

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.113/Mum/2021
(Assessment Year :2011-12)**

Dy. CIT-8(3)(1) Room No.615, 6 th Floor Aayakar Bhavan, M.K. Road Mumbai, Maharashtra-400 020	Vs.	M/s. Tanish Homes & Construction Pvt. Ltd., 61/62, Gaya Building 4 th Floor, 109, Y.M.Road Masjid (W), Mumbai-400 003
PAN/GIR No.AACCT8447P		
(Appellant)	..	(Respondent)

**CO No.144/Mum/2021
(Arising out of ITA No.113/Mum/2021)
(Assessment Year :2011-12)**

M/s. Tanish Homes & Construction Pvt. Ltd., 61/62, Gaya Building 4 th Floor, 109, Y.M.Road Masjid (W), Mumbai-400 003	Vs.	Dy. CIT-8(3)(1) Room No.615, 6 th Floor Aayakar Bhavan, M.K. Road Mumbai, Maharashtra-400 020
PAN/GIR No.AACCT8447P		
(Appellant)	..	(Respondent)

Revenue by	Shri Prakash Jhunjunwala
Assessee by	Shri Murali Mohan
Date of Hearing	15/06/2022
Date of Pronouncement	30/06/2022

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.113/Mum/2021 & Cross Objection in CO No.144/Mum/2021 for A.Y.2011-12 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-48, Mumbai in appeal No.CIT(A)-47/Appeal No.410/15-16 dated 03/11/2020 (Id. CIT(A) in short) against the order of assessment passed u/s.153(3) r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28/03/2016 by the Id. Dy. Commissioner of Income Tax-CC-2(2), Mumbai (hereinafter referred to as Id. AO).

Identical issues are involved in these appeals, hence they are taken up together and disposed of by this common order for the sake of convenience.

2. Let us take us take up the Revenue appeal in ITA No.113/Mum/2021. The first issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the addition made on account of share capital and share premium u/s.68 of the Act in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the materials available on record. We find that assessee is a company engaged in the construction of real estate business in addition to the business of buying and selling of properties and making investment in properties. The assessee had originally electronically filed its return of income on

30/09/2011 declaring loss of Rs.42,833/-. A search and seizure action u/s.132(1) of the Act was carried out in the premises of the company on 25/07/2013. Pursuant to the search, notice u/s.153A of the Act was issued to the assessee on 21/08/2014. The assessee filed a letter dated 'Nil' on 21/12/2015 before the Id. AO stating that the return already filed u/s.139(1) of the Act may be treated as return in response to notice issued u/s.153A of the Act. Thereafter, notice u/s.143(2) of the Act was issued to the assessee on 22/12/2015. The Id. AO vide notice dated 22/12/2015 directed the assessee to furnish the details of share capital and share premium received during the year under consideration. During the course of search proceedings also, a statement u/s.132(4) of the Act was taken from the Director of the assessee company, wherein the question was posed regarding the receipt of share capital and share premium by the assessee company. In response to the said question, the Director responded that the entire share capital and share premium received by the assessee from various entities were genuine and categorically denied having made any cash payments to Shri Shirish Shah.

3.1. During the course of assessment proceedings, the Id.AO sought to verify the veracity of share application money of Rs.26.20 Crores against the allotment of 262000 equity shares having face value of Rs.10/- per share with premium of Rs. 990/- per share. This share application money was received from 15 entities. In response to the show-cause notice issued by the Id. AO vide letter dated 22/12/2015 asking for various details to prove the veracity of share capital and share premium received by the assessee, the assessee vide letters dated 28/12/2015 and 06/02/2016 furnished all the requisite details such as (a) PAN of the share applicants (b) Their Registered Office address (c) Their IT returns (d) Their bank statements (e) Share Application Forms (f) Board Resolutions

of such companies making investments in assessee company (g) details of project funding (h) Annual financial statements (i) Annual results filed with Bombay Stock Exchange in respect of listed companies (j) Availability of investible funds with the share applicants proving their credit worthiness.

3.2. The assessee during the year under consideration had received share capital and share premium from the following parties:-

Sl. No.	Name of the shareholder	No. of share	Amount received alongwith share premium
1	Allied Computer international (Asia) Ltd	8600	8600000
2	Advance Technologies Ltd.,	7500	7500000
3	Dhanush Technologies Ltd.,	5000	5000000
4	Emporis Project Ltd.,	4000	4000000
5	M/s. Empowre India Ltd.,	69500	69500000
6	Green Villa Ltd., (Iris Media and Entertainment Ltd.,)	25000	25000000
7	L N Industries Ltd.,	55000	55000000
8	Prabhav Industries Ltd.,	14500	14500000
9	Sanguine Media Ltd.,	29500	29500000
10	Secunderabad Healthcare Ltd	16500	16500000
11	Shri Ganesh Spionners Ltd (now known as Yantra Natural Resources Ltd.,)	8000	8000000
12	Speciality Papers Ltd.,	2500	2500000
13	Meritorius Realty P. Ltd.,	7500	7500000
14	Moonlight Solutions P. Ltd.,	4000	4000000
15	Tanish Estate Developers P. Ltd.,	5100	5100000
			262200000

3.3. It is pertinent to note that the shares were allotted to all the aforesaid 15 shareholders at a premium of Rs. 990/- per share. **Out of the 15 shareholders, the Id. AO accepted the share capital and premium component received from M/s. Tanish Estate Developers Pvt. Ltd., in the sum of Rs.51,00,000/- for allotment of 5100 shares, as genuine.** In respect of remaining 14 share applicants totaling to Rs.25.71 Crores, the Id. AO sought to make further examination. Thereafter, the AO vide notice u/s.142(1) requested the assessee to produce the directors for examination. In response, the assessee vide letter dated 06/02/2016 informed that it had filed the documents including confirmation of account on assessment records and assured the Id. AO to extend all possible assistance if department wish to call the directors. Thereafter, the Id. AO issued summons u/s.131 to 14 share applicants calling for their source of funds. The AO observed that the summons u/s 131 were served on 11 shares applicants and 3 summons were returned unserved. However, the Id. AO observed that all 14 share applicants had furnished their replies and also had filed supporting documents with them. The main reason for the Id. AO to disbelieve the share capital and share premium received from 14 share applicants as above, is due to the fact that there was a search action u/s.132(1) of the Act conducted at the residential and office premises of Shri Shirish Shah on 09/04/2013 wherein it revealed that the said person was engaged in providing bogus accommodation entries to various persons through various companies controlled by him. The Id. AO observed that the assessee had received share capital and share premium from certain entities controlled by Shri Shirish Shah and hence, the same are to be treated as mere accommodation entries only. The Id. AO observed that the assessee's transactions could not be treated as genuine merely for the reason that the amounts were received by Account payee

cheques. The Id. AO further held that it is immaterial that the share applicant companies are public listed companies. The Id. AO held that the assessee had failed to produce the directors of share applicant companies for examination. The Id. AO further held that the share applicants, during course of their assessments, had not been able to prove the source of their funds and the share applicants had merely stated that their funds were raised through their consultant Shri Shirish C. Shah. The Id. AO held that the assessee had not established the genuineness of the transactions and mere furnishing of the bank statements and balance sheet of share applicants is not sufficient to prove the genuineness and source of funds.

3.4. We find that the Id. AO though did not find anything adverse on the various documentary evidences filed before him, proceeded to treat the share capital and premium amounts received from 14 share applicants in the total sum of Rs.25.71 Crores as unexplained cash credit u/s.68 of the Act on the ground that the assessee failed to produce the directors of the shareholder companies to enable the Id. AO to examine them on oath.

3.5. During the course of first appellate proceedings, the assessee was asked by the Id. CIT(A) whether it will be able to produce the directors of the shareholder companies and assessee expressed its desire to produce the directors of the relevant companies. The Id. CIT(A) observed that in this background, matter was discussed with the Id. AO for further verification, and he, vide letter dated 07/07/2020 was informed that the assessee has desired to produce the directors of the companies and was accordingly directed to examine the directors of the share applicants, as the assessee had expressed its desire to produce the directors of the companies wherefrom share capital had been raised and to furnish the

report after providing the assessee, an opportunity of being heard. The copies of this letter were also marked to the superior officer of the Id. AO.

3.6. The Id. AO however vide report dated 24/07/2020 expressed his inability to do so. The Id. AO stated that the sufficient opportunities to produce the parties were provided to the assessee and there was no violation of natural justice. The Id. AO submitted that his predecessor had made independent enquiries before completion of the assessment and all related facts has been made brought in the assessment order.

3.7. The Id. CIT(A) observed that since the Id. AO was not willing to examine the directors and the additions were made primarily for the reason that the directors were not produced though all other details were submitted by the assessee and placed on record. In order to verify the genuineness of share capital/premium transactions and identity and credit-worthiness of the share applicants, notices u/s.133(6) of the Act were issued by the Id. CIT(A) to all 14 share applicants. The share applicants were directed to furnish the details of their investments made in shares of the assessee company. The share applicants were also directed to furnish the details of share application monies paid, number of shares allotted, mode of payment, details of dividend received, justification of share premium paid, Board Resolution, confirmation of account, Annual accounts of impugned and previous 2 years, source of funds for making such investments, turnover, profitability, etc. The 14 share applicants had furnished their replies in response to notice u/s 133(6) of the Act and also had filed the supporting documents such as confirmation of account, share application forms, Board resolution, I.T. acknowledgement receipt, audited balance sheet, bank statements, CIN Master Data, Certificate of Incorporation, etc. The replies of the 14 share

applicants received in response to notice u/s 133(6) of the Act and documents attached thereto had been perused and kept on record. It may be stated that identical details were submitted by these persons during the assessment proceedings as well, which is available on Id. AO's record.

3.8. Further, in order to examine the existence of the share applicants at the given addresses and whether they were doing any activities, the Inspectors of Id. CIT(A)'s office namely Mrs. Suvarna A. Mayekarand and Mr. Rajkumar H. Ambwani were authorized on 15/09/2020 to visit the premises of 6 share applicant companies, located at different places in Mumbai, to verify the antecedents of these companies and their activities and submit their report. The said Inspectors had personally visited the business premises of the share applicants and conducted the enquiry and sought the required information from them. The enquiries conducted by the inspectors revealed that 5 share applicants were found to be in existence at the given addresses and their offices were found as functional and they furnished relevant details of their businesses. At one place, it was reported that the directors and other persons were not in a position to produce their identity cards. The office of one of the share applicants named M/s. Meritorious Reality Pvt Ltd was found closed with a message on the door that their office is temporary closed due to Covid-19.

3.9. The Id. CIT(A) observed that the assessee had furnished the complete details of all the shareholders containing various details including the availability of investible funds in the hands of the shareholder companies. For each shareholder, in order to prove the three necessary ingredients of Section 68 viz. identity of the shareholders,

creditworthiness of the shareholders and genuineness of the transactions, the assessee had furnished the various evidences which are tabulated in pages 17-21 of the order of the Id. CIT(A).

3.10. The Id. CIT(A) appreciated the aforesaid various documentary evidences furnished by the assessee before the Id. AO as well as before him; also appreciate the fact that the Inspectors deputed by the Id. CIT(A) to verify the credentials of six share applicants where no adverse reports were received from the Inspectors and also considering the fact that the Director of the assessee company in the statement recorded u/s.132 (4) of the Act during the course of search proceedings had categorically denied having made any cash payment of Shri Shirish Shah and duly appreciating the fact that all the 14 share applicants had duly responded to the notice issued 133(6) of the Act and summons issued u/s.131 of the Act together with the affidavits by furnishing the relevant details called for, deleted the addition made in the sum of Rs.25.71 Crores u/s.68 of the Act.

4. We find that the assessee had received share capital and share premium of Rs.25.71 Crores from 14 share applicants as already detailed supra. It is not in dispute that assessee had furnished the following documents before the lower authorities.

- (a) Name, address and PAN of share applicants;
- b) PAN Card and IT acknowledgement receipts of share applicants;
- c) CIN Master data (ROC) and Certificate of Incorporation of share applicants;
- d) Share application forms disclosing the cheque numbers, bank details, number of shares subscribed, etc;

- e) Board resolution of share applicant companies authorizing to make investment in shares of assessee company;
- f) Evidence that 12 share applicants are the companies in which public are substantially interested and listed in Bombay Stock Exchange. These 12 share applicants are governed by SEBI, Bombay Stock Exchange, Company Law board and independent appointed nominee directors;
- g) Confirmation of account along with their address and PAN;
- h) Balance-sheet and IT acknowledgement receipts of share applicants. The share capital and Reserves of share applicants are much more than their investments made in assessee company;
- i) Bank statements of share applicants evidencing the payments made through A/c payee cheques. The source of share applicant's funds is not out of cash deposits, however is sourced out of their accounted and disclosed funds;
- j) Bank Statement of assessee evidencing the receipt of share application monies through banking channel;
- k) Reply to notices u/s 131/133(6) furnished by share applicants confirming their investments made in assessee company and proving their source of funds;
- l) Affidavit sworn on oath of the share applicants confirming their investments in shares of assessee company.

4.1. Apart from the above, the assessee had also furnished the following documents to prove the three necessary ingredients of Section 68 of the Act i.e. identity of share applicants, creditworthiness of share applicants and genuineness of the transactions in respect of each of the shareholders in the following tabular form:-

<i>Sr no.</i>	<i>Identity of share applicant</i>	<i>Genuineness of transaction</i>	<i>Credit-worthiness of Share applicant</i>

1	<p>Shri Ganesh Spinners Ltd - Rs.80,00,000/- (Now Known :Yantra Natural Resources Ltd)</p> <p>PAN card CIN Master Data Certificate of incorporation Listing In Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
2	<p>Sanguine Media Ltd - Rs.2,95,00,000/-</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing In Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
3	<p>Avance Technologies Ltd- Rs.75,00,000/-</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing in Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
4	<p>Emporis Project Ltd- Rs.40,00,000/-</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing in Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
5	<p>Empower India Ltd- Rs.6,95,00,000/- (Formerly known as Empower Industries India Ltd)</p> <p>PAN card CIN Master Data</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
	<p>Certificate of Incorporation Listing in Bombay Stock Exchange</p>		

6	<p>Channel Guide India Ltd - Rs.2,50,00,000/- (Now known as Iris Media Works Ltd)</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing in Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
7	<p>LN Poylesters Ltd - Rs.5,50,00,000/- (Now known as LN Industries India Ltd)</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing in Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
8	<p>Prabhav Industries Ltd - Rs.1,45,00,000/-</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing in Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
9	<p>Allied Computer International (Asia)Ltd- Rs.86,00,000/-</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing In Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
10	<p>Dhanush Technologies Ltd. - Rs.50,00,000/-</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing In Bombay Stock Exchange</p>	<p>Share Application form Board Resolution Confirmation of Account</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>
11	<p>Secunderbad Healthcare Ltd-Rs.1,65,00,000/-</p> <p>PAN card CIN Master Data Certificate of Incorporation Listing In Bombay Stock</p>	<p>Share Application form Board Resolution Confirmation of Account Affidavit of shareholder Reply to Notice u/s. 131/133(6)</p>	<p>IT Acknowledgement receipt Bank statement Balance sheet</p>

1	Allied Computer International(Asia) Ltd PAN- AADCA4412E	86,00,000/-	ING Vysya Bank Ltd	50,00,000/- 25,00,000/- 11,00,000/-	20/11/2010 19/07/2010 22/07/2010	1,20,82,54,291	No cash deposit in bank account before issuing the cheques
2	Avance Technologies Ltd, PAN :AAECA5763B	75,00,000/-	Standard Chartered Bank	50,00,000/- 25,00,000/-	03/07/2010 03/07/2010	1,64,46,39,054	No cash deposit in bank account before issuing the cheques
3	Dhanush Technologies Ltd. PAN: AABCD3429L	50,00,000/-	ING Vysya Bank Ltd	50,00,000/-	21/12/2010	5,76,28,90,600	No cash deposit in bank account before issuing the cheques
4	Empories projects Ltd. PAN: AABCN0273G	40,00,000/-	ING Vysya Bank Ltd	40,00,000/-	18/03/2011	93,95,09,700	No cash deposit in bank account before issuing the cheques
5	Empower India Limited (Formerly known as Empower Industries India Ltd) PAN: AAACH3967N	6,95,00,000/-	Yes Bank	125,00,000 75,00,000 50,00,000 50,00,000 100,00,000 50,00,000 50,00,000 35,00,000 30,00,000 30,00,000 10,00,000	15/11/2010 22/11/2010 29/11/2010 29/11/2010 06/12/2010 06/12/2010 06/12/2010 24/12/2010 10/02/2011 11/02/2011 24/06/2010	3,22,38,91,050	No cash deposit in bank account before issuing the cheques

6	M/s. Channel Guide India Ltd (Now known as Jump Network Ltd) PAN: AAACB4506D	2,50,00,000 /-	Indusind Bank,	50,00,000 /- 50,00,000 /- 50,00,000 /- 50,00,000/- 50,00,000/-	11/11/2010 11/11/2010 11/11/2010 11/11/2010 22/12/2010	8,44,53,325	No cash deposit in bank account before issuing the cheques
7	LN Poylesters Ltd. (Formerly known as LN Industries India Ltd.) PAN: AAACL4102B	5,50,00,000 /-	Yes Bank Limited	100,00,000 100,00,000/- 100,00,000/- 100,00,000/- 100,00,000/- 100,00,000/-	28/10/2010 28/10/2010 28/10/2010 28/10/2010 28/10/2010 28/10/2010	1,87,45,13,577	No cash deposit in bank account before issuing the cheques
8	Prabhav Industries Ltd. PAN: AAACE4247Q	1,45,00,000	Standard Chartered Bank	50,00,000 50,00,000 45,00,000	18/06/2010 21/06/2010 24/06/2010	1,48,09,72,695	No cash deposit in bank account before issuing the cheques
9	Sanguine Media Ltd. PAN: AAEC5221 7C	2,95.00,000 /-	Yes Bank,	50,00,000 60,00,000 45,00,000 40,00,000 50,00,000 50,00,000	09/07/2010 09/07/2010 07/08/2010 10/08/2010 11/08/2010 22/10/2010	1,24,63,33,574	No cash deposit in bank account before issuing the cheques
10	Secunderabad Healthcare Ltd PAN: AACCS8246B	1,65,00,000/-	YES Bank, Hyderabad	50,00,000 100,00,000 75,00,000	22/10/2010 22/10/2010 16/08/2010	1,09.75,39,648	No cash deposit in bank account before issuing the cheques
11	Shri Ganesh Spinners Ltd (Now known as Yantra Natural Resources Ltd) PAN: AACCS4221Q	80,00,000/-	Yes Bank,	30,00,000 /- 30,00,000/- 20,00,000/-	02/07/2010 02/07/2010 06/07/2010	2,93,21,97,313	No cash deposit in bank account before issuing the cheques

12	Speciality Papers Ltd PAN: AAECs0861Q	25,00,000/-	ING Vysya Bank Ltd	25,00,000 /-	31/03/2011	1,79,76,30,9 68	No cash deposit in bank account before issuing the cheques
13	Meritorious Reality Pvt Ltd PAN: AAGCM3629L	75,00,000/-	Royal Bank of Scotlan d	30,25,000 /- 25,50,000 /- 19,25,000 /-	18/06/2010 18/06/2010 18/06/2010	23,24,12,364	No cash deposit in bank account before issuing the cheques
14	Moonlight Solutions Pvt Ltd PAN: AAGCM2643G	40,00,0007-	Axis Bank Ltd	40,00,000/-	13/01/2011	12,12,61,502	No cash deposit in bank account before issuing the cheques
	Total	25,71,00,000			-		

4.3. We find that notices u/s.133(6) of the Act were replied directly by the share applicants before the lower authorities by filing the requisite documents and confirming the fact of making investments in the assessee company at a premium. We also find that summons issued u/s.131 of the Act before the lower authorities were duly responded by the shareholders by filing the necessary requisite documents together with the affidavits from the directors of the shareholder companies.

4.4. We find that no defects were pointed out by the Id. AO in the various documentary evidences filed by the assessee and also that were filed by the share applicants directly before the Id. AO. No contrary materials were brought on record by the Id. AO to disbelieve the entire transactions. Moreover, we find that the assessee had furnished evidences to prove that the status of all the 14 share applicants disclosed in the records of Registrar of Companies (ROC) as "Active category". We further find that in respect of 12 listed entities, their status is disclosed in the records of Bombay Stock Exchange (BSE) as "Active category". We find that the assessee had also furnished the valuation report to its Nagpur Smart City Project along with relevant Government permissions and valuation details to justify the fair valuation of share premium using Discounted Cash Flow (DCF) method. When all these documents are staring on us with no

adverse inference drawn thereon by the Id. AO and more especially, when the said parties were also subject matter of examination by both the Id. AO as well as by the Id. CIT(A), then there could be no addition merely on some suspicion. The law is very well settled that onus to prove that the transaction is not real is on the person who asserts the allegation as decided by the Hon'ble Supreme Court in the celebrated decision of Daulat Ram Rawatmull reported in 87 ITR 349. Yet another celebrated decision of the Hon'ble Supreme Court in the case of Umacharan Shaw & Bros. reported in 37 ITR 271 would also advance the case of the assessee, wherein it was held that suspicion howsoever strong cannot take the place of direct evidences.

4.5. We further hold that for the year under consideration, the assessee is not legally bound to prove the source of source of share applicants. We find that assessee had given direct evidences to prove that there was no cash deposits in the bank statements of share applicants immediately before making investments in assessee company. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of PCIT vs. Veedhata Tower Pvt. Ltd., reported in 403 ITR 415 (Bom) wherein it was held that once the payer had confirmed the transaction of making investment in a company towards share capital and share premium, the revenue cannot invoke the provisions of Section 68 of the Act in the hands of the recipient even if the monies were received from bogus shareholders. The assessee had duly discharged the onus which is cast upon it in terms of pre-amended Section 68 of the Act by filing the necessary confirmation letters of the share applicants, their affidavits, their full address with their PAN etc. The said decision also held that the proviso to Section 68 of the Act which was introduced by the Finance Act 2012 w.e.f. 01/04/2013 would be effective only from

A.Y.2013-14 onwards and not for the earlier assessment years. We hold that in any case, the receipt of share capital and share premium would only have to be construed as capital receipt not chargeable to tax as has been held by the Hon'ble Jurisdictional High Court in the case of Vodafone India Services Pvt. Ltd., vs. Addl. CIT reported in 368 ITR 1 (Bom). It was held specifically that the share capital / share premium is not of the Revenue field and would not partake the character of income as defined u/s 2(24) of the Act. The relevant operative portion of the said decision is reproduced hereunder:-

24. A plain reading of Section 92(1) of the Act very clearly brings out that income arising from a International Transaction is a condition precedent for application of Chapter X of the Act. This has already been so held by the order dated 29 November 2013 of this Court in Vodafone-III. We could have straight way held that the issue of examining the jurisdiction to apply Chapter X of the Act stands concluded by the order in Vodafone-III.

25. But we have examined the issue afresh. 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 is undoubtedly on capital account. Share premium have been made taxable by a legal fiction under Section 56(2)(viib) of the Act and the same is enumerated as Income in Section 2(24)(xvi) of the Act. However, what is brought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case what is being sought to be taxed is capital not received from a non-resident i.e. premium allegedly not received on application of ALP. Therefore, absent express legislation, no amount received, accrued or arising on capital account transaction can be subjected to tax as Income. This is settled by the decision of this Court in Cadell Weaving Mill Co. v. CIT [\[2011\] 249 ITR 265/116 Taxman 77](#) was upheld by the Apex Court in CIT v. D.P Sandu Bros. Chember (P.) Ltd. [\[2005\] 273 ITR 1/142 Taxman 713](#). This Court has in Cadell Weaving Mills Co. (supra) inter alia, observed as under:—

'It is well settled that all receipts are not taxable under the Income tax Act. Section 2(24) defines "income". It is no doubt an inclusive definition. However, a capital receipt is not income under section 2(24) unless it is chargeable to tax as capital gains under Section 45. It is for this reason that under section 2(24)(vi) that the Legislature has expressly stated, inter alia, that income shall include any capital gains chargeable under

section 45. Under Section 2(24)(vi), the Legislature has not included all capital gains as income. It is only capital gains chargeable under Section 45 which has been treated as income under Section 2(24). If the argument of the Department is accepted then all capital gains whether chargeable under section 45 or not, would come within the definition of the word "income" under section 2(24). Further, under section 2(24)(vi) the Legislature has not stated that "any capital gains" will be covered under the word income. On the contrary, the Legislature has advisedly stated that only capital gains which are chargeable under Section 45 of the Act could be treated as income. In other words, capital gains not chargeable to tax under section 45 fall outside the definition of the word "income" in section 2(24) of the Act. It is true that section 2(24) of the Act is an inclusive definition. However, in this case, we are required to ascertain the scope of Section 2(24)(vi) and for that purpose we have to read the sub section strictly. We cannot widen the scope of sub section by saying that the definition as a whole is inclusive and not exhaustive. In the present case, the words "chargeable under section 45" are very important. They are not being read by the Department. These words cannot be omitted. In fact, the prior history shows that capital gains were not chargeable before 1946. They were not chargeable between 1948 and 1956. Therefore, whenever an amount which is other wise a capital receipt is to be charged to tax, section 2(24) specifically so provides.'

In view of the above, we find considerable substance in the Petitioner's case that neither the capital receipts received by the Petitioner on issue of equity shares to its holding company, a non-resident entity, nor the alleged short-fall between the so called fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act.

4.6. We further find that this decision of the Hon'ble Bombay High Court has been accepted by the Income Tax Department by not preferring further appeal to the Hon'ble Supreme Court. In fact, the instructions have been issued by the Central Board of Direct Taxes (CBDT) directing the Field Officers not to prefer further appeal as the decision of the Hon'ble Bombay High Court in the case of Vodafone India Services Pvt. Ltd., referred to supra has been accepted by the Income Tax department to be correct. For the sake of convenience, the relevant Instruction No.2/2015 dated 29/01/2015 issued by the CBDT is reproduced below:-

Instruction No.2/2015

F No.500/15/2014/APA-I
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
Foreign Tax & Tax Reserch- I Division
APA-I Section

New Delhi, Dated the 29th January, 2015

To
All Principal CCsIT/DsGIT and CCsIT/DsGIT

Madam/Sir

Subject Acceptance of the Order of the Hon'ble High Court of Bombay in the case of Vodafone India Services Pvt. Ltd.-reg.

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(WP No.871/2014), wherein the Court has held, inter-alia, that the premium on share issue was on account of 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, DRPs, and CslT(Appeals).

3. This issues with the approval of Chairperson CBDT.

(Anchal Khandelwal)
Under Secretary to the Govt. of India

4.7. We further find that a statement was recorded from the Director of the assessee company Shri Saurabh Bora during the search u/s.132(4) of the Act, wherein he had categorically stated that the transactions on receipt of share capital and premium were genuine and the same does not depict any unexplained income in the hands of the assessee company. In the said statement, the Director had duly explained the

future prospects of the assessee company and the project under consideration and had also categorically denied having made any cash payments to Shri Shirish Shah which had been rooted back in the form of share capital and share premium to the assessee company. For the sake of convenience, the replies given by the said Director in respect of various questions posed by the investigation team while recording statements u/s.132(4) of the Act are reproduced below:-

"Ans to Q.13 I am providing you the details of Share application money received in the above companies since FY.2006-07 till date along with the name, address and PAN of the applicants as below:....."

Ans to Q.45 M/s. Tanish Homes & Construction Pvt. Ltd was Incorporated on 24.01.2008. The company is in the business real estate and constructions, Investment in stock & shares, aggregation of land. The company is in advance stage of setting up integrated residential and commercial township projects in the city of Nagpur. The land acquisition for this purpose is already completed and the process of obtaining necessary Govt. permissions for the integrated township is in place....."

Ans to Q.51 M/s. Tanish Homes & Construction Pvt Ltd had received share application money in F.Y.2010-11 only. I am providing you herewith the details of share application money received in M/s. Tanish Homes & Construction Pvt Ltd since F.Y.2006-07....."

Ans to Q.60 Sir, this was based on our future projection as we were going to acquire land for an integrated residential and commercial township. The land was close to MSEB power plant and western coalfields where huge employment is there. Hence, the demand for affordable housing is huge in that particular area. Hence, looking at the size and future prospect, the premium was decided.

Ans to Q.61 We had circulated a presentation of future prospects of our company.

Ans to Q.121 Yes, M/s. Tanish Homes & Construction Pvt Ltd had purchased the said land.

Ans to Q.122 Sir, the source for the purchase of land for Nagpur project was share capital received in the company as mentioned in reply to Q.No.51

Ans to Q.132 I have not given any cash to Shri Shirish Shah and therefore I am not in a position to respond to this question.

Ans to Q.136 I have not given any cash to Mr. Shirish Shah. I shall furnish the explanation in due course."

4.8. We find that none of these statements were found to be untrue by the Id. AO.

4.9. In the instant case we further find that the Id. CIT(A) had also sought to examine the veracity of the transactions by deputing two Inspectors to verify six out of the 14 share applicants. Out of the six applicants, the Inspectors could find 5 applicants at the relevant address as existent and found the documents filed by them to be correct. One share applicant who was not found at the given address at the time of their visit, was stated to be temporarily closed due to Covid 19 Pandemic.

4.10. We further find that the genuineness of the transactions in the instant case with regard to share premium cannot be doubted at all as the same AO had accepted the premium component of Rs.990/- per share for amounts received from M/s. Tanish Estate Developers (P) Ltd., during the year under consideration. We hold that when said premium component of Rs.990/- per share is accepted for one shareholder, the same cannot be doubted for other shareholders by the Id. AO. In any case as stated earlier, all the 14 shareholders had duly confirmed the fact of making investments in share capital / premium in assessee company which fact is also duly reflected in their audited financial statements. Hence, the genuineness of the transactions stood clearly established. All the shareholders are duly assessed to tax and had been regularly filing their income tax returns. All the shareholder companies were still in active category in the records to ROC and BSE. Even the random verification

sought to be carried out by the Id. CIT(A) on six share applicants by deputing Inspectors revealed that all of them were found to be existent at the relevant address. These facts collectively prove that the identity of the share applicants stood clearly established. As far as the credit worthiness of the share applicants are concerned, we find from the aforesaid tabulation, all the share applicants are having sufficient investible funds in their kitty for making investments in the assessee company. Hence, the creditworthiness of the shareholders stood clearly established and proved by the assessee company. Hence, all the three necessary ingredients of Section 68 stand clearly proved and established in the instant case. Hence it could be safely concluded that the assessee in the instant case had duly discharged its onus in full in accordance with the requirements of section 68 of the Act. We find that the Id. AO had not disputed the correctness of various documentary evidences and documents submitted by the assessee and had not brought any contrary documentary evidence to disprove the transactions and involvement of unaccounted money belonging to the assessee, except merely making bald allegations.

4.11. We find that the Id. CIT(A) had also observed in para 9.9 of his order that assessee had furnished the project report of a smart city project, being undertaken by it and valuation report wherein the valuation of the assessee company is determined at Rs.173 Crores and fair value of share is determined at Rs.1190/- per share. We find that the Id. CIT(A) had also observed that the assessee had also filed the copies of various approvals and permissions sought for developing the smart city near Nagpur as under:-

(i) NIT has given Preliminary Approval on 20/02/2015. The EE. (Metro)/A.E-3/1418 has been approved for potential measurement under "Group Housing Scheme":

(ii) Several permissions with regards to the N.A applications :

a) MSEB-Maharashtra State Electricity Board

b) Punar Vasan department

c) Bhu Sampadan department

d) ULC-Urban Land Ceiling department e) State Highway department

f) Zillah Parishad department

(iii) N.A Permission application was submitted and filled with NIT Nagpur office on 27th May, 2014 and fees has been paid;

(iv) Section 89 permission even before purchasing the land from the revenue authorities of Nagpur for approximately more than 137 acres on 9th September 2010.

4.12. We find that the Id. AO had made the addition u/s.68 of the Act for the reason that the Directors of the share holder companies are name sake directors and such companies are controlled by an accommodation entry provider Shri Shirish Shah. Since the assessee had not produced the Directors of shareholder companies for examination, the transaction of receipt of share capital / premium was treated as not genuine and accordingly, the Id. AO added the same u/s.68 of the Act. First of all, we find that assessee in the instant case had not received any share capital / premium from Shri Shirish Shah. The monies have been received from certain companies in which Shri Shirish Shah is neither the shareholder nor the Director. Moreover, as stated earlier, the Director of the assessee company in his statement recorded u/s.132(4) of the Act during the course of such proceedings had categorically denied of any undisclosed accommodation transactions entered with Shri Shirish Shah. It is a fact on record that all the Directors of the share applicant companies had also filed affidavits on oath confirming the fact of making investments in

assessee company at a premium. None of the contents of the affidavit were found to be false by the Id. AO. When the contents of the affidavit were not found to be false, then no adverse inference could be drawn on the transactions for which affidavit has been filed. Reliance in this regard is placed on the celebrated decision of the Hon'ble Supreme Court in the case of Mehta Parikh & Co. vs ITO reported in 30 ITR 181. Moreover, in the instant case the assessee's Director had also requested the Id. AO to cross examine Shri Shirish Shah which was not granted by the Id. AO on the ground that none of the statement of Shri Shirish Shah had been relied upon by the Id. AO and hence, in the opinion of the Id. AO, there was no need for providing any cross examination. In our considered opinion, when none of the statements of Shri Shirish Shah was sought to be relied upon by the Id. AO, then where is the need for the Id. AO to draw adverse inference on the assessee on the pretext that assessee had received share capital / premium from companies allegedly controlled by Shri Shirish Shah. In any case, we find that the share capital / premium received from companies which are allegedly controlled by Shri Shirish Shah has been found to be genuine by the Hon'ble Madhya Pradesh High Court (Indore Bench) in the case of PCIT vs. Chain House International Pvt. Ltd., reported in 408 ITR 561. The Special Leave Petition preferred by the Revenue against this judgment before the Hon'ble Supreme Court was dismissed which is reported in 262 Taxman 207.

4.13. We find that even though the Directors of the share applicant companies did not appear in person before the Id. AO in response to the summons issued u/s.131 of the Act, they had duly furnished the requisite details that were called for together with the affidavits confirming the factum of investment in assessee company at a premium. The law is very well settled that merely because the Directors of share applicant

companies does not comply with the summons u/s.131 of the Act by making their appearance in person, no addition could be made u/s.68 of the Act in the hands of the recipient. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs Orchids Industries Pvt. Ltd., 397 ITR 136 (Bom). It is pertinent to note that the SLP preferred by the Revenue against this decision before the Hon'ble Apex Court was dismissed which is reported in 116 taxmann.com 113.

4.14. It is pertinent to note that in the instant case assessee had expressed his willingness to produce the share applicants of the companies during the course of first appellate proceedings. Accordingly, this matter was discussed by Id. CIT(A) with the Id. AO. Thereafter, a letter was sent by Id. CIT(A) to the Id.AO stating that assessee has desired to produce the Directors of the shareholder companies who may be examined and a report may be submitted. The matter was also notified to superior officer of the Id. AO. The assessee's Director had also appeared before the Id. AO in this regard seeking his convenience and understand the date and time for production of the Directors of share applicant companies. The Id. AO however, did not heed to the said request and he could not complete the exercise as mandated by the Id. CIT(A). The Id. AO vide letter dated 24/07/2020 expressed his inability to verify the facts from the Directors of the shareholder companies. Hence, the Id. CIT(A) was forced to make independent enquiries by issuing notice u/s.133(6) of the Act to the shareholder companies which were duly complied with. In fact the Id. CIT(A) went a step further by even deputing two Inspectors to verify the existence of six shareholder companies on a random basis vide order dated 15/09/2020. No adverse reports were given by the Inspectors in this regard. Hence there was no need to

doubt the transactions of receipt of share capital / premium from the shareholder companies by the Id. CIT(A).

4.15. We find that in the following decisions of various High Courts and Co-ordinate Benches of Tribunal, various parties from whom assessee has received share capital / premium were found to be genuine and additions made u/s.56(2) (viib) and u/s. 68 of the Act were deleted in the hands of the recipient:-

- i) PCIT vs. Chain House International Pvt. Ltd., reported in 408 ITR 561(MP)
- ii) ITO vs. Nita Jajoo Ventures Pvt. Ltd., in ITA No.2890/Mum/2017 dated 13/08/2021 rendered by Mumbai Tribunal
- iii) ITO vs. Amirashmi Finstock Pvt. Ltd., in ITA Nos.4558-4559/Mum/2017 dated 22/10/2020 rendered by Mumbai Tribunal
- iv) Ancon Chemplast Pvt. Ltd., vs, ITO reported in 189 ITD 156 rendered by Delhi Tribunal
- v) ITO vs. Greeksoft Institute of Financial Market Pvt. Ltd., in ITA No.3969/Mum/2017 dated 24/10/2018 rendered by Mumbai Tribunal
- vi) ITO vs. Sidhivinayak Filaments Pvt. Ltd., in ITA No.3003/Mum/2017 dated 21/06/2019 rendered by Mumbai Tribunal
- vii) INS Finance and Investment Pvt. Ltd., vs. ITO in ITA No.9266/Del/2019 dated 26/10/2020 rendered by Delhi Tribunal
- viii) Seth Carbon and Alloys Pvt. Ltd., vs. DCIT in ITA Nos.2865-2866/Mum/2019 dated 17/05/2021 rendered by Mumbai Tribunal

4.16 In view of the aforesaid elaborate observations and respectfully following the various judicial precedents relied upon hereinabove, we do

not find any infirmity in the order passed by the Id. CIT(A) in respect of deleting the addition in the sum of Rs. 25.71 Crores u/s.68 of the Act. Hence, the ground No. (i), (ii) & (iii) raised by the Revenue are dismissed.

5. The ground No. (iv) raised by the Revenue is challenging the deletion of addition of loan amount of Rs.5,00,000/- treated as unexplained cash credit u/s.68 of the Act.

5.1. We have heard the rival submissions and perused the materials available on record. We find that assessee had received unsecured loans on 09/06/2010 from M/s. Enakshi Impex Pvt. Ltd., of Rs.2,50,000/- and M/s.Kinita Real Estate Pvt. Ltd., of Rs.2,50,000/- totaling to Rs.5,00,000/-. The Id. AO observed that the aforesaid lender companies were controlled by Shri Shirish Shah and accordingly directed the assessee to justify the genuineness of the loan transactions. In response, the assessee filed the submissions on 03/02/2016 alongwith supporting evidences such as CIN, PAN, Acknowledgement of return of income, Confirmation of accounts and bank statement of the parties. The Id. AO held that the assessee had explained the identity of the lenders, however has failed to explain the capacity of lenders and genuineness of loan transactions and accordingly made the addition u/s.68 of the Act in the sum of Rs.5,00,000/- while completing the assessment.

5.2. We find that the assessee had furnished the following documents to prove the necessary ingredients of section 68 of the Act viz. identity and creditworthiness of the lenders and genuineness of loan transactions, as under:

a) Name, address and PAN of the loans received during the year;

- b) PAN card of the lenders;
- c) CIN Master data (ROC) of the lenders;
- d) Confirmation of loans;
- e) I.T. acknowledgement receipt of the lenders;
- f) Bank statement of the lenders;
- g) Balance sheet of the lenders.

5.3. It is not in dispute that the entire loans had been received through regular banking channels and had been duly disclosed in the financial statements of the lenders and in the books of the assessee company. It is not in dispute that the immediate source of credit for advancing these loans to the assessee company by the lenders were not out of any cash deposits in their bank accounts. For the year under consideration, the assessee is not required to prove the source of source of the lenders , but had filed the relevant documents as detailed supra. We find that the the assessee had furnished the copies of PAN card, CIN Master Data and I.T. acknowledgement receipt to prove the identity of the lenders. The assessee had filed the confirmation of account and own bank statement in respect of loan received through banking channel to justify the genuineness of the loan transaction. The assessee had filed the I.T. returns, balance sheet and bank statement of the parties to prove the credit-worthiness of the lenders. We find that the Id. AO had not brought any contrary material on record to disbelieve the aforesaid documentary evidences placed on record. Once the loan confirmations are placed on record from the side of the lenders and transactions have been routed through regular banking channels and all the three ingredients of section 68 of the Act are clearly established and proved by the assessee, there cannot be any addition u/s 68 of the Act in the hands of the recipient assessee. Hence we do not find any infirmity in the action of the Id.

CIT(A) deleting this addition of Rs 5,00,000/- u/s 68 of the Act. Accordingly, the Ground No. (iv) raised by the revenue is dismissed.

6. Let us come to the cross objections preferred by the assessee. The Id. AR before us stated that the cross objections preferred by the assessee are not pressed. The same is reckoned as a statement made from the Bar and accordingly, the cross objections preferred by the assessee are dismissed as not pressed.

7. In the result, the appeal filed by the revenue is dismissed and cross objections preferred by the assessee is dismissed.

Order pronounced on
in the notice board

30/06/2022 by way of proper mentioning

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated
KARUNA, *sr.ps*

30/06 /2022

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai