provisions of section 68 of the Act are not attracted to the present case as the shares were not issued for a consideration which was discharged in terms of money. The consideration was discharged by accepting the investments in the hands of the investors which were duly shown in their hands of the investors prior to the date of said transfer to the assessee company and thereafter duly shown in the balance sheet of the assessee. The Ld. A.R. submitted that this is a barter system of giving investments to the assessee company in lieu of allotment of shares at a premium and therefore the provisions of section 68 are not applicable. We have also examined the case laws stated by the assessee in defence of his arguments and the relevant portions of the case laws cited by the Ld. A.R. are reproduced as under:

"1. ITO vs. BhagwatMarcom (P) Ltd. (supra)

"No addition could be made under section 68 where assessee company issued its shares at premium to certain companies in lieu of shares held by said companies and there was no inflow of cash. " "Section 68 of the I. T. Act, 1961 - Cash Credit (Share Application Money) - A.Y. 2012-13 - During year under consideration, assessee-company issued its shares at premium to certain companies in lieu of shares held by said companies- said transactions were entered in books of account - whether there being no real inflow of cash involved in aforesaid transactions, amount of entry could not be treated as unexplained cash credit under section 68 - Held, yes (In favor of assessee)."

2. ITO vs. Saffron ComtradePvt Ltd. (supra)

"Section 68 of the Act is not applicable on the facts of the assessee's case, since no money transaction took place between assessee and share subscribing companies. It is a simple case of shares being allotted in lieu of shares held by the share subscribers. That is, it is just swapping of shares, i.e. shares are exchanged from another shares, therefore, section 68 does not attract in the assessee's case under consideration."

3. ITO vs. Kaner Investments Ltd (supra)

"Section 68 of the Act is not applicable on the facts of the assessee's case, since no money transaction took place between assessee and share subscribing companies. It is a simple case of shares being allotted in lieu of shares held by the share subscribers. That is, it is just swapping of shares, i.e. shares are exchanged from another shares, therefore, section 68 does not attract in the assessee's case under consideration. "

4. ITO vs. Aryvarat Construction Pvt. Ltd. (supra)

"The assessee has allotted the shares of the company in exchange for acquisition of shares from those companies (share applicant companies) and thereby, we note that no sum of money/cash was transferred between the assessee and the share subscribers and the Ld. CIT (A) passed the impugned order taking note of the decisions given by this Tribunal in the case of I TO Vs. Anupam Nandi in ITA No. 774/Kol/2012 and the Hon 'ble Calcutta High Court in the case of Jatia Investment Co. Vs. CIT 206 ITR 718 and other cases. We note that in this case, the shares subscribers have given shares in exchange of the shares of the assessee and no sum of money has been transferred to the assessee on this score. In similar case, the Tribunal in the case of Anand Enterprises Ltd. in ITA No. 1614/Kol/2016 dated 26.09.2018 wherein in similar issue arose.

5. ITO vs. SarvlokVanijyaPvt Ltd. (supra)

"We note that assessee company allotted 25,800 equity shares to 3 applicant companies for Rs. 1,29,00,000/- in consideration for purchase of equity shares held

by these applicant companies. Photocopies of the agreements entered in this regard are enclosed in paper book. We note that the shares were allotted against consideration for purchase of equity shares held by these applicant companies; hence it is a barter system therefore, provisions of section 68 does not apply. "

6. ITO vs. Vishwadam Traders P. Ltd. (supra)

"Section 68 of the Act is not applicable on the facts of the assessee's case, since no money transaction took place between assessee and share subscribing companies. It is a simple case of shares being allotted in lieu of shares held by the share subscribers. That is, it is just swapping of shares, i.e. shares are exchanged from another shares, therefore, section 68 does not attract in the assessee's case under consideration. "

7. Access Global Limited vs. ITO (supra)

We note that LdCIT(A), without properly appreciating the facts and evidences filed before him confirmed the addition made by AO. Whereas no share were issued during the year either by the assessee company or the companies amalgamated with it. The increase in share premium was nothing but the addition of share premium account of the amalgamating companies with the corresponding figure of the assessee company, therefore, there is no cash involved in this transaction, hence provisions of section 68 does not apply. We note that Ld. CIT(A) erred in confirming the addition made U/s. 68 particularly when the initial onus were duly discharged by the assessee stating that it is only an adjustment entry during the amalgamation scheme. Therefore, in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents relied upon hereinabove, we hold that the Id. AO had erroneously invoked the provisions of section 68 of the Act to the facts of the instant case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares during amalgamation scheme, that is, the increase in share capital is only due to scheme of amalgamation approved by Honorable Calcutta high court, hence, addition under section 68 should not be made. "

8. ITO vs. Anand Enterprises Ltd (supra)

"In view of the aforesaid observations, in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents relied upon hereinabove, we hold that the Id. AO had erroneously invoked the provisions of section 68 of the Act to the facts of the instant case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares of certain companies from certain shareholders without paying any cash consideration and instead the consideration was settled through issuance of shares to the respective parties. Moreover, in the balance sheet of the assessee company in the schedule to share capital, it is very clearly mentioned by way of note that the fresh share capital was raised during the year for consideration other than cash. Hence we hold that provision of section 68 of the Act are not applicable in the instant case and accordingly the entire addition deserves to be deleted which has rightly been

done by the Id. CIT (A) which does not require any interference. Accordingly, grounds raised by the revenue are dismissed. "

9. ABA Earthline Communications Ltd vs. ITO (supra)

"The Id. Counsel for the assessee submitted that, in this case, the assessee has allotted shares at a premium, as purchase consideration for purchase of shares in the share applicant companies. Shares were purchased from the companies who had applied for shares in the assessee company and got allotted the same. He submitted that the shares were allotted for consideration other than cash and hence Section 68 of the Act, does not apply. He relied on the order of the 'C' Bench of this Tribunal in the case of ITO vs. M/s. Anand Enterprises Ltd., ITA No. 1614/Kol/2016 & C.O. No.56/Kol/2016; dt. 26/09/2018."

"Applying the proposition of law laid down in the case-law cited above, to the facts of the case on hand, we delete the addition in question made u/s 68 of the Act. "

10. ITO vs. Sunglow Dealcom Private Limited (supra)

"The assessee is a company and is in the business of investment. An addition of unexplained cash credit u/s 68 of the Act, were made by the Assessing Officer on the ground that the assessee failed to explain the sources of funds for the share capital received by it at a premium. On appeal the Id. First Appellate Authority, held that the allotment of shares in this case was a non-cash transactions and that they were subscribed through book entries. He held that Section 68 of the Act, does not apply as the assessee has proved the identity, creditworthiness and genuineness of the transactions. He gave a factual finding and deleted the addition. "

"Applying the propositions of law laid down in the above cases to the facts of this case, we uphold the order of the Id. First Appellate Authority and dismiss this appeal of the revenue. "

11. DCIT vs. P.N. Memorial Neuro Centre & Research Ltd. (supra)

"Section 68 of the Act is not applicable on the facts of the assessee* s case, since no money transaction took place between assessee and share subscribing companies. It is a simple case of shares being allotted in lieu of shares held by the share subscribers. That is, it is just swapping of shares, i.e. shares are exchanged from another shares, therefore, section 68 does not attract in the assessee's case under consideration. "

12. ITOvs. DSR Impex Pvt Ltd (supra)

"We have heard Id. D.R. for the Revenue and perused the materials available on record. We note that the Id. CIT (A) has rightly observed that shares have been issued against the shares therefore it is nothing but barter system of issuing shares in lieu of shares. Therefore section 68 of the Act does not apply and for that we rely

on the judgment of Co-ordinate Bench of IT AT Kolkata in the case of M/s Anand Enterprises Ltd. in ITA No. 1614/Kol/2016 for A.Y. 2012-13 dated 26/09/2018

13. Jatia Investment Co. vs. CIT (supra)

"Section 68 of the Income Tax Act, 1961 Cash Credits - Assessment year 1976-77 - Partners of assessee-firm were members of one 'J' group running several businesses and industries - Accounts of assessee-firm showed that it had borrowed certain amount from GB, a proprietary concern of one of its partners JM, which was invested in purchase of shares - ITO found that GB had no cash balance to advance said amount to assessee - He, thus, concluded that source of funds for purchase of shares by assessee was not explained, and consequently, assessed that amount as income from undisclosed sources — It was contended by assessee that notional cash entries were made to reduce indebtedness of three companies of 'J' Group to GB in order to comply with certain directions of RBI — Assessee-firm substituted three companies of 'J' Group as debtor to GB - It was further stated that question of cash credit did not arise, there being no actual passing or receipt of cash but transactions were mere book entries - Whether, in aforesaid circumstances, effect and import of transaction was that assessee took over liability of aforesaid three companies to 'GB' in exchange for shares and, therefore, amount of loan in question could not be treated as assessee 's income from undisclosed sources - Held, yes."

14. ITO vs. V.R. Global Energy (P) Ltd (supra)

SLP dismissed against High Court ruling that where assessee allotted shares to a company in settlement of pre-existing liability of assessee to said company, since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium could not be treated as unexplained cash credits under section 68. "

"Section 68 of the Income-tax Act, 1961 - Cash credit (Share capital) - Assessment year 2012-13 - Assessee-company allotted share to one VR in settlement of pre-existing liability of assessee to said company -Assessing Officer treated value of shares allotted as unexplained cash credits under section 68 - High Court by impugned order held that cash credits towards share capital were only by way of book adjustment and not actual receipts, thus, same could not be treated as receipts towards share subscription money - It further held that since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium, could not be treated as unexplained cash credits under section 68 -Whether Special leave petition filed against impugned order was to be dismissed - Held, yes [Para 27] [In favor of assessee]. "

15. V.R. Global Energy (P) Ltd vs. ITO (supra)

"Where assessee allotted shares to a company in settlement of preexisting liability of assessee to said company, since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium could not be treated as unexplained cash credits under section 68. "

"Section 68 of the Income-tax Act, 1961 - Cash credit (Shares, allotment of) -

Assessment year 2012-13 - Assessee-company allotted share to one VR in settlement of pre-existing liability of assessee to said company - Assessing officer treated value of shares allotted as unexplained cash credits under section 68 - Whether cash credits towards share capital were only by way of book adjustment and not actual receipts, thus, same could not be treated as receipts towards share subscription money - Held, yes - Whether since no cash was involved in transaction of said allotment of shares, conversion of these liabilities into share capital and share premium, could not be treated as unexplained cash credits under section 68 - Held, yes [Para 27] [In favor of assessee]."

16. ACIT vs. Paras Healthcare P. Ltd (supra)

"The Assessing Officer, though had not mentioned under which provision the additions are being made. It appears that the said additions have been made u/s 68 of the Act because it is the only section under which any sum found credited in the books of account can be added back. In the case of Jaffa Investment Co. in 206ITR 718 at page 725, it is held that in case no cash has been received by the assessee, then no addition can be made u/s 68 of the Act. Similarly, the Pune Bench of the Tribunal also held so in the case of KantiLal & Bros. vs. ACIT in 52 ITD 412"

8. Thus, it is clear from the above that section 68 is not to be invoked where consideration is discharged by way of barter system and not by paying any sum of money. We, therefore, respectfully following the aforesaid decisions, set aside the order of Ld. CIT(A) and direct the AO to delete the disallowance.

9. Appeal of the assessee allowed.

ITA No.544/M/2018

10. The issue involved in the present appeal is identical to the one as stated above in ITA No.543/M/2018 for A.Y. 2012-13. Therefore, our finding in ITA No.543/M/2018 for A.Y. 2012-13 would, mutatis mutandis, apply to this appeal as well. Accordingly, the appeal of the assessee is allowed.

11. In the result, both the appeals of the assesseees are allowed.

Order pronounced in the open court on 06.04.2021.

**Sd/-
(Amarjit Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 06.04.2021.

* Kishore, Sr. P.S.

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

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.