

ITA NO. 202/JP/2024  
DHANUKA REALTY LTD VS ITO, WARD 4(4), JAIPUR

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष  
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 202/JP/2024  
निर्धारण वर्ष/Assessment Year : 2009-10

M/s. Dhanuka Realty Ltd. 5 <sup>th</sup> Floor, The Solitaire Plot No. C-212, 213C, Haunuman Nagar, Vaishali Nagar, Jaipur	बनाम Vs.	The ITO Ward 4 (3) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AALCS 5610 A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Dheeraj Borad, CA  
राजस्व की ओर से / Revenue by: Mrs. Monisha Choudhary, Addl. CIT-DR

सुनवाई की तारीख / Date of Hearing : 24/06/2024  
उदघोषणा की तारीख / Date of Pronouncement: 20/08/2024

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the Id. CIT(A) dated 31-01-2024, National Faceless Appeal Centre, Delhi [ hereinafter referred to as (NFAC) ] for the assessment year 2009-10 raising therein following grounds of appeal.

“1. That on the facts and in Law the Id. Commissioner (appeals) erred in sustaining the action of the AO whereby he (the AO) initiated reassessment proceedings against the appellant, consequently issued notice u/s. 148 of the I.T. Act, and finally passed order u/s 143(3) r.w.s.147. adding an amount

of Rs 49,50,000 in the total income of assessee, which upholding by the Commissioner (appeals) the action of the AO whereby he (the AO) initiated reassessment proceedings, issued notice u/s. 148 and passed order u/s 143(3) r.w.s.147 adding an amount of Rs 49,50,000 in the total income of assessee, are unjustified and liable to be cancelled.

2. That the Id. Commissioner (appeals) erred in sustaining the levy of tax made by the A.O. u/s.56(1) of the I.T. Act on the total consideration of Rs.49,50,000/- (face value @ Rs.10/- per share of 33000 shares at Rs.3,30,000/- + Share premium @Rs.140/- per share of 33000 shares at Rs.46,20,000/-) received by the assessee company from issue of 33000 shares at a value of Rs.150/- per share in the previous year relevant to A.Y. 2009-10, which sustaining of levy of tax made by the A.O. u/s.56(1) of the I.T. Act on the total consideration of Rs.49,50,000/ is most arbitrary, unjust, untenable and bad in fact and in law and in the alternative excessive w.r.t. facts and circumstances of the case.

3. That the Id. Commissioner (appeals) failed to appreciate that section 56(2) (vii b) bringing share premium into income tax net was first time brought on the statute book by the Finance Act, 2012, w.c.f. assessment year 2013-14 and as such this provision was not applicable in the year under appeal i.e. A.Y. 2009-10.

4. That the Id. Commissioner (appeals) ought to have decided on merit the ground of appeal no 12.

2.1 Brief facts of the case are that the return of income was filed by the assessee declaring Nil Income. However, assessment was completed u/s 143(3) on 26-12-2016 and the addition was made by the at Rs.49.50 lacs. The observation as made by the AO at para 9 of his order is reproduced as under:-

“In the above background of the facts and circumstances surrounding this case, it is hereby held that the receipt of share capital and share premium was part of a colourful transaction by way of which a sum of Rs.46,40,000/- was introduced into the books of the assessee company in the form of share premium attached to the share capital. As discussion above, the premium of Rs.140/- per share was not justified at all on the basis of absolutely no assets, no business activity, no income, no net worth nor any promise for creation of any asserts, business activity, income or net worth in the future. Accordingly, the charging and receipt of share premium/ share capital to the tune of Rs.49,50,000/- is held to be income of the assessee company in the nature of income envisaged u/s 56(1) of the Income Tax Act, 1961. The same is added back to the total income of the assessee.”

2.2 Being aggrieved by the order of the AO, the assessee carried the matter before the ld. CIT(A) who dismissed the appeal of the assessee by observing as under:-

“7.2.4 On the basis of above observation, the Ld. AO made addition to the said amount. As can be seen from the above para, the Ld. AO mentioned that the appellant only provided the names and address of the investors but not the credit worthiness of these persons. It is also noticed that the Ld. AO has asked the appellant to explain that why the value of share was having such huge premium and the explanation was never furnished before him. The Ld. AO also furnished that the identity of the creditors and banking channel of the transaction is not sufficient but the hird element to the credit worthiness is also required. During the appellate proceedings, the appellant claimed that the necessary documents were furnished before the AO but these documents did not include the credit worthiness of the investors. In Para 4 of his submissions the appellant wrongly claimed that credit worthiness was submitted before the AO. Had, the same being done these documents should have also

been part of the replies furnished by him before this office. The appellant relied upon certain case laws but failed to mention that which part of the said orders is related to facts of his case. The appellant failed to furnish the credit worthiness of the investors, hence, the provisions of section 68/69/69A of the Act are also applicable in his case. The Ld. AO has invoked section 56(1) which is having broad interpretation covering the above said provisions also. Keeping in view of these observation, the additions made by AO due to non-explanation on account of credit worthiness of the investors, are confirmed. The grounds of appellant are dismissed.

7.4 Grounds of appeal No. 10, 11, and 13 of the appellant are either general or consequential hence, no specific findings are required.

7.5 Ground of appeal No. 12 of the appellant pertains to disallowance of Rs. 13,337/- to be carry forward as unabsorbed losses. Keeping in view of findings on merits, this issue becomes infructuous hence, the ground is dismissed.

8. In the result, the appeal filed by the appellant is dismissed.”

2.3 Aggrieved by the order of the Id CIT(A) is in appeal before this Bench on the grounds mentioned hereinabove.

3.1 The Ground No. 1 & 2 raised by the assessee challenging the addition made by the AO u/s 56(1) of the Income Tax Act and also initiated proceedings for reopening of the case. Therefore, I have decided to adjudicate the same by present order. It is noted in this case that the additions were made by the AO on account of the fact that the assessee issued 33,000 shares of Rs.10/- each for a consideration of Rs.150/ each at a premium of Rs.140/- each per share. Accordingly, assessee

received premium of Rs.46,20,000/- and the allegation of the department in the case of the assessee is that the assessee company issued shares at substantial higher premium which is not supported with book value and market value of the assets of the company whereas in this regard, the Id. AR relied upon his two written submissions i.e. 29-05-2024 and 19-06-2024 which are reproduced as under:-

'Dated: 29-05-2024

Sub: Written submissions by the appellant in regard to income tax appeal bearing number ITA 202/JPR/2024 for A.Y. 2009-10  
May it please your honors.

#### BRIEF FACTS OF THE CASE

The humble appellant craves leave to refer to and rely upon brief facts of the case which form part of the paper book being simultaneously filed.

#### SUBMISSIONS IN REGARD TO ALL THE GROUNDS OF APPEAL

#### GROUND OF APPEAL NO. 1

This ground of appeal is against sustaining by the Id. CIT(A) action of the AO for issuing notice u/s. 148 and consequently passing by the AO assessment order u/s. 143(3) r.w.s. 147 and adding an amount of Rs. 49,50,000/- in the total income of assessee. In support of this ground of appeal it is respectfully submitted as under:-

1. That the re-assessment proceedings have been initiated on the basis of information received from the DIT (I & CI) Rajasthan, Jaipur that the assessee has issued shares at a higher premium of Rs. 46,20,000/- as compared to its book value and market value. In this regard it is submitted that it is a settled position of law that notice u/s. 148 cannot be issued on borrowed satisfaction and as such the Id. CIT(A) ought to have cancelled the notice u/s. 148 and the relevant assessment order.

2. That the Id. CIT(A) should have cancelled the notice u/s. 148 and consequently cancelled the re-assessment order because by reading the reasons to belief which inter alia mentions that the AO has reasons to believe that income at least to the extent of Rs. 46,20,000/- has escaped assessment and it clearly comes out that the AO has acted on mere suspicion and conjectures and while initiating re-assessment proceedings he was not sure that such and such amount of income has been concealed. The consensus of judicial opinion has been that if reasons recorded per- se reflect that the matter requires detailed investigation and further verification then such reason at the most can be categorized that A.O. has reasons to suspect and not reason to believe that income chargeable to tax has escaped assessment rendering the re-assessment proceedings all the more vulnerable. In this relation assessee places reliance on (1) Dharkeshwari Cotton Mills Ltd. Vs. CIT 26 ITR 775, (2) Omar Salay Mohammed Vs. CIT 37 ITR 151 and (3) Lal Chand Bhagat Ambica Ram Vs. CIT 37 ITR 288. 3. That the Indian Courts including the Apex Court have time and again held that action u/s 147 of the I.T. Act 1961 cannot be taken for reopening assessment if the information is wholly vague, indefinite, far-fetched and remote. The courts have also held that there must be a live link or close nexus between the material coming to the knowledge of the A.O. and the formation of his belief.

4. That the Id. CIT(A) failed to consider that notice u/s. 148 could be issued only when income chargeable to tax has escaped assessment and such assessment had occurred by reason of either omission or failure on the part of assessee to file return u/s. 139 or to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions are conditions precedent to be satisfied before assessing officer could have jurisdiction to issue notice u/s. 148 read with section 147 of the Act. After applying these twin tests it is crystal clear that notice for reopening the assessment is not in consonance and in conformity with which section 147 of the Act is couched.

5. That the Id. CIT(A) failed to consider that the assessee is regularly assessed to income tax from last many years. For the year under appeal the assessee maintained regular books of accounts and the same were audited. On the basis of these audited books of accounts it prepared its return of income and filed the same and no material fact was concealed.

6. That the Id. CIT(A) failed to consider that each and every transaction done by the assessee in the previous year ended on 31.3.2009 formed part of its audited books of accounts and not a single transaction is concealed from the regular books of accounts. As per section 148 of the I.T. Act proceedings of re-assessment could be started on getting new information and in this case no new facts have come into the knowledge of the A.O.

### GROUND OF APPEAL NO. 2

This ground of appeal is against sustenance by the Id. CIT(A) of levy of tax u/s.56(1) of the I.T. Act by the A.O. by holding the total receipt of share premium/share capital to the tune of Rs.49,50,000/- (face value @ Rs.10/- per share of 33000 shares at Rs.3,30,000/- + Share premium@ Rs.140/- per share of 33000 shares at Rs.46,20,000/-] in the nature of income envisaged u/s. 56(1) of the I.T. Act. It is respectfully submitted that this levy of tax u/s. 56(1) is unjustified and in this regard the assessee craves leave to make following respectful submissions:-

### SUBMISSIONS ON FACTS

As regards the finding recorded by the Id. CIT(A) that neither does the issuing company possess any asset worth its name nor does it derive any profit. It is submitted as under.-

1. It is highly incorrect to say that the appellant company does not possess any asset worth its name.
2. The factual position is that during financial year 2008-09 relevant to subject assessment year 2009-10, which is very second year of its incorporation, the assessee, who is involved in the business of "Construction of Residential Complex purchased two plots of land bearing no. 19,20 Shri Gopal Nagar, Jaipur Rajasthan for total cost of acquisition of Rs. 85,05,330.00/- (Purchase value and stamp duty and Registration charges). Copy of sale deed for purchasing these two plots was duly filed with the AO and it forms part of the paper book being filed simultaneously.

3. After purchase of the above mentioned two plots of land the assessee company started construction work on this land. Various expenses on boring, building material, labour expenses, architect fees, advertisement expenses etc. were incurred. A detailed list of direct expenses, indirect expenses, ledger account of purchase of two plots of land also form part of the paper book being filed simultaneously.

4. After viewing these facts one could very well visualize that the prospects of the assessee company would be very bright in the near future and this was the main reason which tempted/attracted allottees to subscribe the shares at a premium of Rs. 140 per share.

### SUBMISSIONS ON THE POINT OF LAW

1. The first and foremost contention of the assessee is that the share premium receipt is capital in nature. In other words issue of share capital including premium were on capital account and could not be considered to be income. The definition of income as provided under section 2(24) of the Income-Tax Act, 1961 at the relevant time did not define income as any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from April 1, 2013 and thus, would have, no application to the share premium received by the assessee in the previous year relevant to the assessment year 2009-10 and accordingly the share premium could not be taxed as revenue receipt because it is a capital receipt. Reliance is placed in this regard on various judicial pronouncement annexed herewith.

2. That the learned CIT(A) failed to take into consideration various details, information, supporting papers and documents including the following filed before the AO in the course of assessment proceedings:-

i. List of the share allottees which inter alia included existing directors of the company and the number of shares allotted to such allottees.

ii. Copy of share certificates issued to allottees.

iii. Certified true copy of resolution passed in the Board meeting of the company held on Saturday, 27.12.2008 at the registered office of the

company authorizing issue of 33,000 shares at a premium of Rs. 140 per share.

3. That the Id. CIT(A) failed to appreciate that to establish the identity, creditworthiness and genuineness of issuing of 33,000/- shares at a value of Rs. 150 per share to the allottees the assessee filed before the AO following evidences, supporting papers and documents:-

- i. All allottees have regular source of income.
- ii. All allottees file their income tax returns on regular basis from last many years and pay their taxes on the income so earned by them.
- iii. Balance sheets or statement of affairs of the allottees showing that all the share allottees had their own sufficient capital balance as per individual capital account appearing in their individual balance sheets in the shape of investments as well as loans and advances.

4. That the Id. CIT(A) ought to have appreciated that in the course of assessment proceedings the assessee produced the details of bank account of all the allottees and so also copy of their relevant bank statement confirming that allotment money has been received by the assessee from the allottees through proper banking channels.

5. Against the nomenclature given by the Id. CIT(A) and the AO to the transaction of issuing 33,000/- shares at a value of Rs. 150/- per share as 'colorful transaction and also making various other adverse observations it is respectfully submitted as under:-

- i. To establish the identity, creditworthiness and genuineness of issuing of 33,000/- shares at a value of Rs. 150 per share to above mentioned allottees the assessee has furnished various supporting evidences mentioned in para no. 2, 3 and 4 above.
- ii. The lower authorities have not gathered nor mentioned in the relevant assessment order nor in the impugned order passed by the CIT(A) an iota of

evidence or other material by which it could be shown that the assessee company had routed its own money in the name of allottees.

iii. That balance sheets or statement of affairs of all the allottees filed before the AO clearly show that the share allottees possessed considerable assets and had been existing income tax assessee's for a long period of time before the above mentioned transaction.

6. Moreover during the course of assessment proceedings, complete details of the investor i.e. the PAN, balance sheet/statement of affairs copy of IT Return, copies of bank statements, resolution of the board authorizing the parties and also the parties who made the investment have confirmed the transaction.

7. That by filing above mentioned various evidences given in para 2, 3 and 4 above the assessee has duly discharged the onus of proving the identity, creditworthiness and genuineness of issue of shares at a share premium of Rs.140/- and allotment money received by the assessee company. It is further submitted that the share premium of Rs.140/- per share was kept by the assessee company after taking into consideration the long term business prospects and projections of the company. In its support the assessee company had filed copy of sale deed for purchase of two plots of land for total amount of Rs. 85,05,330.00/- and details of expenses incurred on boring, architect fees, purchase of building material etc.

8. That without prejudice to above and in the alternative it is respectfully submitted that the share holders as on 1.4.2008 and as on 31.3.2009 are almost common. The allegation of the A O is that receipt of higher share premium by the company is a colorful transaction of getting capital. In this regard the assessee's submission is that share holders as on opening day of relevant previous year and as on closing day of the previous year ended on 31.3.2009 are mostly common and in close relationship i.e. parents and their children. To clarify it is submitted that Mr Girish Dhanuka and Rama Devi Dhanuka are husband and wife and Shri Yogesh Dhanuka, Peeyush Dhanuka and Hitesh Dhanuka are their sons and as such on account of their close relationship, by no canon of law, this transaction can be termed a colorful transaction particularly in view of the fact that all payments have been routed through banking channels and all allottees being regular income tax payers since last many years.

9. That as per reasons to belief escapement of income is mentioned as Rs. 46,20,000/-. As against this addition has been made at Rs. 49,50,000/- 10. In support of submissions made in para no. 2 to 8 above reliance is placed on various judicial pronouncement annexed herewith.

### GROUND OF APPEAL NO. 3

This ground of appeal is against sustenance of levy of tax u/s. 56(2)(vii b) on the total consideration of Rs. 49,50,000/- received by the assessee company from issue of 33,000/- shares at a value of Rs. 150/- per share in the previous year relevant to year under appeal i.e. A.Y. 2009-10. In support of this ground of appeal it is submitted as under:-

(i) The position of law in regard to chargeability of share premium changed only from AY 2013-14 when share premium was charged to tax in the circumstances given in section 56(2)(viib) of the I.T. Act w.e.f AY 2013-14. In other words receipt of share premium during the relevant assessment year i.e. AY 2009-10 was not a taxable event. In support of it the humble appellant craves leave to draw your honors' kind attention to sec. 56(2)(viib) which was introduced with effect from April 1, 2013.

(ii) That from reading the above section and sub-sections and provisos it clearly emerges that the relevant provisions of taxation of share premium in the hands of a closely held company are contained in section 56(2)(viib) of the I.T. Act and this section 56(2)(viib) was first time inserted on the statute book by the Finance Act, 2012.w.e.f. assessment year 2013-14. In other words if any addition is to be made in regard to share premium it can be added only in assessment year 2013-14 and subsequent assessment years but not in earlier assessment years ie. no addition can be made in assessment year 2012-13 and also in the assessment years earlier to A.Y. 2012-13 including assessment year 2009-10 which is subject assessment year under appeal before your honor.

(iii) Section 56(2)(viib) which came on statute book with effect from 1.04.2013 very clearly provides that where a company, not being a company in which the public are substantially interested, receives, in any previous

year, from any person being a resident, any consideration for issue of shares and if the consideration received for the issue of shares exceeds the fair market value of the shares shall be chargeable to income tax under the head "Income from other sources"

(iv) As said above section 56(2)(viib) came on statute book with effect from 1.04.2013. The general principle in this regard is that provisions in a statute would operate prospectively unless retrospective operation is provided for expressly in the statute itself or by necessary implication.

(v) It is respectfully submitted that from reading section 56(2)(viib) it clearly comes out that it has been brought on statute book from assessment year 2013-14 onwards and it is not retrospective nor its language in any way suggest that it is to operate retrospectively.

(vi) In regard to Retrospective Legislation it is submitted that the general principle is that provisions in a statute would operate prospectively unless retrospective operation is provided for expressly or by necessary implication. A taxing provision imposing liability is governed by the normal presumption that is not retrospective. Thus, a substantive law is intended to be prospective unless a contrary intention is manifest from the language of the provision or arises by necessary implication.

vii) Reliance is placed in this regard on various judicial pronouncement annexed herewith.

'Dated: 19-06-2024

Sub: Issuing of 33,000/- shares of Rs. 10 each for a consideration of Rs. 150 each..at premium of Rs. 140 per share, receiving premium of Rs. 46,20,000/- , justification for quantum of such premium and identity, creditworthiness and genuineness of all such subscribers.

With reference to above, paper book and written submissions filed on 30/05/2024 and part hearing effected before the hon'ble bench on 05/06/2024, it is respectfully submitted as under-

1. As regards filing of replies and furnishing of supporting papers and documents before the A.O. in regard to issuing of 33,000 fresh shares on 27/12/2008 of face value of Rs. 10 each at a premium of Rs. 140 per share and identity, creditworthiness and genuineness of fresh share capital and share premium subscribed by fresh allottees it is very humbly submitted as under:-

(i) In the course of assessment proceedings the AO issued notice u/s. 142(1) dated 15th July 2016 with a detailed query letter (copy of notice forms part of paper book) to the assessee. In compliance to this notice the assessee furnished a full reply of all the queries along with all the annexure interalia including statement of account duly confirmed by all the six fresh allottees who advanced money to the appellant company in the relevant previous year, a part of which was later on treated as allotment money of fresh shares allotted to him/her out of aforesaid 33000 shares and a copy of certificate issued by chartered accountant confirming the fair market value of the share on 27/12/2008 at Rs. 150/- per share (copy of reply and relevant supporting papers form part of the paper book).

(ii). After some time the AO issued a second notice dated 23/11/2016 (copy of notice forms part of paper book) asking the assessee to furnish reply up to 30/11/2016. In compliance to this notice assessee's counsel M.L. Borad Advocate and the director of the assessee company Shri Hitesh Dhanuka with relevant record attended before the A.O. and simultaneously he filed a reply with the A.O. on 30/11/2016 (copy of acknowledgment form part of the paper book).

(iii). That the observation of the AO in para 9 of the relevant assessment order saying that the premium of Rs. 140/- per share was not justified at all on the basis of absolutely no assets, no business activities etc. is not true and correct because the assessee company who is involved in the business of "Construction of Residential Complex" purchased two plots of land bearing no. 19,20 Shri Gopal Nagar, Jaipur Rajasthan for total cost of acquisition of Rs. 85,05,330.00/- during FY 01/04/2008 to 31/03/2009 relevant to subject assessment year. Copy of sale deed for purchasing these two plots was duly filed with the AO with the reply letter filed on 05/08/2016 in the course of assessment proceedings of the assessee, and it forms part of the paper book filed on 30/05/2024.

(iv). After purchase of the above mentioned two plots of land the assessee company started construction work on this land. Various expenses on boring, building material, labour expenses, architect fees, advertisement expenses etc, were incurred.

(v) That in para 6 of the relevant assessment order the A.O. has observed, "during the course of re-assessment proceedings the assessee company furnished the confirmations and other documents to justify share premium so received in question".

(vi). That from the perusal of both the above mentioned notices and copy of the order sheet entries, the Hon'ble bench will kindly see that in the course of assessment proceedings the A.O. neither specifically asked the assessee to file bank statements nor did he ask to prove identity, creditworthiness and genuineness of the allottees. However whatever information and supporting papers the... A.O. required in the course of assessment proceedings the same... were produced/furnished before him.

(vii). That specially in regard to identity, creditworthiness and genuineness of fresh share capital and share premium subscribed by fresh allottees the appellant craves leave to submit as under:-

(a) In the course of assessment proceedings the assessee submitted statement of account duly confirmed by all the six fresh allottees whose names are given in the relevant assessment order itself.

(b) In all these statement of accounts PAN and full address of the allottees are given.

(c) These statements show that there is no cash transaction.

(d) These statements further confirm that allotment money has been given through banking channel.

(e) Except Rama Dhanuka all the shareholders are existing shareholders of the appellant company.

(f) Except Rama Dhanuka and Girish Chandra Dhanuka all other shareholders are also existing directors of the company and all of them are statutorily required to have DIN.

(g) In above regard the hon'ble bench will very kindly observe that shareholders before the issue of 33000 shares at a premium of Rs. 140/- per shares and the share holders after the allotment of fresh 33000 shares are the same except one. To explain this it is submitted that before allotments there were only 5 shareholders, namely, (1) Atul Shanker, (2) Girish Chandra Dhanuka, (3) Yogesh Dhanuka, (4) Peeyush Dhanuka, (5) Hitesh Dhanuka and after allotment there are 6 shareholders, namely (1) Atul Shanker, (2) Girish Chandra Dhanuka, (3) Yogesh Dhanuka, (4) Peeyush Dhanuka, (5) Hitesh Dhanuka (6) Rama Dhanuka (she is a new subscriber and is wife of existing share holder Girish Chandra Dhanuka and mother of existing shareholders Yogesh Dhanuka, Peeyush Dhanuka and Hitesh Dhanuka). In view of such factual position, it is submitted that, by no canon of law the issuing of 33000 shares at a premium of Rs. 140 can be called as a 'colorful transaction to introduce unexplained money. A complete list of share holders and directors as on 01/12/2008 and as on 31/03/2009 is enclosed.

(h) That from the perusal of above mentioned reply dated 05/08/2016 the Hon'ble bench will kindly see that TDS has been deducted from the interest allowed to the allottees, which confirm the creditworthiness of the allottees.

(i) The appellant is enclosing herewith a certified copy of order sheet entries of assessment proceedings. From the perusal of these order sheet entries, the Hon'ble Bench will please find that the AO has mentioned that the assessee has furnished complete details and documents as required by him (the AO). Further he has nowhere mentioned that the assessee was required to prove identity, creditworthiness and genuineness but he has failed to file any reply.

2. That in addition to judicial pronouncements referred to and relied upon in the written submissions filed on 30/05/2024, the humble appellant craves leave to refer to and rely upon the judgment of Hon'ble Bombay High Court in the case of CIT Vs Gagandeep Infrastructure Pvt. Ltd. (Income Tax Appeal No. 1613 of 2014 and judgment dated 20/03/2017) wherein the Hon'ble Court held that the proviso to s. 68 (which creates an obligation on the issuing co to explain the source of share capital & premium) has been introduced by the Finance Act 2012 w.e.f. 01/04/2013 and does not have

retrospective effect. Prior thereto, as per Lovely Exports 317 ITP. 218 (SC), if the AO regards the share premium as bogus, he has to assess the shareholders but cannot assess the same as the issuing company's unexplained cash credit.

3. Against the above mentioned additions, contention of the appellant is that share premium exceeding fair market value is first time by way brought to tax on statute book of insertion of section 56(2)(viib) of the I.T. Act with effect from 01/04/2013 i.e. on and from A.Y. 2013-14. In this regard it is submitted that as the assessment year involved in this appeal is A.Y. 2009-10 it cannot be subjected to tax in A.Y. 2009-10 because it is earlier to A.Y. 2013-14. Moreover the share capital and share premium is a capital receipt and not liable to tax before A.Y. 2013-14.’’

It was also submitted by the Id. AR of the assessee that premium in the present case was kept by the assessee on the basis of Fair Market Value and after taking into consideration the long term business prospect and business projections of the company. It was further submitted that share application was made by existing share holders and 50% shares have been issued to the Directors and their his relatives.

3.2 On the contrary, the Id. DR relied upon the orders of the Revenue Authorities and submitted that since the assessee could not prove the creditworthiness of shareholders, therefore, in these circumstances, the appeal filed by the assessee deserves to be dismissed.

3.3 After hearing the Counsels for both the parties, perusing the documents placed on record, judgement cited by respective parties and also taking into

considerations the orders passed by the Revenue Authorities, I found from the record that the addition in the present case was made on account of the fact that the assessee issued shares at a substantial higher premium and according to the Department the same is not supported by book value and market value of the assets of the company and moreover, according to the Department the creditworthiness of the shareholders were not proved by the assessee. However, on the contrary, it was reiterated by the ld. AR of the assessee that premium was kept by the assessee company on the basis of Fair Market Value and after taking into consideration long term business prospect and projections of the company. Since the solitary reasons for making addition in the present case is that the assessee could not prove the creditworthiness of the share holders. In this regard a specific arguments alongwith supported documents have been placed on record and my attention was drawn to the facts that in the course of assessment proceedings the AO issued notice u/s. 142(1) dated 15th July 2016 with a detailed query letter (copy of notice forms part of paper book) to the assessee. In compliance to this notice the assessee furnished a full reply of all the queries along with all the annexure interalia including statement of account duly confirmed by all the six fresh allottees who advanced money to the appellant company in the relevant previous year, a part of which was later on treated as allotment money of fresh shares allotted to him/her out of aforesaid 33000 shares and a copy of certificate issued by chartered accountant confirming

the fair market value of the share on 27/12/2008 at Rs. 150/- per share (copy of reply and relevant supporting papers form part of the paper book). After some time the AO issued a second notice dated 23/11/2016 (copy of notice forms part of paper book) asking the assessee to furnish reply up to 30/11/2016. In compliance to this notice assessee's counsel M.L. Borad Advocate and the director of the assessee company Shri Hitesh Dhanuka with relevant record attended before the A.O. and simultaneously he filed a reply with the A.O. on 30/11/2016 (copy of acknowledgment form part of the paper book). The observation of the AO in para 9 of the relevant assessment order saying that the premium of Rs. 140/- per share was not justified at all on the basis of absolutely no assets, no business activities etc. is not true and correct because the assessee company who is involved in the business of "Construction of Residential Complex" purchased two plots of land bearing no. 19,20 Shri Gopal Nagar, Jaipur Rajasthan for total cost of acquisition of Rs. 85,05,330.00/- during FY 01/04/2008 to 31/03/2009 relevant to subject assessment year. Copy of sale deed for purchasing these two plots was duly filed with the AO with the reply letter filed on 05/08/2016 in the course of assessment proceedings of the assessee, and it forms part of the paper book filed on 30/05/2024. It is observed that after purchase of the above mentioned two plots of land the assessee company started construction work on this land. Various expenses on boring, building material, labour expenses, architect fees,

advertisement expenses etc, were incurred. It is noticed that in para 6 of the relevant assessment order the A.O. has observed, "during the course of re-assessment proceedings the assessee company furnished the confirmations and other documents to justify share premium so received in question". Hence, on perusal of both the above mentioned notices and copy of the order sheet entries, the Bench noticed that in the course of assessment proceedings the A.O. neither specifically asked the assessee to file bank statements nor did he ask to prove identity, creditworthiness and genuineness of the allottees. However whatever information and supporting papers the A.O. required in the course of assessment proceedings the, same were produced/furnished before him. It is noticed that specially in regard to identity, creditworthiness and genuineness of fresh share capital and share premium subscribed by fresh allottees the assessee submitted as under:-

- (a) In the course of assessment proceedings the assessee submitted statement of account duly confirmed by all the six fresh allottees whose names are given in the relevant assessment order itself.
- (b) In all these statement of accounts PAN and full address of the allottees are given.
- (c) These statements show that there is no cash transaction.
- (d) These statements further confirm that allotment money has been given through banking channel.

(e) Except Rama Dhanuka all the shareholders are existing shareholders of the appellant company.

(f) Except Rama Dhanuka and Girish Chandra Dhanuka all other shareholders are also existing directors of the company and all of them are statutorily required to have DIN.

(g) In above regard the hon'ble bench will very kindly observe that shareholders before the issue of 33000 shares at a premium of Rs. 140/- per shares and the share holders after the allotment of fresh 33000 shares are the same except one. To explain this it is submitted that before allotments there were only 5 shareholders, namely, (1) Atul Shanker, (2) Girish Chandra Dhanuka, (3) Yogesh Dhanuka, (4) Peeyush Dhanuka, (5) Hitesh Dhanuka and after allotment there are 6 shareholders, namely (1) Atul Shanker, (2) Girish Chandra Dhanuka, (3) Yogesh Dhanuka, (4) Peeyush Dhanuka, (5) Hitesh Dhanuka (6) Rama Dhanuka (she is a new subscriber and is wife of existing share holder Girish Chandra Dhanuka and mother of existing shareholders Yogesh Dhanuka, Peeyush Dhanuka and Hitesh Dhanuka). In view of such factual position, it is submitted that, by no canon of law the issuing of 33000 shares at a premium of Rs. 140 can be called as a 'colorful transaction to introduce unexplained money. A complete list of share holders and directors as on 01/12/2008 and as on 31/03/2009 is enclosed.

(h) That from the perusal of above mentioned reply dated 05/08/2016 the Hon'ble bench will kindly see that TDS has been deducted from the interest allowed to the allottees, which confirm the creditworthiness of the allottees.

(i) The appellant is enclosing herewith a certified copy of order sheet entries of assessment proceedings. From the perusal of these order sheet entries, the Hon'ble Bench will please find that the AO has mentioned that the assessee has furnished complete details and documents as required by him (the AO). Further he has nowhere mentioned that the assessee was required to prove identity, creditworthiness and genuineness but he has failed to file any reply.

After having gone through the factual as well as legal position of the present case, I found that it is an undisputed fact that during the assessment proceedings the

assessee had submitted that statement of account duly confirmed by all the six fresh allottees whose names are given in the relevant assessment order itself and moreover in the statement of account the PAN, full addresses of the allottees are also mentioned. From the statement placed on record, one can easily notice that there is no cash transactions in the said statements and further these statements placed on record also confirm that allotment money was has been given through banking channel. Except Rama Dhanuka, all the shares holders are existing directors of the assessee company and all of them are statutorily to have DIN.

3.4 Apart from this, I also noticed that before issue of 33,000 shares at a premium of Rs.140/- per share and upto the allotment of fresh shares the allottees are same except one and in order to explain this the assessee submitted that before allotment there was only 05 share holders namely (1) Shri Atul Shanker, (2) Girish Chand Dhanuka (3)Yogesh Dhanuka (4) Peeyush Dhanuka and (5) Hitesh Dhanukan and after allotment there are 06 share holders namely (1) Shri Atul Shanker, (2) Girish Chand Dhanuka (3)Yogesh Dhanuka (4) Peeyush Dhanuka and (5) Hitesh Dhanuka. In this way, the said Rama Dhanuka is a new subscriber as she is wife of existing share holder Shri Girish Chandra Dhanuka and mother of existing share holder Shri Yogesh Dhanuka, Peeyush Dhanuka and Hitesh Dhanuka. Therefore, in these circumstances, issuing of 33,000 shares at a premium of Rs.140/-each cannot be termed as ‘‘Colourful Transactions to introduce it

unexplained money”. I have also perused the complete list of share holders and directors as on 01-12-2008 and as on 31-03-2009. I have also observed that TDS has already been deducted from the interest allowed to the allottees which confirm the creditworthiness of the allottees. It is noticed that the Id. AR of the assessee has also placed on record the certified copy of order sheet entries of assessment proceedings. From the perusal of these order sheet entries, I can notice that the AO has mentioned that the assessee had submitted complete details and documents as required by the AO and he has nowhere mentioned that the assessee was required to prove the identity, creditworthiness and genuineness. Therefore, merely saying that the assessee could not prove creditworthiness of the allottees is far from truth. Hence, in view of the above facts and circumstances of the case, we do not concur with the findings of the Id. CIT(A) and the addition so confirm is directed to be deleted. Thus Ground No. 1 & 2 of the assessee is allowed.

4.1 The Ground No. 3 of the assessee relates to levy of tax u/s 56(2)(viib) on the total consideration of Rs.49.50 lacs received by the assessee company from issue of 33,000 shares at value of Rs.150/- per share in the previous year relevant to year under appeal.

4.2 The Bench has heard both the parties and perusing the materials available on record and after appreciating the facts of the case, it is found that the assessee has placed reliance in the case of CIT vs Gagandeep Infrastructure Pvt. Ltd.

(Income Tax Appeal No. 1613 of 2014 and judgement dated 20-03-2017 of Hon'ble Bombay High Court) wherein the Hon'ble High Court held that the proviso to Section 68 (which creates an obligation on the issuing company to explain the source of share capital and premium) has been introduced by the Finance Act, 2012 w.e.f. 01-04-2013 and does not have retrospective effect and even otherwise prior thereto as per the Judgement of Hon'ble Supreme Court in the case of Lovely Exports, 317 ITR 218, if the AO regards the share premium as bogus, he has to assess the share capital but cannot assess the same as the issuing company's unexplained cash credit. Apart from all these judicial pronouncements and as per factual position the share premium exceeding fair market value is brought to tax on statute book first time by way of insertion of Section 56(2)(viib) of the Income Tax Act w.e.f. 01-04-2013 i.e. on and from 2013-14. It may be noted that since the appeal of the assessee in the year under consideration is 2009-10 which cannot be subjected to tax because it is earlier to A.Y. 2013-14. Since the share capital and share premium is a capital receipt, therefore, it is not liable to tax before AY 2013-14. In this view of the matter, this Ground of appeal No. 3 of the assessee is allowed.

5.0 In the result, the appeal of the assessee is allowed with no orders as to costs.

Order pronounced in the open court on 20/08/2024.

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 20 /08/2024

**\*Mishra**

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

1. The Appellant- M/s. Dhanuka Realty Ltd., Jaipur
2. प्रत्यर्धी / The Respondent- The ITO, Ward 4(4), Jaipur
3. आयकर आयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No.202/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar