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

SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 258/MUM/2020
(Assessment Year: 2014-15)

Assistant Commissioner of Income-tax,
6 (2)(1), Mumbai,
Room No. 504, Aaykar Bhavan,
M.K. Road, Churchgae,
Mumbai - 400020

..... **Assessee**

M/s Chiripal Poly Films Ltd.,
109/110, Peninsula Centre ,
Dr. S.S. Rao Road, Parel,
Mumbai - 400012
[PAN: AADCC7403M]

Vs

..... **Respondent**

CO No. 152/MUM/2022
(Arising out of ITA No. 258/Mum/2020)
(Assessment Year: 2014-15)

M/s Chiripal Poly Films Ltd.,
109/110, Peninsula Centre ,
Dr. S.S. Rao Road, Parel,
Mumbai - 400012
[PAN: AADCC7403M]

..... **Assessee**

Assistant Commissioner of Income-tax,
6 (2)(1), Mumbai,
Room No. 504, Aaykar Bhavan,
M.K. Road, Churchgae,
Mumbai - 400020

Vs

..... **Respondent**

Appearance

For the Assessee/Assessee : Shri Tushar Hemani, Sr. Advocate
Shri Parimal Singh Parmar

For the Respondent/Department : Shri K.C. Selvamani

Date

Conclusion of hearing	:	14.07.2023
Pronouncement of order	:	11.10.2023

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. The present appeal filed by the Revenue and Cross-Objection filed by the Assessee pertaining to the Assessment Year 2014-15 arise from the order, dated 03/09/2019, passed by the Ld. Commissioner of Income Tax (Appeals)-12, Mumbai [hereinafter referred to as 'the CIT(A)'], whereby the CIT(A) had partly allowed appeal of the Assessee against the Assessment Order, dated 30/12/2016, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Revenue has raised following grounds of appeal:

   1. *"On facts and circumstances of the case in deleting the addition of Rs. 2,20,54,200/- on account of introduction of share application money treated as unexplained credit u/s 68 of the Income Tax Act, 1961 without appreciating the fact that genuineness & Creditworthiness of foreign entities from which these funds received were not properly established by the assessee. The assessee has failed to discharge its onus to prove the genuineness of these transactions. Even the source of these investments remained unexplained as most of the entities did not have its own fund to invest and money trail revealed that main source of these funds were routed through various accounts.*

   2. *On facts and circumstances of the case in deleting the addition of Rs.35,00,05,950/- on account of the share premium collected on issue of shares treated as unexplained credit u/s 68 of the Income Tax Act, 1961 without appreciating the fact that genuineness & Creditworthiness of entities from which these funds received were not properly established by the assessee. The assessee has failed to discharge its onus to prove the genuineness of these transactions. Even the source of these investments remained unexplained.*

3. *Whether on facts and circumstances of the case, the Ld. CIT(A) is justified that section 68 of the Act cannot be applied where the transaction is proved to be that of a share allotment that the valuation for charging premium is not justified.*

4. *On the facts and circumstance of the case and in law, the Ld. CIT(A) erred in deleting the addition made by Assessing Officer under section 56(2)(viib) of the Act without appreciating that facts that the AO had interfered with the tax payers statutory right under rule 11UA(2) of the ITR to chose the method of valuation after rejecting the tax payers valuation, the AO had the authority to carry out its own independent valuation and adopt the NAV method for this purpose.*

5. *On the facts and circumstance of the case and in law, the ld. CIT(A) erred in deleting the addition made by Assessing Officer under section 56(2)(viib) of the act without appreciating the facts that the matter of taxability cannot be decided on the basis of entries which the assessee may choose to make in his account but has to be decided in the accordance with the previous of law.*

6. *On the facts and circumstance of the case and in law, the Ld. CIT(A) erred in deleting the addition made by Assessing Officer on account of depreciation claimed on intangible assets on the basis of decision made in A.Y. 2012-13.*

7. *The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the AO be restored."*

2.1. The Assessee has raised following grounds of cross objection:

"1.1 In law and in the facts and circumstances of the appellant's case, Hon'ble ITAT may direct the Ld. Assessing officer to compute the correct total income by reducing the capital receipt received by the assessee during the year under consideration in the form of Electricity duty subsidy for Rs. 2,80,68,707/-.

1.2 In law and in the facts and circumstances of the appellant's case, Hon'ble ITAT may direct the Ld. Assessing officer to reduce the book profit computed under section 115JB by the

capital receipt received by the assessee during the year under consideration in the form of Electricity duty subsidy for Rs. 2,80,68,707 /-. It has been a settled position of law that any fiscal incentive provided which is not in the nature of income perse shall not liable to tax under the deeming provisions of section 115JB of the Act.

2.1 In law and in the facts and circumstances of the appellant's case, Hon'ble ITAT may direct the Ld. Assessing officer to compute the correct total income by reducing capital receipt received by the during the year under consideration in the form of MEIS / SEIS incentive for Rs. 90,16,813/-.

2.2 In law and in the facts and circumstances of the appellant's case, Hon'ble ITAT may direct the Ld. Assessing officer to reduce the book profit computed under section 115JB by a capital receipt received by the assessee during the year under consideration in the form of MEIS/SEIS incentive for Rs. 90,16,813/-. It has been a settled position of law that any fiscal incentive provided which is not in the nature of income perse shall not liable to tax under the deeming provisions of Section 115JB of the Act."

3. The relevant facts in brief are that the Assessee is a private limited company engaged in the business of the manufacturing of Bi-axially Oriented Polypropylene (for short 'BOPP') and trading in fabric. The Assessee filed return of income for the Assessment Year 2014-15 on 29/11/2014 declaring total loss at INR 55,47,89,293/- and offering income of INR 24,79,61,362/- to tax under Section 115JB of the Act.

3.1. The case of the Assessee was selected for regular scrutiny and assessment under Section 143(3) of the Act was completed by the Assessing Officer vide order, dated 30/12/2016, after making, inter alia, (a) addition of INR 37,20,60,150/- under Section 68 of the Act in respect of share capital and premium received by the Assessee

during the relevant previous year, and (b) disallowance of INR 29,57,924/- being depreciation claimed by the Assessee on intangible assets. Further, the Assessing Officer also concluded that INR 23,71,34,031/- was taxable in the hands of the Assessee under Section 56(2)(viib) of the Act read with Rule 11UA of the Income Tax Rules, 1962 [for short 'the Rules'] holding the same to be share capital/premium received by the Assessee from resident companies in excess of the fair market value determined under Rule 11UA using Net Asset Valuation Method. However, no separate addition was made by the Assessing Officer since addition of INR 35,00,05,950/- being entire amount of share capital/premium, was made by the Assessing Officer under Section 68 of the Act.

3.2. Being aggrieved, the Assessee preferred appeal against the Assessment Order, dated 30/12/2016, before the CIT(A) which was partly allowed by the CIT(A) vide order, dated 03/09/2019. The CIT(A) deleted the above addition of INR 37,20,60,150/- made by the Assessing Officer under Section 68 of the Act, and directed the Assessing Officer to delete the disallowance of INR 29,57,924/- made by the Assessing Officer in respect of depreciation on intangible assets. Further, the CIT(A) also concluded that alternate addition of INR 23,71,34,031/- under Section 56(2)(viib) of the Act proposed by the Assessing Officer was also not correct under law.

3.3. Being aggrieved, the Revenue is now in appeal before us against the above relief granted by the CIT(A) vide order, dated 03/09/2019, on the grounds reproduced in paragraph 2 above. The Assessee has also filed cross objection, delayed by 1046 days as per the registry, whereby the Assessee has raised a fresh claim for the first time before the Tribunal seeking exclusion of (a) electric

duty subsidy of INR 2,80,68,707/- and (b) capital receipt of INR 90,16,813/-, received in the form of MEIS/SEIS incentives, while computing book profits under Section 115JB of the Act. The grounds raised by the Assessee are reproduced in paragraph 2.1 above.

4. We have considered the rival submissions, perused the material on record including the judgments/decisions cited during the course of hearing and examined the position in law.

5. We would first take up the appeal preferred by the Revenue.

Ground No. 1 to 5

6. Ground No. 1 to 5 raised by the Revenue involve overlapping factual and legal aspects and therefore, the same are taken up together.

7. Ground No. 1 to 3 raised by the Revenue are directed against the order of CIT(A) deleting the addition of INR 37,20,60,150/- made by the Assessing Officer under Section 68 of the Act. While Ground No. 4 & 5 pertain to alternative addition of INR 23,71,34,031/- proposed by the Assessing Officer under Section 56(2)(viib) of the Act.

8. The facts relevant to the adjudication of the grounds under consideration, as emerging from the perusal of the records including the paper-book filed by the Assessee, are that during the assessment proceedings the Assessing Officer noticed that the Assessee had raised share capital from 1 non-resident investor and 7 resident companies. The details of shares issued and share capital

& premium received are as under:

Non-Resident Investor

Sl.	Investor	Share Allotted	Face Value	Issue Price	Consideration	Share Premium
1	Platinummic FZE, UAE	21,004	10	1,050	2,20,54,200	2,18,44,160

Resident Investors/Companies

Sl.	Investor	Share Allotted	Face Value (INR)	Issue Price (INR)	Consideration (INR)	Share Premium @ INR 1,040 per Share
1	Bhushan Petrofils Pvt. Ltd., New Delhi	47,620	10	1,050	5,00,01,000	4,95,24,800
2	Dindayal Processors Pvt. Ltd.	47,620	10	1,050	5,00,01,000	4,95,24,800
3	Sparow Exports Pvt. Ltd.	47,620	10	1,050	5,00,01,000	4,95,24,800
4	Shanti Spintex Pvt. Ltd., Bldaj	47,620	10	1,050	5,00,01,000	4,95,24,800
5	Bhavna Textiles Pvt. Ltd., New Delhi	47,620	10	1,050	5,00,01,000	4,95,24,800
6	Chiripal Textiles Mills Pvt. Ltd.	47,620	10	1,050	5,00,01,000	4,95,24,800
7	Quality Exim Pvt. Ltd.	47,620	10	1,050	5,00,01,000	4,95,24,800
	Total				35,00,05,950	346672560

8.1. The Assessing Officer asked the Assessee to prove identity and

creditworthiness of the investors and genuineness of the transaction with regards to provisions contained in Section 68 of the Act. The Assessee was specifically asked to furnish documents such as confirmation from the investors, copy of the balance sheet, income tax return and also to provide justification for the high premium of INR 1,040/- per share charged/received by the Assessee. In response, the Assessee filed reply letters dated 23/09/2016, 06/10/2016, 05/12/2016/ and 16/12/2016 providing various details, documents and explanation including the following:

(a) Vide letter dated 23.09.2016, in relation to resident companies, the Assessee provided:

(a.1.) Table containing basic details w.r.t. increase in share capital viz. name, address, PAN, date of transaction, number of shares, issue price, total consideration and share premium,

(a.2.) Relevant page of audited financial statements ;

(a.3.) Details of directors who attended board meeting,

(a.4.) PAN of all resident companies,

(a.5.) Share application forms,

(a.6.) Share certificates,

(a.7.) Bank statements – highlighting each banking transaction for funds received from investors,

(a.8.) Board resolution for allotment of shares,

(a.9.) Form 2 along with G.A.R. 7 challan and

(a.10.)Annual returns filed with ROC.

[placed at Pg 33 to 121 of paper-book]

(b) Vide letter, dated 23.09.2016, in relation to Non-Resident

Investor the Assessee also provided:

(b.1.) Intimation to RBI regarding issue of equity shares to non-resident investors

(b.2.) Reporting made to RBI in the form of FCGPR

(b.3.) Foreign Inward Remittance Certificate (FIRC)

[placed at Pg 72 to 85 of paper-book]

(c) Vide letter filed on 05.12.16, the Assessee placed on record Project Appraisal Report issued by Gujarat Industrial and Technical Consultancy Organization Limited (GITCO).

[placed at Pg 122 to 271 of paper-book]

(d) Vide letter dated 16.12.2016, the Assessee provided Acknowledgment of ITR, Balance-Sheet and Profit & Loss Account in relation to resident companies. Further, the Assessee also filed Assessment Orders of Bhushan Petrofils Pvt. Ltd., Sparow Exports Pvt. Ltd., Chiripal Textiles Mills Pvt. Ltd., M/s Quality Exim Private Limited for the Assessment Year 2014-15.

[placed at Pg 272 to 338 of paper-book]

8.2. However, the Assessing Officer rejected the claim/contentions of the Assessee. The Assessing Officer observed that the Assessee had failed to furnish copy of balance sheet & financials of the non-resident investor; and had also failed to furnish any evidence regarding the source of funds invested by the non-resident investor. In view of the aforesaid observations, the Assessing Officer concluded that the Assessee failed to prove the source of the share capital & premium received by it from the non-resident investor and had failed to discharge the onus cast upon the Assessee under Section 68 of the Act. Further, since the Assessee had failed to produce any records regarding the due-diligence done

by the Assessee before issuing shares to non-resident investor, the source of the investment in the form of share capital & premium received by the Assessee from the non-resident investor remained unverified. As the identity & creditworthiness of the non-resident investor and genuineness of the transaction remained to be proved, the provisions of Section 68 of the Act were attracted. Therefore, amount of INR 2,20,54,200/- received by the Assessee from non-resident investor (i.e. Platinummic FZE, UAE) was to be added as income in the hands of the Assessee being unexplained cash credit under Section 68 of the Act.

8.3. Similarly, the Assessing Officer rejected the claim/contentions of the Assessee in relation to share capital & premium received from 7 resident companies and made an addition of INR 35,00,05,950/- in the hands of the Assessee under Section 68 of the Act. While doing so the Assessing Officer observed that as per the amended provisions of Section 68 of the Act (effective from 01/04/2013), the Assessee was required to prove the 'source of source' of share capital & premium received from the resident companies during the relevant previous year. The reasoning given by the Assessing Officer while making the above addition was that the Assessee had failed to furnish copy of confirmation, Balance Sheet, ITR and Financials of the resident companies and therefore, failed to prove, both, the source of share capital & premium received as well as the 'source of source' of such share capital & premium. Thus, the Assessee had failed to discharge the onus cast upon the Assessee as per the provisions to Section 68 of the Act, and therefore, the share capital & premium received from resident companies aggregating to INR 35,00,05,950/- was to be added as income in the hands of the Assessee under Section 68 of the Act.

8.4. Further, the Assessing Officer also proposed an alternative addition of INR 23,71,34,031/- under Section 56(2)(viib) of the Act read with Rule 11UA of the Rules. While doing so the Assessing Officer rejected the value of INR 1,050/- per share determined by the independent valuer as per Rule 11UA of the Rules by using Discounted Cash Flow Method (DCF) holding that (a) the valuation report was a cryptic two page valuation report that contained no data or basis on which projection of net expected distributable income was made by the valuer; (b) the Project Appraisal Report issued by GITCO was based on projected analysis of the Assessee's financials from Financial Years 2012-13 to 2023-24, and the net profit after tax and depreciation for Financial Year 2014-15 to Financial Year 2017-18 as per GITCOs Report were less than the valuation report furnished by the Assessee, and (c) the valuation report submitted by the Assessee also did not match with the actual result of the Assessee. In view of the aforesaid, the Assessing Officer rejected the independent valuer's report as not reliable and determined value of shares of the Assessee under Rule 11UA of the Rules at INR 338.61 per share by adopting Net Asset Valuation (NAV) method. Since the shares were issued by the Assessee at INR 1,050/-, being a price higher than the Fair Market Value of INR 338.61 determined by the Assessing Officer, alternative addition at the rate of INR 711.39/- [INR 1050 – INR 338.61] per share issued to the resident companies was proposed. Thus, the Assessing Officer proposed aggregate addition of INR 23,71,34,031/- under Section 56(2)(viib) of the Act read with Rule 11UA of the Rules. However, since the Assessing Officer had disallowed entire amount of share capital & premium received from resident companies aggregating to INR 35,00,05,950/- under Section 68 of the Act no

separate addition was made by the Assessing Officer.

9. Being aggrieved, the Assessee challenged the aggregate addition of INR 37,20,60,150/- made by the Assessing Officer under Section 68 of the Act holding the same to be unexplained cash credit, in appeal before CIT(A). Before the CIT(A), it was contended on behalf of the Assessee that the Assessing Officer had ignored the documents and details filed along with reply dated 23/09/2016 and 14/12/2016 submitted by the Assessee during the assessment proceedings. It was contended on behalf of the Assessee that all the details called for by the Assessing Officer during the assessment proceedings were furnished by the Assessee. However, the Assessing Officer rejected the contentions of the Assessee and ignored the documents/details submitted by the Assessee without carrying out any enquiry/verification. Despite having details about the resident/non-resident investors, the Assessing Officer did not issue any notice or call for any information/details/documents under Section 133(6) of the Act from the investors. The Assessing Officer also overlooked the fact that Bhushan Petrofils Pvt. Ltd, Dindayal Processor, Sparrow Exports Ltd. and Chiripal Textiles Mills Pvt. Ltd. had made investments in the Assessee-company during the previous year relevant to the Assessment Year 2011-12. Though the Assessing Officer had made similar additions under Section 68 of the Act the same were deleted by CIT(A) and the order of CIT(A) was confirmed by the Tribunal in ITA No. 2671/Mum/2016 vide order, dated 19/02/2019. Thus, the Assessee had discharged the initial onus cast on the Assessee under Section 68 of the Act and provided documentary evidences to prove identity and creditworthiness of the investors as well as genuineness of the transaction. Accordingly, the addition of INR 37,20,60,150/- made

by the Assessing Officer under Section 68 of the Act cannot be sustained.

9.1. Before the CIT(A), it was further submitted on behalf of the Assessee that the Assessing Officer erred in rejecting the valuation report of the independent valuer as the Assessing Officer had failed to appreciate that the valuation was based upon the Project Appraisal Report received from GITCO which was a leading Techno Economic Feasibility analyst set up by All India Financial Institution, State Industries Promotion Corporation and 7 Nationalized Banks. While reconciling the figures taken in Share Valuation Report with the Project Appraisal Report by GITCO, the Assessing Officer took into consideration projections in respect of existing BOPP Projects instead of projections of the combined project which included the BOPP Lines to be set up by the Assessee. The profitability projections of the combined project (as appearing at page 67 of the Project Appraisal Report) were same as the projections taken by the independent valuer to arrive at the value of INR 1,050/- per share using DCF Method which is one of the method notified by the Central Board of Direct Taxes (CBDT) vide Notification No. 52/2012, dated 29/11/2012 for the purpose of Rule 11UA of the Rules. On the basis of the aforesaid, it was contended that the alternative addition of INR 23,71,34,031/- worked out by the Assessing Officer under Section 56(2)(viib) of the Act was also not sustainable in law.

9.2. The above submissions of the Assessee found favour with the CIT(A) as the CIT(A) agreed with the Assessee and deleted the addition of INR 37,20,60,150/- under Section 68 of the Act. Further, the CIT(A) also concluded that DCF Method was one of the Method notified under Rule 11UA (2)(b) of the Rules and therefore,

the Assessing Officer was not justified in rejecting the valuation done by the independent valuer using DCF Method and adopting NAV Method for valuation of shares. Further, the CIT(A) observed that DCF Method was based on projections and estimates which cannot be replaced by the actual figures by the Assessing Officer. Thus, the Assessing Officer had no justification for rejecting the declared valuation of shares and proposing addition of INR 23,71,34,031/-.

10. The Revenue is now in appeal before the Tribunal Challenging the above relief granted by the CIT(A) by deleting the addition of the INR 37,20,60,150/- made by the Assessing Officer under Section 68 of the Act, and by holding that the alternative addition of INR 23,71,34,031/- proposed by the Assessing Officer was not sustainable in law.

10.1. The Ld. Departmental Representative appearing before us submitted that Assessee had failed to discharge its onus cast upon him with respect to issue of share capital to the foreign party during the assessment proceedings. Huge premium of INR 1,040/- per share was charged by the Assessee which was not commensurate with the Fair Market Value determined by the Assessing Officer. The valuation report submitted by the Assessee based upon DCF Method was flawed. As pointed out by the Assessing Officer, the valuation report submitted by the Assessee did not provide the basis for arriving at the projected profits; the projections were much more than the projections stated in the Project Appraisal Report of GITCO; and the projections were made on the premise that there were 3 production lines whereas only 2 BOPP Lines were installed and commissioned during the relevant

previous year. Further, the projections for the financial year did not match with the actual results of the same financial year. Elaborating upon the aforesaid, the Learned Departmental Representative submitted that the CIT(A) proceeded on the incorrect understanding that the Assessing Officer had rejected the valuation report submitted by the Assessee only for the reason that the projections did not confirm to the actual financial results without appreciating that the aforesaid reasoning given by the Assessing Officer while rejecting the valuation report submitted by the Assessee. The Learned Departmental Representative also emphasized upon the fact that the Assessing Officer had noted that the Assessee did not submit the financial results of the non-resident investor.

10.2. Per Contra, the Learned Senior Counsel appearing for the Assessee reiterated the submissions made by the Assessee before the CIT(A) and contended that the order passed by the CIT(A), wherein all the relevant aspects have been considered, deserves to be upheld. He submitted that the identity and creditworthiness of the non-resident-investor and genuineness of transaction was proved by the Assessee during the assessment proceedings. Taking us though the reply filed during the assessment proceedings, he submitted that the Assessee had filed all the relevant details and documents asked for by the Assessing Officer which included details of investors, PAN No., share application form, share certificate, Board Resolution for allotment of shares, Form No. 2 along with GAR Challan, Annual Return filed with Registrar of Companies and the bank statements of the Assessee showing receipt of investment through banking channel. In this regard, the Ld. Senior Counsel also placed reliance on paragraphs 4.10, 4.15 and 4.16 of the order passed by the

CIT(A).

10.3. Elaborating further, the Ld. Senior Counsel submitted that in case of non-resident investors that the Assessee had submitted name & address of the non-resident investor, copy of FIRCs, FCGPR filed with RBI and valuation report to support issuance of shares at a premium.

10.4. With respect to the applicability of proviso to Section 68 of the Act (inserted with effect from 01/04/2013), the Ld. Senior Counsel submitted that the same applies only in the case of resident companies, and that the Assessee had furnished the Profit & Loss Account, Balance Sheet, ITR and Assessment Orders of the resident companies and thereby, disclosed the 'source of source' to satisfy the requirement of proviso to Section 68 of the Act.

10.5. In view of the above, the Ld. Senior Counsel submitted that the Assessee had discharged the onus cast upon the Assessee under Section 68 of the Act. In case the Assessing Officer harboured any doubts, the Assessing Officer was free to carry out inquiry/investigation to bring on record material to controvert the claim/contentions of the Assessee. However, no such inquiry/investigation was conducted.

10.6. Dealing with the contention of the Revenue relating to charging of very high premium by the Assessee, the Ld. Senior Counsel submitted that the valuation report was prepared by an independent valuer using DCF Method, which is one of the prescribed methods under Rule 11UA of the Rules and on the basis of financial projections approved/vetted by GITCO. Taking us through the Project Appraisal Report from GITCO, the Ld. Senior

Counsel submitted that the net profit as per the valuation report are same as net profits as considered by GITCO for the combined project which includes the proposed BOPP line. As regards the contention of the Revenue that the projections did not confirm with the actual, the Ld Sr. Counsel submitted that valuation was done as per the DCF Method using the projections and the actual results cannot be expected to be same as the projections as there is bound to be some variance. On the basis of the aforesaid, the Ld. Senior Counsel supported the order of the CIT(A) holding that alternative addition of INR 23,71,34,031/- proposed by the Assessing Officer by invoking provisions of Section 56(2)(viib) of the Act cannot be sustained.

10.7. In conclusion the Ld. Senior Counsel submitted that the identical contentions raised by the Revenue have been rejected by the Tribunal in the case of the Assessee for the Assessment Years 2011-12, 2012-13 and 2013-14.

11. We have heard the rival contention and perused the material on record including the judicial precedents cited during the course of hearing.

Ground No. 4 & 5

12. On perusal of Assessment Order, we find that the Assessing Officer doubted the high value on which shares were issued by the Assessee during the relevant previous year and therefore, we would first deal with the issue of valuation of shares of the Assessee-Company and the Ground No. 4 & 5 raised by the Revenue.

12.1. The Assessing Officer was on the view that value of INR 1,050/- per

shares computed by the independent valuer in the valuation report, which consisted of face value of INR 10/- per share and share premium of INR 1,040/- per share, was much higher than the fair value of the shares of the Assessee-company. The valuation report relied upon by the Assessee, wherein the valuation was done on the basis of DCF Method, was rejected by the Assessing Officer on the ground that (a) the valuation report was cryptic two page report providing no data or basis on which projections were made by the valuer; (b) net profit after tax and depreciation of the Assessee-Company projected for the Financial Years 2014-15 to Financial Year 2017-18 in the Project Appraisal Report by GITCO was much lesser than the figures adopted by the independent valuer in the valuation report; and (c) the projections contained in the valuation report did not confirm with the actual results of the Assessee-Company. However, on perusal of the order passed by the CIT(A) we note that the CIT(A) had accepted the valuation report relied upon by the Assessee-Company observing that (a) DCF Method was one of the method notified as per Rule 11UA(2)(b) of the Rules, therefore, the Assessing Officer was not justified in rejecting the same arbitrarily without assigning any reasoning or rational basis and (b) there was no justification of making comparison of the estimate/projections with the actuals as in the case of DCF Method valuation is based on projections and not actual. During the hearing, the Ld. Departmental Representative had contended that the CIT(A) had failed to consider the infirmity pointed out by the Assessing Officer in the valuation report relied upon by the Assessee in relation to variance in the projections for the Financial Years 2014-15 to Financial Year 2017-18 between the valuation report and Project Appraisal Report by GITCO. In this regard, we

note that in the appeal preferred by the Revenue in the case of the Assessee for the immediately preceding assessment year (i.e. Assessment Year 2013-2014), identical arguments raised by the Revenue were rejected by the Tribunal vide, order dated 12/04/2022, passed in ITA No. 7052/Mum/2019. For the Assessment Year 2013-14, the value of the shares of the Assessee-Company was determined by the independent valuer at INR 1,050/- (including premium of INR 1,040/- per share) by using DCF Method. The Assessing Officer had rejected the aforesaid valuation pointing out identical infirmities. In appeal, the CIT(A) accepted the valuation report submitted by the Assessee and overturned the decision of the Assessing Officer. The appeal preferred by the Revenue was dismissed by the Tribunal on this issue accepting the value of INR 1,050/- per share of the Assessee-Company determined by independent valuer using DCF Method notified as per the provisions of Rule 11UA(2)(b) of the Rules. The relevant extract of the decision of the Tribunal for the Assessment Year 2013-14 passed in ITA No. 7052/Mum/2019 on 12/04/2022 read as under:

> *"43. In view of this grounds no. 1, 2, & 3 of the appeal with respect to addition under section 68 of the Act are dismissed.*
>
> *44. Now, we come to the justification of premium charged by the assessee. At the cost of repetition, the fact shows that assessee has been issued shares of Rs. 39,37,00,200/- consisting of face value of 3,71,464 shares of Rs. 10 at each amounting to Rs. 37,14,640/-. The assessee further received premium on 3,71,464 shares at the rate of 1,040 per share amounting to Rs. 38,63,22,560/-. The learned Assessing Officer rejected the valuation report submitted by the assessee for two reasons;*
>
> *I. That valuation is cryptic and did not have the basic data of the valuation including management representation*

II. <u>The valuation report is at wide variance with the project appraisal report by GITCO and the actual performance of the company in subsequent years.</u>

45. The provisions of section 56(2)(viib) of the Act provides that where a company not being a company in which the public are substantially interest receive in any previous year from any person being a resident any consideration for issue of shares that exceeds the face value of such share, the aggregate consideration received for such shares has exceeds the fair market value of the shares is the income chargeable to tax under the head income from other sources in the hands of such issue of company. From the plain reading of the above provisions of the law, it is clear that it applies only in case of receipt of considering for issue of shares from a resident person. In the present case, M/s. Opulence Investments Limited is non-resident and therefore, the provisions of section 56(i) (vilb) of the Act do not apply in the case of the assessee.

46. Even otherwise, the fact shows that the share premium of Rs. 1040/- per share has been derived based on adopting Discounted Cash Flow Method based on CMA report appraised and vetted by GITCO and accordingly, valuation certificate in accordance with Rule 11UA. Further, the learned Assessing Officer has rejected the valuation report stating it to be cryptic and two-pager report. It is contended by the LD AR that there is no mismatch between figures reported in TEV study report prepared by GITCO and figures taken in Valuation report determining value of shares. He further submitted that TEV study is the basis for valuation certificate. We completely agree with the above submission of the assessee that if there is no variation between the figures of TEV study report conducted by GITCO and the earning figures of valuation report then, even otherwise tow pager report, despite being cryptic cannot be discarded.

47. The facts are also put to our attention that the net profit after tax and depreciation worked out by the learned assessing officer are fallacious for the reason that it considered the projections for the existing BOPP lines whereas the projections with respect to the combined project should have been adopted. If, the financial projections of the combined project are taken into consideration than there is no difference in the financial projections of net profit after

tax and depreciation taken as per the valuation report as well as by the GITCO. This is tabulated as Under:-

Net profit after tax and depreciation for financial year	*As per GITCO of the existing BOPP Lines*	*As per GITCO (combined project)*	*As per the valuation report)*
12-13	*1085.75*	*1080.75*	*1085.31*
13-14	*1849.84*	*1849.84*	*1849.44*
14-15	*2127.29*	*4823*	*4822.49*
15-16	*2442.48*	*7049*	*7049.01*
16-17	*2514.50*	*8303*	*8302.83*
17-18	*2608.09*	*9123*	*9122.69*

There cannot be any dispute that the figures of net profit after Tax and Depreciation shall be taken of the combined project and not of the existing project only. Therefore, it is now evident that if the combined projections as per GITCO report are taken, there is no difference between the financial figures of net profit after tax and depreciation taken as per the valuation report.

48. The learned assessing officer was also of the view that the financial projections of the valuation report are at wide variance with the actual results. The claim of the assessing officer is that the actual results shows far less net profit compared to the projected results, therefore the allegation is that in the projected results the profits are shown higher to justify the higher premium. When we look at the actual figures we find that for financial year 13 - 14 the actual profit of the assessee is only Rs. 2033.700 which is less than the projected results in the valuation report of Rs. 1849.44. Even otherwise, the discounted cash flow method speaks about the estimation of future cash flow available to an organization. It is based on so many estimations, exemptions, representation, and other external factors. Therefore merely if there are variations in the actual performance of an enterprise with the projections, the projections cannot be rejected as such on that basis unless the regulatory disproportionalities authority finds or absurdities flaws and in assumptions, estimations etc. No doubt, variations between the actual results in the estimation are required to be justified by the assessee, if questioned. Based on the explanation of the assessee the learned assessing officer is bound to decide whether the brands is because of the valid reasons or it is merely for justification of higher premium.

49. Further with respect to the valuation of the share of the assessee company, it has been shown to us that for assessment year 2011 - 12 the assessee issued shares at a premium of 990 per share which is been accepted by the coordinate bench in ITA number 2671/MUM/2016.. Further for assessment year 2012-13 identical premium i.e. 990 per share has been accepted by the coordinate bench in ITA number 5996/M/2016. For assessment year 2013-14, the premium accepted by the assessee is only 1040 per share, which is marginally higher than the premium accepted by the coordinate bench in earlier years in assessee's own case. We have not shown by the revenue that the above premium accepted by the coordinate benches in assessee's own case has not been accepted by the revenue. Therefore, on this basis also, we are of the view that the premium charged by the assessee of Rs. 1040 per share is not excessive.

50. The learned assessing officer has also worked out the fair value per equity shares of 887 per share point written submission dated 27/12/2021 wherein the learned assessing officer is of the view that the valuation of shares based on the TEV study which was on the basis of three BOPP lines whereas in the value for valuation certificate the valuation was made on the basis of two BOPP lines only. The learned assessing officer therefore worked out the net distributed income to the equity shareholders at two third of projected net distributable income and worked out fair value per equity shares of 887 per share. This is only because of the reason that the learned assessing officer has considered the projection for the existing BOPP project only, which is Page number 62 of the report of GITCO, the AO should have taken the combined Propied projections placed at page number 67 of that project report. Therefore, the valuation made by the learned assessing officer at Rs. 887 per share is based on incorrect assumptions.

51. In view of the above facts, we uphold the order of the learned CIT - A in deleting the addition u/s 68 of the act with respect to shares issued by the assessee at a premium of 1040 per share to opulence investment Ltd Mauritius as based on the explanation of the assessee and information received by FT & TR division of CBDT clearly proves the identity and creditworthiness of the investor. The premium charged by the assessee on the issue of shares cannot also be charged to tax in the hands of the assessee in view of the provisions not applicable where investor is a non-resident as well as

proper justification supported by valuation report and TEV study produced.

52. In the result, ground number 1 3 of the additional grounds of appeal and ground number 1 - 2 of the original appeal memo are dismissed." (Emphasis Supplied)

12.2. There is nothing on record to persuade us to take a view different from the one taken by the Tribunal for the Assessment Year 2013-14. On perusal of the relevant extract of the Project Appraisal Report at page 217, 229, 257 & 258 of the paper book, we find that there is no variance in the projections of the combined project and the projections considered by the valuation report and reproduced in paragraph 5.5 of the Assessment Order. The Assessing Officer has only taken into consideration existing BOPP line as opposed to the combined project (including proposed BOPP lines) which have been considered while preparing projections for the purpose of valuation of the shares of the Assessee-Company using DCF Method. While dismissing the appeal of the Revenue for the Assessment Year 2013-14 [ITA No. 7052/Mum/2019, dated 12/04/2022], the Tribunal had held that the Assessing Officer should have taken the combined project including the proposed BOPP lines. Accordingly, consistent with the view taken by the Tribunal for the Assessment Year 2013-14, we uphold the valuation of INR 1,050/- per share determined in the valuation report from the independent valuer relied upon by the Assessee-Company.

12.3. In view of paragraph 12.1 & 12.2 above, we do not find any infirmity in the order passed by the CIT(A) deleting the alternative addition of INR 23,71,34,031/- proposed by the Assessing Officer under Section 56(2)(viib) of the Act. Ground No. 4 & 5 raised by the Revenue are, therefore, dismissed.

Ground No. 1

13. Next, we would take up Ground No. 1 raised by the Revenue which is directed against the order of CIT(A) deleting the addition of INR 2,20,54,200/- made by the Assessing Officer under Section 68 of the Act in respect of share capital and premium received by the Assessee from non-resident investor.

13.1. During the relevant previous year, the Assessee had issued 21,004 shares having face value of INR 10/- each to M/s Platinummic FZE, UAE at a consideration of INR 1,050/- per share (including share premium of INR 1,040/- per share) for total consideration of INR 2,20,54,200/-. The Assessing Officer treated the share capital and premium aggregating to INR 2,20,54,200/- received from the aforesaid non-resident investor as unexplained cash credit in the books of accounts and made an addition under Section 68 of the Act observing as under:

> *"4.2.2. Details were called for in this regard and the Section 68 of the Act laces onus on the assessee to prove identity of the party, genuineness of the transaction and creditworthiness of the party. The assessee, vide point 1 of the order sheet noting dated 08.12.2016, was specifically asked to furnish copy of confirmation of the party from whom Share Capital/Premium is taken along with copy of its Balance Sheet & ITR to prove the source of funds received and give justification of the premium charged. In this context, the AR of the assessee vide letter dated 16.12.2016 stated that 'vide point 2 of submission dated 23.09.2016, assessee has submitted following comprehensive details evidencing identification, genuineness of the transactions and creditworthiness of the said parties who have invested in share capital during the year under consideration.*
>
> *4.2.3. Thus, it is evident that the assessee has not discharged the onus of u/s 68 and has not furnished any details whatsoever regarding the foreign party. It is precisely to ascertain as to whether PFAZ is a mere conduit, the assessee was required to furnish the creditworthiness of PFAZ so that the real source of funds flown to the assessee can be ascertained. The assessee did not discharge this*

onus and no details and evidence of Investment claimed to be made by PFAZ has been furnished by it. It is beyond the preponderance of probabilities that a person receiving Rs.2,20,54,200/- from a foreign party would not do any due diligence in this regard. It is Incumbent on every person who receives money in Its bank account to ascertain the source of funds. The assessee cannot take plea of case laws such as Lovely Exports in this regard as the sum is received from foreign party which is beyond the jurisdiction of Indian Tax Authorities. The facts in the instant case are different. The assessee has not furnished any details as to how it came to know about PFAZ, what were the correspondences, what exactly the assessee do to find out the bona fide of the funds of PFAZ. It is not the case of the assessee that it will receive funds from any foreign entity without doing due diligence and verifying the credentials of the party. The assessee has miserably failed to give iota of supporting document to establish the creditworthiness of PFAZ. The submission of this ground is therefore rejected."

13.2. After making the above observations, the Assessing Officer concluded that the Assessee had failed to discharge the onus under Section 68 of the Act as the Assessee has failed to furnish documents and evidence to establish identity & creditworthiness of the non-resident investor and genuineness of the transaction.

13.3. In appeal preferred by the Assessee, the CIT(A) deleted the addition of INR 2,20,54,200/-.

13.4. The Revenue is now in appeal before us challenging the above order of CIT(A) deleting the addition.

13.5. We have given thoughtful consideration to the rival contentions and perused the material on record. On perusal of the Assessing Officer we find that the Assessing Officer has noted in paragraph 4.2.2. reproduced hereinabove, that the Assessee had filed the following documents/details:

(a) a chart showing details of the payments
(b) copy of share application/allotment letter

(c) copy of share certificate
(d) copy of bank statement of Assessee evidencing receipt
(e) copy of certificate of FIRC
(f) copy of Board Resolution for allotment of equity shares
(g) copy of its annual return filed with ROC

13.6. However, the Assessing Officer was not satisfied. While making the addition under Section 68 of the Act the Assessing Officer noted that the Assessee had not furnished copy of financials of non-resident investor and evidence of the source of funds invested by such non-resident Investor. Therefore, before CIT(A), vide submission dated 06/08/2019, the Assessee filed copy of the financials for the year ended 30/06/2012, bank statement of non-resident investor for the month of May, 2013 and certificate of formation to show creditworthiness of the non-resident investor and genuineness of the transaction.

13.7. The CIT(A), taking into consideration the documents furnished by the Assessee, deleted the addition of INR 2,20,54,200/- made by the Assessing Officer under Section 68 of the Act. The CIT(A) noted that the proviso to Section 68 of the Act dealing with the requirement of establishing 'source of source' was not applicable to non-resident investor. The relevant extract of the decision of the Tribunal reads as under:

> "*4.10 I have gone through the assessment order of the AO, submissions of the assessee company extracted above and perused the material available on the record. Assessee filed following details of foreign entity, Platinummic FZE, UAE to prove identity, creditworthiness and genuineness of transaction, as required under the provisions of Section 68:*
>
> - *Complete address and details of PFZE*
> - *Copy of Board Resolution authorizing issue of share capital*
> - *Copy of Share certificate*

- *Copy of Intimation to RBI regarding issue of Equity Shares to Foreign Company against consideration under FDI scheme.*
- *Copy of complete reporting made to RBI for FIRC, UIN No, and FCGPR report inter-alia containing entire banking transaction details*
- *Copy of return filed with ROC*
- *Copy of its Bank statement showing receipt of share capital/share premium*
- *Copy of share valuation certificate justifying the share premium charged by the independent professional.*
- *Copy of CMA report (appraised and vetted by GITCO) for BOPP Line*

4.11 It is seen from the above that the appellant had filed extensive documents to substantiate the identity, creditworthiness of the investor i.e. Platinummic FZE, UAE and genuineness of the transaction. Proviso placed under section 68 requiring the source of source is not applicable to non resident investments. In this regard Hon'ble Delhi Tribunal in case of Bycell Telecommunications India (P) Ltd. V. PCIT (supra) held that the AO was not required to verify the source of source, except under exceptional circumstances where there is a strong prima facie material to demonstrate that the source itself is not genuine. In the instant case, nothing has been brought on record by the AO to challenge the genuineness of the source. As a result, the action of the AO in questioning the source of source is not warranted in the case of non resident investor. Further, AO also discussed in the assessment proceedings the justification for share premium in the background of the issue price, contending that DCF valuation was not an appropriate method for valuation of shares and the entire amount received towards issue of shares represented unexplained cash credits under Section 68.

4.12 It is seen that the said monies received by it from M/s. Platinummic FZE, UAE were computed in accordance with DCF valuation arrived at by an independent Chartered Accountant in compliance with the Foreign Exchange Management Act and the rules and regulations framed there under. This being an approved method for the purpose of FEMA, was an acceptable method for the valuation of shares. Hon'ble Mumbai Tribunal (jurisdictional) in case of Finproject India Private Ltd. v. PCIT (supra), held that the DCF technique of valuation is appropriate method for determining the value of shares, given that the same was in accordance with the

FEMA provisions. Thus, the appellant cannot be considered to be in default for compliance with something that was merited by law.

4.13 Further, on examination of the submissions filed by the appellant, it is seen that the genuineness of the transaction of receipt of share capital had been duly established by the appellant by furnishing the copy of the Foreign Inward Remittance Certificate ("FIRC) issued by the Authorised Dealer Banks and Form-2 submitted to the Registrar of Companies. In the said FIRC's, the authorised dealers have certified the receipt of inward remittance from M/s. Platinummic FZE, UAE on various dates, the Rupee equivalent of which amounting to Rs.2,20,54,200 has been credited to the Bank Account of the appellant. Further, it is certified in the FIRC that the purpose of remittance is "FDI for purchase of equity" favouring "Chiripal Poly Films Ltd.". Apart from the genuineness of the transaction, the Foreign Inward Remittance certificate also serves the purpose of establishing the identity of M/s. Platinummic FZE, UAE, as it mentions the name of the remitter and the name of the remitting bank in Dubai and the purpose of the remittance. In this connection, it is pertinent to point out the address of M/s. Platinummic FZE, UAE is PO Box 42914 (dubai), RAKFTZ, Ras Al khaimah, UAE.

4.14 Further, it is seen that the appellant has informed the RBI regarding the Foreign Inward Remittance from M/s. Platinummic FZE, UAE towards subscription to the shares of the appellant company at Rs.1050 per share comprising of face value of Rs.10 per share and premium of Rs.1040 per share, along with the KYC form in respect of the non-resident investor. It is further seen that the RBI has allotted Unique Identification Number (UIN) MUC24051300573 for the said Foreign Inward Remittance and intimated the same to the appellant. Thus, it is seen that the investment made by M/s. Platinummic FZE, UAE in the share capital of the appellant company during the year, which comprised of paid up share capital of Rs.2,10,040 and share premium of Rs.2,18,44,160, has duly complied with the FEMA provisions and RBI regulations."

13.8. We are in agreement with CIT(A). Firstly, the proviso to Section 68 of the Act putting onus on the Assessee to provide explanation about 'source of source' does not apply to receipt of share

capital/premium from a non-resident. Therefore, the same would not have any application in case of share capital & premium received by the Assessee from M/s Platinummic FZE, UAE. Secondly, in our view, the Assessee had placed on record sufficient details and documents to establish identity & creditworthiness of the non-resident investor and the genuineness of the transaction. The CIT(A) has in paragraph 4.10 of the order impugned listed the details and documents filed by the Assessee. None of the aforesaid documents were disputed by the Assessing Officer. The Assessee had even filed the financial statement for the year ended June, 2013 and certificate of incorporation of the non-resident investor before the CIT(A) to show creditworthiness of the non-resident investor. As per the certificate of formation M/s Platinummic FZE, UAE was formed on 28/07/2011. A perusal of the financial statements for the year ended June, 2013, the Assessee was operational and had earned trading profits. Further, the material placed before us also does not show that any independent inquiry or investigation was carried out by the Assessing Officer before rejecting the submission/documents provided by the Assessee. The FIRCs show that share application & premium were received by the Assessee through normal banking channel from the non-resident investor. The issuance of shares at a premium of INR 1,040/- was reported to the Reserve Bank of India (RBI) and is supported by the valuation report determining value of shares as per DCF Method which has already been accepted by us. There is nothing on record to suggest that the transaction was not a genuine transaction. Thus, in our view the primary onus cast upon the Assessee under Section 68 of the Act to explain the nature and source of share capital & premium received from non-resident investor was

discharged by the Assessee.

13.9. We note that in the case of the Assessee for the Assessment Year 2011-12 the Co-ordinate Bench of the Tribunal had, vide order, dated 19/02/2019, passed in ITA No. 2671/Mum/2016 : reported in 177 ITD 441 (Mumbai), confirmed the order of CIT(A) deleting similar addition made by the Assessing Officer under Section 68 of the Act in respect of share capital & premium received by the Assessee from non-resident investor after taking into consideration similar details/documents filed by the Assessee in that case before the Assessing Officer and CIT(A).

13.10. In view of the above, given the facts and circumstances of the present case, we concur with the CIT(A) and hold that the Assessee had discharged the onus cast upon the Assessee under Section 68 of the Act to establish the identity & credit worthiness of non-resident investor and the genuineness of the transaction of receipt of share capital and premium of INR 2,20,54,200/- from M/s Platinummic FZE, UAE. Accordingly, Ground No. 1 raised by the Revenue is dismissed.

Ground No. 2 & 3

14. In relation to addition of INR 35,00,05,950/- deleted by the CIT(A) pertaining to share capital & premium received from the resident companies, both sides had adopted the corresponding arguments made in respect of non-resident investor discussed hereinabove while adjudicating Ground No. 1 above, with the applicability of proviso to Section 68 of the Act being the only additional issue addressed by both the sides.

14.1. In this regard, both the sides, in principle, agreed that the proviso to Section 68 of the Act shall apply in case of share capital & premium received by resident companies during the relevant previous year. The issue for consideration before us pertaining to the proviso to Section 68 of the Act is whether in the facts and circumstances of the present case, the CIT(A) was correct in deleting the addition made by the Assessing Officer under Section 68 of the Act in respect of the share capital & premium received by the Assessee from the resident companies holding, inter alia, that action of Assessing Officer challenging the source of source was not warranted.

14.2. It is the case of the Revenue that the CIT(A) had incorrectly concluded that the Assessee had explained 'the source' of share capital & premium as well as the 'source of source'. During the course of hearing, the Ld. Departmental Representative vehemently contended that the Assessee had failed to provide explanation about the 'source of source' and therefore, the provisions contained in proviso to Section 68 of the Act were attracted. Whereas the stand taken by the Assessee in the appellate proceeding before us was that the CIT(A) had rightly deleted the addition after taking into consideration the details/documents filed by the Assessee which were not considered by the Assessing Officer. The Assessee had discharged the onus cast by the proviso to Section 68 of the Act to furnish explanation about the nature and source of share capital & premium received from resident companies and credited in the books of the Assessee during the relevant previous year. Reliance in this regard was placed on paragraph 4.15 & 4.16 of the order passed by CIT(A) and the orders passed by the Tribunal in appeals preferred by the Revenue in the case of the Assessee for the Assessment Year 2011-12 (ITA No. 2671/Mum/2016, dated 19/02/2019), Assessment

Year 2012-13 (ITA No. 5996/Mum/2016, dated 24/03/2021 and Assessment Year 2013-14 (ITA No. 7052/Mum/2019, dated 12/04/2022).

14.3. We have heard the rival contention and perused the material on record. We note that out of the 7 resident companies, 4 resident companies (namely, Bhushan Petrofils Pvt. Ltd, Dindayal Processor Pvt. Ltd., Sparrow Exports Pvt. Ltd. and Chiripal Textiles Mills Pvt. Ltd.) had subscribed for shares of the Assessee during the previous year relevant to the Assessment Year 2011-12. Giving identical reasoning, the Assessing Officer had made addition under Section 68 of the Act which was deleted by the CIT(A) taking into consideration similar documents/details filed by the Assessee during the assessment proceedings for the Assessment Year 2011-12. The order of the CIT(A) was confirmed by the Tribunal while dismissing the appeal of the Revenue vide order, dated 19/02/2019, passed in ITA No. 2671/Mum/2016. Therefore, consistent with the view taken by the Tribunal in the aforesaid decision, we conclude that the documents/details furnished by the Assessee in relation to the resident companies were sufficient to explain the source of share capital & premium received by the Assessee during the relevant previous year. However, the proviso to Section 68 of the Act was not applicable for the Assessment Year 2011-12, as the same was introduced with effect from 01/04/2013. Therefore, the issue relating to the applicability and satisfaction of the provisions contained in proviso to Section 68 of the Act was not before the Tribunal in appeal preferred by the Revenue for the Assessment Year 2011-12. Same was the case in appeal preferred by the Revenue for the Assessment Year 2012-13. For the Assessment Year 2013-14, the issue that travelled to the Tribunal

pertained to share capital & premium received from another non-resident investor. Therefore, the Tribunal was not required to examine the provisions contained in proviso to Section 68 of the Act. Thus, the issue has come for consideration in the case of the Assessee for the first time in the present appeal.

14.4. Proviso to Section 68 of the Act was inserted by the Finance Act, 2012 with effect from 01/04/2013. After insertion of proviso to Section 68 of the Act, as applicable at the relevant time, read as under:

> ***"Cash credits.***
>
> *Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation" about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:*
>
> *Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company be deemed to be not satisfactory, unless-*
>
> *(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
>
> *(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory.*
>
> *Provided further that nothing contained in the first proviso [or second so shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to clause (23FB) of section 10."*

14.5. On perusal of proviso under Section 68 of the Act, it can be seen that the said proviso creates a deeming fiction whereby the explanation furnished by the Assessee in relation to any sum, being share capital or premium, found to be credited in the books of accounts of the Assessee is considered to be not satisfactory unless the resident investor also offers an explanation about the nature and source of sum so credited and such explanation is found to be correct by the Assessing Officer.

14.6. At this juncture, it would be pertinent to refer to the relevant extract of the Memorandum to the Finance Bill, 2012 giving the purpose of introduction of proviso to Section 68 which reads as under:

"C. MEASURES TO PREVENT GENERATION AND CIRCULATION OF UNACCOUNTED MONEY

Cash credits under section 68 of the Act

Section 68 of the Act provides that if any sum is found credited in the books of an assessee and such assessee either

(i) does not offer any explanation about nature and source of money; or

(ii) the explanation offered by the assessee is found to be not satisfactory by the Assessing Officer,

then, such amount can be taxed as income of the assessee.

The onus of satisfactorily explaining such credits remains on the person in whose books such sum is credited. If such person fails to offer an explanation or the explanation is not found to be satisfactory then the sum is added to the total income of the person. Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this section, particularly, in cases where the sum which is credited as share capital, share premium

etc.

Judicial pronouncements, while recognizing that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, have advised a balance to be maintained regarding onus of proof to be placed on the company. The Courts have drawn a distinction and emphasized that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large.

In the case of closely held companies, investments are made by known persons. Therefore, a higher onus is required to be placed on such companies besides the general onus to establish identity and credit worthiness of creditor and genuineness of transaction. ***This additional onus, needs to be placed on such companies to also prove the source of money in the hands of such shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit****. If the company fails to discharge the additional onus, the sum shall be treated as income of the company and added to its income.*

It is, therefore, proposed to amend section 68 of the Act to provide that the nature and source of any sum credited, as share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee company in the hands of the resident shareholder*. However, even in the case of closely held companies, it is proposed that this additional onus of satisfactorily explaining the source in the hands of the shareholder, would not apply if the shareholder is a well regulated entity, i.e. a Venture Capital Fund, Venture Capital Company registered with the Securities Exchange Board of India (SEBI)."*

This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years."

14.7. On perusal of above, it can be seen that proviso to Section 68 of the Act is inserted with effect from 01/04/2013 and applies to the

Assessment Year 2014-15 before us. It puts additional onus on a company receiving share capital & premium from an Indian resident to also prove the source of money in the hands of such Indian resident shareholder. If the company fails to discharge this additional onus, the share capital & premium is to be treated as income of the company receiving such share capital or premium. Thus it is clear that proviso was inserted in Section 68 of the Act to provide that the nature and source of any sum credited as share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained in the hands of the resident investor/shareholder.

14.8. In view of the above, we proceed to examine the findings returned by the CIT(A).

14.9. The CIT(A) has dealt with this issue in paragraph 4.15 to 4.19 of the order impugned. In paragraph 4.16, the CIT(A) has relied upon the decision of Delhi Bench of the Tribunal in the case of Bycell Telecommunications India (Pvt.) Ltd. Vs. Principal Commissioner of Income-Tax-II, New Delhi : [2018] 90 taxmann.com 268 (Delhi-Trib.). On perusal of the same, we find that the decision was rendered in appeal preferred by the Assessee against the order passed under Section 263 of the Act pertaining to assessment years 2006-07 to 2010-11. The proviso to Section 68 of the Act was introduced with effect from 01/04/2013 and applied to Assessment Year 2013-14 and subsequent assessment years. Therefore, the decision cannot be applied to the facts of the present case. Further, the aforesaid decision of the Tribunal does now lay down the preposition for which the decision has been cited. The conclusion drawn by the CIT(A) that in the aforesaid decision the Tribunal had

held that the '*Assessing Officer is not required to verify the source, except under exceptional circumstances where there is a strong prima facie material to demonstrate that the source itself in not genuine*' is not correct and runs contrary to the specific provisions contained in proviso to Section 68 of the Act.

14.10. Further, we note that in paragraph 4.17 of the order impugned, the CIT(A) has placed reliance upon the decision of the Tribunal in the case of the Assessee for Assessment Year 2011-12 [ITA No.2671/Mum/2016, dated 19/02/2019]. The aforesaid decision also pertains to the assessment year prior to insertion of proviso to Section 68 of the Act. Even in the decision of the Tribunal in the case of the Assessee for the Assessment Year 2013-14, the Tribunal was not required to address the issue relating to applicability of proviso to Section 68 of the Act to the share capital & premium receipt by the Assessee from the resident companies since in the Assessment Year 2013-14 the issue that travelled to the Tribunal pertained to share capital & premium received from non-resident investors. Thus, the issue whether the Assessee has discharged the additional onus cast upon the Assessee by proviso to Section 68 of the Act would have to be examined in view of the facts and circumstances of the present case only.

14.11. In this regard, we note that the CIT(A) has returned a finding in paragraph 4.16 of the order impugned that the Assessee had discharged the onus cast upon it by furnishing various documents/details specified therein. It is admitted position that the aforesaid documents were filed by the Assessee before the Assessing Officer. On going through the letter dated 16/12/2016 filed by the Assessee before Assessing Officer [placed at pages 272

to 338 of the paper-book] we find that the Assessee has filed the Profit & Loss Account as well as the Balance Sheet of the 7 resident companies for the relevant previous year. Further, the Assessee has also filed the ITR Acknowledgement and copy of assessment orders in case of resident companies for the Assessment Year 2014-15 where the same have been passed. On perusal of paragraph 4.3.7 of the Assessment Order, dated 30/12/2016, we find that the Assessing Officer had concluded that the Assessee had failed to discharge the additional onus cast upon the Assessee by proviso to Section 68 of the Act in the following manner:

> *"4.3.7. In this context, the AR of the assessee vide letter dated 16.12.2016 stated that 'vide point 2 of submission dated 23.09.2016, assessee has submitted following comprehensive details evidencing Identification, genuineness of the transactions and creditworthiness of the said parties who have invested in share capital during the year under consideration. However, on verification of the assessee's submission dated 23.09.2016, which is filed on 06.10.2016, It is seen that the assessee has merely furnished photo copies of PAN cards of such parties from whom share capital / premium is claimed to be taken during the year. Besides this, the assessee has also filed copy of share allotment letter, share certificate, its own bank account statement evidencing receipt of money from the said party, copy of certificate of FIRC, copy of resolution passed in the meeting of Board of directors for allotment of equity shares and copy of Its annual return filed with ROC. Thus, it is evident that the assessee has not filed copy confirmation of the said parties along with its balance sheet, ITR and financial of the said parties from whom share capital / premium is taken. Therefore, it is clear that the assessee has not only failed to prove the source of the share capital / premium received but also the source of the source of such parties, which is the onus cast upon the assessee explicitly as per proviso to section 68 of the Act inserted w.e.f. 01.04.2013. On the basis of the details furnished in the course of assessment proceedings, in spite of various opportunities, the source of the Investment in the form of share capital/premium itself remains unverified as such the question of ascertaining the source of the source does not arise at all."*

14.12. On perusal of record, we find that the finding returned by the Assessing Officer that the Assessee had not filed copy of ITR, balance sheet of the 7 resident companies is contrary to material on record. The Assessee has placed before us (at page 33 to 121 of the Paper-book), a copy of reply dated 23/09/2016, whereby the Assessee had filed the details and documents listed by the CIT(A) in paragraph 4.15 & 4.16 of the order impugned. After examination of the said documents, the CIT(A) has returned a finding that the Assessee had discharged the primary additional onus cast upon the Assessee by the proviso to Section 68 of the Act. On perusal of the said documents, we concur with the CIT(A) to this extent. During the appellate proceedings the Ld. Departmental Representative had highlighted the fact that the Assessee had failed to file the bank statement of the resident companies during the assessment proceedings. On perusal of the Assessment Order, we find that the reasoning given by the Assessing Officer in paragraph 4.3.7 of the Assessing Officer for rejecting the documents filed by the Assessee is that the Assessee had not filed copy of confirmation, ITR and financials. As we have noted hereinabove, the Assessee had filed copy of ITR acknowledgment, Balance Sheet and the Profit & Loss of the resident companies for the relevant previous year. Thus, rejection of the documents/details filed by the Assessee on account of failure to furnish the confirmation cannot be sustained. The Assessment Order does not make any reference to inquiry/verification carried out by the Assessing Officer. On perusal of record before us, we find that no details/information was called for from the resident companies or third parties under Section 133(6) of the Act. Therefore, there was nothing brought on record to counter the documents/details furnished by the Assessee. The

findings returned by the CIT(A) that the resident companies had sufficient funds their own in the books which were the source of investment has also gone uncontroverted during the appellate proceedings before us. We already rejected revenues challenge to the valuation report relied upon by the Assessee wherein the value of shares of the Assessee-Company has been determined using DCF Method at INR 1,050/- (including premium of INR 1,040/-) per share.

14.13. In view of the above, we do not find merit in Ground No. 2 & 3 raised by the Revenue and the same are dismissed.

Ground No. 6

15. The Revenue is aggrieved by the action of the CIT(A) deleting the addition/disallowance of depreciation claimed by the Assessee.

15.1. On perusal of material placed before us we find that the Assessing Officer had disallowed depreciation of INR 29,57,924/- claimed by the Assessee in respect of the right for usage of common infrastructure and administrative facilities allotted in Vraj integrated Textile Park Ltd. The Assessee had claimed depreciation at the rate of 25% while the Assessing Officer restricted the allowance of depreciation to 10%. In appeal the CIT(A) agreed with the Assessee and deleted the disallowance made by the Assessing Officer by following the decision passed by CIT(A) in appeal for the Assessment Year 2012-13 wherein the claim of depreciation at the rate of 25% was allowed. Revenue is now in appeal before us.

15.2. During the course of hearing both the sides agreed that this issue stands decided by the Tribunal in favour of the Assessee in the case of the Assessee for the preceding assessment years. Relevant

extract of the decision of the Tribunal for the Assessment Year 2013-14, ITA No. 7052/Mum/2019 , dated 12/04/2022] containing the relevant facts and adjudication on the issue reads as under:

> *"53. Coming to the ground number 3 of the original appeal memo where the learned assessing officer is aggrieved by the action of the learned and CIT - A in deleting the addition/disallowance of depreciation claimed on intangible assets. The fact shows that the AO noticed during the course of assessment proceedings from the assessment order for assessment year 2012 - 13 that assessee has claimed depreciation on intangible assets amounting to 1,729,782, which was disallowed. The fact shows that assessee has obtained a right for usage of common infrastructure and administrative facilities that were allotted in Vraj integrated Textile Park Ltd. These are the rights for usage of common infrastructure and administrative facility for plots, which were allotted in the above Textile Park. According to the assessee, usage and occupancy rights for common infrastructure and administrative facilities developed in the industrial park had been conferred upon the assessee company. Therefore according to the assessee said rights were directly or keen to and having Inextricable linkage with the access and effective utilization of factory building and other facilities established by the assessee company in that Textile Park. Therefore, according to the assessee it is an intangible asset and hence is eligible for depreciation at the rate of 25%. The AO is of the view that above advantage is linked to the factory building, factory building itself is eligible for depreciation at the rate of 10% and therefore depreciation can be claimed by the assessee only at the rate of 10% on this intangible right. Therefore, AO disallowed the depreciation claimed by the assessee on the above for the reason that it has been disallowed in the earlier years. The learned CIT - A deleted the about disallowance based on the order passed by his predecessor for assessment year 2012-13. Both the parties confirmed before us that identical issue has been decided by the coordinate bench in assessee's own case for assessment year 2012 - 13 in ITA number 5996/M/2016 and therefore it deserves to be followed.*
>
> *The coordinate bench dealt with the above issue as under:*
>
> > *"3. The next issue to be decided in this appeal is as to whether the Id CIT (A) was justified in deleting the*

disallowance of 17,29,780/- made on account of depreciation on intangible assets in the facts and circumstances of the case.

3.1. We have heard the rival submissions and perused the materials available on record. We find that the Id AO observed that the assessee had shown addition of intangible assets of RS 3,45,95,600/- as 'rights in infrastructure' and claimed depreciation thereon during the year under consideration. The Id AO observed that this addition does not fall under the list of intangible assets u/s 32(1)(ii) of the Act and accordingly denied the depreciation thereon. We find that the assessee had pleaded that it had acquired 'rights in infrastructure' during the year under consideration and since such rights were for usage of common infrastructure and administrative facilities for plots allotted in Vraj Infrastructure Textile Part (VITP), the same were akin to and having inextricable link with 'excess and effective utilization of factory building and other facilities' established by the assessee in VITP.

We find that the assessee had further pleaded that despite the fact that such rights were shown as 'intangible assets' eligible for depreciation at 25% in the Tax Audit Report, the assessee had adopted rate of depreciation applicable to 'factory building' at 10% and since the assets were acquired in the second half of the year, it had claimed depreciation at the rate of 5% amounting to 17,29,780/- (3,45,95,600 10% 50%). We find that the Id AO had denied depreciation on the only ground that the assessee had self- contradicted its claim by saying that such rights were intangible assets on one hand and by claiming depreciation at the rate applicable to factory building on the other hand. We find that the Id CIT-A had granted relief to the assessee by categorically holding that the rights in infrastructure acquired by the assessee in VITP is having direct nexus with effective utilization of its factory premises in its Textile Park. This factual finding has not been controverted by the revenue before us. Either way, the incurrence of expenditure towards acquiring rights in infrastructure in VITP has not been doubted by the revenue. The only issue is the rate of depreciation thereon. The LD CITA had also observed that the assessee is eligible for 25% depreciation but had claimed only 10% and accordingly deleted the disallowance made by the LD AO. Hence, we do not deem it fit to interfere in the order of the Id CITA. Accordingly, the Ground No. II raised by the revenue is dismissed."

54. We find that facts are similar in this year too. We have not been explained any reason by the LD DR to deviate from the orders of the coordinate bench in assessee's own case. Therefore, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2012-13 we do not find any infirmity in the order of the learned CITA in allowing depreciation on the usage and occupancy rights at the rate of 25% considering it as intangible asset. Accordingly, ground number 3 of the appeal is dismissed."

15.3. In view of the above decision of the Tribunal, we do not find any infirmity in the order passed by the CIT(A) in allowing the claim of depreciation at as claimed by the Assessee. Accordingly, Ground No. 6 raised by the Revenue is dismissed.

CO No. 152/Mum/2022

16. We would now take up the grounds raised in Cross Objection preferred by the Assessee in the appeal preferred by the Revenue.

16.1. According to the Registry, there is a delay of 1046 days in filing the cross-objections. In the application seeking condonation of delay the Assessee has explained that there was an inadvertent mistake while filing Form 36A as the date of filing appeal by the Revenue before the Tribunal was incorrectly taken as date of knowledge of appeal preferred by the Revenue. The Assessee got knowledge of appeal filed by the Revenue through registered post dated 27/07/2021 sent by the Tribunal. Copy of envelope showing date of receipt has been filed by the Assessee. Therefore, the actual delay in filing the cross-objections gets reduced to 511 days. On 27/07/2021, when the notice from the Tribunal was received by the staff of the Assessee, the office of the Assessee was functioning with limited staff due to Covid-19 Pandemic and failed to place the same before the concerned person. Many of the key persons of the

Assessee-Company were affected by Covid-19 Pandemic. Even when the hearing of appeal was listed before the Tribunal in the year 2022 the concerned staff of the Assessee could not go to the office of concerned counsel to discuss the issue. It is only in the month of December, 2022 that the proper steps could be taken to file the cross-objections before the Tribunal on 19/12/2022. The Ld. Sr. Counsel for the Assessee had submitted that in case the period granted by the Hon'ble Supreme Court vide order, dated 10/01/2022, passed by the Hon'ble Supreme Court in suo moto Writ Petition (C) No. 3 of 2022 is excluded the period of delay further gets reduced to around 202 days which has been explained as aforesaid.

16.2. We have heard both the sides in relation to application for condonation of delay in filing cross-objections.

16.3. The Hon'ble Supreme Court, in the case of Collector of Land Acquisition Vs. Mst. Katiji & others AIR 1987 1353 (SC) has emphasized that substantial justice should prevail over technical considerations. The requirement that every day's delay must be explained does not mean that a pedantic approach should be taken. The aforesaid doctrine must be applied in a rational common sense and in pragmatic manner, and more so in circumstances where a litigant does not stand to benefit by lodging the appeal late as is the case before us. It is not disputed that the notice of hearing was first sent to the Assessee through registered post, dated 27.07.2021, and was received by the staff of the Assessee at a time when the Covid-19 pandemic was in place and therefore, the notice could not be placed before the concerned person. On account of non-availability of key persons, the issue could only be discussed

with the concerned counsel on December, 2022 and cross-objections were filed soon thereafter. After considering the totality of facts and circumstances leading to the filing of the cross-objection we are of the view that the delay in filing of the cross-objection needs to be condoned in view of the explanation furnished by the Assessee which we find to be reasonable. In our view the Assessee was prevented by reasonable cause from presenting the cross-objections within limitation.

16.4. In view of the above, the application seeking condonation of delay in filing the cross-objections is allowed. Accordingly, we proceed the examine the grounds raised in the cross-objections

Ground No. 1.1 to 2.2

17. By way of Ground No. 1.1 to 2.2 raised in the cross objections, the Assessee has sought exclusion of the following two capital receipts (credited to the Profit & Loss Account) while computing 'Book Profits' under Section 115JB of the Act:

(a) Electricity Duty Subsidy: INR 2,80,68,707/-
(b) MEIS/SEIS Incentive : INR 90,16,813/-

17.1. While this issue has been raised for the first time before the Tribunal, there is no dispute that the additional claim raised by the Assessee springs from the assessment records as the facts relevant to adjudication of the additional claim from part of the assessment records. The contention of the Revenue is that since the claim has been raised for the first time before the Tribunal, the Assessing Officer has not been granted opportunity to examine and verify the nature and quantum of the capital receipts now sought to be excluded from computation of 'Book Profits' under Section 115JB of

the Act. Keeping in view the aforesaid contention of the Revenue, while we admit the additional claim of the Assessee in view of the judgment of the Hon'ble Bombay High Court in the case of Commissioner of Income-tax, Central-I, Mumbai Pruthvi Brokers & Shareholders: [2012] 349 ITR 336 (Bombay), we remit the issue to the file of Assessing Officer for adjudication as per law, being the course acceptable to both the sides. All rights and contentions of the Assessee are left open. The Assessing Officer is directed to grant opportunity of being heard to the Assessee. In terms of the aforesaid Ground No. 1.1 to 2.2 and raised by the Assessee are allowed for statistical purposes.

In result, appeal preferred by the Revenue is dismissed and Cross Objection preferred by the Assessee is allowed for statistical purposes.

Order pronounced on 11.10.2023.

Sd/-	***Sd/-***
(Om Prakash Kant)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 11.10.2023
Alindra, PS

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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