

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI. GAGAN GOYAL, AM

आयकर अपील सं/ I.T.A. No.3258/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

M/s Nav Consec Pvt Ltd C/o Sanjay Shah, 108, 1 st Floor Sujata Niketan, Rani Sati Marg Malad East, Mumbai-400097	बनाम/ Vs.	Income Tax Officer, Ward 9(2)(3) Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCN1435A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Anil Surana, CA (written Submission)	
Assessee by:	Dr Mahesh Akhade, CIT DR	

सुनवाई की तारीख / Date of Hearing: 21/11/2022
घोषणा की तारीख /Date of Pronouncement: 25/01/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee company against the order of the Commissioner of Income-tax (Appeals)-21, Mumbai dated 04/03/2016 assessment year 2011-12.

2. The main grievance of the assessee is against the action of the Ld.CIT(A) confirming the addition of Rs.9,97,50,100/- made by Assessing Officer [AO] under section 68 of the Act.

3. The brief facts are that the Assessing Officer noted that assessee had increased its paid up capital by Rs.20,49,900/- and the security premium account showed amount of Rs.9,97,50,100/-. The Assessing Officer noted that the shares were issued to the following persons:-

Sr.No.	Name of the shareholder	Dt of allotment	No. of shares allotted	Face Value	Share premium charged	Premium per share	Total amount (Rs.)
1	N & V Intrade (P) Ltd	30.04.2010	20,00,000	20,00,000	0	0	20,00,000
2	Destiny Goods (P) Ltd	31.03.2011	24,950	24,950	4,98,75,050	1,999	4,99,00,000
3	Future Vincom (P) Ltd	31.03.2011	24,950	24,950	4,98,75,050	1,999	4,99,00,000

And the **AO acknowledged** in his own words that there was **no cash** consideration as under:-

“The assessee issued the above capital for other than for a cash consideration and lieu of this allotment the assessee received shares of other companies stated to be of the equal value.”

4. The Assessing Officer after giving a finding of fact that the assessee had issued the aforesaid capital other than for cash consideration which means in lieu of this allotment of shares of assessee, it received shares of other companies stated to be of the equal value. The Assessing Officer asked the assessee to file the confirmation of account from all parties which had subscribed to the shares with complete addresses, PAN, proof of filing of return, source of funds supported by bank statements, justification for premium charged on the shares issued alongwith the basis of valuation and method applied, copies of the minutes of the Board for

increasing of the share capital, copies of the share application form, etc. and in response, the assessee filed the following reply:-

“1. With reference to confirmation of account from all the parties, we would like to state that we have already submitted the same in our earlier submission dated 09-12-2013. Your assessee in the impugned year, deals in trading of shares of high growth potential private limited companies with a focus towards Indian Companies and related commodities proposes to acquire shares of certain such target companies and issue its own shares as consideration for it.

2. Your assessee has for the purpose of valuation of shares performed a high-level desktop-based limited scope value analysis of the company purely on information available in the public domain. The management decided for the purpose valuation of its shares for fresh issue in the impugned year that the discounted cash flow approach (DCF) would be the most suitable method to do the value analysis in this case'

3. With reference to your good self calling for justification of premium charged on the shares issued, it is submitted that the shares have been valued as per the widely accepted Discounted Cash Flow method (DCF) which arrived at a value of more than Rs.2,000/- per share. Copy of the valuation report submitted to the shareholders by way of a presentation at the time of issue of shares at a premium is enclosed herewith, It is to be noted that shares cannot be valued only on the face value or book value as these methods fail to recognize the future potential of the which is best captured while valuing them by the DCF method. Furthermore, DCF is prescribed as one of the methods for valuation of unquoted equity shares under the Act. Even Otherwise, Share premium is a capital receipt and It is hereby stated that, firstly, issuing shares at a premium is a commercial decision of the business of the assessee company. Also issue of shares as in the present case for consideration other than cash is well within the provisions of the Indian Companies Act, 1956.

Further, as regards the taxability of such unreasonable share premium u/s.68 of the Act, it is submitted that:

- a) The jurisdiction for calculation of premium is provided herein.
- b) The nature and source, as required by provisions of Section 68 of the Act, for allotment of shares at premium is explained as the same has been issued and credited in the books of the assessee company for procurement of shares of other companies under written agreement between the assessee company as well as the allottees of the shares for consideration other than in cash. Moreover, the same have been confirmed by the allotted companies u/s.133(6) of the Act, to your good office by submission of confirmation as well as other supporting documents called for. It is also pertinent to state that the assessee company has provided

valuation of the companies whose shares have been purchased by it from the allotted companies for consideration other than in cash and such consideration is more than the book value of those shares and therefore have not been purchased for under consideration.

c) An amendment was brought into Section 68 w.e.f, 01-04-2013 only relevant from A.Y.2013-14 and subsequent year by finance act, 2012. Wherein the legislature for the first time introduced the concept of furnishing explanation to the assessing officer w.r.t. share premium, share capital and share application money and should the assessee not furnish any explanation or furnish an explanation not satisfactory to the assessing officer can be added to the total income of the assessee. Now it is pertinent to note that this amendment is brought in light of the brother amendment brought by the same finance Act, 2012 w.e.f, 01-04-2013 in Section 56(2) of the Act. The brother amendment required that any issue of shares in excess of the fair market value of the company has to be charged to tax as 'income from Other sources', in the light of this background, it is submitted that firstly, these provisions were introduced in the act as there was no previous provision in the act to deal with such issues and the courts on a consistent basis ruled in favour of the tax payers and denying any additions on such pretexts casted by the department."

5. However, the Assessing Officer did not accept the reply of the assessee for the following reasons:-

“ a. The assessee company was incorporated on 08.12.2009 and filed its first return of income for the A.Y 2010-11, During the year the assessee company has introduced the share capital of Rs.20,49,900/- and share premium of Rs.9,97,50,100/-.

b. The valuation as submitted by assessee of its shares with certificates issued by M/s. Madhu Securities Pvt. Ltd., is unsigned and was without any supporting documents to the facts and figures relied therein. The projections shown there in does not matches the actual results of the assessee company as is apparent from the record. In the said valuation, the valuer relied purely on the management inputs and the estimates given by the management. There is no basis of any working given in the copy of the report filed by assessee on record. The estimate relied upon and the projections relied upon does not match the actual figures disclosed in the assessee's subsequent returns filed, For example the EBDITA for FY 2012-13 has been projected at Rs.25 crores, where as in the actual audited financials of the assessee does not reflect such figures. Similarly for the F.Y 2013-14 the EBDITA has been shown at Rs.31.25 crores where as in actual there is no such reflection by way of advance tax payments by the assessee company. Thus it is proved that the estimates relied upon by the

management are unrealistic and does not justify charging of such a huge premium on allotment of shares in the year under consideration.

c. The book value of the share as on 01.04.2010 is only Rs.0.73/- as per the working u/r. IIUA of the IT Rules. The assessee however allotted shares and charged premium from the above persons for Rs.1,999/- per share. (1+1999).

d. The assessee company being a new company, the book valuation of each of the share as on date of issue at par value is very nominal value i.e a maximum of Rs.10/- or Rs.0.73/- at par based on its market valuation. The above facts available on record clearly indicate that, the charging of premium at Rs.1,999/- per share is not at all justified and assessee received excessive amount by way of premium. Therefore the nature of the transaction remains unexplained.”

6. And thereafter, the Assessing Officer was pleased to make an addition of Rs.9,97,50,100/- under section 68 of the Act (share premium was brought to tax and not the share capital). Aggrieved, the assessee preferred an appeal before the Ld.CIT(A) who was pleased to confirm the same but was also pleased to add the share capital and thus, he enhanced the same with Rs.2,50,000/-. Thus made total addition under section 68 of the Act Rs.10,19,00,000/-. Aggrieved by the aforesaid action, the assessee is before us by raising following grounds:-

1. For that the order of the Ld. CIT(A) is arbitrary, illegal and bad in law.
2. For that the Ld. Commissioner of Income Tax (Appeal) erred in confirming the addition of Rs. 9,97,50,100/- made by the Ld. Assessing Officer by assessing the share capital and premium as unexplained cash credit whereas admittedly the identities of the allottees was proved and the share applicants in response to the notices u/s 133(6) issued to them confirmed the transactions and submitted evidences in support of the shares sold by them to the appellant company in consideration of which the shares were allotted to them.
3. For that Ld. Ld. Commissioner of Income Tax (Appeal) erred in holding that proviso to Section DO inserted by the Finance Act, 2012 is retrospective. Even otherwise the shares having been allotted to the subscribers against investments purchased from them there is no question of explaining the source of source.

4. For that the Ld. CIT(A) erred in drawing adverse inference on the count that the agreement between the appellant and N & V Intrade was executed in Kolkata whereas the Registered Office of both the companies were situated in Mumbai.

5. For that the Ld. CIT(A) erred in drawing adverse inference on account of high share premium charged -wherein the share premium is a capital receipt. The issue is squarely covered by the decision of jurisdictional Dombatj High Coxirt in the case of Vodafone Services India Pvt. Ltd. reported in

6. For that the Ld. CIT(A) erred in drawing adverse inference on account that the appellant did not explain the source from which the subscribers acquired the shares sold to appellant company whereas the appellant was not required to seek such details from them.

7. For that the Ld. CIT(A) erred in drawing adverse inference on account that the . appellant did not file the details of investments of the allottees as on 31.03.2010 and 31.03.2011 and the investments purchased and sold during the said period by them

whereas the appellant had no reason to posses the said details.

8. For that the Ld. CIT(A) erred in drawing adverse inference on the count that the appellant did not produce the share certifies relating to investments. Had the appellant did not purchase the investment from the allottees there was no question of assessing the value of shares purchased from the allottees as unexplained cash credit.

7. We have heard both the parties and perused the records. Before us, the main ground raised by the assessee is that no addition could have been sustained under section 68 of the Act, since *no sum of money* has been involved in the whole transaction of Rs. 10,19,00,000/-. According to the Ld.AR, section 68 of the Act, comes under the short title “**Cash Credits**” and the opening expression is “Where any *sum* is found credited in the books of an assessee. Therefore, according to the Ld.AR, the expression “*sum*” means an amount of money and the short title “Cash Credit” before section 68 of the Act also indicates that amount of Credit is cash, and not in any other form viz shares, etc; and for that proposition, he relied on the judgment of the Hon’ble Supreme Court in the case of H.H. Shri Rama Verma vs CIT (1991) 57

Taxman 139 (SC) wherein the Hon'ble Supreme Court, though in the context of section 80G(2)(a) of the Act, held that the expression "*sums*" occurring in section 80G of the Act did not include any donation made in kind in the shape of shares. We note that the assessee company in lieu of its shares (on a premium) has received shares of other companies of equal value as found, as a matter of fact by the Assessing Officer at para 3.1 of the assessment order (supra). Thus, this transaction is in the nature of barter/exchange. We note that even though no Cash/Sum of money was involved in the transaction, however the assessee when called upon to prove the identity, credit worthiness and genuineness of the share-subscribers filed confirmation from three (3) legal entities (Private Limited Companies), their respective PAN; Income Tax Return (ITR); Financial of these companies; Bank-Statements etc. And the AO had issued notice u/s 133(6) of the Act to these share subscribers which directly replied to the AO by filling the requisite documents like their memorandum of Association, minutes of the board meeting, resolution etc. Thus we note the assessee had discharged the burden to prove the identity, creditworthiness at genuineness of the three (3) share applicants. And the AO couldn't find any infirmities in these documents filed by the assessee/share-subscribers (filed directly by them pursuant to AO's notices). So the deeming provision u/s 68 of the Act was not attracted. And that must be the reason why the AO didn't add in the assessment order the share-capital of Rs. 2.50 lakhs even though he made addition of share premium, which also he couldn't have done because proviso u/s 68 of the Act took effect from 01 April 2013 onwards (i.e, from AY 2013-14 onwards) which also we will discuss [infra] separately.

8. Coming back to the contention of Ld.AR that section 68 of the Act is not attracted in the facts of the case because, there was no cash credit in the whole share allotment and was only barter/exchange, we find force in this ground raised by the assessee in the aforesaid facts and circumstance of the case. And for that we rely on decision in the case of **M/s V R Global Energy Pvt Ltd vs ITO** in Tax case (Appeal) No.246 of 2017 before the **Hon'ble Madras High Court** and by judgment dated 06.08.018 it was decided in favour of the assessee. The facts of that case [M/s V R Global Energy Pvt Ltd] was that the assessee was a Company carrying on business of manufacture of Wind Electric Generators and parts of Wind Electric Generators. That **assessee M/s VR Global Energy Pvt. Ltd** had filed its return of income for the assessment year 2012-13 on 30.9.2012 declaring income of Rs.40,46,570/-. In the balance sheet, the assessee showed Rs.90,18,00,000/- as share premium as on 31.03.2012 and had also introduced share capital of Rs.16,70,000/-. Thus, the assessee had issued share capital of total value of Rs.90.34 Crores, out of which, the paid up value of shares allotted was Rs.61.7 lakhs. And the balance of Rs.90.18 Crores was shown in the share premium account. And in that case, it was an admitted fact that the entire share premium and the paid up value was apparently by book adjustment. According to the assessee, one Smt. Vathasala Ranganathan was a partner holding 50% share in the firm M/s. Shriram Auto Finance, who had paid various advance amounts to banks and other institutions on behalf of the companies as per the particulars given below:

Name of the company	Amount
Century Wood Limited	8.25
TTG Industries Limited	34.15
Other	18.00

9. In the books of account of M/s. Shriram Auto Finance, a total amount of Rs. 60.67 crores was shown as receivable from the companies named above. This was reflected in the balance sheet of M/s Shriram Auto Finance as on 1.3.2012. The above said companies assigned their liability payable to M/s.Shriram Auto Finance to the assessee by an agreement dated 1.3.2012. Therefore, in the book of accounts, the assessee had shown the amounts as due from the various companies and corresponding amount as payable to M/s.Shriram Auto Finance. Smt. Vathsala Ranganathan retired from the partnership of M/s. Shriram Auto Finance. On retirement of Smt. Vathsala

Ranganathan, M/s.Shriram Auto Finance assigned the said amount of Rs.60.67 Crores payable by the assessee to M/s.Shriram Auto Finance to Smt. Vathsala Ranganathan. Consequently, in the books of accounts of the assessee, the said amount was shown as due to Smt. Vathsala Ranganathan.

10. On retirement of Smt. Vathsala Ranganathan from M/s.Shriram Auto Finance, in all, a sum of Rs.65.95 Crores became payable by the assessee to Smt. Vathsala Ranganathan. The assessee therefore, decided to allot its shares to Smt. Vathsala Ranganathan in settlement of the amount due to her. The assessee allotted 1,19,000 shares with face value of Rs.10/- at a premium of Rs.5400/- and, therefore, the allotment of shares by the appellant to Smt. Vathsala Ranganathan was in settlement of the pre-existing liability of the assessee company to Smt. Vathsala Ranganathan.

11. According to the assessee, shares were allotted against the liability that had accrued to the assessee from transfer to it of the assets being receivables and preference shares of equal value and correspondingly there was a liability created in favour of the transferors, viz., M/s.Shriram Auto Finance. Further it was stated that the apportionment between the paid up capital and the share premium was on the basis of the agreement between the shareholders and the company and hence there is no scope for addition under Section 68 of the said Act. According to assessee, when liability has been created equal to amount of assets transferred and shares allotted in settlement of this liability, there can be no addition under Section 68 of the said Act as unexplained cash credit. It was an admitted fact that the transactions have been confirmed by those companies and, therefore, the liability of the assessee to the said companies was genuine and had accrued

on transfer by the three persons of the assets by way of receivables/shares of equal value and, therefore, the conversion of these liabilities into share capital account cannot be assessed as unexplained credit.

12. The return filed by the assessee was selected for scrutiny wherein the AO on 31.3.2015 determined the total income of the assessee for the assessment year 2012- 13 at Rs.91,06,12,134/-.The Assessing Officer, vide the assessment order dated 31.3.2015, added the share premium and the share capital for the fresh allotment of 167000 shares and treated the same as unexplained cash credits under Section 68 of the said Act, while holding that the method of valuation was not acceptable and that the share premium of Rs.5400/- was unreasonable. The Assessing officer held that the assignment agreement furnished by the appellant assessee was only a purported agreement without any substance and the transaction was a mere book adjustment.

13. Aggrieved by the order of assessment, the assessee appealed to the Commissioner of Income Tax (Appeals), who held that the assessee had not shown any convincing reason as to how the share with a face value of Rs.10/- could be valued at Rs.5,400/- per share, despite several opportunities granted to it, and that the assessee had not submitted the particulars of its net worth. In effect, the Commissioner of Income Tax (Appeals) held that the assessee had not proved the genuineness and credit worthiness of the credit entries in its books of accounts. Thus, CIT(A) upheld the addition of share premium and share capital as unexplained cash credit under Section 68 of the said Act and dismissed the appeal of the assessee.

14. On further appeal, the Tribunal, held that by way of introducing cash credit in the name of share premium and share capital, the appellant assessee is making attempts to reduce the tax liability. The Tribunal further held that when the Assessing Officer found credit in the books of account and the appellant assessee could not offer any satisfactory explanation, then the entries found in the books have to be treated as income of the appellant assessee and, thus, dismissed the appeal by confirming the orders passed by the authorities below. When the assessee assailed the decision of the Tribunal, on the aforesaid facts, the Hon'ble Madras High Court over-turned the decision of the lower authorities, and allowed the appeal of assessee by deleting the addition of Rs.91,06,12,134/-has held as under:

"18. Assailing the said order, the appellant assessee has filed the present appeal raising, inter alia, the following questions of law:

(i) Whether the learned Tribunal erred in confirming the valuation of shares allotted in settlement of the pre-existing liability taxable as unexplained cash credit?

(ii) Whether the learned Tribunal erred in holding that value of shares allotted to individuals would amount to unexplained cash credit?"

19. The learned counsel for the appellant assessee contended that shares were allotted to Smt Vathasala Ranganathan and others in settlement of pre-existing liability and, therefore, it will not amount to unexplained cash credit.

20. Counsel argued, and rightly, that when there was no cash involved in the Transaction of allotment of shares, provisions of Section 68 of the said Act treating it as unexplained cash credit are not attracted.

21. Learned counsel for the appellant assessee emphatically argued that inasmuch as the source of credit in which shares were allotted was clearly

explainable, the same cannot be treated as unexplained cash credit. Moreover, the identity of the share holders and the liability of the company to shareholders has been established and, therefore, the allotment of shares cannot be treated as unexplained cash credit.

22. In Commissioner of Income Tax v. Electro Polychem Ltd., reported in (2007) 294 ITR 661, cited on behalf of the appellant, a Division Bench of this Court held that in case of cash credit of share application money even if it were to be assumed that the subscribers to the increased share capital were not genuine, the amount of share capital would in no circumstances be regarded as undisclosed income of the company.

23. In Commissioner of Income Tax v. Steller Investment Ltd., reported in (2001) 251 ITR 263, also cited on behalf of the appellant, the Supreme Court held that even if the subscribers to the increased share capital of assessee-company were not genuine. the amount could not be regarded as undisclosed income of the company.

24. The question of whether the learned Tribunal erred in confirming the valuation of shares allotted in settlement of the preexisting liability taxable as unexplained cash credit, does not involve any question of law, far less any substantial question of law.

25. However, the second question is answered in favour of the assessee and against the Revenue by the judgment of the Division Bench of this Court in Commissioner of Income Tax v. Electro Polychem Ltd., supra, and Commissioner of Income Tax v. Steller Investment Ltd., supra.

26 This case is distinguishable from the case of CIT. v. Lovely Expos Pvt. Ltd. reported in 216 CTR 195, in that the transactions were only book transactions, and there was no cash receipt. The decisions in (i) Commissioner of Income Tax v. Focus Exports Pvt. Ltd., reported in (2014) 90 CCH 0105 (Delhi); (ii) Commissioner of Income Tax v. Globus Securities & Finance Pvt. Ltd.. reported in (2014) 264 CTR 481 (Delhi); (Hi) Onassis Axles Private Limited v. Commissioner of Income Tax, reported in (2014) 364 ITR 53 (Delhi), (iv) Olwin Tiles India (P) Ltd. v. Deputy Commissioner of Income Tax reported in (2016) 382 ITR 291 (Gujarat); (v) B.R. Petruchem Pvt. Lid. v. The Income Tax Officer, (Order dated 24.4.2017 in T.C.(A) No. 1498 of

2007; and (vi) Rajmandir Estates Private Limited v. Principal Commissioner of Income Tax, reported in (2016) 386 ITR 162 (Calcutta), cited on behalf of the respondent are distinguishable, in that the cash credits towards share capital were admittedly only by way of book adjustment and not actual receipts which could not be substantiated as receipts towards share subscription money.

28. The appeal is, thus, allowed and the judgment and order of the learned Tribunal dated 1.9.2016 is set aside for the reasons discussed above. Additions under Section 68 of the 1961 Act are also set aside. The questions of law are answered against the Revenue. No costs. Consequently, CMP No 9496 of 2017 is closed."

15. On similar issue, the Hon'ble Calcutta High Court in the case of M/s Jatia Investment Co vs. CIT reported in 206 ITR held as follows:

6. The matter came up in appeal before the Tribunal and it was also argued that the companies had to reduce their indebtedness in of rule 58A of the Companies Act. The Tribunal held as follows:

“we have considered have rival submissions. The case sought to be made out in favour of the assessee is rather strange. The assessee maintains regular books of account and makes certain entries. The assessee is now trying to convince us that the entries made in the books were false and no value should be attached to them. It is impossible for us to hold that we have to disregard the entries in the books of account merely because it suits the assessee. If the idea was to reduce the indebtedness of the companies we do not understand how it has been brought out when corresponding assets have also been jettisoned by those companies making the overall ratio of indebtedness the same as before. We do not also see how rule 58A of the Indian

Companies Act comes into the picture. Also, if those entries were merely adjustment entries we do not understand why journal entries were not passed making havalas which should have brought the same result. The very fact that cash entries are made for the purchase of shares by the assessee would show that the assessee had paid cash for the purchase of shares. Obviously, the assessee is not able to show how the cash was provided. The concerns from whom cash allegedly passed did not have enough cash balance to lend money to the assessee. In these circumstances, the Income-tax Officer was fully justified in drawing the conclusion that the assessee brought cash into the books of account for the purchase of shares but the source thereof was unexplained. The learned Commissioner of Income-tax (Appeals) was fully justified in endorsing the findings of the Income-tax Officer. We, therefore, do not see any reason to interfere with the orders of the authorities below. The appeal accordingly fails and is dismissed."

7. A miscellaneous application was filed urging that some arguments advanced by the assessee were not considered by the Tribunal. The Tribunal gave its findings as follows:

"The assessee's representative, as is clear from our log books, clearly referred to rule 58A at the time of hearing. As there was no such rule in the Companies Act, the argument had to be ignored. Further, the document at page 7 of the paper book being the direction of the Reserve Bank to non-financial companies, was not considered as it was not produced before the authorities below. It was also not the case of the assessee before the authorities below that the entries were made in pursuance of the Reserve Bank's direction. The letters addressed by the three

limited companies attempting to explain that the entries in their books were adjustment entries were not believed by the Inspecting Assistant Commissioner, as they were contrary to facts. The Commissioner of Income-tax (Appeals) also told that, having regard to the clear narration in the stock account of the various concerns, the assessee's story that no cash passed but only contra entries were made had to be rejected. The Tribunal agreed with this finding. In fact, the notice with which the limited companies attempted to reduce their borrowings does not explain the cash entries. What the assessee was required is to prove the source for the purchase of shares. In this attempt, the assessee has failed. We, therefore, do not find any mistake in our order."

8. At the hearing, Mr. Bajoria, learned counsel appearing for the assessee, summed up the facts at the outset.

9. The partners of the assessee-firm are members of the Jatia family running several businesses and industries through numerous firms, concerns and companies commonly known as the Jatia Group. The three companies of the group, viz. Jatia industries Pvt. Ltd., Praise Co. Pvt Ltd., and Onkar Industries Pvt. Ltd., borrowed large sums from Messrs. Gazanand Bissweswarlal and Co. (for short GB and Co.), a sole concern of Shri J. M. Jatia- one of the partners of the assessee. The ratio of the said borrowing to the paid-up share capital and reserves exceeded the permissible limit under the circular issued by the Reserve Bank of India in exercise of its powers under the Reserve Bank of India Act, 1934. According to the directions of the Reserve Bank of India, the said three companies of the group being non-financial companies were required to keep down the

ratio of the loan to share capital and free reserves to the ceiling limit of 25% (later reduced to 15%). Learned counsel submitted that for the requirement of conforming to this prescribed ceiling limit of the volume of loans, the said three companies were to liquidate the loans borrowed from the said proprietary concern of Shri J. M. Jatia. But the said companies had not the requisite liquidity to discharge the loans. Since the lending proprietary concern of Shri J. M. Jatia belonged to the same group, an arrangement was made for reduction of the volume of borrowing of the companies to the requisite limit. Therefore, a partnership firm. i.e., the assessee, was constituted on April 20, 1975, with the members of the Jatia family as its partners. Within three days from the date of constitution of the firm, the said three companies showed sale of shares which it had been holding in various companies of the Jatia group to the firm. In exchange, as consideration, the firm made a credit entry in the cash book of an aggregate sum of Rs. 11.20 lakhs in favour of the said three companies. The said three companies, in turn, showed the credit entries in the cash books as repayment of loan aggregating in all to Rs. 11.20 lakhs. The assessee-firm showed the amount of consideration payable to the three companies as paid out of the loan from the said sole concern of Shri J. M. Jatia, viz. GB and Co., by making a debit entry in the cash book without, however, receiving any cash. Necessary entries relating to the transactions were passed in the books of account of the assessee, GB and Co., and three companies through their respective cash books. Thus, the cash book showed that there was merely a circulation of cash ending at the point it began, the cumulative effect being that the assessee became a debtor to GB and Co. in place of the said three companies of the group.

10. This is the crux of the whole matter. The Income-tax Officer's case is that the transactions were recorded in the cash book through a circuit, but at no point in the circuit there was cash. In the words of the Income-tax Officer, the position found by him that warranted the addition of this amount of Rs. 11.20 lakhs in the hands of the assessee is as under:

"In view of the transactions recorded above, it is apparent that the money flowing amongst the parties including the assessee-firm cannot be explained as belonging to Messrs. GB and Co. The same cannot be said to have belonged to Messrs. Jatia Industries Pvt. Ltd., Messrs. Onkar Industries Pvt. Ltd., and Messrs. Praise Co. P. Ltd., as they did not have their own cash balance for advancing money to Messrs. GB and Co."

11. What the Officer drives at is that each of the parties made entries in the cash book in spite of their not having any cash to pass on.

12. Therefore, the advance of loan in cash by GB and Co, to the assessee-firm, as reflected in the entry in the cash book of the assessee-firm, is unexplained cash credit, which attracts the provisions of Section 68 of the Income-tax Act, 1961.

13. According to Shri. Bajoria, the whole matter boils down to the fact that though the entries were made in the cash book in the case, there was no passage of cash at any stage. The whole thing was arranged by the entries to show that GB and Co. notionally advanced cash to the assessee-firm though not having cash to pass on. The assessee-firm, in turn, paid as consideration for the shares to the said three companies the same nonexistent cash as the aggregate purchase value of the shares held by the said companies in the other companies of the group without, however, any passage of cash and the said companies in their turn passing on the said non-existent cash to GB and Co.

14. Shri Bajoria emphasised that, in the course of assessment proceedings, the Income-tax Officer examined the transactions and found that these are only entries not involving at any stage any cash. He pointed out that the entire transactions were effected between the assessee-firm and the concerns belonging to the Jatia group only for the requirement of complying with the

directions of the Reserve Bank of India that cast on the companies a statutory obligation to reduce their borrowing to maintain parity with the loan and capital ratio as prescribed. The assessee-company merely substituted the said three companies as debtors to GB and Co. and received the shares for undertaking the liability.

15. Confronted with the question why the reduction of loan could not be achieved by straightaway transfer of the shares in question by the said three companies to GB and Co. in discharge of the loans, without creating a circuit, Shri Bajoria explained that such a course was not acceptable to all the members of the family as the lender, GB and Co., is the sole concern of Shri J.M. Jatia. To avoid the jeopardy of the other members of the Jatia family this arrangement had to be made, and the assessee-firm had to be created as a device to protect the interest of all members of the group. In any case, it was urged that the transactions as also the creation of the assessee-firm were devices to avoid the mischief of the ceiling imposed by the Reserve Bank of India on the aforesaid three non-financial companies. The assessee-firm stepped into the shoes of the said three companies. The companies ceased to be debtors and, to that extent, the magnitude of its loan fell within the prescribed ratio.

16. It is finally emphasised by learned counsel for the assessee that the ultimate result is that the firm becomes a debtor to GB and Co. and the three non-financial companies of the group got discharged. Learned counsel also emphasised that, at the worst, it can be said that the assessee-firm has received valuable assets being the said shares of the equivalent value of the debt taken over by it from the companies, i.e., Rs. 11.20 lakhs.

17. Therefore, the question of cash credit does not arise in, there being no actual parsing or receipt of cash. In other words, the transactions are mere book entries. It was contended that the fact that the entries passed through the cash book could not detract from or efface the essential nature of the entries. It was also urged that the entries were passed through the cash book so that the repayment of loans by the said three companies could be established before the Reserve Bank of India. But, according to Shri Bajoria, that does not mean that it amounts to an artifice employed to deceive any authorities, because the transactions showing the amount as received in cash and paid away

spontaneously and simultaneously were not actual but only notional. He, however, stated that, as far as the question of Section 68 is concerned, the nature of the transactions and the entries clearly show that no cash, in fact, flowed. It was further stressed that the transactions are above board. No outsider is involved. The entries were made in the books of the concerns of the same group. The shares in question were also of the companies of the group. There was no attempt at hiding the transactions. Nor is it the case of any of the parties to the transaction that there was any passing of cash. Every party unequivocally stated that the transactions were carried into effect merely by way of adjustments of the said loans and the share transfers.

18. Shri A.C. Moitra, the learned advocate for the Revenue, reiterated the grounds on which the Tribunal has affirmed the addition of the amount of Rs. 11.20 lakhs as unexplained cash credit. He particularly emphasised that the assessee's contention that the entries are only adjustment entries is not acceptable, because the adjustment entries are not made through the cash book. It is an accepted principle of accounting that book adjustments and the entries in effecting them are made by journal entries and not cash entries. He urged that the purported motive of the entries being the reduction of loans of the three limited companies does not explain the whole matter, because the entries are cash entries. The fact remains that, at every stage, the parties showed the payments and receipts of cash even when there was no cash available for such entries. This quite justifies the addition as sustained by the Tribunal.

19. We have perused the assessment order carefully. We find that cash did not pass at any stage though entries were made in the cash book showing payments and receipts; but since the entries made a complete round, no passing of cash was necessary for the purpose of making the entries. That there was no passing of cash is also admitted by the Income-tax Officer himself. We have already extracted the observation of the Income-tax Officer in paragraph 14 of his assessment order. The Income-tax Officer has clearly opined that all the respective parties did not receive cash nor did pay cash as none had any cash for the purpose. The only point in the assessment order is that the entries not involving the passing of cash should not have found a place in the cash book, but in the ledger account through journal entries. There is another self-contradiction in the Income-tax Officer's finding that, if there

was no real cash entry on the credit side of the cash book, but merely a notional or fictitious cash entry, as admitted by him, there is no real credit of cash to its cash book; the question of inclusion of the amount of the entry as unexplained cash credit cannot arise.

20. One of the grounds of the Tribunal for disbelieving the assessee's case is that the adjustment entries were made by notional cash entries with a view to bringing down the debt-and-capital ratio, i.e., that while being discharged of the debt the said companies also jettisoned their assets, i.e.. the shares held by them of equivalent sum without achieving the avowed purpose. Here the Tribunal certainly misdirected itself. The ratio to be reduced is of the loan in relation to the share capital and the reserves. Jettisoning the shares had the desired effect of reducing the borrowed capital.

21. Again, as regards the Tribunal's refusal to take notice of the directions of the Reserve Bank, it is not correct for the Tribunal to hold that the said document was a new evidence in the true sense of the term. The assessee has been consistently pleading before the lower authorities that the entries had to be made in order to bring the companies in conformity with the said direction. Moreover, the direction of the Reserve Bank is a public document within the meaning of Section 74 of the Evidence Act, 1872. Documents of a public nature and public authority are generally admissible in evidence subject to the mode of proving them as laid down in sections 76 and 78 of the Evidence Act.

22. In our view, the effect and import of the transactions is that the assessee took over the liability of the aforesaid non-financial companies to GB and Co. in exchange for the shares as aforesaid.

23. In the premises, we answer all the questions, in the affirmative and in favour of the assessee and against the Revenue.

24. There will be no order as to costs.

16. So in the case on hand of the present assessee is concerned, we find that there was no sum of money / cash was involved in the transaction of allotment of shares by the assessee company. Therefore, provisions of section 68 of the Act (unexplained cash credit) is not attracted as held by Hon'ble Madras High Court in

M/s V.R. Global Energy Pvt Ltd Vs ITO (supra) and Hon'ble Calcutta High Court in M/s Jatia Investment Co Vs CIT (supra). Therefore no addition u/s 68 of the Act was warranted in their case.

17. Further the Ld.AR also submitted that the Assessing Officer's action of adding the sum share premium under section 68 of the Act could not have been done for the assessment year under consideration, i.e. A.Y.2011-12 because the Proviso to section 68 of the Act was introduced with effect from 01/04/2013 and would not apply for the relevant assessment year under consideration. We find force in the submission of the Ld.AR that the Proviso to section 68 of the Act has been introduced by the Finance Act, 2012 with effect from 01/04/2012 and it would be effective only from A.Y. 2013-14 onwards. We note that the Hon'ble jurisdictional Bombay High Court in the case of CIT vs M/s Gangadeep Infrastructure Pvt Ltd held so. By framing the question of law as under:-

“(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of Rs.7,53,50,000/- under Section 68 of the act being share capital / share premium received during the year when the Assessing Officer held the same as unexplained cash credit?”

18. And the Hon'ble High Court answered the question of law as follow:-

(e) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The

Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit."

19. The Ld.AR also brought to our notice the Hon'ble Bombay High Court decision in the case of PCIT vs Apeak Infotech (2017) 88 taxmann.com 695 (Bom) wherein the question of law adjudicated by the Hon'ble High Court are as under:-

"A. Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct to uphold the decision on Commissioner of Income-tax (Appeals) that the share premium received by the assessee-company cannot be taxed under section 68 of the Act ignoring the ratio laid down by this court in its decision reported in the case of Major Metals Ltd v. Union of India [2013] 359 ITR 450 (Bom)?"

B. Whether on the facts and in the circumstances of the case and in law, the Tribunal as well as the Commissioner of Income-tax (Appeals) was right in deleting addition made by the Assessing Officer, by holding that the share premium receipt is capital in nature?"

20. And the Hon'ble High Court answered the same as under:-

"Regarding Question A :

The issue raised by the Revenue in this question is to bring to tax the share premium received under section 68 of the Act. We find that the issue of bringing the share premium to tax under section 68 of the Act was not an issue which was urged by the appellant "Revenue before the Tribunal. The only issue which was urged before the Tribunal as recorded in para 11 of the impugned order is the addition of share capital and share application money in the hands of the assessee as income under section 28(iv) of the Act. We find that the Commissioner of Income-tax (Appeals) did consider the issue of applicability of section 68 of the Act and concluded that it does not apply. The Revenue seems to have accepted the same and did not urge this issue before the Tribunal. Mr. Bhoot, learned counsel appearing for the Revenue also fairly states that the issue of applicability of section 68 of the Act was not urged by the Revenue before the Tribunal.

(b) It is a settled position in law as held by this court in CIT v. *Tata Chemicals, Ltd.* f20021 122 Taxman 643/256 ITR 395 (Bom.) that in an appeal under section 260A of the Act, the High Court can only decide a question if it had been raised before the Tribunal even if not determined by the Tribunal. Therefore, no occasion to consider the question as prayed for arises.

(c) In any case, we may point out that the amendment to section 68 of the Act by the addition of proviso thereto took place with effect from April 1, 2013. Therefore, it is not applicable for the subject assessment year 2012-13. So far as the pre-amended section 68 of the Act is concerned, the same cannot be invoked in this case, as evidence was led by the respondents-assesseees before the Assessing Officer with regard to identity, capacity

of the investor as well as the genuineness of the investment. Therefore, admittedly, the Assessing Officer did not invoke section 68 of the Act to bring the share premium to tax. Similarly, the Commissioner of Income-tax (Appeals) on consideration of facts, found that section 68 of the Act cannot be invoked. In view of the above, it is likely that the Revenue may have taken an informed decision not to urge the issue of section 68 of the Act before the Tribunal.

(d) We may also point out that decision of this court in *Major Metals Ltd. v. Union of India* [2012] 19 taxmann.com 176/207 Taxman 185/f2013l 359 ITR 450 Bom, proceeded on its own facts to uphold the invocation of section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers to shares of the assessee company were not creditworthy inasmuch as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000 at premium at Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by this court in its writ jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this case has been given by the authorities that shareholder/share applicants were unidentifiable or bogus.

(e) In the above view Question No. A is not being entertained in view of the decision in *Tata Chemical Ltd. (supra)*. Accordingly, the question (A) is not entertained.

Regarding Question B:

(a) We find that the impugned order of the Tribunal upheld the view of the Commissioner of Income-tax (Appeals) to hold that share premium is capital receipt and therefore, cannot be taxed as income. This conclusion was reached by the impugned order following the decision of this court in *Vodafone India Services (P.) Ltd. (supra)* and of the apex court in *G. S. Homes and Hotel (P.) Ltd. (supra)*. In both the above cases the court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income.

(b) It is further pertinent to note that the definition of income as provided under section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from April 1, 2013 and thus, would have, no application to the share premium received by the respondent "assessee in the previous year relevant to the assessment year 2012-13. Similarly, the amendment to section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject assessment year 2012-13 and cannot be invoked. It may be pointed out that this court in *CIT v. Gagandeep Infrastructure (P.) Ltd.* [2017] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 (Bom.) has while refusing to entertain a question with regard to section 68 of the Act has held that the proviso to section 68 of the Act introduced with effect from April 1, 2013 will not have retrospective effect and would be effective only from the assessment year 2013-14.

(c) In view of the above, question No. B as proposed also does not give rise to any substantial question of law as it is an issue concluded by the decision of this court in *Vodafone India Services (P.) Ltd. (supra)* and in the apex court in *G. S. Homes and Hotels (P.) Ltd. (supra)*. Thus not entertained.

Therefore, all the six appeals are dismissed. No order as to costs.”

21. We note that the assessee company was incorporated on 08/12/2009 and filed its first return of income in A.Y. 2010-11 and in the next year i.e. relevant assessment year (AY 2011-12) it had further shown introduction of share capital and the share premium. The three (3) companies which were allotted shares (refer chart) were private limited companies which were regularly assessed to tax by the department. The assessee had filed the following documents to prove the identity, creditworthiness and genuineness of these three (3) investors companies as under:-

- “(a). Confirmation from all the investors.
- (b) address
- (c) PAN details
- (d) Audited annual accounts of all the investors for the relevant year wherein the investment in the assessee company was duly reflected.
- (e) Copies of the Board Resolution of the investor companies authorizing them to invest in the assessee companies shares.

- (f) Copies of the Income tax returns of all the investor companies for having filled their income tax returns for the relevant assessment year.
- (g) Copies of share allotment forms (Form-2)
- (h) Memorandum of association.
- (i) Statement explaining source of fund.
- (j) Bank Statement

22. Further, we note that the AO had also sought confirmations u/s 133(6) to which all the parties have responded. Thus the assessee has discharged the burden of proving the identity, credit worthiness and genuineness of the share applicants. And that AO could not find any infirmity with the documents filed by the assessee and that all the three (3) parties have responded to notice of AO u/s 133(6) of the Act wherein they confirmed the transaction with assessee. And the AO did not make any addition u/s 68 of the Act with respect to the face value of the shares (share-capital). However, he made additions in respect of the premium of Rs.9,97,50,100/- solely on account of treating the same as unjustified premium. We note that the definition of *income* as provided under section 2 (24) of the Act at

the relevant time did not define as income any consideration received for issue of shares in excess of its fair market value. This came into Statute only with effect from 01 April 2013, thus would have no application to the share premium received by the assessee company in the previous year relevant to AY 2011-12. Similarly, we note that amendment to section 68 of the Act by addition of proviso was made subsequently with effect from 01 April, 2013. Therefore, its application is only from AY 2013-14 and not applicable to AY 2011-12. For this proposition we rely on the judgment of the Hon'ble Bombay High Court in CIT vs Gagandeep Infrastructure (supra). Therefore, the AO and the Ld.CIT(A) erred in law by making addition of Rs. 9,97,50,100/- which was *share-premium* and therefore it needs to be deleted on this score also. Thus the entire addition made of Rs. 10.19 Cr is directed to be deleted.

23. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 25.01.2023.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER
Mumbai, Dt :25.01.2023
Shubham P. Lohar

Sd/-
(ABY T .VARKEY)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**

	Details	Date	Initials	Designation
1	Draft dictated/ directed typed on computer on	24.11		Sr.PS/PS
2	Draft Placed before author	28.11		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			