

**IN THE INCOME TAX APPELLATE TRIBUNAL BENCH, NAGPUR
BEFORE SHRI P.K. BANSAL, VP AND SHRI AMARJIT SINGH, JM**

**I.T.A. No. 426/Nag/2016
Assessment Year:2010-11**

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| ACIT Circle-4 Room no.-301, Saraf Chambers, Nagpur. | Vs. | M/s. Fargo Finvest Pvt. Ltd. Plot No.101 New Ramdaspath, Nagpur Pin:440010 |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AAACF2980M | | |
| (Appellant) | .. | (Respondent) |

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| Assessee by: | Hitesh P. Shah |
| Department by: | A.R. Ninawe |

Date of Hearing: 29.06.2017
Date of Pronouncement: 15.09.2017

ORDER



PER AMARJIT SINGH, JM:

The revenue has filed the above mentioned appeal against the order passed by the Commissioner of Income Tax (Appeals)-4, Nagpur [hereinafter referred to as the "CIT(A)"] dated 23.03.2016 relevant to the assessment years 2010-11.

2. The revenue has raised the following grounds:-

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the artificial loss on sale of shares of Rs.2,84,45,520/- without appreciating that the loss is artificially created, to set off profit on sale of shares of Purti Power sugar Ltd. (PPSL).

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of share premium of

*Rs.3,27,60,000/- without appreciating that the share premium amount is liable to held as a profit earned within the meaning of section 28(iv) of the I.T. Act.
Any other ground that may be raised at the time of hearing.”*

3. The brief facts of the case are that the assessee filed its return of income for the A.Y. 2010-11 on 15.10.2010 declaring total income to the tune of Rs.1,17,930/-. The return was processed u/s 143(1) of the I.T. Act, 1961. The case was reopened for scrutiny u/s 147 of the I.T. Act, 1961. The case was reopened on the following grounds:-

“ the assessee has earned profit of Rs.2.86 crores on the sale of shares of Purti Power & Sugar Limited (PPSL) during the financial year 2009-10. In the same year, the assessee made share transaction of other companies worth Rs.18.16 crores which ultimately resulted into loss of Rs.2.84 crores which was adjusted against the profit earned on the sale of shares of PPSL.

The Auditor in the audit report of the assessee company at para no. 4 of report dated 26.09.2010 has stated that the “transaction of investment in share (Rs.12,33,42,000) and sale of share investment (Rs.12,34,96,480) were not supported by adequate evidence like share transfer certificate, ROC filing etc. thus they could not be verified.” Thus it is seen that there are no proper documentary evidences like share transfer certificate, ROC filing etc. to prove the genuineness of the transaction. Hence, they could not be verified. The loss was booked in a span of 1 to 1.5 months. Further the assessee company received share application money on uge premium. There is also no justification for the huge premium charged @ Rs.90/- per share considering the fact that no significant business activity were carried out by the company. The assessee received Rs.3.27 crores towards equity share premium during the year under consideration. The auditor in his audit report has mentioned that “authorized capital of the company has been raised from Rs.1 lacs to Rs. 40 lacs and necessary approval and compliance with the ROC is underway.” It is therefore clear that the assessee has claimed the sale of share without ROC approval/compliance and hence the transactions appeared to be

colorable and artificially designed in such a manner to enable the company to set off the profit on sale of PPSL, shares held by it against the so-called loss booked on sale of shares of other companies.

In view of the above and the details available on record. I have reasons to believe that the income of Rs.6.11 crores chargeable o tax has escaped assessment in these transactions with the meaning of section 147 of the I.T. Act, 1961."

4. Thereafter, notice u/s 148 of the I.T. Act, 1961 was issued to the assessee on 16.04.2013 which was served upon the assessee on 18.04.2013. Notice u/s 142(1) was also issued and served upon the assessee. The assessee raised the objections against the issuance of notice u/s 148 of the I.T. Act, 1961 which were dismissed, therefore, notice u/s 143(1) & 142(1) were again issued and served upon the assessee. The assessee received the huge profit on sale of PPSL shares and against the profit the loss was booked of Rs.2,84,45,520/-. After the setting off the said loss, the profit has been shown very low. The Assessing Officer was of the view that the loss to the tune of Rs.2,84,45,520/- was artificially created to set off profit on sale of shares ,therefore, the said loss was declined and profit from PPCL was added back to the income of the assessee. The assessee also received the share premium to the tune of Rs.3,27,60,000/-. On seen the record, It was found that the assessee was not doing anything to attract the investors which may fatch the huge premium. The notice was given and after considering the reply, the share premium to the tune of Rs.3,27,60,000/- was added to the income of the assessee. Total



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income of the assessee was assessed to the tune of Rs.6,13,23,450/- .Feeling aggrieved, the assessee filed an appeals before the Commissioner of Income Tax Appeal who allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

ISSUE NO.1:-

5. Under this issue the revenue has challenged the deletion of the artificial loss on sale of shares of Rs.2,84,45,520/-. The assessee was holding investment on equity-shares of Purti Power & Sugar Limited amounting to Rs.6,50,00,000/-. During the assessment year, the assessee sold the share of Purti Power & Sugar Ltd. and earned the profit of Rs.2,86,00,000/-. The assessee also purchased the share of some companies in which the assessee suffered the loss to the tune of Rs.2,84,45,520/-. The assessee set-off the said loss against the income upon the sale of shares of Rs.2,86,00,000/-. Assessing Officer was of the view that the said loss was the artificial loss created by Assessee for setting of the same against the income of the assessee on account of sale of shares of shares of PPSL, therefore, the same was not allowed to be set-off against the income arising from the PPSL. Before going further we deemed it necessary to advert the finding of the CIT(A) on record to see this fact in which circumstances the CIT(A) has allowed the claim of the assessee.:-

"I have gone through the assessment order passed by the A.O. grounds of appeal, the submission made by the appellant,

remand report submitted by A.O. and the reply to the remand report submitted by the Ao. The appellant has submitted that the books of account of the appellant company were checked by the auditor, that the appellant had produced necessary evidences in shape of purchases and sale invoices, copies of resolution of Board of Directors, relevant bank statements as well as confirmations received from the concerned parties. Further the appellant has submitted that the AO has not pointed out any single query or doubt on any of the documents or any of the parties involved in the transaction. The appellant has stated that the identity of the parties and the genuineness of transactions have been established beyond doubt. Further that the parties had deputed their principal officer/director to appear before the AO alongwith documentary evidences in support of share transactions. The appellant has also stated that the AO has failed to bring on record any cogent and clinching evidence against the assessee and has heavily relied on the stories of the Investigation Wing without verification of evidences produced during the course of assessment.



5.4 These comments of the appellant were sent to the AO in remand proceedings. The AO in his remand report has not disputed these facts. However, the AO has argued that the appellant has not submitted share application forms, share certificate, contract notes etc. The AO has also stated that the appellant has not submitted share transfer certificate and ROC approval. Further, the AO has stated in his report the auditor's comments regarding non verification of supporting documents.

5.5. I find that in one of the appellant's group case M/s. Gondavana Engineering Pvt. Ltd. for A.Y.20 10-11 similar issue had come up before the Commissioner of Income tax (Appeal), Nagpur. The matter has been adjudicated for A.Y.2010-11 by CITAppealJJ-11, Nagpur vide order dated 01i02D14. In that case also the appellant had earned profit on sale of shares of PPSL and had incurred loss on sale of shares of other companies. The evidence that has been submitted by the appellant before the A.O. during the course of assessment proceedings similar to the evidences that was produced before the A.O. while finalizing the said assessment of M/s. Gondwana Engineering Pvt. Ltd. Other facts of the case are also similar. The matter has been decided by CET(A)-11 by making the following comments:

I have carefully considered the facts of the case and the written submissions of

the appellant find merit in the submissions made. it is seen that the disallowance

has been made by the Ld. AO on account of the following grounds;-

The appellant was unable to produce the share transfer forms to evidence that the said transaction had actually been entered by the appellant

ii) Till date no money has been received by the appellant in respect of sale consideration of the sale shares.

iii) No expenses have been paid by the appellant to any consultant as claimed by the appellant

5.1 With regard to the inability of the appellant to produce the share transfer forms, same has been validly explained by the appellant during the course of appellate and remand proceeding. As per the prevalent custom in the shares were generally transferred alongwith sale Blank Transfer Forms and only the person who wanted to ultimately transfer the shares in their own name, would lodge the Share Certificates alongwith share Transfer Forms with the Company and till then there can be a number, of transfers in respect of the said shares. it is evident that the appellant purchased the said shares and sold them 0)50 in o short time and since the appellant did not intend to ultimately transfer This fact of shares being transferred alongwith necessary Blank Transfer Forms .?s also established from the Copies of Forms attached by the Ld, A.O. alongwith his Remand Report, wherein the Share Transfer Forms Dated 2011012009, were Revalidated by the Purchasers of those shares on 19,101/2010 and again or 2210312010 for subsequent transfers. Also, the absence of photo copies and share transfer form cannot become a ground for disallowance of loss incurred in the share transfer us various other evidences have been submitted by the appellant during the course of assessment and remand proceedings to conclusively establish the fact that it had entered into the actual transaction of the purchase and sale of said purchase. Confirmations in this regard have been given by the appellant from the parties from whom the said shares have been purchased by the appellant. The appellant had purchased the said shares from Best infratech Pvt. Ltd. and Bright Rca icon Pvt. Ltd. and the said confirmations were before the Id. A 0 during remand proceedings and he has not given a finding that the same are eihter bogus, false or fabricated. Rather he has not



commented on the confirmations at all (sample copy of the confirmations is reproduced in para S. below).
appellant later on if all normal channels of recovery are exhausted. There is also that recovery proceedings are initiated, the appellate may lose the remaining of the sole consideration a/so. In heavily case the appellant has flied copies of the confirmations of the parties from whom the purchased of shares had been made and also of the party to whom the sale of the said shares was mode which duly acknowledge the fact that the sold party has to pay the said amount to the appellant.

5.4 The shares which have been sold during the year wider consideration have been purchased by the appellant from M/s.Best Infratech Pvt. Ltd No.869, Sector-19 Dwarka, New Delhi 110 075. The text of the confirmation filed by the appellant as under
This is to certify that we had sold the shares of following companies to M/s Gondwana Engineering Private Ltd:

5.6 However, in the current appeal the AO has treated this loss in a slightly different way. In the case of M/s Gondwana Engineering P. Ltd. based on similar facts the loss was considered as bogus loss by the AO while finalizing the assessment. The matter has been decided in favour of the appellant by CIT(A)-2 in case of M/s gondwana Engineering P. Ltd. for A.Y. 2010-11 decided vide order No. CIT(A)-11/153/13-14. I agree with the finding of my predecessor that considering the facts of the case and evidences produced the losses incurred cannot be treated as bogus loss. The AO has disallowed this loss and made an addition of Rs.2,84,45,520/- as a benefit enjoyed by the appellant within the meaning of Sec.28(iv) of the I.T. Act. By no stretch of imagination, a loss incurred during the course of trading in share transaction can be added as a benefit within the meaning of Sec.28(iv) of the I.T. Act, 1961. Hon'ble High Court of Madras in the case of Iskraemeco Regent Ltd. Vs. CIT(2011) 331 ITR 317 has held that Sec.28(iv) does not apply to any transactions which involves money. Further ITAT, Chennai Bench in case of Spel Semiconductor Ltd. decided vide 35 Taxman.com 304 has held that Sec.28(iv) can be invoked only when benefit or perquisite received is only in kind and not in cash.

5.7 Further I find that based on similar facts and circumstances, the loss on trading in shares has been held to be genuine by my predecessor in case of M/s. Gondwana Engineering P. Ltd. for A.Y. 2010-11. As discussed the AO has not brought anything on



record to treat the loss on share trading as non-genuine. The disallowance of loss of Rs.2,84,45,520/- has been made mainly on the basis of conjuncture and surmises. In his assessment order, the AO has not stated anything with respect to the confirmations filed by the appellant and other evidences filed during the course of assessment proceedings. Further treating the amount as a benefit u/s 28(iv) can't be justified by any stretch of imagination. Accordingly, the AO is directed to delete the addition of Rs.2,84,45,520/- made u/s 28(iv). This ground is accordingly allowed."

6. On appraisal of the above said finding, we noticed that the CIT(A) has considered the books of accounts the appellant and necessary evidence in shape of purchase and sale invoices, copies of resolution of Board of Directors, relevant bank statements and confirmations received from the parties. The Assessing Officer nowhere doubted the genuineness of the transaction. The Principal Officer and Director were appeared before the AO along with necessary documents in support of share transaction. The CIT(A) for the A.Y. 2010-11 decided the matter of controversy in favour of the appellant group case **M/s Gondwana Engineering Pvt. Ltd.** in which the claim of the loss of the shares was allowed against the profit of the shares of other companies. The case was similar in nature having identical facts. The finding of the said case has been produced above while reproducing the finding of the CIT(A). There is no need to repeat the same. Nothing came into notice the finding of the CIT(A) in the case of **M/s Gondwana Engineering Pvt. Ltd.** appellant group case has been reversed or veried during the appeal.



Since, the matter of controversy has been adjudicated on the basis of the finding of the appellant group case **M/s Gondwana Engineering Pvt. Ltd.** for the A.Y. 2010-11 in which the similar matter of controversy has been decided in favour of assessee, therefore, we are of the view that CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Therefore, this issue is decided in favour of the assessee against the revenue.

ISSUE NO. 2:-

7. Under this issue the revenue has challenged the deletion of the addition of share premium of Rs.3,27,60,000/-. The Ld. Representative of the department has argued that the claim of the assessee was wrongly allowed, therefore, the finding of the CIT(A) is wrong against law and facts and is liable to be set aside. However, on the other hand the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further it is necessary advert the finding of the CIT(A) on record.:-

"6.3" I have gone through the assessment order passed by the A.O., grounds of appeal, the submissions made by the appellant, remand report submitted by the A.O. and the reply to the remand report submitted by the appellant. I find that in another group concern of the appellant M/s Gondwana Engineering Pvt. Ltd. for A.Y.2010-13. also this issue of share premium had come up in adjudication before the CIT(A)-LT, Nagpur. The only difference being that the addition was made u/s.68 on account of share premium being undisclosed income of the appellant. The



CIT(A)11 had completed the appellate proceedings by making following comments:

I have carefully considered the facts of the case and the written submissions of the appellant. I find substantial force in the submission made by the appellant With regard to the issue of production of Director of M/s Shrimaya Builtech Pvt Ltd. before the Ld. AU as desired by him, it is clarified, the appellant before the Ld. AU at several occasions that MIs Shrimaya Builtech Pvt. Ltd is not a group company and that therefore the Director of M/s Shrimaya Builtech Pvt. Ltd. were not under their control and that the Ld. 440 can make independent efforts to ensure attendance of Director of company if he so desires. It is however seen that the Ld. AO, during the cow-se of assessment as well as remand proceedings, has not made any efforts to summon the Director of the scud company. No letter /s 133(6) has been sent by the AO to the said company at the address mentioned in Form No. 18 provided to the Ld. 440, In any case, sufficient evidences have been furnished by the appellant to the Ld. AU to establish the identity and creditworthiness of the said party and to establish the genuineness of the transactions. The Ld. AO could have also made independent enquiries with M/s Shrimaya Builtech Pvt. Ltd. or with its jurisdictional AU to come to a considered conclusion with regard to the genuineness of the documents Turn and with regard to the various claims of the appellant. in the absence of contrary evidence being brought on record, the assert of the appellant are required to be accepted.

It is also important to take note of the voluminous evidences that have been submitted by the appellant during the course of assessment, appellate/remand proceedings to establish the identity, creditworthiness and genuineness of the transaction entered into by the appellant with M/s Shrimaya Builtech Pvt. Ltd- To establish the identity of the said company the appellant had provided PAN, copies of Income Tax Returns and Form No. 18 filed by the appellant with RO. The appellant has also filed Jill set of audited financial statements of the said corn for the said financial. The investment schedule attached with the financial statement clearly shows the investment made by that company in the appellant company alongwith the investment made by the said company in other companies. The said evidences establish the availability of with the said company and its creditworthiness. The appellant has also submitted confirmation letters from the said



party alongwith bank statement of the said company. The bank statement of the appellant company as well as of M/s Shrimaya Builtech Pvt. Ltd. clearly establish the fact that share application money has been received by the appellant through RTGS from the bank account of the said company and thus genuineness of the transaction is also established. In the face of such overwhelming evidences there was no basis what so ever-for the AO to come to the conclusion that the share application money received by the appellant from the said M/s Shrimaya, Builtech Pvt. Ltd. were unexplained.

8.2 As a matter of fact conclusive evidence was brought on record by the appellant to rebut the specific query raised by the Ld. AO that it was the assessee's own money which was being routed back as share application through M/c Shrimaya Builtech Pvt. Ltd. It was explained by the appellant that just because the name is mentioned in the bank statement of M/s Shrimaya Builtech Pvt. Ltd., the Ld. AO had assumed that funds have been received from the appellant company only though it was evident from the bank statement itself that the cheque of Rs. 50 lacs had actually bounced and that therefore the said company had issued another cheque and the appellant had borne the cheque return charges also. Subsequently the appellant had also clarified the fact that the amount of Rs. 45 lacs assumed by the Ld. AO to be paid by the appellant and received by M/s Shrimaya Builtech Pvt. Ltd. was in fact received by M/s Shrimaya Builtech Pvt. Ltd. from India Ltd. The appellant had in this regard furnished evidences including bank certificate issued by the Indusind Bank that the said amount of Rs. 45,00,000/- was paid to M/s Shrimaya Builtech Pvt. Ltd. by M/c Chintamani 19 India Ltd. The said certificate conclusively establishes the above facts. The appellant thus clearly established the fact that the appellant had not made payment to M/s Shrimaya Builtech Pvt. Ltd., which was returned to them in the form of share application money as assumed by the Ld. AO.

8.3 It is important to note that of such clear evidence-furnished by the appellant, the Ld. AO in his final remand report has not rebutted the above assertion of the appellant in any manner. The Ld. AO has made the above assertions in the assessment order as well in his first remand report, but after perusal of the above evidences, he has chosen to remain silent on the issue in the final remand report. Thus it is evident that the appellant has not made any payment to M/s. Shrimaya Builtech Pvt. Ltd., which is returned



by them in the form of Share Application Money as presumed by the Id. 4.0. It may be mentioned that once the appellant clarified the fact that the said amount of Rs.45,00,000/- credited in the account of A-1/s. Shrimaya Builtech Pvt. Ltd, was not paid by the appellant, he has not required to give any further evidence in this regard as he is not expected to be in possession of the bank statements or books of accounts of either M/s. Shimaya Builtech Pvt. Ltd. or of the party which paid the said 45 lacs to it But the appellant still made use of its good offices with the

It is also important to note that the Id. AO called for the bank statements of M/s Shrimaya Builtech Pvt Ltd, from the bank directly and there are various entries in the said bank statement wherein the address 101, East High Court road, Nagpur, has been stated and the Id. AO has cast the onus of explaining each such entry in the bank account of M/s Shrimaya Builtech Pvt. Ltd on the appellant. Such shifting of onus is totally Incorrect and improper. As stated above, the appellant has taken move the said M/s Shrimaya Builtech Pvt. Ltd., which has been validly explained. The appellant (who does not have access to the bank statement or the balance sheet of the said party) is asked to explain each and every bank entry as appeared in bank statement of M/s Shrimaya Builtech Pvt. Ltd. The Id., AO on the other hand, was very well in power so as to make whatever enquiries he desires to get to the root of the matter. The appellant cannot be expected to explain each and every entry in a third party bank statement merely because the other companies are also operating from the same address. In this context it is also important to take note of the fact that the Id. AO is having jurisdiction over the various other companies which are operated from the said address and to that extent it would be relatively easy for him to carry out enquiries and investigation in respect of entries in their bank account and to also verify whether the said transactions, which seem questionable to the Id. 4.0, are properly reflected in the books of account of the said assessee.

8.5 Also the reliance placed by the Id. AO on the decision of the Hon'ble Delhi High Court on the case of CII' vs. Globus Securities & Finance Ltd. (supra) is misplaced. In the said case two persons who were controlling three companies and who had given their share application money had admitted before the Director of income-tax (mv.) that they are engaged in the business of providing accommodation. entries through various companies



controlled by them. The relevant portion of the judgement is reproduced hereunder.

The assessment order records that M/s Parivartan Capital and Financial Services Pvt, Ltd. was controlled by Shri Hari Om Bonsai and M/c Sober Associates Pvt. Ltd. and M/s Shri Niwas Loosing & Finance Ltd. were controlled by Shri Mahesh Garg, who in their statements before Director of Income Tax investigations' had admitted that they were engaged in the business of proceeding accommodation entry through various companies controlled by them..."

86 This aspect was one of the key reasons, which led to the eventual final finding of the Hon'ble Delhi High Court in the case of the appellant there is no such evidence that there was any of providing accommodation at any point in the chain of movement of funds. No confessional statement by any party has been brought on record by the by the Ld. AD in the assessment order to establish the fact that accommodation entries were provided by the company at any point in the movement of fund.

8.7 The appellant has also properly explained and justified the charging of share premium of Rs. 9001- per than-c for purchase of shares. It is a fact that the appellant's investment in other companies is to the tune of Rs.75.97 crores. The appellant had also worked out the book value of its share and it was calculated at Rs6061- per share. The above faces were brought to the knowledge of the Ld. AO in remand proceedings but he has chosen not to rebut the same. In light of the above facts, the charging of premium of Rs. 9001- seems justified.

8.8 Considering the above totality of facts and clear evidences furnished by the appellant to establish the identity and creditworthiness of the creditors and the genuineness of the transaction, the addition made by the Ld. AO of Rs. 10080000/- is hereby deleted. This ground is therefore allowed.

6.4, Hon'ble ITAT, Bombay (e-bench) in case of Green Infra Ltd vs. ITO decided vide ITA No.7762/Mum/2012 -(145 {TD 240) has looked at the issue of receipt of share premium. In the case of Green Infra Ltd, the AO had made addition u/s.56 of the I.T. Act as Income from Other Sources. In that case also, the appellant had received share premium to the tune of Rs.490/- per share from its subscribers. The AX). came to the conclusion that this kind of share premium was not justified taking into account 'the business operation of the appellant. Accordingly, the AO treated this share



premium as income from other sources and taxed the same u/s.56(1) of the Income tax Act, 1961. The tribunal has concluded that the receipt related to share capital of any company is capital in nature and therefore cannot be taxed u/s.56(1). As per sec.68, initial onus was on the assessee to prove identity, genuineness of transaction and capacity of depositor. The tribunal held that no evidence was found by which the AO could conclude that entire transaction was sham. Accordingly, the issue was decided in the favour of the assessee.

6.5 I find that during the course of assessment proceeding the appellant has submitted the address, PAN, copies of audited Balance Sheet, Copies of ITR, copies of resolution of Board of Directors authorizing the said investment, copy of bank statements, the appellant has also submitted that parties who had invested in shares of appellant company at a premium have confirmed the transaction of shares during the course of assessment proceedings. Accordingly, the appellant has submitted that the assessee company has established identity and creditworthiness of the entities as well as proved the bona fides and genuineness of transactions beyond doubt. This submission of the appellant was sent to the A.O. for comments and the A.O. in remand proceedings has not disputed this assertion of the appellant. Accordingly, considering the ratio of the case decided by my predecessor in the case of Gondwana Engineering Pvt. Ltd. decided vide order No.CIT(A) treated as income either u/s.68 or u/s.56 in case of the appellant J also find that an amendment has been brought in the Income tax Act and Sec.56(2)(viib) and has been inserted by the Finance Act, 2012 w.e.f 1.4.2013. The current assessment will not be effected by this provision.

6.6. However, in the present case the A.O. has brought this amount to tax not u/s.68 or u/s.56(1) but he has brought the amount to tax u/s.28iv) of the Income tax Act. I find that Ld. ITAT, Mumbai in the case of Softnet Traders & Consultants Vs. Department of income tax decided vide ITA NO3070 & 3071 /Del/2008 (E-Bench) has considered the similar question with similar ground of appeal.

On the facts and in the circumstances of the case the Ld.CIT erred in law and on facts in deleting the addition of Rs. 17,39,43,000/- made by the Assessing Officer to the total of the assessee u/s.28iv). The meaning of section 29(1) of the I.T. Act."

The bench has decided the issue in the following manner:



"This brings us to whether the difference in question can be considered as income. The section reads follows:

The following income shall be chargeable to income-tax under the head profit and gains of business or profession

(iv) the value of any benefit or perquisite, whether convertible; into money or not arising from business or the exercise of a profession Circular explanation the provisions of news. 28(1v) at ci, 82 states as follows: "Assessment of the value of any benefit or perquisite arising from business or exercise of a profession, as income from business or profession.

8.2. A new ci. (iv) has been inserted in § 28, w.e.f. 1st April, 1964, by s- 7 of the Finance Act, 1964, under which the value of any benefit or perquisite (whether convertible, in money or not arising from business or the exercise of a profession will be chargeable to tax under the head 'Profits and gains of business or profession'. A corresponding amendment has been made to section 2 (24), including the value of such benefit or perquisite in the definition of the term 'income' vide new sub-cl.(va) inserted in s. 2(24) by s. 4(c)(i) of the Finance Act 1964.

83. The effect of the a -mentioned is that in respect of an assessment for the asst. yr. 1964- 65 and subsequent years, the value of any benefit or amenity, in Cash or, kind, arising to an assessee from his business or, the exercise of his profession, e.g, the value of rent free residential accommodation secured by an assessee from a company in consideration of the profit services as rendered by him to that company, will be assessable in the hands of the assessee as his income under the head 'Profits and gains of business or profession

The condition of invoking s. 28(it') is that the chargeable income of the assessee should arise from the business or in the exercise of profession. There must be a nexus between the business of the assessee and the benefit derived by the assessee. The assessee in this case purchased certain shares at a certain price and was required to hold these shares for a period of three years. It is not in dispute that this was an investment made by the assessee company hence irrespective of the fact as to whether these investments were made in pursuance of the MoU or not, we are of the opinion that such investments cannot be said to be a benefit arising out of the assessee. Moreover the assessee is the purchaser, of the shares and there is no event that has taken place during the current accounting year which can be said to have resulted in any



income being accrued or arisen to the assessee company duty the year. If at all the assessee the shores, then the benefit of profit in question can be brought to tax in those, particular years. In all the case laws relied upon by the Revenue have been discussed by us while narrating their arguments and in these cases the tax has been levied on the transferor not the transferee. The effect of this section has been explained in' the GBDT in the above cited circular and fr'om this it is clear that, when an assessee purchases goods or, assets at a price lower than the market price, under whatever circumstances, the same cannot be brought to tax under s. 28(iv). The section cover tinge benefits that are availed in addition to consideration earned in carrying out a profession or while doing business, benefit that is passed on by one party to another; in addition to cost or sale price, is covered in this proviso. This is clear from the example quoted. In our humble opinion, this section cannot be invoked wider the present facts and Circumstances.

8.4 Be it as it may the co-ordinate Bench of the Tribunal (F-8cnch, Mumbai the case of Food Improvers (I?) Ld. (supra) held that s. 29 is a charging section and takes into account the receipts of specified categories of all incomes as well as the receipts which could be generally construed as income in the that all the mentioned in s. 128 are inherently of income nature except in case of receipt under a given amount of. Insurance policy. it also states 28(iv) refers to any benefit or perquisite, and this means that such benefit or perquisite should be in the nature of income from the very beginning or it must have characteristics of income before it becomes chargeable at a later stage if the original transaction is completed as designed. The Bench further observed that the words 'benefit or 'perquisite' 'e been used in the Said Section and have to be read together and would drat; colour from each other. Normally the term perquisites denotes meeting out of an obligation of one person by another person either directly or indirectly or provision of some facility or amenity by one person to another person or form the very beginning the person providing such facility or concession knows that whatever is being done is irretrievable to him, as it has been granted to a person OS a privilege or right of that person. 7'hu, it was concluded that the word benefit' has to be interpreted in the same manner, that is, at the time of execution the business transaction one party should give to the other party an irretrievable benefit or advantage, as an



obligation or facility or a concession. In our opinion, only if the seller had incurred an expense or a liability or had provided a facility to the purchaser, then the value in cash of such expenses or benefit or perquisite shall be treated as income. In this case, the seller has not incurred any or liability or has provided. It sold its shores at a reduced price.

7.5 Applying these propositions to the case on hand, the purchase of shares at a particular price which is below the market price as on investment is not income by any stretch of imagination, it cannot also be deemed as income under s. 28(iv) as it is neither benefit nor perquisite that has arisen to the assessee from the business or in the exercise of a profession. The Hon'ble Gujarat High Court in the case of CIT vs. Bhavnagar Bone & Fertiliser Co. Ltd. (1987) 59 CTR (Guj 116 (7987) 166 ITR 316 (Guj has upheld the finding that there must be a nexus between the business of the assessee and the benefit which the assessee has derived for the purpose of attracting provisions of S. 28(iv). At p. 320 it has observed as follow:

In this case the Revenue has not demonstrated what is the business connection or the business done between the seller' and the purchaser of the No case has been made out that privilege or benefit or conclusion has been passed on by the seller to the buyer as part and parcel of a business transaction. 44 benefit has been assessed by the CIT(A). Mere purchase of shares by way of investment cannot be considered as business of the company the objects of title company enable it to invest as well as deal in shares. As already stated there is no event which can be said to have resulted in accrual of income to the assessee on this factual matrix, mere purchase of shares, as an investment, with the lock-in-period of holding for consideration which is less than the market value, cannot be brought to tax, as a benefit: or perquisite wider s. 28(hi) of the Act The assessee has not in this case, secured any benefit or perquisite in consideration of a business transacting undertaken with the sellers of the shares. Thus this issue is decided in yours of the and against the assessee."

8 In view of the above discussion and the order of the coordinate Bench of the Tribunal, we do not find any merit in the appeal of the revenue and accordingly uphold the order CIT(A).

6.7. Again I find that ITAT, Mumbai in the case of DP World (P) Ltd. Vs. DCIT 140 ITI) 694 has stated that in a case where assessee received three residential flats from its sister concern, a



UK based company, which the assessee explained as transaction of gift of shares and agreement of capital receipt not chargeable to tax. Considering the facts of the case the Hon'ble Tribunal held that provision of Sec.28(iv) could not be applied to the assessee's case.

6. I also find that similar issue has been decided in favour of the appellant by Hyderabad Tribunal in case of M/s.KN.13.Investments (1) Ltd. The matter has also been decided in favour of the appellant in appeal before Hon'ble High Court of Andhra Pradesh decided vide 367 ITR 616 by making following comment 7 Sec .28 of the 4 bring the pfoJit5 and of business or under the purview of income tax. The profits and gains of different kinds about a dozen are enlisted under different clauses. The Income Tax officer invoked section 28(iv) of the Act against the B. The expression 'value of any benefit' is made part of the definition of % income under section 2(24) of the Act. It reads:

"The value of any benefit or perquisite taxable under clause (iv) of Section 23"

9. In a way it is a circular phenomenon, in that the definition refers the changing section relies upon the definition, under the Act, The only way to extricate this appears to be, referring to the together ingredients added under section 28(iv) of the Act. After adopting the expression value of any benefit or perquisites", the provision proceeds to qualify the same by the words, convertible into money or not, arising from business or the exercise of a profession."

10. The benefit, which is sought to be taxed, in the instant case, is the difference between the market price, on the one hand, and the allotted price of a share, on the other. It has already been mentioned that, according to the income tax Officer, the market price was Rs. 455 per share, whereas it was allotted to the respondents at Rs.90 per share, on allotment. Even if all the subsidiary contentions advanced by the respondents in this behalf are rejected, remains that there is a clear bar for a block period of three years prohibiting the sale of shares. It is axiomatic that the benefit can be said to have arisen to an individual, and any person in his place, 'would have got the differential price, by selling the shares. Irrespective of the willingness or otherwise of the person holding such a share, if the bar operates, it is difficult to imagine that the sale of the shares would have taken place or, that it would yield the differential price. Though we said this with some amount of precession, the Tribunal elaborated the same in detail and took the



view that as long as the bar operated, the question of cmv benefit in the form of differential price, accruing to the respondents, does not arise. We are in agreement with the conclusion arrived at by the Tribunal,

ii. The second aspect is as to whether the benefit has, in fact, accrued at all to the respondent. There exists a distinction between the "accrual of income" on the one hand, and "arising of income", on the other. While accrual is almost notional in nature, the other is factual. It is too well known that in its complex nature, the covers not on/v the "income" that, in fact, has arisen, but also the one that has accrued.

12. When Parliament has consciously chosen to restrict the taxation of benefit only when it has arisen, it is not permissible to tax the benefits by treating them as "accruals". A close scrutiny of the concept of "arising from business. Secondly, section 28(iv) does not apply to benefits in cash or money (see (1981) 130 ITR 168 (Guj)..."

10. For this reason, we are not going into the question as to whether the second requisite is fulfilled or not. In the present case, the Tribunal has held that the waiver/written off part of principal amount of loan by JSPL does not constitute income at the hands of the assessee. On the facts of this case and particularly having regard to the nature of business only, it will constitute capital receipts.

11. We thus answer the question in favour of the assessee and against the Revenue. As consequence, we dismiss this appeal.

6.11. Also in the case of Fortune Oceanic Products Ltd. Vs. Department of Income Tax decided vide ITA No. 2414/Del/2011 similar issue has been decided by ITAT Delhi Bench in favour of appellant.

6.12. These judicial pronouncements clearly show that share premium received by the appellant is a transaction in the nature of sale and purchase of shares hence is a transaction which is capital in nature and can't be added u/s 28(iv) of the I.T. Act as a benefit within the meaning of that section. Accordingly the AO is directed to delete the addition of Rs.3,27,60,000/- on account of share premium as profit enjoyed within the meaning of section 28(iv) of the I.T. Act, 1961. This ground is accordingly allowed."

8. On appraisal of the above said finding, we noticed that the CIT(A) has decided the matter of controversy on the basis of the finding of the Hon'ble high court of Delhi in the case of **Jindal Equipments Leasing & Consultancy Services Ltd. Vs. CIT in 325 ITR 87 (Delhi)** and on the basis of the decision Hon'ble ITAT Delhi Bench in the case of **Fortune Oceanic Products Ltd. Vs. Department of Income tax ITA. No.2414/Del/2011.** No distinguishable material or law have been produced before us. Therefore, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is liable to be interfere with at this appellate stage.



9. In the result, appeal of the revenue is **hereby ordered to be dismissed.**

Order pronounced in the open court on 15.09.2017

Sd/-

(P.K. BANSAL)

VICE PRESIDENT

दिनांक Dated : 15.09.2017

v.p. singh

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.

Sd/-

(AMARJIT SINGH)

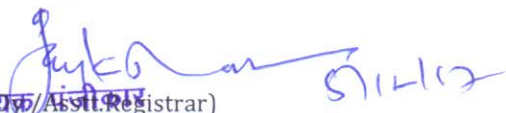
JUDICIAL MEMBER

- 3. आयकरआयुक्त(अपील)/ The CIT(A)-
- 4. आयकरआयुक्त/ CIT
- 5. विभागीयप्रतिनिधि,आयकरअपीलीयअधिकरण, DR, ITAT, Nagpur
- 6. गार्डफाईल /Guard file.



सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,


 उप/सहायकपंजीकार सहायक/Asst.Registrar)
Assistant Registrar
 आयकरअपीलीयअधिकरण, नागपुर
Income Tax Appellate Tribunal
 नागपुर न्यायपीठ /Nagpur Bench