

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

**BEFORE SHRI SANJAY GARG (JUDICIAL MEMBER) AND  
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**

**ITA No. 7039/MUM/2016  
Assessment Year: 2012-13**

UB Ostan (India) Private Limited,  
Sahyadri Sadan, Tilak Road,  
Pune-411-030.

**PAN No. AABCU 2815 K**

**Appellant**

Income-tax Officer-1(3)-4,  
Aayakar Bhavan,  
Mumbai.

**Vs.**

**Respondent**

Assessee by : Mr. Mehul Shah, AR  
Revenue by : Mr. S.N. Kabra, DR

Date of Hearing : 17/05/2022  
Date of pronouncement : 20/07/2022

**ORDER**

**PER OM PRAKASH KANT, AM**

This appeal by the assessee is directed against order dated 29/09/2016 passed by the Ld. CIT(Appeals)-3, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2012-13, raising following grounds:

- 1. On the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in*



*upholding action of the Assessing Officer in making addition of ₹418,490/- raised by way of equity share capital issued to the co-venturers invoking provisions of section 68 which in fact was duly supported by the documentary evidence and underwent the tests of Identity, Creditworthiness, and Genuineness successfully.*

- 2. 2. On the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in upholding action of the Assessing Officer in making addition of ₹43,479,510/- received by way of premium on equity share capital issued to the co-venturers invoking provisions of section 68 which in fact was duly supported by the documentary evidence and underwent the tests of Identity, Creditworthiness, and Genuineness successfully.*
- 3. Without prejudice to Ground No. 2, On the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in not appreciating that legislature brought amendment to section 56 by inserting clause (viib) effective Assessment Year 2013-14 to tax excess premium charged by a closely held company; and case of the Appellant was pertaining to Assessment Year 2012-13; and thus, there was no effective provision under the Income-tax Act 1961 to tax share premium received by the Company.*
- 4. 4. On the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in upholding action of the Assessing Officer in disallowing capital work in progress of ₹17,279,051/- to be claimed against future economic benefits alleging that no details were submitted*



*ignoring the fact that your Appellant submitted all the relevant details called for.*

5. *On the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in upholding action of the Assessing Officer in disallowing legal and consultation charges of ₹3,158,584/- and traveling expenses of RS. 1,638,822 to be claimed against future economic benefits alleging that no details were submitted ignoring the fact that your Appellant submitted all the relevant details called for.*
6. *On the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in upholding action of the Assessing Officer in taxing interest income of ₹510,963/- separately instead of reducing it from the cost of project ignoring the fact that interest receipt arose on temporary deposits with banks pending application to capital work in progress.*
7. *Alternatively and without prejudice to Ground No. 6, on the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in not appreciating that interest income of ₹510,963/- was to be offset against the unallocated expenses carried to balance sheet.*

2. Briefly stated, facts of the case are that the assessee company has been set up as a joint-venture between the 'Ostan' group of Singapore (OSMAP Asia Pacific P. Ltd.) and 'UB' group of India to undertake activities of designing and manufacturing of injection



moulding components, subsystems, ODM and OEM products. For the year under consideration, the assessee filed return of income on 29/09/2012 declaring Nil income. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment completed under section 143(3) of the Act on 30/03/2015, the Assessing Officer made addition for the share capital and share premium received during the year under consideration. The Assessing Officer also disallowed the expenses transferred to capital work-in-progress though not claimed in the year under consideration, but for further adjustment towards block of assets and claim of depreciation. The Ld. Assessing Officer also treated the interest income of ₹5,10,963/-received during the year under consideration as taxable under the head "income from other sources" instead of claim of the assessee of adjusting the same against capital work-in-progress. On further appeal, the Ld. CIT(A)



upheld the order of the Ld. Assessing Officer. On further appeal, the Tribunal vide order dated 05.09.2018 dismissed the appeal of the assessee holding it to be non-maintainable as the prescribed Form No. 36 for filing appeal was signed by the ex-director instead of managing director or director of the company. On the miscellaneous application filed by the assessee removing the defect of not signing the Form No. 36 by the Managing Director or Director of the company, the Tribunal *vide* order dated 30/07/2021 recalled the appeal for deciding in regular course. Accordingly, the appeal has been fixed before the bench for hearing the parties.

3. Before us the Ld. counsel of the assessee has filed a paperbook in two volumes containing pages 1 to 528.

4. The ground No. 1 to 3 of the appeal relate to addition of share capital amounting to ₹4,18,490/-and share premium of ₹4,34,79,510/-.



5. The facts in brief for adjudicating the issue in dispute are that for its manufacturing activities, the assessee proposed to acquire land at “Shriwal” from M/s UB engineering Ltd, who is one of the shareholder. It has been contended by the assessee that pending the transfer of land, construction of factory building was carried out by UB infrastructure Ltd. To fund the project, the assessee company issued equity shares to following co-ventures i.e. shareholders having details as under:

Name of the Allottee	Number of equity shares allotted	Amount of shares (₹10 per share)	Share premium (₹1,990 per share)	Total
UB Engineering	7,000	70,000	0	70,000
VJM Media Private Limited	3,000	30,000	0	30,000
Osmap Asia Pacific Private Limited	10,000	100,000	0	100,000
UB Engineering Limited	7,648	76,480	15,219,520	15,296,000
VJM Media Private Limited	3,277	32,770	6,521,230	6,554,000
Osmap Asia Pacific Private Limited	10,924	109,240	21,738,760	21,848,000
<b>Total</b>	<b>41,849</b>	<b>418,490</b>	<b>43,479,510</b>	<b>43,898,000</b>

5.1 On the basis of the information gathered from the ex-director as well as the shareholders of the company, the Ld. Assessing



Officer was not convinced about the identity & creditworthiness of the parties and genuineness of the transaction.

6. Before the Ld. CIT(A), the assessee filed additional evidence in support of identity, creditworthiness and genuineness of the transaction in respect of share capital and share premium received, however the Ld. CIT(A) also upheld the both the addition of share capital and share premium as unexplained cash credit in terms of section 68 of the Act.

7. Before us, the Ld. counsel of the assessee in support of ground Nos. 1 to 3 of the appeal submitted that all documents related to shareholders were filed before the Assessing Officer which *interalia* contained details of joint-venture, Form No. 2 filed with ROC, annual return filed with ROC, details of shareholders, Form No. FC-GPR filed with RBI, certificate of chartered account as to valuation of the Shares, details of shares allotted etc. The Ld. counsel submitted that Assessing Officer has not raised any doubt on the identity of the



shareholders, who has contributed to the share capital as well as to share premium. He submitted that assessee has already submitted valuation certificate from the chartered accountant as per requirement of law for justifying the share premium charged from the share applicants. The Ld. counsel submitted that finding of the Ld. CIT(A) of no explanation about business foundation by the assessee is contrary to the facts as all the documents with respect to increase in share capital and construction of the project were duly filed before the lower authorities. He submitted that the assessee expended significant amount on construction activity for construction of the factory. The Ld. counsel submitted that in view of the decision of Hon'ble Bombay High Court in the case of **CIT Vs Gagandeep Infrastructure Private Limited in ITA No. 1613 of 2014**, proviso to section 68 (which creates obligation on the issuing company to explain the source of share capital and premium) has been introduced by the Finance Act, 2012 with effect from



01/04/2013 and does not have retrospective effect and therefore the assessee was not obliged to explain source of the source. The Ld. counsel further submitted that lower authorities have not examined the creditworthiness and genuineness of the transaction properly in the light of the documents submitted, and therefore finding of the Ld. CIT(A) might be set aside.

8. The Ld. DR on the other hand submitted that the documents filed by the assessee are not sufficient to justify the creditworthiness and genuineness of the transaction and therefore the Ld. Assessing Officer and the Ld. CIT(A) are justified in making addition in terms of section 68 of the Act in respect of the amount of share capital and share premium credited by the assessee.

9. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In the case, the Ld. counsel of the assessee has contested that initially, 7000 equity shares were issued to M/s UB engineering Ltd for a sum of





and the transactions carried out are not genuine as the amount of share premium has been claimed to have been incurred for the construction of the factory, the land for which was not even acquired by the assessee company. The Ld. CIT(A) has also doubted the business foundation of the assessee company. Before us, the Ld. counsel of the assessee has submitted that share premium has been charged as per the valuation report of the Chartered Accountant and therefore no addition could have been made for the share premium. We find that Assessing Officer has made addition under section 68 of the Act holding the amount of share capital and share premium received by the assessee as unexplained cash credit and not made the addition under section 56(2)(vii) of the Act determining any excess premium charged in case of closely held company, and therefore argument of the Ld. counsel of the assessee in relation to valuation of the share premium are not relevant for adjudicating issue-in-dispute beforehand.



9.1 In the case, the Assessing Officer has noted that no compliance was made by the assessee company. It was submitted on behalf of the assessee that regular directors nominated by the UB group had resigned and there was no staff working and therefore he issued notices to the directors of the company, which were shown as directors on record. The Assessing Officer also issued notices u/s 133(6) to the shareholders. The Assessing Officer also issued notices to the bankers of the assessee company for gathering bank statements. After considering the information collected and submissions filed on behalf of the assessee, the Ld. Assessing Officer was of the view that receipt of money through banking channel in itself was not sufficient to discharge the onus under section 68 of the Act. The relevant finding of the Ld. Assessing Officer is reproduced as under:

*“12.7 The money may have been received through banking channels, but neither does it reflect the business foundation on which the stated venture with foreign partner, should have been prepared nor does it*



*reflect any actual genuine business activity. The share monies had come through banking channel is, at best, neutral. The companies which subscribed to the shares were borne on the file of the Registrar of Companies or are identifiable, was again a neutral fact and that these companies were complying with such formalities did not add any credibility or evidentiary value. It did not ipso facto prove that the transactions were genuine. Introduction of money under the guise of loans, advances, share capital and share premium has been in vogue for so long and so widely prevalent that the tell-tale signs of the instant case will invariably lead to the conclusion in the minds of any ordinary man of normal prudence that the said transaction is nothing but a device for any of the purpose best known to them.*

*12.8 It has been considered more by the Hon'ble Supreme Court in the case of A Govindarajulu Mudaliar v.CIT (1958] 34 ITR 807 that it is not incumbent upon the Assessing Officer, on the facts and circumstances of the case, to establish with the help of material on record that the share monies had come or emanated from the assessee's coffers. Section 68 of the Act casts no such burden upon the Assessing Officer."*

**9.2 The Ld. Assessing Officer held the share capital received by the assessee as unexplained in terms of section 68, observing as under:**

*"13.3 The 'Share Capital' is shown to have been received during the year under reference. The company has received "Share Capital' of Rs. 10/- per share amounting in all to Rs.4,18,490/-. The submissions as received during the assessment proceedings, the facts as brought on record and the stated current position of the companies' affairs, as*



*has been discussed above in the order, points to the doubtful nature of the reflected transaction and shows the lack of genuineness of the claimed nature of the transaction. Considering the facts and circumstances of the case and lack of genuineness of the claimed nature of the transaction, the sum of Rs.4,18,490/-, introduced in the books of the assessee company as share capital is hereby held as unexplained and unsubstantiated as to the genuineness and nature thereof and is brought to tax u/s.68 of the Act.”*

9.3 Similarly, the Assessing Officer held the share premium received as unexplained in terms of the section 68, observing as under:

*“14.5 The shares were issued at a premium to the parties but justification and reason for premium is perspicuously missing and not forthcoming. Why and for what reasons, a share premium would be payable in a case like this, is beyond comprehension. Any and every reasonable man is normally expected to practice due diligence while investing his hard cared money, let alone purchase shares in a company. The stated shareholders are having substantial percentage of shareholdings and have made substantial contribution of funds. Their role does not end with the preparation of the business plan & contributing the funds and stop bothering afterwards.*

*14.6 The submissions as received during the assessment proceedings, the facts as brought on record and the stated current position of the companies' affairs, as has been discussed above in the order, points to the doubtful nature of the reflected transaction and shows the lack of*



*genuineness of the claimed nature of the transaction. Considering the facts and circumstances of the case and lack of genuineness of the claimed nature of the transaction, it is held that the sum of Rs.4,34,79,510/- introduced in the books of the assessee company as share premium is hereby held as unexplained and unsubstantiated as to the genuineness and nature thereof and is brought to tax accordingly u/s.68 of the Act.*

*14.7 Accordingly, The amount of Rs.4,34,79,510/- is added as assessee's income under the provisions of section 68 of the Income Tax Act. 1961."*

#### **9.4 The Ld. CIT(A) upheld the addition observing as under:**

*"7.5 After raising the capital at a higher premium the appellant incurred some expenses and not carried any activities. The Directors in the appellant company were nominated by UB Group, who have all resigned and there is no staff working and the details were not submitted to the AO. During the course of assessment as well as during the course of appellate proceedings, the appellant has failed to establish any business which the appellant is proposing on the basis of which the higher premium was calculated. The appellant UB Ostan India Pvt. Ltd. is a subsidiary of UB Engineering Ltd, and a joint venture company between UB Group and Ostan Group. The overall control of the appellant company is with the UB Group. During the course of assessment proceedings the AO has examined the nature of share capital and share premium and also the genuineness and nature of transaction. The appellant did not explain the business foundation on which the stated venture with foreign partner should*



*have been prepared nor does it reflect any actual genuine business activity. Though share monies has come through banking channel is, at best, neutral. The companies which subscribed to the shares were borne to the file of the Registrar of Companies on are identifiable, was again a neutral fact and that these companies were complying with such formalities did not add any credibility or evidentiary value. It did not apso facto prove that the transactions were genuine. Introduction of money under the guise of loans, advances, share capital and share premium has been in voge for so long and so widely prevalent that the tell-tale signs of the instant case will invariably lead to the conclusion in the minds of any ordinary man of normal prudence that the said transaction is nothing but a device for any of the purpose best known to them. The AO has relied on the decision of the Apex Court in the case of A Govindarajulu Mudaliar vs. CIT [1958] 34 ITR 807, that it is not incumbent upon the AO on the facts and circumstances of the case, to establish with the help of material on record that the share monies had come or emanated from the assessee's coffers. Section 68 of the Act casts no such burden upon the AO.*

7.6 *The facts as brought on record and the current position of the company's affairs establish the doubtful nature and the reflected transaction which is a colorable device to bring the capital in the books of the company and further charged share premium at a higher rate to increase the capital of the company. As regards the premium is concerned, the appellant submitted that the premium was computed on the basis of future business prospects and determined the higher rate of premium. However, perusal of the Balance Sheet indicate that the amount received as share premium*



*has been shown among the share holders as bonus shares without creating corresponding liability. The appellant did not explain the basis of premium charged as the company is existing only on paper and no activity have been carried out during the financial year or subsequent years. In view of the above facts and circumstances of the case, I did not find any reason to interfere in the f the A0 and hence Ground No. 2 and 3 are dismissed.”*

9.5 Before us the Ld. counsel of the assessee has submitted that lower authorities have not examined the documents of the assessee in support of creditworthiness as well as genuineness of the transaction. Before us, the Ld. counsel of the assessee has referred to page No. 351 of the paperbook, which is investment schedule of balance sheet of M/s UB engineering Ltd. In the said schedule investment has been shown in the assessee company i.e. UB Ostan (India) Private Limited amounting to ₹1,54,00,000/- as on 31<sup>st</sup> March 2012. The source of same has been claimed as out of own sources in the form of share capital and reserves and surplus as well as borrowings. Bank statement of M/s UB engineering Ltd showing



the said payment on 07/09/2011 to the assessee company is available on page 140 of the paperbook.

9.6 Similarly, annual report of VJM media Private Limited i.e. shareholder, is available on page 475 to 514 of the paperbook wherein investment in the assessee company is recorded.

9.7 In respect of Ostan Asia-Pacific Pte. Ltd, i.e. shareholder, the Memorandum & Article of Association are available on page 262 to 285 of the paperbook. The Consolidated financial statement for the entity for the year ended 31/12/2012 has been filed on page 506 to page 513 of the paperbook. A certificate of foreign inward remittance issued by the Standard Chartered Bank showing transfer of foreign currency equivalent to ₹2,19,99,300/- is available on page 186 of the paperbook.

9.8 The assessee has also filed bank ledgers of 'Yes Bank' showing receipt of money by way of share capital and share premium in its



books of accounts which is available on page 226 to 232 of the paperbook. Bank statement of the relevant period of Corporation Bank has also been filed on page 123 of the paperbook.

9.9 In our opinion, due to non-cooperation on the part of the assessee in assessment proceedings, part of the documents were collected by the Assessing Officer invoking section 133 (6) of the Act, but same are not explained to the Assessing Officer justifying nature and source of the credit by way of share capital and share premium. The additional evidence filed by the assessee before the Ld. CIT(A) have also not been considered. We find that these documents in support of the creditworthiness and genuineness of the transactions have not been referred by the lower authorities. The Ld. counsel before us has submitted that foreign shareholder of the assessee company is willing to appear before the Assessing Officer through authorized signatory and file all the necessary documents in support of its claim, despite that there is no one on



behalf of the Indian shareholders to cooperate in pursuing the proceedings. In view of the facts and circumstances and the interest of substantial justice, we feel it appropriate to restore this issue back to the file of the Ld. Assessing Officer for examining all the documents in support of claim of the assessee for substantiating nature and source of the credit in its books of accounts, in relation to share capital and share premium. The Ld. Assessing Officer shall give is finding with reasons on the issue of identity, creditworthiness and genuineness of the transaction in respect of the amount of share capital and share premium received. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The grounds 1 to 3 of the appeal are accordingly allowed for statistical purposes.

9.10 The ground No. 4 and 5 of the appeal relates to not considering capital work in progress of ₹1,72,79,051/-and expenses for legal



and consultancy charges of ₹31,58,584/-and travelling expenses of ₹16,38,822/-for further carry forward.

9.11 The Assessing Officer has mainly disallowed carry forward of the expenses in view of lack of information made available by the assessee during assessment proceedings. The relevant finding of the Assessing Officer in respect of work in progress of ₹ 1.72 crores is reproduced as under:

*“15.4 The “Capital Work in Progress’ is shown to have been added during the year under reference, but the assessee has not provided the facts regarding the block-wise/item-wise details of Capital Work-In-Progress, “where the stated assets are being kept/installed/erected, ownership details/ agreements for the places where such works are being undertaken/ where the machinery is being installed/ kept and have failed to provide the details of person to whom payments are made or are due, for such capital work-in-progress. The submissions again point to the standing facts that the assessee is claiming the works on other persons land as its own while the facts that the land never belonged to the assessee, the persons having possession of the land had no capability to sue-motto let the assessee use the land and it is without any hope, from the very beginning, that it belongs to the assessee. The assessee appears to have full knowledge of the status in these regard, since the beginning.*



*The authorized persons as per the KYC details received from the banks to operate the bank accounts of the assessee company shows that these persons are not in employment with the assessee company and at most some of them are the directors in the assessee company but having employment / contact with someone else having income receipts from someone else other than the assessee company. Further, the explanation, as provided, shows the lack of ownership and fails to provide the justification to establish the genuineness of the claimed expenditure towards addition of capital work-in-progress and also failed to justify the purpose of the incurring such expenditure on other persons property.”*

9.12 Similarly travelling expenses and legal and consultancy fee was not allowed to carryforward in absence of evidences in support of the claim.

9.13 The Ld. CIT(A) also upheld the disallowance of capital work-in-progress in view of the fact that even the land was not transferred to the assessee. The disallowance of legal and consultation expenses and travelling expenses was sustained in view of nonproduction of evidences.



10. Before us, the Ld. counsel of the assessee has justified incurring of expenses for capital work-in-progress and travelling and legal expenses. He submitted that all the details were duly provided to the lower authorities. He submitted that the assessee could not proceed with commercial operations due to UB group coming into legal crutches and therefore no benefit of the expenses is ever taken till date.

11. The Ld. DR on the other hand justified disallowance in view of no details of evidence in support of the same were filed before the lower authorities.

12. We find that the Assessing Officer has made the disallowance mainly in view of the fact that no supporting evidence were filed before him. The Ld. CIT(A) has also upheld mainly on this ground. We find that we have already restore the issue in dispute of examining of share capital and share premium received by the assessee in terms of section 68 of the Act to the file of the Ld.



Assessing Officer and therefore in the interest of substantial justice, we feel it appropriate to restore this issue of allowability of capital work-in-progress and legal and consultancy charges and travelling expenses back to the file of the Ld. Assessing Officer for deciding afresh. The assessee is directed to cooperate and file all the documentary evidences in support of its claim. The ground No. four and five of the appeal are accordingly allowed for statistical purposes.

13. In ground 6 and 7, the assessee is aggrieved with taxing interest income of ₹5,10,963/-separately as 'income from other sources'.

14. The contention of the assessee that said interest income should be reduced from the cost of project as the interest received arose from temporary deposit with banks pending application to capital work in progress. Alternatively, the assessee claimed that interest



income of ₹5,10,963/- should have been set off against unallocated expenses carried to the balance sheet.

15. Before us the Ld. counsel of the assessee submitted that issue in dispute is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of **CIT Vs Bokaro steel Ltd 236 ITR 315(SC)**. The Ld. counsel also referred to the decision of the Hon'ble Delhi High Court in the case of **NTPC Sail Power Company Vs CIT in ITA No. 1238 of 2011**, wherein it is held that if the receipt is 'inextricably linked' to the setting up of the project, it would be capital receipt not liable to tax but ultimately to be used for reducing the cost of the project. The Ld. counsel of the assessee before us submitted that in view of the same logic the funds invested by the assessee and the interest earned was inextricably linked with the setting up of the plant and therefore interest earned on fixed deposit must be adjusted with a capital work in progress.



16. The Ld. DR on the other hand submitted that issue of treating interest receipt as capital receipt depends on the finding whether the business of the assessee was set up. He submitted that in the case of the assessee it was manufacturing unit and therefore said it can be called as set up when raw material is purchased and processed for the first time by the said unit.

17. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute in the ground raised is whether the interest income could be adjusted against the capital work in progress. In view of the decision of the Hon'ble Delhi High Court in the case of NTPC sail Power Co Ltd (supra), which has been cited by the assessee counsel, the assessee is required to establish whether the business of the assessee was set up and if the receipt is inextricably linked with the setting up of the project, then only the said receipt could be adjusted against capital work in progress or cost of the project. Since, this



issue of setting of the business has not been decided in the case of the assessee by the lower authorities, therefore we feel it appropriate to restore the issue in dispute also to the file of the Ld. Assessing Officer for deciding afresh in accordance with law. The ground No. 6 and 7 of the appeal of the assessee are accordingly allowed for statistical purposes.

18. In the result, the appeal of the assessee is allowed for statistical purposes.

**Order pronounced in the Court on 20/07/2022.**

Sd/-

**(SANJAY GARG)  
JUDICIAL MEMBER**

Sd/-

**(OM PRAKASH KANT)  
ACCOUNTANT MEMBER**

Mumbai;  
Dated: 20/07/2022  
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.

//True Copy//

BY ORDER,

(Sr. Private Secretary)  
**ITAT, Mumbai**