IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'B', LUCKNOW

(THROUGH VIRTUAL HEARING)

BEFORE SHRI A. D. JAIN, VICE PRESIDENT AND
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA No.116/Lkw/2017
Assessment Year:2012-13

Income Tax Officer-2(2), Range-2, Lucknow.	Vs.	M/s Dev Bhoomi Promoters & Developers Pvt. Ltd., 2/299, Vishal Khand, Gomti Nagar, Lucknow. PAN:AACCD1859R
(Appellant)		(Respondent)

Appellant by	Shri Harish Gidwani, D.R.
Respondent by	Shri K. R. Rastogi, C. A.
Date of hearing	19/08/2021
Date of pronouncement	31/08/2021

O R D E R

PER T. S. KAPOOR, A.M.

This is an appeal filed by the Revenue against the order of learned CIT(A)-I, Lucknow dated 31/05/2016 pertaining to assessment year 2012-2013. In this appeal the Revenue has raised the following grounds of appeal:

"1. The CIT(A) has erred in law and on facts of the case in deleting the addition of Rs.2,00,00,000/- which was made in the absence of proper explanation offered by the assessee

regarding forfeited amount of Rs.2,00,00,000/-, which was shown as unsecured loan in the books of investors. The assessee used colourable device to introduce money in its business under the garb of share application money by making private placement and later on forfeiting the money for non-payment of call money."

2. Learned D. R., at the outset, invited our attention to a petition for condonation of delay in filing the appeal and also invited our attention to the affidavit filed by the Assessing Officer duly notarized and signed, narrating therein the reason for delay in filing of the appeal. It was submitted that due to the retirement of the then Assessing Officer, the appeal could not be filed due to inadvertence mistake and during the course of handing over the charge, the Assessing Officer was not communicated about the pendency of filing of any appeal and it was only in the month of January, 2017, during the compiling of dossier report, the deponent came to know that the appeal as authorized by the Pr. CIT, Lucknow could not be filed within the prescribed time. Therefore, the delay of 158 days has occurred which may be condoned. Learned A. R. had no objection to the condonation of delay in filing the appeal and finding the reason for delay in filing the appeal as plausible, the delay was condoned and Learned D. R. was asked to proceed with his arguments.

3. Learned D. R. submitted that in this case the assessee had issued share capital to four companies at a premium and had forfeited the share application money and therefore, the Assessing Officer required the assessee to explain and on examination of the explanation, the Assessing Officer observed that these companies had not declared the investment in the assessee company as share application money but had classified in their books as unsecured loans and when commission was issued to the Income Tax Officer-6(1), Kanpur to verify these facts, then the investors explained

that since share certificates were not received by them therefore, they had classified the amount under the head unsecured loans. It was submitted that entire process of getting share application money and its forfeiture is a sham transaction meant only to convert its own money. It was submitted that it is unbelievable that in the case of a private placement (where the investors are known to investee company) the application money is forfeited. In view of these circumstances, it was submitted that Assessing Officer had rightly made the additions as these are sham transactions using the colourable devise of share application money being forfeited. It was submitted that learned CIT(A) has not rightly appreciated the facts and therefore, it was prayed that the appeal filed by the Revenue may be allowed.

4. Learned counsel for the assessee, on the other hand, submitted that the assessee had received application for issue of 80,000 cumulative redeemable 10% preference shares having face value of Rs.100/- per share along with premium of Rs.900/- on each share and application amount of Rs.250/- was received on 29/04/2011 from the said parties through banking channels and in support of the transactions, the copy of share application forms along with the copy of confirmation of payment of share application money, copy of bank account of the investors were filed. It was submitted that after receiving the payment, the assessee issued notices to aforesaid parties for allotment money on 07/08/2011 which was duly acknowledged by the above investors and since the assessee did not receive the allotment money it again issued notice on 08/09/2011 duly acknowledged by the investors asking for making the payment up to 23.09.2011 with the condition that if no payment was received till 23.09.2011, the share application money along with premium paid by the investors shall be forfeited and in this regard our attention was invited to pages 38 - 41 of the

paper book where the copy of such letters addressed to investors were placed. It was submitted that when again no payment was received then in terms of resolution passed by the Board held on 24/09/2011, the aforesaid application money paid by them has been forfeited in terms of Article-23 of Articles of Association and the forfeited amount was transferred to Reserve and Surplus and in this respect our attention was invited to pages 46 - 56 of the paper book where a copy of balance sheet and profit & loss account of the company was placed. Our attention was also invited to pages 57-68 of the paper book where a copy of Memorandum and Articles of association was placed. It was submitted that the Assessing Officer did not doubt the creditworthiness of the investors and the Assessing Officer made the addition only on the basis that the investors initially had declared the investment in assessee company as unsecured loans and the reason given by them was since the assessee had not allotted shares therefore, the same were reflected under the head unsecured loans was not acceptable to the Assessing Officer. It was submitted that the mere fact that such amount was classified as unsecured loans by the investors cannot change the nature of investment received by the assessee which necessarily is towards share application money which is apparent from the copy of share application forms signed by the respective investors. It was submitted that many times companies issue shares with the condition that the payment is to be made in two or more installments and the usual course is to collect entire money as share application money, allotment money and one or more in the form of call money and if the allotment money or call money is not received then the company is empowered to forfeit the money already received from applicants. It was submitted that the amount forfeited is a capital receipt and not taxable in the hands of the assessee and reliance in this respect was placed on the following case laws:

(i) Asiatic Oxygen Ltd. vs. DCIT (1994] 49 ITD 355 [ITAT, Calcutta)
(ii) DCIT vs. Brijlaxmi Leasing & Finance Ltd. (2009) 118 ITD 546 (ITAT, Ahmedabad)
(iii) Prism Cement Limited vs. JCIT (2006) 101 ITD 103 (ITAT, Mumbai)
(iv) Addl. CIT vs. Om Oils & Oil Seeds Exchange Ltd. (1985) 152 ITR 552 (Del.)
(v) Travancore Rubber & Tea Co. Ltd. vs. CIT (2000) 243 ITR 158 (SC)
(vi) Deepak Fertilizers & Petrochemicals Corpn. Ltd. vs. Dy. CIT [2009] 116 ITD 372
(ITAT, Mumbai)
(vii) Multan Electric Supply Co. Ltd., In Rel3 ITR 457 (Lahore)
(viii) Jaikishan Dadlani vs. ITO [2005] 4 SOT 138 (ITAT, Mumbai)

Learned counsel for the assessee submitted that learned CIT(A) has elaborately discussed the issue in his order and has heavily placed reliance on the findings of learned CIT(A).

5. We have heard the rival parties and have gone through the material placed on record. We find that the application money, received by assessee, is supported by share application forms, placed at pages 13 to 24 of the paper book. The above share application forms clearly state the type of shares, the amount paid as application money. The above share application form also contains acceptance by the investors which also contained that application of shares will be subjected to provisions of Companies Act as well as the provisions of Memorandum and Articles of Association of the company. Such application money has been paid by the investors through banking channels. The confirmations by the investor company regarding having paid share application money to the assessee along with the copy of their bank accounts is placed at pages 25 to 33 of the paper book. After receiving share application money, the assessee, vide

letter dated 07/08/2011, asked the investor companies to pay the balance amount on or before 7th September, 2011, a copy of such notice is placed at pages 34 to 37 of the paper book. Then again on 8th September 2011, the assessee reminded the investor companies to pay the balance amount on or before 23rd September, 2011, a copy of such reminder is placed at pages 38 to 41 of the paper book. Even then the assessee did not receive the balance amount against allotment of shares and therefore, vide letter dated 26th September, 2011, the assessee conveyed to the investors that in terms of Article 23 of Articles of Association, the share application money has been forfeited and a copy of such communication is placed at pages 42 to 45 of the paper book. A copy of Articles of Association is placed at pages 57 to 68 of the paper book. Chapter-6 of Article of Association is regarding forfeiture of shares and the clause runs from clause 21 to 31. For the sake of completeness, the provisions contained under the head 'forfeiture of shares' is reproduced below:

> *"21. If a member fails to pay any call, or installment of a call, on the day appointed for payment thereof, the Board of Directors may at any time thereafter during such time as any part of the call of installment remains unpaid serve a notice on him requiring payment of so much of the call of installment as is unpaid, together with any interest which may have accrued.*
>
> *22. The notice aforesaid shall:*
>
> *(a)Name a future date (not being earlier than the expiry of fourteen days from the date of service of the notice) on or before which the payment required by the notice is to be made; and*
> *(b)State that in the event of non-payment on or date so names the shares in respect of which call was made will be liable to eb forfeited at the discretion of the Board.*
>
> *23. If the requirement of any such notice as aforesaid are not compiled with, any share in respect of the notice has*

been given, may at time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the Board to that effect.

24. *A forfeited share shall be deemed to be the property of the company, and may be sold of otherwise disposed of on such terms and in such manner as the Board of Director may other manner.*

25. *At any time before a sale of disposal as aforesaid, the Board of Director may their discretion, neither cancel the forfeiture on such terms as they think fit of deal with it in any other manner.*

26. *A person whose shares have been forfeited shall cease to be member in respect of the forfeited shares, but shall notwithstanding the forfeiture, remain liable to pay the company all money, which at the date of forfeiture, were presently payable by him to the company in respect of shares.*

27. *The liability of such persons shall cease if and when the company shall have received in full of such moneys in respect of the shares.*

28. *A duly verified declaration in writing that the declaring Managing Director, a Director, a Manager or Secretary of the company, and that share in the company has been duly forfeited on a date stated in the declaration shall be conclusive evidence of the fact therein stated as against all such money in respect of the shares.*

29. *The co0mpany may receive the consideration if any, given for the share in favour of the person to whom the share is sold disposed of. The transferee shall thereupon be registered as the holder of the shares.*

30. *The transferee shall not be bound to see the application of the purchase money if any, nor shall his title to be share be affected by any irregularity of invalidity in the proceedings in reference to the forfeiture, sale of disposal of the share.*

31. The provision of these regulations as to forfeiture shall apply in case of non-payment sun which, by the term of issue of a share, become payable at fixed time, whether on account of nominal value of the share or by of premium, as if the same had been payable by call duly made and notified."

5.1 The above provisions, contained in the Article of Association of assessee company, clearly states that in the event of non payment of allotment money or call money, the amount already paid will be forfeited and therefore, the assessee company having powers under Article 23 had forfeited the above said money. Now the above said forfeited money is a capital receipt which is not liable to tax as per the provisions of I.T. Act and therefore, was not rightly offered to tax by the assessee company and was rightly credited to reserve and surplus. The Assessing Officer, during the assessment proceedings, did not doubt the creditworthiness of investor and his only objection in disallowing the same is that the investors in their books of account had classified investment in the assessee company as unsecured loans. In our opinion, such classification made by the investor company, in their books of account, does not alter the nature of transactions which clearly is share application money as is evident from the copy of share application forms, placed at pages 13 to 24 of the paper book. The explanation of the investor company that since they had not yet received the allotment of shares and therefore, had classified the same as unsecured loans is plausible. The learned CIT(A) has very elaborately dealt the issue in para 5 which, for the sake of completeness is reproduced below:

"5. I have considered the written submission of appellant, paper book and case laws relied by appellant. I have also gone through the findings given by AO in assessment order and I find that the AO has mainly asserted on following points

in support of his contention for making aforesaid addition of Rs.2,00,00,000/- :-

(i) The forfeiture of share money issued on premium was an income of the appellant which has not been disclosed in its return.
(ii) Since, the parties who had paid the money to appellant have actually shown the same as Unsecured Loans in their respective financial statements instead of confirming the amount being given as share application money towards Cumulative Redeemable 10% Preference Shares issued by the appellant, genuineness of transaction was questionable.

5.1 On careful consideration of the written submissions of the appellant and observations of the AO particularly in respect of his first contention as mentioned above, I hold that forfeiture of share money issued on premium was not an income of the appellant because:

a. *There was no adverse implication in the I.T. Act, 1961 for the appellant to issue its shares at premium more than its book value during the present year as the clause (viib) of sub-section (2) of section 56 of the I.T. Act, 1961 has been inserted vide Finance Act, 2012 w.e.f. 01.04.2013 and no other provision was in existence during the present year which deals with such kind of transaction; and*
b. *The appellant is not engaged in the business of raising finance through offer of equity. In fact, the equity has been raised to strengthen its business.*
c. *The sum received by the appellant was not on account of any security deposit or advance for performance of any contract which has ultimately been forfeited.*
d. *The amount forfeited by the appellant could not be distributed among shareholders in terms of sec. 78 and 205 of the Companies Act 1956.*
e. *The amount forfeited is not covered by the definition of income as defined in section 2(24) of the Income Tax Act, 1961.*

Besides this, the appellant has placed its reliance on various authorities wherein it has been held that the share application money which had been forfeited ion account of

default of payment as per the terms of issue of shares was capital receipt, therefore not assessable in the hands of the appellant.

It has been held in Asiatic Oxygen Ltd. vs. DCIT (1994) 49 ITD 355 (TTAT, Calcutta) that amount forfeited from shareholders for default of payment of call money was capital receipt.

In the case of DCIT vs. Brijlaxmi Leasing & Finance Ltd. (2009) 118 ITD 546 (IT AT, Ahmedabad) it was held that the share application which had been forfeited as per the terms of the prospectus could not be treated as a receipt in the normal course of the business of the assessee, which was engaged in financing and leasing business.

In Prism Cement Limited vs. JCIT (2006) 101 ITD 103 (IT AT, Mumbai) it has been held that the amount received by the assessed in lieu of issuance of debentures which was forfeited later on account of non-payment of call money, would assume the character of a capital receipt. Section 41(1) is not attracted and same cannot be treated as deemed business income.

In the case of Addl. CIT vs. Om Oils & Oil Seeds Exchange Ltd. (1995) 152 ITR 552 (Del), it was held that the premium on issue of shares is to be regarded as money paid on capital account and not as revenue receipt.

It has been held in Travancore Rubber & Tea Co. Ltd. vs. CTT (2000) 243 ITR 158 (SC) that the amount forfeited by the assessee was in terms of the agreement. Such a clause has been construed as providing for compensation for breach of contract under s. 74 of the Indian Contract Act, 1872. If the agreed sums of money under the agreements had been received by the assessee, they would have been credited in its account as a capital receipt. That being so, the forfeited amounts must also be treated as capital receipt.

In the case of Deepak Fertilizers & Petrochemicals Corpn. Ltd. vs. Dy. CIT [2009] 116 1TD 372 (ITAT, Mumbai) it was held that the forfeiture of application money received

against partly convertible debentures gave rise to capital receipt not chargeable to tax.

It has been held in Multan Electric Supply Co. Ltd., In Re13 ITR 457 (Lahore) that any profit which arises on the forfeiture of shares is neither a revenue receipt, nor profit on the working of the company, but is simply the circulating capital of the company, and as such, a capital asset.

In the case of Jaikishan Dadlani vs. ITO [2005] 4 SOT 138 (ITAT, Mumbai) it was held that there cannot be any dispute about the position that the share capital forfeiture receipts are in the nature of capital receipts.

In view of the above, I find much force in argument of appellant that the forfeiture of share money issued on premium on account of default of payment as per the terms of issue of shares was capital receipt, therefore, not liable to be included in the total income of appellant.

5.2 With regard to another observation of the AO in respect of genuineness of transaction by virtue of which sec. 68 of the Act has been invoked in the present case, I have considered the matter. During the appellate proceedings the appellant has furnished the acknowledged copies of share application forms, terms of issue of such shares, intimation for making payment of allotment money, reminder for payment of allotment money, information regarding forfeiture of application money paid by all the applicants, Articles of Associations of the appellant consisting of relevant clause under which it is empowered to forfeit such share application money etc. which were also furnished before the Ld. Assessing Officer on 28.10.2014 during assessment proceedings and also mentioned at first paragraph of page no. 2 of the assessment order itself. On account of these documents which were duly available on record, it could not be inferred that the appellant has not adequately followed the procedure laid down in the Companies Act, 1956 before forfeiting the share application money paid by four corporate applicants.

The AO has gathered certain information directly from such corporate applicants or their respective jurisdictional Assessing Officers to verily the transactions made by them with the appellant and it has been revealed from such information that they have shown the money paid by them to appellant as unsecured loans in their respective financial statements, except one - M/s Cityon Solar Limited, New Delhi who had admitted that the money invested by them was forfeited for non-payment of balance amount, although such applicant has not furnished its financial statements.

One of the applicant - M/s Bansal Suppliers Pvt. Ltd., Kanpur has however, initially informed vide its letter dated 15.12.2014 that the money given to appellant was on account of Unsecured Loan but merely after four days, they have suo moto furnished another letter through which it has been intimated that the amount was paid as share application money to appellant. Thus, the later information given by this applicant was in contradiction to their preliminary information. Afterwards, such aapplicant has stated on oath before its Assessing Officer that because share certificates were not received by them they have shown the amount paid to appellant as Unsecured Loan in their books of account.

Another applicant - M/s Zero Traders & Services Ltd., Kanpur has also staled before its Assessing Officer that no intimation of forfeiture of share application money was received by them neither the share certificates were received by them so they have shown the money under Unsecured Loans in their Balance Sheet.

Fourth applicant - M/s Cityon Systems (India) Limited has furnished copy of report wherein money given to the appellant was recorded under the head unsecured loans.

On the of information given by M/s Bansal Suppliers Pvt. Ltd. and Zero Traders & Services Ltd., apparently, there was rational connection between the transactions made by them and accounting entries reflected in the books of account of the appellant as the explanation furnished by them for recording the transactions as unsecured loan is itself sufficient to substantiate the nature of origin of such transactions which

is entirely same as presented by appellant before the AO. Thus, there was no perversity at the end of the appellant in this regard.

It is also reasonably understandable that in case applicants have not paid the allotment money within stipulated period as laid down in the terms of issue of such shares, no share certificates ought to be delivered to them as a result of which there was no infirmity at the end of the appellant.

Besides this, after pursuing the relevant facts of the present case along with the contents of assessment order passed by the AO, it is very much evident that the AO has although, gathered certain information directly from such corporate applicants or their respective jurisdictional Assessing Officer to verify the transactions made by them with the appellant and the information lead to some controversies also but neither such information was furnished to the appellant nor offered for cross-examination. The appellant has also submitted that an explanation given has to be considered objectively before the Assessing Officer takes a decision to accept it or reject it, i.e. department cannot convert a good proof into no proof on mere ipse dixit. Besides this, it has also been submitted by the appellant that neither it is a prerogative of the appellant nor it was responsible at all to take care of the authenticity or legitimacy of accounting entries made in the books of account of such applicants and the manner in which they have shown the transactions in their respective financial statements particularly when no opportunity of cross-examination of them was given to the appellant.

Considering this peculiar fact, I hold that no addition can be made on this account and no such inference can be drawn against the appellant which entail that the transactions were sham or colourable devise to introduce money in its business under the garb of share application money being forfeited unilaterally as in the matters relating to sec. 68, the rule of audi alterant partem has to be observed and the veracity of genuineness must be tested at the touchstone of evidence and not otherwise. Reliance is placed on the

following authorities wherein it has been held that the appellant must be provided a fair opportunity of being heard during the assessment proceedings as it is a basic rule of Natural Justice.

a) *In the case of CIT vs. Jindal Vegetables Products Ltd. (2009) 315 ITR 265 (Del.) it was held that no reliance can be placed on the statements as they were inherently contradictory and unreliable and no opportunity was given to the assessee by the AO to cross-examine the person.*

b) *It has been held in Heirs And Lrs of Late Laxmanbhai S. Patel vs. Commissioner of Income Tax (2010) 327 ITR 290 (Guj.) that the legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, is that if the addition is made, the Same is required to be deleted on the ground of violation of the principles of natural justice.*

c) *It was held in the case of CIT vs. SMC Share Brokers Ltd. (2007) 288 ITR 345 (Del) that though statement of third party had evidentiary value, weight could not be given to it in proceedings against the assessee without testing it under cross examination.*

d) *In the case of CIT v. Eastern Commercial Enterprises (1994) 210 ITR 103 (Cal.) it was held that the cross examination is sine ana non of the due process of taking evidence and no adverse inference can be drawn against a party unless that party is put on notice of the case made out against him.*

e) *It was held in the case of Kishinchand Chettaram vs. CIT 125 ITR 713 (SC) that the amount cannot be assessed as undisclosed income of assess^ in the absence of positive material brought by Revenue to prove that the amount in fact belonged to assessee as the burden lay on the Revenue.*

f) *In CIT vs. Geetanjali Education Society (2008) 174 Taxman 440 (Raj.) it has been held that assessee, registered under s. 12A, could not be denied exemption under] s. 11 on the ground that donations were bogus*

without examining the donors and subjecting those donors to cross-examination who had been examined.

g) *It was held in the case of M/s Shree Barkha synthetics Ltd. vs. ACIT (2006) 55 Taxman 289 (Raj) that "where assessee company had received share application money from a company from and individual investor through banking channel and had furnished confirmation of investment in share capital by said company and had also proved existence of said individual investor, it could be said that the assessee had proved genuineness of said. AO cannot make any additions, it could be said application money by treating the same as unexplained cash credit u/s 68."*

h) *CIT vs. Kandhenu Steels & Alloy Ltd. (2012) 248 ITR 33 (Delhi)*

In addition to above, the appellant has also submitted that applicant companies were not fictitious and their existence or identity was never disputed. Moreover, such companies were also having bank accounts and payments were received by the appellant through banking channel. Therefore, the inference that the genuineness of transaction was questionable is not acceptable in view of decision of Hon'ble Supreme Court in the case of CIT vs. Lovely Exports (P) Ltd. 216 CTR 195 (SC) where it was held that share money cannot be regarded as undisclosed income u/s 68 if the names of the payers are given to the Assessing Officer. Besides this, the proviso to section 68 of the I.T. Act, 1961 regarding any sum credited on account of share application money, share capital, share premium, etc. was actually inserted vide Finance Act 2012 and effective from 01/04/2013 or assessment year 2013-14. Thus, the addition so made by invoking the provisions of sec. 68 is wholly unwarranted in the present case and not sustainable at all.

On careful consideration of the written submissions filed by the appellant, findings given by the AO in the assessment order and facts mentioned above, I hold that the AO was not justified in invoking sec. 68 in the present circumstances and the addition of Rs.2,00,00,000/- is liable to be deleted. The AO is directed to delete the addition of

Rs.2,00,00,000/-. Thus, ground no. 1, 2, 3, 4 and 5 are allowed in favour of appellant."

5.2 In the above findings of learned CIT(A), we do not find any infirmity and therefore, the appeal of the Revenue is dismissed.

6. In the result, the appeal of the Revenue stands dismissed.

(Order pronounced in the open court on 31/08/2021)

Sd/.	**Sd/.**
(A. D. JAIN)	**(T. S. KAPOOR)**
Vice President	**Accountant Member**

Dated:31/08/2021
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

By Order
Assistant Registrar