

**आयकर अपीलीय अधिकरण “जी” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“G” BENCH, MUMBAI**

**माननीय श्री महावीर सिंह, उपाध्यक्ष एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND**  
**HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकरअपील सं./ I.T.A. No. 3502/Mum/2017  
(निर्धारण वर्ष / Assessment Year: 2012-13)

|  |                      |  |
|--|----------------------|--|
| <b>ITO – 1(3)(2)</b><br>5 <sup>th</sup> floor, R. No. 541<br>Aaykar Bhavan, M. K. Road<br>Mubmai-400 020 | <b>बनाम</b><br>/ Vs. | <b>M/s Suntech Peripherals Pvt. Ltd.</b><br>2-B, Prem Kutir, 177<br>Babubhai Chinoi Road<br>Marine Drive, Mumbai-400 020 |
| स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. <b>AABCS-6873-P</b>  |                      |  |
| (अपीलार्थी/ <b>Appellant</b> )   | :                    | (प्रत्यर्थी / <b>Respondent</b> )  |

|                    |   |                                   |
|--------------------|---|-----------------------------------|
| <b>Assessee by</b> | : | Shri Prakash Jotwani – Ld. AR     |
| <b>Revenue by</b>  | : | Shri Hoshang Boman Irani – Ld. DR |

|  |   |            |
|--|---|------------|
| सुनवाई की तारीख/<br><b>Date of Hearing</b>       | : | 24/11/2021 |
| घोषणा की तारीख /<br><b>Date of Pronouncement</b> | : | 18/02/2022 |

**आदेश / ORDER**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by revenue for Assessment Year (AY) 2012-13 arises out of the order of learned Commissioner of Income-Tax (Appeals)-3, Mumbai [CIT(A)], dated 28/02/2017 in the matter of assessment framed by Ld. AO u/s 143(3) on 30/03/2015. The grounds raised by the revenue read as under: -

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in deleting the addition of share premium received on the ground that it was a capital receipt when in reality there is accretion to assets without a corresponding increase in claimable liability (shares and premium reserve) and therefore determining the nature of such receipt of share premium as income on it remaining

unexplained u/s. 68 by treating the same as unexplained own income was correct in the facts of the case and in law?

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in disagreeing with invocation of section 68 of the Act to tax share premium when the receipt of premium in the instant case defied all commercial prudence thereby confirming absence of any explanation about the nature of receipt of share premium the nature being so critical in the scope of section 68 of the Act?

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was erred in allowing relief to the assessee by relying upon the Board's Instruction No.2 of 2015 and Hon'ble Bombay High Court decision in the case of Vodafone India Services Pvt. Ltd. where in issue of transfer pricing adjustment is involved, whereas the issue on hand is different and hence the said case law and Board's Instruction is not applicable in the present case.

2. Having heard rival submissions and after careful consideration of material on record, our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

### **Assessment Proceedings**

3.1 The material facts are that the assessee being resident corporate assessee was assessed u/s 143(3) on 30/03/2015. During assessment proceedings, it transpired that the assessee allotted 49800 shares to following entities: -

| No. | Name of the Entity             | No. of Shares |
|-----|--------------------------------|---------------|
| 1.  | M/s P.G.Impex Pvt. Ltd.        | 17500         |
| 2.  | M/s Infiniti Impex Pvt. Ltd.   | 27300         |
| 3.  | M/s Pokarmal Gudayal Pvt. Ltd. | 4000          |
| 4.  | Mrs. Anju Berlia               | 1000          |

Since the assessee commanded a premium of Rs.2000/- per share, it was asked to justify the premium charged on shares.

3.2 The assessee justified the same by submitting that during Financial Year 2008-09, it got a proposal for development of real estate in Thane, West for an aggregate area of 3,75,000 sq. feet. Various meetings were held between the assessee company and the prospective land owners in this connection and it was decided that in lieu of development rights

being given to the company, the land owners were to be paid 40% of the estimated sale of the project. Accordingly, the assessee company commenced the process for arranging finance for working capital required for the proposed project. The assessee company approached various bankers for loans and were informed that the company ought to increase its paid up capital and free reserves so as to be eligible for additional finance facilities by banks. Therefore, the assessee decided to issue fresh equity capital and obtained necessary valuation report in this regard. On the basis of the valuation determined, the company issued 49,800 equity shares of Rs.10/- at a premium of Rs.2,000/- per share. Necessary application money was called from the prospective new shareholders and eventually shares were allotted to them during Financial Year 2011-12. However, prior to finalization of development agreement with the land owner, the land on which the development was to commence, came under litigation and the company was unable to raise any additional finance for working capital on the basis of a disputed project and hence all activities undertaken by the company in connection with the proposed project came to a standstill. It was further submitted that The Companies Act, 1956, does not specify the price at which shares are to be issued. It does not limit the premium at which shares are to be issued. Further, the premium would be a capital receipt and not an income in its ordinary senses. The assessee was not required to prove the justification of the premium. Rather it would be the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The revenue authorities cannot question the charging of huge premium without any

bar from any legislated law of the land. Nevertheless, in order to substantiate its claim for issue of share at a high premium, the assessee had also obtained internal valuation report by an Accountant based on Discounted Free Cash method (DCF) prior to the issuance of equity shares on premium. This DCF method is one of the approved method of valuation to determine fair market value of the unquoted equity shares of a company. The company had complied with all formalities and had made all necessary disclosure prior to issue of equity shares at a premium. Further all details of subscribers to shares were submitted and the transactions were duly confirmed by the subscribers in response to notice u/s 133(6) as issued by Ld. AO. Thus, the entire process of issue of shares at a premium has been verified and no doubts have been raised with regard to the genuineness of the said transactions. Further as per Clause No.4 of the share subscription agreement, as entered into by the assessee company with the subscribers, clearly stated that the assessee was to use share application money for construction project and if project was not commenced within 5 years of share allotment, then such money was to be refunded to the shareholders or the shares were to be issued at face value of entire amount i.e. including share premium.

3.3 However, the submissions were not acceptable to Ld. AO since the allotment was based on anticipatory project initiation and it would be hard to believe that the investor would invest at high premium in anticipation of initiation of project. The assessee suffered losses even in AYs 2013-14 & 2014-15 and therefore, so called projection was not reasonable. It was accepted by Ld. AO that though the source of funds was fully explained, however, the quantum of high premium of Rs.2000/- per share remained unjustified. The case laws as relied upon by the

assessee were held to be not applicable. Finally, the amount of share premium as received by the assessee during the year was held to be unexplained cash credit u/s 68 and added to the total income of the assessee.

### **Appellate Proceedings**

4. The Ld. CIT(A) noted that the subscribers were group concerns and related parties and there were no outside parties. The shares issued to the subscribers were never transferred and held by them at all times. The identity of the investor, their creditworthiness and genuineness of transaction was not under doubt. The valuation report submitted by the assessee was never doubted by Ld. AO. Therefore, the additions were held to be not justified with following observations: -

7.3 I have carefully considered the rival submissions and facts of the case. The appellant had issued shares to three companies and one individual, at a premium of Rs 2,000/- per share and tried to justify the share premium charged by the company on the issue of fresh share capital issued by the company. The appellant company had in financial year 2008-09 got a proposal for development of real estate. However, no development could take place on the property because of dispute between members/directors of Pesticides & Brewers Ltd with whom MOU was signed for development of real estate. The High Court of Calcutta in its CS No. 79 of 2011 has granted an injunction restraining from transferring or alienating or otherwise encumbering any of the fixed assets of Pesticides & Brewers Ltd. without previous leave of the court. In view of this, the property could not be developed.

7.4 Further, the AO has not doubted source of funds but of the view that the nature of premium remained unjustified as to why premium of Rs. 2000/- per share was collected from four shareholders when the project did not initiate. The appellant has explained before the AO as well during the appellate proceeding the reason of charging the premium on the prospective coming project. The appellant has further explained the reason and circumstances as to why the project could not be materialized later on. In my opinion, the appellant has complied with all the requirements to prove the genuineness of the amount received towards the share application money and the premium, identity of the creditors, genuineness of the transactions and the creditworthiness of the creditor by filing relevant documents. Further the AO has not brought on record any evidence to show that the explanation of the appellant is not correct. The AO has only raised the issue of unreasonableness of the amount of premium so received by the appellant @ Rs.2,000/- per share. Therefore, the AO is not justified in making the addition u/s 68 of the IT Act.

7.5 The issue of premium has been dealt with by the recent instruction of CBDT (Instruction No. 2/2015 dated 29.01.2015) which made it clear that premium on

share issued was on account of capital account transaction and does not give rise to income. The Board's Instruction is reproduced as under:-

*"In reference to the above cited subject, I am directed to draw your attention to the decision of the High Court of Bombay in the case of Vodafone India Services Pvt. Ltd. for AY 2009-10 (WPNo. 871/2014), wherein the Court has held, inter alia, that the premium on share issue was on account of a capital account transaction and does not give rise to income and hence, not liable to transfer pricing adjustment.*

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

*3. This issued with the approval of Chairperson, CBDT.*

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

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

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

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

7.8 Considering the Board's Instruction No. 2/2015 vide F No. 500/15/2014-APA-I dated 29.01.2015 and respectfully following the jurisdictional High Court Bombay's decision in the case of **Vodafone India Services Pvt. Ltd. Vs Union of India & Others (2014) 368 ITR 01 (Bombay HC)** and jurisdictional ITAT "G" Bench decision in the case of **Green Infra Ltd. ITA No. 7762/Mum/2012 dated 23.08.2013**, in view of the above facts and circumstances of the case, I am of the considered opinion that share premium amount received by the appellant is in the nature of capital and same cannot be assessed u/s 68 of the IT Act and therefore addition made by the AO is deleted. **Grounds 2 and 3** are, therefore, **allowed**.

8. In the result, the appeal for **A.Y. 2012-13 is partly allowed**.

Aggrieved the revenue is in further appeal before us.

### **Our findings and Adjudication**

5. Upon careful consideration of factual matrix, it would be gathered that the assessee has allotted 49800 shares to group concerns and related entities at a premium of Rs.2000/- per share. The assessee has

justified the premium on the ground that in earlier year, it got proposal for development of real estate project in Thane, West and accordingly, the assessee was required to commence the process of arranging working capital finance required for the proposed project. As per the requirements of various bankers, the assessee was obligated to increase its paid up capital and free reserves so as to be eligible for additional finance facilities by banks. Accordingly, the assessee issued shares to the group entities. In support of premium received by the assessee, the assessee furnished report of an Accountant wherein the valuation was justified on the basis of DCF method which is one of the recognized method of valuation. Be that as the case may be, Ld. AO has not doubted the valuation made by the valuer. The transactions are duly evidenced by share subscription agreement. All the subscribers have confirmed the transactions in response to notices issued by Ld. AO u/s 133(6). In fact, Ld. AO has accepted the fact that the source of credit has been proved by the assessee. In such a scenario, the primary requirements of Sec.68 i.e., to prove the identity of the subscribers, their creditworthiness and genuineness of the transactions were duly established by the assessee. Further, the Companies Act, 1956 do not put any limit on the quantum of premium which would be charged by the assessee. In such a case, it would be the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The revenue authorities cannot question the charging of huge premium without any bar from any legislated law of the land. The company had complied with all formalities and had made all necessary disclosure prior to issue of equity shares at a premium. Nothing adverse

has been shown to us. So far as the issues flagged by Ld. AO are concerned, we find that the shares were issued on the basis of anticipatory projections and the actual result may not be in agreement with the projections made by the assessee. Therefore, the same are bereft of any logic or reasonable conclusion and hence, disregarded.

6. It is settled position of law that to avoid the rigors of Section 68, the assessee must prove the identity, creditworthiness of the lenders / investors to advance such monies and genuineness of the transactions. Once these three ingredients are shown to be fulfilled by the assessee, the primary onus casted upon him, in this regard, could be said to have been discharged and accordingly, the onus would shift upon revenue to dislodge the assessee's claim by bringing on record material evidences. Unless this onus is discharged by the revenue, no addition could be sustained u/s 68. This legal proposition is duly supported by the decision of Hon'ble Supreme Court in the case of **Lovely Exports P. Ltd. [319 ITR 5]** as followed by Hon'ble Bombay High Court in the case of **CIT Vs. Gagandeep Infrastructure Private Limited [80 Taxmann.com 272]** & subsequently in **CIT Vs. Orchid Industries Private Limited [88 Taxmann.com 502]**. The Hon'ble Delhi High Court followed the said decision in **Pr. CIT V/s Adamine Construction Pvt. Ltd. [107 Taxmann.com 84]** against which revenue's Special Leave petition was dismissed by Hon'ble Supreme Court which is reported at 107 Taxmann.com 85. Similar is the position of decision of Hon'ble Delhi High Court rendered in **Pr. CIT V/s Himachal Fibers Ltd. [98 Taxmann.com 72]** against which revenue's Special Leave Petition was dismissed by Hon'ble Supreme Court which is reported at 98 Taxmann.com 173. Similar is the decision of Hon'ble High Court of

Madhya Pradesh in **Pr. CIT V/s Chain House International Pvt. Ltd. [98 Taxmann.com 47]** against which revenue's Special Leave Petition has been dismissed by Hon'ble Supreme Court on 18/02/2019 which is reported at 103 Taxmann.com 435. Similar is the decision of Hon'ble Bombay High Court in **Pr. CIT V/s Ami Industries (India) Pvt. Ltd. [ITA No. 1231 of 2017, dated 29/01/2020]** which has been rendered after considering the principles laid down by Hon'ble Supreme Court in its recent decision titled as **Pr.CIT Vs. NRA Iron & Steel Pvt. Ltd. [412 ITR 161]**. The other decisions as placed on record by Ld. AR also support the same view.

7. Another pertinent fact as noted by us is that the provisions of Sec.56(2)(viib) were not applicable to the year under consideration since these provisions would be applicable only from AY 2013-14. Therefore, Ld. AO had no power to question the wisdom of the assessee to command high premium from investor entities.

8. Lastly, so far as the question of nature of share-premium is concerned, these transactions have been held to be capital in nature by our jurisdictional High Court in the case of **Vodafone India Services Pvt. Ltd. vs. Union of India & Others (2014) 368 ITR 01 (Bom HC)** which has been reiterated in Board's Instruction No. 2/2015 vide F. No. 500/15/2014-APA-I dated 29.01.2015 Therefore, no fault could be found in these findings.

9. Finally, on the given facts and circumstances, we find no reason to interfere in the impugned order.

10. The appeal stands dismissed.

*Order pronounced on 18/02/2022.*

**Sd/-**

**(Mahavir Singh)**

**उपाध्यक्ष / Vice President**

**Sd/-**

**(Manoj Kumar Aggarwal)**

**लेखा सदस्य / Accountant Member**

दिनांक Dated : 18/02/2022  
Sr.PS, Dhananjay

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**