

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER**

**ITA NO. 2251/MUM/2019 (A.Y: 2013-14)**

Luhariwala Finance & Investment Pvt. Ltd., A-204, Corporate Centre Premises Andheri Kurla Road, Marol Pipeline Andheri (E), Mumbai - 400059  <b>PAN: AAACL0784F</b>	v.	ACIT – 10(2)(1) Room No. 509, 5 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	:	<b>Shri Ashok Bansali</b>
<b>Department by</b>	:	<b>Shri Mehul Jain</b>
<b>Date of Hearing</b>	:	<b>15.06.2022</b>
<b>Date of Pronouncement</b>	:	<b>06.09.2022</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)-17, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 18.02.2019 for the A.Y.2013-14.
2. Brief facts of the case are, the return of income was filed by the assessee on 30.09.2013 declaring total loss of ₹.41,95,800/-. The case

was selected for scrutiny and notices u/s. 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") along with the questionnaire were issued and served on the assessee. In response AR of the assessee attended and submitted the relevant information as called for.

**3.** Assessee is engaged in the business of dealing in shares, securities and finance etc., during the assessment proceedings Assessing Officer observed that assessee has issued 84000 shares with face value of ₹.100 at the premium of ₹.400/- amounting to ₹.3,36,00,000 to the following parties: -

<b>Sr.No.</b>	<b>Name of Share applicant to whom share allotted at premium</b>	<b>Number of Share allotted during the year</b>	<b>Share capital issued at face value of Rs. 100</b>	<b>Securities Premium @ Rs. 400/- per Share</b>
1	Forever Flourishing Fin& Invest. Pvt.Ltd.	41,000	41,00,000	1,64,00,000/-
2	Golden Medows Export Pvt. Ltd.	4,000	4,00,000	16,00,000/-
3	Innova Commercial Pvt. Ltd.	5,000	5,00,000	20,00,000/-
4	Logical Financial Consultants Pvt. Ltd.	12,000	12,00,000	48,00,000/-
5	Nilachal Dealers Pvt. Ltd.	7,000	7,00,000	28,00,000/-
6	Shalimar Niketan Pvt. Ltd.,	15,000	15,00,000	60,00,000/-

**4.** When the assessee was asked to submit the details of the shares which were issued during the current assessment year, the Ld. AR of the assessee furnished Form No.2, valuation of equity shares of the company as on 31.03.2012 and also submitted confirmations, return of income and bank details of the allottees of the shares. In order to verify the

genuineness, identity and creditworthiness of the above said parties  
 Assessing Officer issued summons u/s. 131 of the Act.

**5.** The Assessing Officer observed that M/s. Forever Flourishing Finance & Investment Pvt. Ltd., and M/s. Golden Medows Export Pvt. Ltd., head offices are situated in Mumbai. Accordingly, he issued summons for physical presence with the various details of transactions relating to investments in the assessee company. In response, common director of the above companies Shri Krishna Khadaria appeared before the Assessing Officer and recorded his statement. He was asked to explain, in response, he claimed that the investment made by them out of their own capital. However, Assessing Officer observed from the Axis Bank account submitted by them that they have received various amounts in its bank account immediately or a day before, they issued cheques to the assessee company. A statement was shared with them. In response they have submitted as under: -

<b>Date</b>	<b>Cheque Received From</b>	<b>Amount</b>	<b>Nature of receipt</b>
2/5/2012	Comfort Deal Trade Pvt. Ltd.	4,000,000	Amount received towards share Capital
10/5/2012	Evernew Conclave Pvt. Ltd	2,800,000	Amount received towards share Capital
21/5/2012	Blossom Deal Com Pvt. Ltd	5,500,000	Amount received towards share Capital
16/10/2012	Thai Malai Golf Resort & Spa Pvt. Ltd.	200,000	Amount received towards refund of loan advanced in earlier years

<b>Date</b>	<b>Cheque Received From</b>	<b>Amount</b>	<b>Nature of receipt</b>
18/10/2012	Intime Real Pvt. Ltd	1,550,000	Amount received towards unsecured loans
18/10/2012	Pranjal Trading Co. Pvt. Ltd.	1,000,000	Amount received towards unsecured loans
18/10/2012	Gawarja Merchants Pvt. Ltd	350,000	Amount received towards unsecured loans
22/10/2012	Seawood Hospitality and Realty Pvt. Ltd.,	2,500,000	Amount received towards refund of advanced during the year
5/11/2012	Pranjal Trading co. Pvt. Ltd.	5,000,000	Amount received towards unsecured loans

<b>Date</b>	<b>Cheque Received From</b>	<b>Amount</b>	<b>Nature of receipt</b>
16/10/2012	Globe Soya Products Ltd.,	20,00,000	Repayment of loan given in earlier

**6.** From the above statement Assessing Officer observed that three companies namely M/s. Comfort Deal Trade Pvt. Ltd., M/s. Evernew Conclave Pvt. Ltd., and M/s. Blossom Deal Com Pvt. Ltd., in which Shri Devesh Upadhyay is a common Director and are Kolkata based companies. The Assessing Officer observed in his order that the Kolkata Investigation wing has found in search operation carried in the case of companies controlled by Devesh Upadhyay that he is involved in providing accommodation entries by relying on the statement recorded from Devesh Upadhyay and also Assessing Officer directed DDIT(Investigation), Kolkata to find/trace the four companies who are having physical addresses in Kolkata. Assessing Officer received report from DDIT(Inv.), Kolkata that they have visited the addresses on 23.03.2016 and they found no board or name plate in the name of above stated companies

anywhere at the above said addresses and also they have enquired from the caretakers of the building and no one could give any information regarding these companies. Therefore, they could not summon notice u/s. 131 of the Act to any of those parties.

**7.** Assessee was also given show cause notice for confronting the report of the commission from DDIT(INV.), Kolkata. In response assessee submitted as under: -

*".....(i) We have the parties under sr. no. 1 to 4 of the said Report were not available noted that as per the Inspector's report as in his opinion there was no board or name plate found at the said addresses and he merely made enquiries from the caretaker/ guard of the building & also local enquiries the details thereof have not been stated in the said report. In fact the said inspector did not even visit the room on the floor mentioned in the said addresses which could have thrown light on the existence of such persons. Thus it will be seen that the said inspector has given the report very casually without bringing any acceptable evidence to establish that the report of the inspector is neither here nor there & is only a pretence of formality.*

*ii) On the contrary, our clients have made a search on the website of Ministry of Corporate Affairs (MCA) of these companies & it is noted that all of them are registered at the addressees as mentioned in the report & it AT:2013-14 is noted that all of them are registered at the addresses as mentioned in the report & are active who have also filed the necessary returns as required under the Companies Act. A copy of the master data of each of the companies as available on the website as above is enclosed which speak for itself. It will not be out of place to mention that the above companies are also borne out in the record of Income-tax Dept., Kolkata as per acknowledgement of return of income filed by them already furnished vide our letter dated 05.01.2016 which itself establishes their existence. It is, therefore, submitted that no adverse inference can be drawn against us based on the Inspector's report as above."*

**8.** After considering the submissions of the assessee, Assessing Officer found it to be not acceptable. He observed that assessee has issued shares to these parties who are habitually an accommodation entry provider companies. Further, he observed that the companies in which Devesh Upadhyay is a common director are the companies involved in providing accommodation entries and he heavily relied on the statements given by him before DDIT(Inv.), Kolkata and accordingly, he made addition u/s. 68 of the Act, only to the extent of share premium received by the assessee and not the total receipt of share capital.

**9.** Aggrieved assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions before the Ld.CIT(A). After considering the detailed submissions of the assessee Ld.CIT(A) dismissed the appeal filed by the assessee with the following observations: -

*"5. In view of the above discussed factual matrix in the background of legal principles laid down by various judicial reviews, it is clear that the claim of share capital with huge premium is not an ordinary investment in a normal course of business. The AO has not only accepted the information based on the statement of entry operator but had made enquiries through commission issued to the DDIT(Inv), Calcutta. He has provided due opportunity on every stage to the appellant. The investor companies are either, themselves a Shell company or they have been funded through the Shell companies. The argument of details given on MCA Website in the background of investigation report that such company do not exist, has got no evidentiary value. As held by Hon'ble Delhi High Court, in case of Nova Promoters and Finlease (P) Ltd.(supra), the information filed with ROC are legal formality and every company has to comply with such formality and it does not add any creditability or evidentiary*

*value. The argument that entry operator, Mr. Devesh Upadyay had not been allowed to be confronted, sounds hollow. The complete Search & Seizure operation in case of Devesh Upadyay and associated business entities, has unearthed the scam of accommodation entry to various unscrupulous business entities who wants to launder their own unaccounted fund in the garb of their share capital/premium, unsecured loan etc. Thus, the conclusion of the AO has been strengthened by the investigation carried out in case of Mr. Devesh Upadyay. The crux of the issue is the manipulated financials, lack of profit making apparatus of lender companies. The argument that in case of some of the companies, specific adverse finding has not been given by the AO is again not based on facts. The fact remained that all these companies have got connection with Calcutta based entry operators and are basically Shell company, created and maintained for the purpose of such introduction of unaccounted fund in the garb of share capital/premium like in case of appellant company. The plethora of judgment are available, some of them have been quoted in the preceding para which suggests that wherever, the AO is in possession of material, which discredits and impeaches the particulars submitted by the appellant and links with the accommodation entry provider, the filing of assessment details, PAN, payment through cheque, ROC details etc., are not enough. In such situation, the burden is heavier and such burden cast upon the appellant company with regard to ingredients of section 68 have not been complied with and thus, the AO is justifiably concluded and taxed Rs. 3,36,00,000/- u/s.68 of the Act. Ground of appeal filed on this issue is therefore dismissed."*

**10.** Aggrieved assessee is in appeal before us, raising following additional/amended grounds of appeal: -

*ADDITIONAL/AMENDED GROUNDS OF APPEAL*

*1. The Id. CIT(A) in confirming the addition in respect of share premium received u/s 68 of the Act erred in not appreciating that once the genuineness of transactions in respect of receipt of share capital has been accepted then the share premium received from the very same shareholders could not have been doubted and more so when the premium received did not exceed the fair market value of the shares determined in accordance with Rule 11UA of the IT Rules, 1962 r.w.s. 56(2)(viib) of the Act.*

*2. Without prejudice to the preliminary ground as above, the Id. CIT(A) erred in holding, in conformity with the AO, that the cash credit*

*with regard to share premium was not explained leading to the addition of Rs. 3.36 crs. u/s 68 of the Act.*

*2. i. In doing so, the Id. CIT(A) erred in*

*a. not considering pragmatically the material, evidence & submissions made & filed before him,*

*b. not appreciating that the AO did not confront the statement of Shri Devesh Upadhyay used behind the back of the appellant and also did not afford an opportunity to the appellant to establish its case,*

*c. not appreciating that the enquiries made by the DDIT (Kol) in pursuance of commission issued u/s 131(1)(d) of the Act were not in accordance with law & was merely based on vague report of his inspector,*

*d. holding that the four Kolkata based share applicant companies were not in existence which is not borne out from the record in as much as the Inspector report only said that the said companies were not found at its addresses,*

*e. not appreciating that the two of the Mumbai based companies complied with the summons issued u/s 131 of the Act & confirmed the transactions with the appellant by tendering all the necessary documents and explanations in the matter,*

*f. not appreciating that major portion of source of fund of M/s Forever Flourishing Finance & Investments (P) Ltd, a Mumbai based share applicant company was not from the companies allegedly controlled & operated by Shri Devesh Upadhyay,*

*g. not appreciating that in case of M/s Golden Meadows Export (P) Ltd, a Mumbai based share applicant company, source of fund was not from any of the companies allegedly controlled by Shri Devesh Upadhyay,*

*h. not appreciating that M/s Logical Financial Consultants (P) Ltd. and M/s Shalimar Niketan (P) Ltd., Kolkata based share applicant companies were not controlled & managed by Shri Devesh Upadhyay,*

*i. not appreciating that merely because companies in question had Kolkata connection, adverse inference could not be drawn and in any event of the matter not all the share applicant companies have Kolkata connection and/or source of fund of all the said companies was not from Kolkata companies,*

*j. relying upon decisions which are distinguishable on facts, and*

*k. not considering the decisions direct on the issue relied upon by the appellant.*

*3. The Id. CIT(A) erred in relying upon extraneous consideration in confirming the addition."*

*Your appellant submits that the addition made by the AO & confirmed by the Id. CIT(A) be deleted and in the alternative suitable relief be allowed.*

*Your appellant submits that the additional/amended grounds of appeal raise pure question of law & do not require investigation of facts and, therefore, the Hon. Tribunal may be pleased to admit & adjudicate the same in place of the grounds of appeal filed originally."*

**11.** At the time of hearing Ld. AR submitted as under: -

*"1. It is confirmed that the appellant had indeed filed with not only the Ld. AO but also with the Ld. CIT (Appeals) full working of fair market value of equity shares of the appellant as per Rule 11UA justifying the premium. No fault was found with the working. In fact, out of the paper book filed with the Hon'ble bench, page nos. 1 to 48 thereof, which, inter-alia, also contain the details U/r 11UA have also been filed during the course of the first appeal. It may please be appreciated from the same (page 45 of the paper book) that the fair market value U/R 11UA comes to Rs. 584.06 per share against which the appellant has issued the shares @Rs. 500 each. (including premium Rs. 400 each).*

*2. The Ld. CIT (Appeals) has disregarded the above details and has, at many places in his order, referred to the "huge premium" at which the shares were issued. Example: page 10 of the CIT (A) order: para 4.2: In the beginning of the para it is said that " The share investments have been made with huge premium." In view of this important omission, the addition made by the Ld. AO as confirmed by the CIT (A) order may please be set aside.*

*3. The Ld. CIT (Appeals) has been, while passing his order, been guided by a pre-set notion about the assesseees with "Calcutta connection". Example: page 10 of the CIT (A) order: para 4.2: 3rd to 6th lines read as follows: "All the investors have got a Calcutta connection for their source of fund. Either they are based at Calcutta or their source of fund are from Calcutta. " It is submitted that the CIT (A) order is based not on facts and law but on the exemplified*

*pre-conceived notions and biases, and therefore, deserves to be set aside.*

*4. It is submitted that the Ld. Assessing Officer has accepted the equity capital face value part and has added the premium part. It is submitted that receipt of capital and premium by a single cheque (the same credit) cannot be considered partly explained and partly unexplained. It may please be appreciated that once the receipt of share capital has been accepted as genuine within the ken of Section 68 of the Act, there is no reason for the Ld. AO to doubt the share premium component received from the very same shareholders as bogus. In support of this, the appellant relies on the judgement of Hon Kolkata ITAT in case of Savera Towers Pvt. Ltd. (page nos. 198 to 208 of paper book).*

*5. The Ld. DR has tried to canvass confusion by suggesting that the allowing of capital and addition of premium could be a mistake on the Ld. AO's part. It is submitted that it was a clear intention of the Ld. AO to only tax the premium amount and the same is absolutely clear by the heading of para 4 of the assessment order which is titled 4. Addition of Share Premium Received u/s 68 of 1. T. Act (page 2 of the assessment order: top). The appellant submits that there is no basis for such a guess as there are no proceedings u/s 154(3) on record.*

*6. It is submitted that the assessment order is largely based upon an alleged statement by one Mr. Devesh Upadhyaya. The statement was not supplied to the appellant nor was the appellant confronted with the same. The statement was not tested by the Ld. AO. The Ld. AO even did not make any enquiry as to the treatment to the investment and the preceding receipts in the investor companies' assessments. Thus any reliance placed by the Ld. Assessing Officer on the same and the additions made by the Ld. Assessing Officer on the basis of the statement deserves to be set aside.*

*7. In any event, the Ld. Assessing Officer has not even suggested any relation of 3 shareholders, viz. Golden Meadows Exports P. Ltd., Logical Financial Consultants P. Ltd. and Shalimar Niketan P. Ltd. with the said Mr. Devesh Upadhyaya. Still premium received from these shareholders has also been added to appellant's income.*

*8. The Ld. Assessing Officer has made additions in relation to capital subscribed by 4 investors who have subscribed to about 46.5% of the capital citing the reason of their non-appearance before him. At the same time, he has also made additions in respect of the other 2 investors who have subscribed to about 53.5% of the capital and who in fact appeared before him and confirmed the fact of investment and*

*no fault has been found or suggested with their statement by the Ld. Assessing Officer.*

*9. In case of Forever Flourishing Fin & Invest P Ltd. the Ld. Assessing Officer has made addition citing reason of Flourishing, in turn, having received funds from companies connected with said Mr. Devesh Upadhyaya. However, when the director of Forever Flourishing Fin & Invest P Ltd. appeared before him he was not confronted about this alleged connection. The Id. Assessing Officer has made addition in relation to the entire premium received from Forever Flourishing Fin & Invest P Ltd. even though, by his own admission, as per table given on page 4 of the assessment order, out of the funds invested by Forever Flourishing Fin & Invest P Ltd. only 48.78% of the invested funds were alleged to have "Devesh Upadhyaya connection".*

*10. In case of the investor Golden Meadows Export P. Ltd. the Ld. Assessing Officer is totally silent and has cited no reason at all behind the disallowance.*

*11. A combined reading of 6 to 10 above would show that the Ld. Assessing Officer had made up his mind to make the addition, come what may and thus he has harped on minor perceived negatives and has plainly ignored the big positives in front of him.*

*12. As far as the factum of 4 investors not appearing before him, the Ld. Assessing Officer has kept silent on and has ignored appellant's rejoinder to the DIT (Inv)'s report submitted to him. (Pages 49-54 of the paper book). To repeat, the deputed inspector merely enquired with the watchmen / caretakers and did not even visit the relevant offices. In any event, if he had problem with finding the directors he ought to have served the documents by affixture but that was not done.*

*13. We bring to your honors' attention the judgement of Hon. Delhi HC in case of Steel & Alloys Ltd. ( page nos. 73-130 of the paper book). Special attention is kindly requested towards para 42 of the order (page nos. 106 to 109 of the paper book) according to which it was decided that the case should not be sent back to the AO because that would amount to allowing a fresh inning to the AO for his negligence (and thus putting the AO at a higher pedestal for no fault of the appellant).*

*14. The Ld. DR, in passing, had orally alleged that some of the Kolkata shareholders were struck off by the relevant ROC. We request the Hon. Bench to kindly ignore the remark as: (a) It is not borne out by the assessment order or CIT (A) order; (b) Even if true, had no bearing on the assessment or appeal; and (c) No case has been made out by the Ld. DR for admitting the new evidence, even if this*

*allegation is supported by documentary evidence. In this context, the appellant relies on the judgement of Hon. Delhi HC in the case of CIT-3 Vs. Five Vision Promoters P. Ltd. rendered on 27.11.2015 in IT Appeal nos. 234 to 236 of 2015 in which the Hon. High Court has held that subsequent events have no bearing while applying Section 68.*

*We further rely on the paper book submitted, especially our written submissions on pages 57 to 69, details filed on pages 164 to 164 and submissions vide page nos. 165 to 171 of the paper book."*

**12.** On the other hand, Ld.DR brought to our notice Page No. 2 and Page No. 12 of the Assessment Order and also Page No. 3 of the Ld.CIT(A) order to submit that the share premium received by the assessee is only from the companies involved in providing accommodation entries. He vehemently argues that the additions sustained by the Ld.CIT(A) may be considered and decide in favour of the revenue.

**13.** Considered the rival submissions and material placed on record, we observe in this case that assessee has issued share capital to six parties out of which two parties are from Mumbai and four parties are originate from Kolkata. The Assessing Officer has issued summons to the parties who are originate from Mumbai and enquired with them the details of investment in shares in the assessee company. These companies i.e., M/s. Forever Flourishing Finance & Investment Pvt. Ltd., and M/s. Golden Medows Export Pvt. Ltd., have invested ₹.2,00,00,000/- and ₹.20,00,000/- respectively in assessee company. Assessing Officer has

enquired with them certain discrepancies noticed in the bank statement for which they have given the detailed information from whom they received funds in their bank. Except three transactions involving ₹.1.23 crores received from three companies which are originates from Kolkata and incidentally these companies also controlled by Devesh Upadhyay and has not found any other discrepancies in the transactions involving investment in the companies having traces in Mumbai.

**14.** With regard to Kolkata based companies Assessing Officer has issued summon to DDIT (Inv.), Kolkata to investigate these parties and they found that none of these parties are in existence in the address provided by the Assessing Officer. On enquiry by the Assessing Officer with the assessee and assessee has submitted that the Inspector who has visited the spot to verify the address has casually visited the addresses and has not enquired seriously and these investors are in existence in the same address and further, it was submitted that these companies are in existence as per website of Ministry of Corporate Affairs and also these are all companies who are in existence of the record of the Income Tax Department and it was informed that all these parties are in existence in one of the building which contain several floors. Therefore, the Inspector

has not visited any of the floors except made the submission that there is no name board or name plate found in the above said addresses.

**15.** We observe from the record that Assessing Officer has relied fully on the statement and investigations made by DDIT(Inv.), Kolkata in the case of Devesh Upadhyay case. However, we observe that assessee has submitted all the relevant information relating to the parties like, PAN, details in Ministry of Corporate Affairs Portal and importantly all the investments were received through banking channels only. Further, we observe that Assessing Officer has no doubt, doubted all the six parties who are the investors in the company. However, he proceeded to make the addition only to the extent of share premium received by the assessee. In our view this is contrary stand of the tax authorities that they accept the face value of the shares invested by these parties and doubts only the share premium received by the assessee. Further, assessee has also filed the relevant valuation of equity shares of the company as on 31.03.2012, confirmations from these parties, Return of Income and bank account of all the parties. Therefore, it clearly indicates that the shares investment by these parties are found to be genuine and revenue authorities cannot accept part of the investment as genuine and rest of the investment as non-genuine. The valuation of shares submitted by the assessee justifies

the allotment of shares with premium and it is also fact on record that Assessing Officer has not doubted the valuation of shares in this case. Therefore, we do not find any reason to uphold the order of the Ld.CIT(A) who has dismissed the appeal filed by the assessee by applying preponderance of human probabilities. Accordingly, grounds raised by the assessee are allowed.

**16.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 06<sup>th</sup> September, 2022

Sd/-  
**(SANDEEP SINGH KARHAIL)**  
**JUDICIAL MEMBER**

Mumbai / Dated 06.09.2022  
Giridhar, Sr.PS

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**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

(Asstt. Registrar)  
**ITAT, Mum**