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

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER) AND SHRI AMARJIT SINGH (JUDICIAL MEMBER)

ITA No. 6115/MUM/2017
Assessment Year: 2010-11

Income Tax Officer-11(3)(2), R.No. 428, Aayakar Bhavan, M.K. Road, Mumbai-400020. **Appellant**	**Vs.**	M/s Vastu Minerals Pvt. Ltd., 4, Arun Villa, Subhash Road-B, Vile Parle (E), Mumbai-400057. **PAN No. AACCV 0308 B** **Respondent**

Revenue by	:	Mr. Arvind Sontakke, DR
Assessee by	:	Mr. Rohit Golecha, AR
Date of Hearing	:	14/02/2022
Date of pronouncement	:	10/03/2022

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 15.06.2017 passed by the Ld. Commissioner of Income Tax (Appeals)-18, Mumbai [in short 'the Ld. CIT(A)'] for the assessment year 2010-11, raising following grounds:

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.2,30,42,520/- u/s 68 of the Income-tax Act, 1961. The order of the Ld. CIT(A) is perverse and department is relying on the decision of Hon'ble Delhi High Court in*

the case of M/s.Nova Promoters & Finance (P) Ltd. dated 15.02.2012, in which the Hon'ble Delhi High Court discussed the case of M/s.Lovely Exports and after discussion it did not accept the decision of the Hon'ble Supreme Court after differentiating the fact of the case and held that unexplained share application money received can be taxed u/s.68 of the Income-tax Act, 1961."

2. *Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in appreciating the fact that identity of the shareholders cannot merely be established by furnishing PAN, copies of return of income alongwith all schedules, bank statement, request letter for application of shares, etc. or assessment particulars did not establish the identity of the person, which only shows that the company has an identity without appreciating the fact that these were only paper companies having bogus addresses. In view of this, department is relying on the decision of ITAT, Indore in the case of Aggarwal Coal Corporation Pvt.Ltd. V/s. Addl.CIT Range 5, Indore in ITA No.151/Ind./2009 dated 31.10.2011.*
3. *Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in appreciating the fact that by merely submitting that money was received through banking channels did not reflect genuine business activity and the companies merely routed money which was given back through bank account. The movement of the money through bank account is not sufficient to establish creditworthiness or even genuineness of the transactions relying on the judgement of M/s. Kachwala Gems V/S. JCIT ITANo.134/JP/2002.*
4. *Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in appreciating the fact that the AO has clearly established that valuation was motivated in as much as assessee company has never shown any worthwhile profit on or after*

such credit of share premium to warrant the buying of its share at such high premium by other entities/companies.

5. *Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in appreciating the fact that all parties do not have their own profit making apparatus. The above companies do not have their own funds, the amount claimed to be invested is either from huge share premium / share application money received in these companies or from some unknown sources. Considering financials of said companies, the source of said share premium amounts (subsequently invested in Assessee Company) cannot be said to be genuine ; how these companies will attract such a huge premium without having any actual business is beyond common understanding. The investments reported by these companies defy the test of human probability and cannot be said to be genuine arm's length transaction. Moreover, the shareholders who have paid hefty premium sold the share at Rs.10/- per share to Reinoz IT Solutions Pvt. Ltd. in which both the company's directors are common.*
6. *The appellant prays that the order of the Ld. CIT(A), Mumbai on the above grounds be set aside and that of the A.O. be restored.*

2. Briefly stated, facts of the case are that on the basis of information received from the Director of Income Tax (I&CI), Mumbai, the Assessing Officer reopened the assessment. In the reassessment completed on 29.03.2016, the Assessing Officer made addition amounting to ₹2,30,42,250/- holding the share premium received as unexplained cash credit in terms of section 68 of the Income Tax Act, 1961 (in short 'the Act'). On further appeal, the Ld. CIT(A) deleted the addition.

3. Aggrieved with the findings of the Ld. CIT(A), the Revenue is in appeal before the Tribunal raising grounds as reproduced above. In the grounds raised, the Revenue has agitated deletion of the addition of ₹2,30,42,520/- mainly on the ground that merely furnishing of PAN, copies of return of income and other statutory documents, the identity of the shareholder companies was not established. The Revenue has also agitated that merely entries through banking channels does not establish genuineness of transaction and creditworthiness of the parties. Further, it is agitated that attracting of huge of share premium without actual business also does not establish, the creditworthiness or genuineness of the transaction.

4. Before us, the Ld. Departmental Representative submitted that the Ld. CIT(A) has deleted the addition on the basis of assumption of the wrong facts that assessee has discharged its onus u/s 68 of the Act. He referred to para 11 of the assessment order and submitted that noticed issued u/s 133(6) to the Act issued to shareholder companies were returned back by the postal Department. The Ld. DR further submitted that on analysis of the documents furnished by the assessee, it was seen that shareholder companies were not having any independent source of income and in their accounts also money was obtained by way of high share premium without any business activity of the

company. According to him, it is the ultimate money of the company which has been re-routed through various layers of companies and thus companies were involved only in getting share premium and further investing into another company without any substantial business to justify high share premium of their shares. Though the assessee subsequently provided changed address of shareholders but as the limitation for completing the assessment was approaching, the Assessing Officer asked the assessee to produce those parties, but the assessee failed to produce those parties. The Ld. DR submitted that finding of Ld. CIT(A) that the assessee has discharged its onus u/s 133(6) of the Act, is factually incorrect. He submitted that in view of the non-appreciation of the facts properly by the Ld. CIT(A), the matter may be restored back to the Assessing Officer or the Ld. CIT(A) for deciding afresh.

5. On the other hand, the Ld. counsel of the assessee relied on the order of the Ld. CIT(A) and submitted that all information in respect of shareholder companies including PAN, copy of return of income filed by them bank statement etc. were duly filed before the Assessing Officer and therefore onus of the assessee stands discharged. He further submitted that the assessee has also provided new address of the shareholder entities to the Assessing Officer. Further, he submitted that share premium was charged on the basis of the

valuation report carried out by an independent Chartered Accountant and any fall in the share price due to subsequent political events, the assessee cannot be alleged for charging high share premium. He further submitted that sale of the shares to promoters/directors of the assessee company, is merely a co-incidence and cannot be held that it re-routing of assessee's money.

6. We have heard rival submissions of the party on the issue in dispute and perused the relevant material on record. We find that in this case, the assessee-company was incorporated for undertaking mining business and received share premium of ₹399/- on the shares allotted to following parties :

Sr. No.	Name of the Party	PAN	No. of Shares	Share Capital Amount	Share Premium Amount	Total Share Application received
1.	Global Films & Broadcasting Ltd.	AAACF2764P	3750	3750	1496250	1500000
2.	Kapish Packaging Pvt. Ltd.	AABCK8443K	3750	3750	1496250	1500000
3.	Kirti Finvest	AAACK9830B	7500	7500	2992500	3000000
4.	Rashel Agrotech Ltd.	AAACR5669R	3750	3750	1496250	1500000
5.	Terry Towel India Ltd.	AACCT2642J	25000	25000	9975000	1000000
6.	Yamroosh Investments	AAACY1193P	12500	12500	4987500	5000000
7.	Bharat K. Sheth	AAPPS2867N	1500	1500	598500	600000
		Total	**57750**	**57750**	**23042250**	**23100000**

6.1 It is undisputed that the Assessing Officer issued notice u/s 133(6) to above parties asking them to submit their confirmation, copy of return of income and audited report bank statement, however, the notices issued were

retuned bank by the postal department as unclaimed. The Assessing Officer brought to this facts of the notice of the assessee-company by way of show cause letter dated 14.03.2016. Though the assessee provided new address of the shareholder parties but in view of the expiry of limitation for completion of assessment on 31.03.2016, the Assessing Officer asked the assessee to produce those parties before him. However, the assessee did not produce those parties and therefore, there was no independent verification of the existence of the parties, particularly in view of the fact that adverse information was received by the Assessing Officer in respect of those parties. Once, the Assessing Officer asked the assessee to produce those parties, it was the duty of the assessee to produce them before the Assessing Officer for their verification, therefore in the circumstances it cannot be said that the assessee discharged its onus only by way of filing confirmation and other documents including audited statement etc. in respect of shareholders. The relevant finding of the Assessing Officer is reproduced as under :

> *"11. The notices u/s. 133(6) issued on addresses provided by the assessee were returned back by the postal department from the addresses. Later, the assessee contended that the above parties had changed their address and provided new addresses. The assessee also failed to produce the parties before the AO. The confirmations, ROI and audit report of the parties were provided by the assessee itself. Moreover, the submission made by the parties does not prove their*

creditworthiness, in view of their loss making returns and no reserves or capital. The contention of the assessee that any person who wants to grow have to take the risk, and it might sometimes happen that the person is investing though they don't have the credit worthiness or by going above their capacity with only motive to earn income, does not hold good for the fact that, a person will only invest in a company if he has creditworthiness and also good faith in the company in which he has complete faith for future growth. Also creditworthiness is the main ingredient which has to be proved not hit by the section 68 of the I.T. Act. Here the assessee has failed to prove the identity as well as the creditworthiness of the parties from whom the share application money have been received. Moreover, the assessee itself is agreeing that the above parties are lacking creditworthiness."

6.2 The Ld. Assessing Officer rejected the valuation report justifying share premium at ₹399/- particularly in view of the fact that shares have been transferred to the directors/promotors of the assessee-company at face value of ₹10/-. The relevant finding of the Assessing Officer is reproduced as under :

"12. In respect of the valuation report, it is contended by the assessee, that the valuation was done in FY 2009-10 when the projections were good but in F.Y. 2010-11, there were unfavorable Government policies which effected the mining industries as a committee was appointed to investigate illegal iron ore and manganese mining practice and a temporary ban were also imposed. As a result of this, the assessee company also adopted a wait and watch policy and due to this, there was no activity in the company. This contention made by the assessee is also not feasible, as the committee was investigating only illegally run mining industries and the ban was also a temporary one.

13. The shares were purchased by the above parties at a premium of Rs. 399/- which was also above the intrinsic value of the company. The explanation given by the company that, the parties were not only concerned with the past dividend but invested on the basis of the future profitability of the assessee company which as per the AR of the assessee company was strong and profitable. If this was the case, then the above parties would have hold on to the shares of the company and not sold it at Rs. 10 per share which is much below the price at which it was purchased and suffered a huge loss.

14. During the course of assessment proceeding, the assessee was asked to give an explanation for the fact that how the share holders who have paid heafty premium sold the share at the Rs. 10/- per share to Reinoz IT Solutions Pvt. Ltd in which both the company's directors are common and why it should not be held that the above transactions is nothing by the circumvention of the assessee's own funds and that the above transactions were not genuine. The AR. of the assessee company has only given a vague reply on the above fact, and not been able to completely substantiate the genuineness of these transactions. The above facts clearly shows that the assessee company has failed to prove the third ingredient of the section 68 i.e. genuineness of the transactions."

6.3 However, the Ld. CIT(A) deleted the addition observing as under :

"Ground No. 2 :

Under this Grounds of Appeal, the Appellant has agitated addition of Rs. 2,30,42,520/- u/s. 68 being amount of share premium received by the Appellant during the year under appeal by disregarding amendment of section 56(2) (viib) amended w.e.f. A.Y. 2013-14. I have carefully considered contentions of the Appellant as well as the assessment records in this regard. On perusal of the same, I find that the A.O. has added a sum of Rs.2,30,42,250/- u/s 68 by way of unexplained cash credit. I find that the Appellant issued 57750 equity shares

@Rs.400/- each which included share premium of Rs.399/- per share having face value of Rs.1/- cach. The A.O. called for the necessary details in respect of 7 shareholders mentioned in Para No.5, at Page No.2 of Assessment Order. The Appellant also filed necessary confirmations which were rejected by the A.0. by holding that, it is pertinent to note that confirmations enclosed by the assessee company from the above mentioned 7 share holders in respect of purchase of shares at a premium, does not show the creditworthiness of the shareholders. In fact, the assessee is obliged to explain not only the source of share premium but also the nature. The assessee has offered explanation simply stating that the excessive share premium is covered by the provisions of sec. 56(2)(vib) of the Act applicable from A.Y. 2013-14. The assessee company has failed to establish the intrinsic value of its shares to be Rs.400/- per share at which the assessee has received the share premium". Accordingly, the A.O. added Rs. 2,30,42,250 u/s 68. On the other hand, I find that the Appellant has & complied with all the enquiries made by the A.O. u/s 133(6) which inter alia, includes details e.g. Acknowledgement of return, PAN, Audited Accounts, details of investments, copy of share certificates, copy of share application, copy of Board Resolution, to substantiate the identity, genuineness and creditworthiness of the share holders. The A.O. did not make any further verification or observations on the same. The A.O. merely rejected all these summarily which is against the principle of natural justice. Not only that but no comments were offered on the detailed submissions made by the share holders directly to the A.O. I therefore find that the initial burden casts upon the Appellant is duly discharged by them u/s. 133(6). The Appellant has satisfactorily proved source of share capital and share premium. Not only that but the Appellant also relied upon Valuation Report of M/s. J H. Ghumara & Co., Chartered Accountants, dated 15.06.2009 in support of share valuation of Rs.400/- which is equal to Issue Price of shares at Rs.400/- (1 + 399). Moreover, I find substantial strength in the averment of the Appellant that amendment to sec. 56(2)(viib) is effective only from AY. 2013-14. This view is also strengthened by the ratio of order in the case of Green Infra Ltd. (145 ITD

240) (Mum). I also find that various case laws relied upon by the Appellant substantially advance the case of the Appellant in this regard. Moreover, amendment to sec. 68 is also w.e.f. A.Y. 2013-14. It is further noticed that the A.O. has accepted the amount of share capital of Rs.1/- per share but added only R$.399/- per share being share premium. This clearly shows that the A.O. has accepted identity, genuineness and creditworthiness of the share holders but merely doubted genuineness of share premium. This is against the golden Rule of interpretation. I therefore find that the A.O has adopted contradictory stand in respect of share premium which was rejected and share capital which was accepted. This is also against the observations made by the A.O. which are merely based on surmises and conjectures which cannot form the basis of any addition tenable in law. Recently in the case of Commissioner of Income Tax -1 v/s. M/s. Gagandeep Infrastructure Pvt. Ltd, in Income Tax Appeal No. 1613 of 2014 the Honorable High Court of Bombay has held that "We find that the proviso to Section 68 of the Act has been introduced by the Finance act 2012 with effect from 1st April 2013. Thus it would be effective only from the assessment year 2013-14 onwards and not for the subject Assessment Year. In Fact, before the tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced " for normal removal of doubts or that it is "declatory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to section 68 of the act is immaterial and does not change the interpretation of Section 68 of the act both before and after the adding of the Provision. In any view of the matter the three essential tests while confirming the preprovisio section 68 of the act laid down by the courts the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the tribunal and on facts it was found satisfied. Honorable

Bombay High Court in the case of Vodafone India Services (P.) Ltd. V. Union of India [2015) 228 Taxman 25 (Bom.) has held that : "The word income for the purpose of the Act has a well understood meaning as defined in Section 2(24) of the Act. This even when the definition in Section 2(24) of the Act is an inclusive definition. It cannot be disputed that income will not in its normal meaning include capital receipts unless it is so specified, as in Section 2(24) (vi) of the Act. In such a case, Capital Gains chargeable to tax under Section 45 of the Act are, defined to be income. The amounts received on issue of share capital including the premium are undoubtedly on capital account." It may be worth mentioning that the excess share premium received by company has been made taxable as income w.e.f. 01.04.2013 by inserting clause (viib) in section 56(2) of the Act, which reads"

"(viib) Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares."

However, the subject assessment year being AY. 2010-11, the aforesaid amendment does not apply. The AO has also disregarded Instruction no 2/2015 [F.NO.500/15/2014-APA-I), DATED 29-1-2015 the CBDT in which it is clearly stated that share premium cannot be added. Thus, the very basis of reopening by the Assessing Officer that share premium in excess of book value has escaped assessment, is not tenable in law. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the promenaded Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the

Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit". I also find fortified by the instruction No.2 of 2015 dated 29.01.2015 issued by the CDT in which it is emphasized that the premium on share issued was on account of Capital Account transaction and does not give rise to income. Although the same was issued in relation to Transfer Pricing Adjustment, the ratio descend applies same way to domestic transactions of share capital and share premium. In view of the above, I therefore, direct the A.O. to delete the addition of Rs.2,30,42,520/- in respect of share premium u/s 68. This Ground of Appeal succeeds."

6.4 The Ld. CIT(A) has deleted the addition mainly on the ground that the assessee has complied notices u/s 133(6) of the Act and therefore onus of the assessee in terms of section 68 of the Act stands discharged. We find that this factual observation of Ld. CIT(A) is not correct. It is undisputed that the assessee failed to produce those parties before the Assessing Officer. In view of expiry of limitation of assessment on 31.03.2016, he did not issue notice u/s 133(6) at the new address and asked the assessee to produce those parties. The findings of the Ld. CIT(A) that the assessee stands discharged its onus in terms of section 68 of the Act has been arrived at wrong assumption of the facts. In the case sufficient time was not available with the assessee to produce those parties i.e. less than one month during assessment proceedings, therefore in the interest of substantial justice we feel it appropriate to set aside the order of Ld.

CIT(A) and restore the issue of addition in dispute to the file of the Assessing Officer with the direction to the assessee to produce the shareholder parties before the Assessing Officer for verification of the identity, creditworthiness and genuineness of the transaction. The grounds raised by the Revenue are accordingly allowed for statistical purposes.

7. In the result, the appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced in the open Court on 10/03/2022.

Sd/-	Sd/-
(AMARJIT SINGH)	(OM PRAKASH KANT)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: **10/03/2022**
Dragon/Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai