

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 666/KOL/2023
Assessment Year: 2012-2013**

***Income Tax Officer,..... Appellant
Ward-8(2), Kolkata,
Aayakar Bhawan, 5th Floor,
P-7, Chowringhee Square,
Kolkata-700069***

-Vs.-

***M/s. Indus Realty Pvt. Limited,.....Respondent
Plot-6, Block-EN, Sector-5,
Salt Lake City,
Kolkata-700091
[PAN:AABCI4027R]***

Appearances by:

*Shri B.K. Singh, JCIT, Sr. D.R., appeared on behalf of the
Revenue*

*Shri Ashok Tulsyan, A.R., appeared on behalf of the
assessee*

Date of concluding the hearing : August 23, 2023

Date of pronouncing the order : November 08, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The Revenue is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals),

National Faceless Appeal Centre (NFAC), Delhi dated 25th March, 2023 passed for A.Y. 2012-13.

2. The Registry has pointed out that appeal of the Revenue is time barred by 40 days. In order to explain the delay, the ld. Assessing Officer has filed an application for condonation of delay. In his application, he submitted that orders of the ld. CIT(Appeals) are downloaded from the system of manual checking basis and during the period from January, 2023 to May, 2023, the Department was under pressure of disposing of time-barring matters. For this reason and due to non-availability of sufficient system resources, the searching of the appeal order in ITBA system could not be done on regular basis. In other words, according to the ld. Assessing Officer, he could not keep a tap on the site for checking whether any appellate order of his jurisdiction has been uploaded or not. On due consideration of the explanation of assessee with the help of both the ld. Representatives, we are satisfied that on account of work load, the ld. Assessing Officer might have failed to keep a tag on perusal of the site day to day basis or he might have missed the uploading of the impugned order. Therefore, we condone the delay of 40 days in filing the appeal beyond the period of limitation and proceed to decide the appeal on merit.

3. The Revenue has taken three grounds of appeal. The solitary grievance of the Revenue is that Id. CIT(Appeals) has erred in deleting the addition of Rs.3,00,00,000/-, which was treated by the Id. Assessing Officer as unexplained cash credit by disbelieving the receipt of share capital along with share premium. The Id. Assessing Officer has made the addition with the help of section 68 of the Income Tax Act.

4. Brief facts of the case are that the assessee-company has filed its return of income on 25.09.2012 declaring total income at 'NIL'. The case of the assessee was selected for scrutiny assessment and notices under section 143(2) and under section 142(1) were issued and served upon the assessee. On perusal of the record it revealed that the assessee-company has received share application money including share premium of Rs.3,00,00,000/- from four Group Concern. We will be taking note of all these details while taking cognizance of the submission of the assessee. The Id. Assessing Officer has issued notice to the share applicants and the Directors of the subscriber companies had appeared before him and submitted the details. The Id. Assessing Officer was unable to breach the credibility of witnesses with the angle of identity, creditworthiness of the share subscriber companies and the genuineness of the transactions but thereafter he observed that against the

face value of Rs.1/- each share, the assessee has received the subscription money at Rs.50/-, in other words, it received 49 rupees as premium. He was of the view that the assessee-company has been incurring loss year after year and, therefore, there was no justification at the end of the assessee to command such a premium from the market. On the strength of this belief, he held the transaction of the assessee as non-genuine and made the addition, with the help of section 68, treated this share application money as unexplained credit.

5. The ld. CIT(Appeals), on the other hand, did not concur with the ld. Assessing Officer and deleted the addition. The finding recorded by the ld. CIT(Appeals) reads as under:-

“5.3. DECISION:- The order u/s 154/143(3), the ground of appeal, the statement of facts, and the submissions furnished by the appellant have been carefully considered.

5.3.1. The facts of the case are as mentioned in the above paras and need not be repeated again. Based on them, the following points emerge:-

1. All the 4 share applicant companies responded to notices u/s 133(6) vide their replies on 15.12.2014 with their documents to prove the genuineness of transaction.

2. Director of all the 4 share applicant companies personally appeared before the AO and their statements were recorded on oath u/s 131 of the Act. - thus the Identity was proven

3. The bank statement and audited accounts of share applicant companies were submitted to the AO who subsequently analysed it - Irrespective of the ‘ successful and correct analysis’ done by the AO, the balance sheets of the 4 applicant companies show sufficient strength to prove that

unless proven otherwise, there is no doubt on the creditworthiness of the applicant companies.

4. *The share applicant companies had redeemed their mutual funds or utilized their refunded loan or their overdraft facility to apply for the shares of the Appellant company. - thus genuineness of the source of funds were established. The AO could not bring about any evidence to substantiate his suspicion that the source of funds was some unaccounted money which was being circulated in the guise of share application money.*

5. *To what end does a business uses its own money or its borrowings is entirely in the domain of the business and the AO cannot step into the shoes of the company to decide what prima facie appears to be a financially illogical decision. Irrespective of how financially imprudent the business decision may appear to an external party, i.e. the Assessing Officer, it is the prerogative of the business entity to decide what to do with its funds. Whether purchasing a dud share at an exorbitant price is justified or not, it is for the businesses to take a call. Moreover, all the share applicants are group companies and hence situations may arise where funds are transferred from one to another depending upon their consolidated business strategy and outlook. In any case, while suspicion may arise that the transaction smacks of unaccounted money being circulated, but it cannot be considered as conclusive evidence just on that basis. Some corroborative evidence has to be placed on record in order to justify the conclusion. The assessee, on the other hand, has to ensure that Identity, creditworthiness and genuineness of transaction must be established. Financial prudence need not necessarily be proven.*

6. *As far as the question of excess share premium is concerned, it is true that the necessary provision for taxing the same has been incorporated in the statute in the form of Sec. 56(2)(viib) of the Act w.e.f. AY 13-14. Hence the Appellant cannot be hit by this provision for the relevant assessment year.*

7. *As far as addition u/s 68 of the Act is concerned, it is also true that the Proviso to Sec. 68 has been inserted w.e.f. 1.4.2013 i.e from AY 13-14. Hence the applicability of the provision for the relevant assessment year to the Appellant case is debatable.*

8. *In this context, the decision of the jurisdictional Kolkata Tribunal in [2023] 146 taxmann.com 406 (Kolkata - Trib.) BST Infratech Ltd. v. Deputy Commissioner of Income-tax. pronounced on 30,11.2022 is squarely applicable to the instant appeal. The relevant extract of the Tribunal order is reproduced as under:-*

“5. After considering the above details, which have also been reproduced in the impugned order of the CIT(A), we note that the Assessee has proved the identity of the share subscribers. The share applicants are the Group companies of the assessee company and they are body corporate, registered with the ROC and they were available at the given address. The share applicants have furnished copy of PAN and are registered with ROC having CIN. All the data's of such companies are available with Income-tax Department & ROC. They are also assessed to Income-tax regularly. In respect of genuineness of the transaction the Id. Counsel has established that the share application money i/i/as received through proper banking channels; the share holders had sufficient fund for the purpose of investment & the investments are reflected in their books of account and Bank accounts of the shareholders confirmed the transactions. All are share holders are regularly assessed to Income Tax.

So far as the need for share subscription money and the reason for the group companies to invest in the assessee company is concerned, in this regard it has been explained by the assessee that the assessee is a manufacturing company having turnover of more than Rs. 241 Crores and huge net worth. The assessee is mainly engaged in steel industry so the future prospect is great. Also the business of the assessee is heavily expanding in terms of both turnover and asset. That the assessee was in need of funds as the assessee was expanding its operations. The facts of the case itself suggest that during the impugned point of time there was heavy increase in fixed assets also the turnover increased by 73%. To expand the business assessee needed the funds, which were generated through issue of fresh shares. Further, that the reason to invest also included strategic relation and are made by the associate/group companies, having directors directly related to the assessee company's directors.

We further find force in the contention of the Ld. AR that even the Assessing Officer or the CIT(A) has not brought on record any evidence to show that it was the assessee's own fund that was brought back in the form of share application money. The Ld. CIT(A), himself, has pointed out that the assessment order of the AO was cryptic and that no exercise was done by the AO to examine the records of the case.

Even the Ld. CIT(A), who has, himself, done the exercise of examining the documents has not pointed any doubt or discrepancy with regard to the identity of the investors. The only contention that has been raised by the CIT(A) in the impugned order is that the investor companies have low income. Assets in the form of investments have been created through rotation of money in between the group companies and that the assets mainly consist of cash and cash equivalents. The above contentions raised by the CIT(A), in our view, are not enough to prove that any unaccounted money of the assessee has been introduced in the assessee company, warranting addition under section 68 of the Income-tax Act. Even after making elaborate exercise of examining the documents, the Ld. CIT(A) could not point out any rebuttal to the above evidences furnished by the assessee to prove the identity, creditworthiness of the share subscribers and genuineness of the transaction. The hon'ble Jurisdictional Calcutta High Court, in the case of Pr. CIT v. Anmol Stainless (P.) Ltd. [2022] 138 taxmann.com 535 has held that that where it has been sufficiently established that share applicants had substantial creditworthiness and investments had been made by assessee's own sister concern/group companies having mostly common directors and thus, establishing creditworthiness and genuineness of investments, additions under section 68 had been rightly been deleted.

In view of the discussions made above, we do not find justification on the part of lower authorities in making/confirming the impugned additions, the same are accordingly ordered to be deleted.

In the result, the appeal of the assessee is, hereby, allowed. ”

1. The Appellant has also relied on the following case laws:-

1. CIT V. Apex Therm Packaging (P) Ltd. in 42 taxmann.com 473 wherein the Hon'ble Gujarat High Court held that when full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all creditors/lenders were furnished and when it had been found that loans were furnished through cheques and loan account were duly reflected in balance sheet, then the Assessing Officer was not justified in making addition.

2. *CIT V. Kamdhenu Steel & Alloys Ltd in [2012] 19 taxmann.com 26 (Delhi), wherein the Hon'ble Delhi High Court has held that when full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all creditors/lenders were furnished and when it had been found that loans were furnished through cheques and loan account were duly reflected in balance sheet, the Assessing Officer was not justified in making addition.*

3. *Polymers (P) ltd. vs. DCIT in 111 TTJ 112 wherein the Hon'ble Jodhpur Bench of ITAT wherein it was held that in respect of the share application money, the assessee company has to prove existence of persons in whose name share application is received. No burden is cast on the assessee to prove whether that person himself has invested or some other person has made investment in his name. The burden to prove that the money did not belong to him but to somebody else is on the revenue. It was further held that if any of the shareholders is found to have made unexplained investment, then addition of such investment is required to be made in the hands of the shareholders and not in the hands of the assessee. Accordingly, it was held that the AO was not justified in treating the investment made by the several shareholders in the assessee-company as bogus and to make addition u/s 68 of the Act.*

4. *Gagandeep Infrastructure Pvt. Ltd. vs. ACIT (Mumbai), the Hon'ble Mumbai Bench of ITAT. The Bombay High Court in the same appellant's case in [2017] 80 taxmann.com 272 (Bombay) has held that-*

"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.

9.The Ld. AO has placed reliance on the decision of the Hon'ble Supreme Court in Sumati Dayal v. CIT (214 ITR 801) which is a landmark judgment for decision in cases wherein the surrounding circumstances are heavily evident and hence the true nature of a transaction has to be ascertained in the light of these surrounding circumstances. Any other conclusion would be a travesty of justice. In this instant case however, the reliance is misplaced as the AO's self congratulatory 'successful and correct' analysis falls short of proving that the apparent is probably not real. The facts of this case are positively inclined towards the Appellant, rather than the Department.

The Ld. AO has also stated that

"All these circumstances clearly indicate that what is apparent is probably not real and on further investigation specially on logical analysis c the sworn statement recorded from one fresh share subscriber it is established: that what is apparent is not real.". However, the 'logical analysis' of the sworn statement is not spelled out at all in the impugned assessment order. Therefore the contention of the AO is unconvincing and hence unacceptable*

5.3.2. Hence, in view of the above discussion and respectfully following the numerous judgments cited above, I am inclined to hold that the addition made under Sec. 68 of the Act by the Ld. AO is not

factually and legally sustainable. Hence the same is deleted. Thus the Appellant succeeds and this Ground is ALLOWED”.

6. With the assistance of Id. Representatives, we have gone through the record carefully. A perusal of the record would indicate that four Group Companies, who have sufficient net worth has made the investment with the assessee. The following table will depict the position of all funds possessed by the subscribers, vis-a-vis investment made with the assessee:-

Sl. No.	Particulars	Amount (Rs.)	Amount Invested (Rs.)
1	Citizen Securities Pvt. Ltd.	3,91,29,175	25,00,000
2	De-Con Projects Pvt. Ltd.	6,89,96,701	50,00,000
3	Software Conglomerate Pvt. Ltd.	9,15,11,941	50,00,000
4	Quickpay Suppliers Pvt. Ltd.	2,77,71,945	1,75,00,000

7. During the course of hearing, it was pointed out that all these four companies are Group Company of the assessee. They filed positive return income every year though small in number. For instance first group Concern is Citizen Securities Pvt. Ltd., who has net worth of Rs.3.91 crores and this Concern invested only Rs.25 lakhs, i.e. less than 10% of its own net worth. The Directors of this Company appeared before the Id. Assessing Officer and deposed that the Company has made investment with the assessee-company and also paid share premium. Similarly the second company is

De-Con Projects Pvt. Limited. It invested Rs.50 lakhs out of its net worth of Rs.6.89 crores. This company has filed a return declaring profit of Rs.3,92,065/-. The next one is Software Conglomerate Pvt. Limited. It has also a net worth of Rs.2.63 crores and made investment of Rs.50 lakhs and the last one is Quickpay Suppliers Pvt. Limited, who has net worth of Rs.2.77 crores and made investment of Rs.1.75 crores. According to the assessee, this company had earned a profit of Rs.3.99 crores during the instant year and had enough funds to make such heavy investment. The assessee has filed all these documents. The only area of difference between the assessee and the ld. Assessing Officer is as to why the subscriber will invest in a Company, who is making losses. To this, ld. CIT(Appeals) has also held that it is for the businessman to decide how it wants to use its funds. The subscribers have not borrowed the money for making investment with the assessee-company. The group concern might have decided to start some activity on substantial basis in the assessee-company, therefore, it could be a support from the group concern. The ld. 1st Appellate Authority has also examined whether, this excess premium paid by the subscribers is to be construed as a gift to the assessee within the meaning of section 56(2)(vib) of the Income Tax Act but held that this provision is applicable from A.Y. 2013-14 and not in A.Y. 2012-13.

8. On due consideration of the order of Id. CIT(Appeals), we are of the view that it does not call for any interference at our end. Accordingly, the appeal of the Revenue is dismissed on merit.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 08.11.2023.

Sd/- (Rajesh Kumar) Accountant Member	Sd/- (Rajpal Yadav) Vice-President
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Kolkata, the 8th day of November, 2023

*Copies to :(1) Income Tax Officer,
Ward-8(2), Kolkata,
Aayakar Bhawan, 5th Floor,
P-7, Chowringhee Square,
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*(2) M/s. Indus Realty Pvt. Limited,
Plot-6, Block-EN, Sector-5,
Salt Lake City, Kolkata-700091*

*(3) Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre (NFAC), Delhi;*

(4) CIT- Ranchi;

(5) The Departmental Representative

(6) Guard File

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.