आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: HYBRID MODE
श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO.552/Chd/2023
निर्धारण वर्ष / Assessment Year : 2012-13

The DCIT Chandigarh	बनाम	James Hotels Ltd. # 10, Sector -17A, Chandigarh
स्थायी लेखा सं. / PAN NO: AAACJ3508M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri R.K. Kapoor,
Shri Prince and Shri Sanjay Gupta, C.A's
राजस्व की ओर से / Revenue by : Shri Rohit Sharma, CIT, DR

सुनवाई की तारीख / Date of Hearing : 04/07/2024
उदघोषणा की तारीख / Date of Pronouncement : 01/10/2024

आदेश / Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Revenue against the order of the Ld. CIT(A)/NFAC, Delhi dt. 10/07/2023 pertaining to Assessment Year 2012-13.

2. In the present appeal, Revenue has raised the following grounds of appeal:

(i) The Ld. CIT(A), on facts and circumstances of the case, has erred in deleting the penalty of Rs. 1,75,00,000/- under section 271D of the Act by the AO holding that the assessee has made the impugned transaction in violation of provisions of Section 269SS of the Act.

(ii) The Ld. CIT(A), on facts and circumstances of the case, has erred in not accepting the impugned transaction under the loans or deposits.

(iii) The Ld. CIT(A), on facts and circumstances of the case, has erred in ignoring the fact that Special resolution to increase the Authorised Share Capital has been passed on 14.12.2011 i.e. a day after the order dated 13.12.2011 barring the allotment of shares and the fact that transactions had recurred on 05.04.2011, 28.08.2011 and 26.09.2011 i.e. before the said resolution to enhance authorized share capital.

3. Briefly the facts of the case are that the assessee filed its return of income on 14/09/2012 declaring income at NIL. The case of the assessee was selected for scrutiny and notice under section 143(2) and 142(1) were issued calling for the necessary information and documentation.

3.1 During the course of assessment proceedings, the AO observed that there are huge cash deposits as reflected in the bank statement furnished by the assessee and the assessee was asked to explain the nature and source of said cash deposit. In response, the assessee submitted that these cash deposits were received from share holders / Director namely Shri Haravtar Singh Arora and Shri Ajmair Singh Bhullar. It was submitted that these two persons have paid money out of sale proceeds of the property and copy of the sale agreement were also furnished. The assessment proceedings were completed whereby the returned income was accepted and no adverse findings as such was recorded regarding the nature and source of such deposits received from the share holders/Directors.

3.2 At the same time, during the course of assessment proceedings, the AO confronted the assessee regarding the violation of provisions of Section 269SS of the Act. In response, the assessee submitted that the cash has been received from Promoters/Directors of the company during the F.Y 2011-12 as share application money. The submissions so filed by the assessee were not found acceptable and the AO held that the assessee has violated the provision of Section 269SS of the Act and therefore liable to be proceed against as per the provisions of Section 271D of the Act and matter was accordingly referred to the JCIT, Range -2 Chandigarh for initiation of penalty proceedings under section 271D of the Act vide letter dt. 06/04/2015.

4. The Additional CIT, Range-2, Chandigarh, thereafter, on receipt of reference and after going through the assessment records, issued the penalty notice under section 271D dt. 29/06/2015 calling for the necessary information/ documentation from the assessee.

5. In response, the assessee submitted that during the relevant assessment year, it had received Rs 2948 lacs as share application money from directors/shareholders and the details of share application money received during the year are as under:-

Particulars	Date	Amounts(Rs)	Name of Application
Opening Balance	01.04.2011	8,03,00,000	
	01.04.2011 to 14.10.2011	1,61,00,000	Ajit Pal Singh
	01.04.2011 to 14.10.2011	12,91,13,000	Haravtar Singh Arora
	01.04.2011 to 14.10.2011	14,74,20,000	Ajmair Singh Bhullar
	01.04.2011 to 14.10.2011	22,07,000	Paramjit Singh
Total		37,51,40,000	

5.1 It was submitted that out of Rs. 2948 lacs received during the year as share application money, the assessee company had received Rs. 175 lacs in cash as share application money from directors / shareholders, the detail of which is as under:-

Name of Applicant	Date	Amount(Rs.)
Haravtar Singh Arora	28.08.2011	70,00,000
Ajmair Singh Bhullar	05.04.2011	70,00,000
Ajmair Singh Bhullar	26.09.2011	35,00,000

5.2 It was submitted that the assessee company has received share application money to meet the debt equity ratio requirement of lending bankers as well as to meet the financial requirements of the company. It was further submitted that during the assessment proceedings, the assessee company explained the sources of cash deposit received from directors/shareholders as share application money of Rs. 175 lacs and the Ld. A.O. has dully accepted the explanation of sources of cash deposit given by the assessee company. Further, the assessee company had explained during the assessment proceedings that the cash from shareholders during the financial year 2011-12 was received as share application money. However, the. Ld. AO. has initiated the penalty proceedings u/s 271D of I.T. Act by holding that the assessee has violated the provisions of section 269SS of I. T. Act as the assessee has received the same in cash. Regarding the same, it

was submitted that the amount received was on account of share application money and not the loans or deposits as there was no liability to repay it on demand or otherwise and no interest on this amount was to be paid. The company had duly passed a special resolution for issuing the 10% optionally convertible non cumulative redeemable preference shares. A copy of which is enclosed herewith. However, because of order passed by Hon'ble Company Law Board vide its orders dated 13.12.2011 (copy enclosed) directed the company to keep allotment of shares in abeyance, the said amount of Rs 3751.40 lacs has been duly reflected as share application money in the audited balance sheet of the relevant assessment year and subsequent years also. Copy of relevant pages of audited balance sheet of 2011-12. 2012-13 and 2013-14 enclosed substantiating the contention of the assessee company.

5.3 It was further submitted that the rationale for introducing provision of section 269SS was to prevent tax evasion i.e, the laundering of concealed income by parties in the guise of cash loan or deposits in or outside the accounts. The provisions of section 269SS therefore have application only in a limited way in respect of deposits or loans. Where it is neither deposit nor loan, the provisions have no application at all. The advances of share application money have not flowed from any undisclosed income of the assessee company or the concerned persons, the same is duly substantiated from the records as well as the findings of the Ld AO as the sources of the same have been duly explained and also accepted by the A.O. Further, the nature of amount received is clearly of share application money because if the intention was to receive them as loans or deposits, there must have been some terms regarding their repayments, chargeability of interest would have existed and certainly, the contributors would not have made the contributions gratuitously. Moreover, it is not a case of closely held company whereby the directors/shareholders could be presumed to have contributed

the money as loans or advances. Thus, the provision of section 269SS in the case of share application money, received in cash are not applicable.

5.4 Reliance was placed on the case of CIT vs Idhayam Publications Ltd 285 ITR 221 (Madras High Court) wherein it was clearly held that if the money has come into current account and no interest was being charged for the same, then, that would not be covered by the definition of loan and deposits. It has been further emphasized that as per Companies (Acceptance and Deposits) Rule 1974, deposit would not include any amount received from the directors of shareholders of the company. Further in CIT vs Rugmini Ram Ragav Spinners Pvt (2008) (Madras) 304 ITR 417, it has been held that the money in cash by a company towards allotment of shares, was neither a loan nor a deposit. Further, reliance was placed in the case of M/s Iqbal Inn and Hotels Ltd vs JCIT (ITA no. 876 to 879/Chd/2013) pronounced on 30.01.2015 wherein the Chandigarh Bench of the Tribunal has held that the share application money or deposit in current account cannot be included in the definition of deposit so as to trigger the provision of section 269SS of A.T. Act. Further, Hon'ble Punjab and Haryana High Court in the case of CIT vs Speedways Rubber Pvt Ltd 326 ITR 31 (P&H) clearly held that if the transaction was bonafide and default was of technical nature, then, the penalty is not justified because of share application money or deposit in current account cannot be included in the definition of deposit but in any case, even assumed otherwise, then, the defect is only of technical nature and there was a bonafide belief on the part of the assessee that this is not in contravention of provisions of the Act and does not call for levy of penalty. It was submitted that the majority of the judicial pronouncements particularly of the jurisdictional High Court and also the ITAT are in favour of the assessee on this issue. Even otherwise, the Hon'ble Supreme Court In the case of CIT vs Vegetable Products Ltd 88 ITR 192 (SC) has duly held the view on the issue of levy of penalty in favour of the assessee. Thus, in view of the above

submission, it was submitted that no penalty should be levied on the share application money received in cash.

5.5 Further, during the course of penalty proceedings, the Counsel of assessee filed another reply dated 12.10 2015 explaining the sequence of events and contents thereof read as under: -

"1.Sequence of Events

(a) That a total of Rs. 2948.40 lacs was received as share application money during the year from the directors/share holders which included a sum of Rs. 175.00 lacs in cash Further a sum of Rs 803.00 lacs was outstanding as share application money pending allotment as on 01.04 11, thus raising a total share application money to Rs. 3751.40 lacs (the copy of balance sheet reflecting the above is already on record and is a part of our earlier reply dated 07.09.15)

(b) On 14.12.2011 a meeting of the share holders of the company was held wherein a special resolution vide item no 3 was passed for making allotment of 37514000 no. of 10% optionally convertible non cumulative redeemable preference shares to these director/share holders (copy of the minutes of the meeting of share holders is enclosed)

(c) However in the mean time on 13.12.2011, the Hon'ble Company Board / passed an interim order for keeping in abeyance the resolution vide item no. 3. Since this order came to light in the meeting so accordingly it was decided in the meeting to keep in abeyance the implementation of resolution vide item no. 3. Thus the entire share application money of Rs. 3751.40 lacs continued to be reflected under the head share application money.

2 The next question regarding the non applicability of sec. 269AA and consequently sec. 271D of the I.T Act on the amount of Rs. 175.00 lacs as cash share application money, a detailed reply has already been furnished vide our earlier letter dated 07.09.2015. Further as required please find enclosed the copies of the following judgments relied upon by the assessee on the said issue.

(i) M/s Iqbal Inn and Hotels Ltd vs JCIT ITA no. 876 to 879/Chd/2013 pronounced on 30 01.2014.
(ii) CIT vs Rugmini Ram Ragav Spinners Pvt Ltd (2008) (Madras) 304ITR 417
(iii) CIT vs Idhayam Publications Ltd (Madras High Court) 285 ITR 221
(iv) CIT vs Speedways Rubbers Pvt Ltd 326 ITR 31 (P&H)

The contention of the assessee further substantiated from the facts that the assessee Co. during the relevant year increased its Authorized Capital by Rs. 38.00 crore to became authorized for issue the shores of Rs. 37.50 crore from the Share Application Money. Thus the presumption that the amount received is not a share application money is not correct at all.

Thus taking into consideration the facts and circumstances of the case and also the judicial pronouncements it is clear that since the amounts received were not in the nature of loan or deposits accordingly these is no violation of sec. 269SS of the I.T. Act."

6. The submissions so filed by the assessee were considered but not found acceptable to the Ld. Addl. CIT, Range-2, Chandigarh and he held that the assessee has contravened the provisions of 269SS of the Act and levied the penalty under section 271D amounting to Rs. 1.75 Crores equal to the amount accepted in cash otherwise than by account payee cheque and the relevant findings of the Ld. Add.CIT read as under:

"5. I have gone through the submissions made. The sum & substance of the assessee's submissions is that there was outstanding balance of share application money of Rs. 803 lacs as on 1.4.2011 and Rs. 2948.40 lacs was received during the F.Y. 2011-12, out of this amount an amount of Rs. 175 lacs was received in cash from directors/shareholders on 28.08.2011, 05.04.2011 and 26.09.2011 respectively. Thus as per the details filed and submissions made, the assessee has claimed to have received share application money from Sh. Haravtar Singh Arora of Rs12,91,13,000/- out of which Rs. 70,00,000/- is in cash and from Sh Ajmar Singh Bhullar of Rs. 14,74,20,000/- out of which Rs 1,05,00,000/- (Rs 70,00,000/- plus Rs, 35,00,003/-) is in cash. Further as per assessee, the shares were to be allotted in the meeting of the shareholders of the company, which was to be held on 14.12.2011, but were kept in abeyance due to interim order dated 13.12.2011 of the Hon'ble Company Law Board The Assessee has further argued that the amount of Rs 175.00 lacs received in cash is share application money and provisions of Sec 269SS and consequently Sec 271D are not attracted on the same. The Assessee has also relied upon certain case laws which are forming part of its replies as reproduced in earlier paragraphs.

6. As per the details filed and the material on record the assessee company is a public limited company and is listed on the stock exchange. The assessee company is engaged in the hospitality business and is running the hotel Park Plaza in Sector 17-A Chandigarh. The Authorised Share Capital as on 31.03.11 was Rs 14,00,00,000/-. The Subscribed capital (Issued & Paid-up) and Share application money(pending allotment) as on 31.03.11 was Rs 8,00,05000/- and Rs 8,03,00,000/- respectively. Hon'ble Company Law Board. New Delhi Bench vide order dated 13.12.11 has barred the Company from making allotment of 37514000 shares in order to protect the interest of 40% public shareholders who are other than the promoters. It also appears from the above referred order that some complaints were pending before the SEBI with regard to the assessee.

The assessee has taken the argument that there was outstanding balance of share application money of Rs. 803 lacs as on 1.04. 2011 and Rs. 2948.40 lacs was received during the F.Y. 2011-12, out of this amount an amount of Rs. 175 lacs was received in cash from directors/shareholders. The assessee has further argued, vide written submission filed on 12.10.15, that on 14.12.2011 a

meeting of the share holders of the company was held wherein a special resolution vide item no 3 was passed for making allotment of 37514000 no. of 10% optionally convertible non cumulative redeemable preference shares to the director/share holders The submissions of the assessee in this regard are considered but are not acceptable. It is seen from the minutes of the meeting of share holders held on 14.12.11, furnished by the AR during the course of proceedings before the undersigned, that the Special Resolution No 1 on the said date was to 'INCREASE IN AUTHORISED SHARE CAPITAL AND CONSEQUENT AMENDMENT IN THE MEMORANDUM OF ASSOCIATION'. As per the said resolution the Authorised capital of the assessee was proposed to be increased from Rs 14,00,00,000/- to Rs 52,00.00,000/-. The submissions in this regard have to be seen in the light of order dated 13.12.11 i.e. a day before vide which Hon'ble Company Law Board. New Delhi Bench vide order dated 13.12.11 has barred the Company from making allotment of 37514000 shares in order to protect the interest of 40% public shareholders who are other than the promoters. Thus the Special resolution to increase the Authorised Share capital has been passed on 14.12.11 i.e. a day after the order dated 13.12.11 barring the allotment of shares. While that is in the domain of concerned authorities, the fact of the matter is that the authorized share capital upto these days was only 14,00,00,000/- and the subscribed capital and so called share application money on 1.4.11 was more than that sum. Even if assessee' contention is considered that Authorised capital got increased on 14.12.11, but fact remains that it was not so prior to that date. It may be mentioned here that a company is a separate legal entity as per law and prior to that there was no decision to enhance the Authorised Share Capital and also disputes/complaints were pending before SEBI and CLB. Thus the amounts received from shareholders/directors, including Rs 1,75,00,000/- received in cash, were loans or deposits and not share application money, as claimed by the assessee This is irrespective of the fact that the assessee chose to categorize the same as Share application money subsequently or as on 31.3.12.

In view of the above discussion, the various case laws relied upon are not of help to the assessee as the facts are distinguished from the facts of the assessee. The provisions of Sec 269SS and consequently Sec 271D are very much attracted on the cash deposits totaling to Rs 1,75,00,000/- taken by the assessee Thus the primary argument of the assessee that it was share application money taken in cash has no basis in view of the facts of the case of the assessee.

7. Further, during the course of penalty proceedings vide order sheet entry dated 12.10.2015 the assessee was asked to explain the need of taking cash deposits on various dates as mentioned by him and the AO and also why only these amounts out of the total were taken and deposited in cash. The Authorized Representative vide letter filed on 30.10.2015 submitted as under:

"That the assessee company has accepted the share application money in cash. The reason for same was since the bank account of the company was with State Bank of India, Commercial Branch, Sector-17, Chandigarh and the bank accounts of the directors were different banks/branches and there was a scheduled date of repayment of loan from State Bank Of India thus, to avoid any delay in the repayment, the money was accepted in cash. Even otherwise, there were regular commitments on account of various expenses which were to be met out and since the routine cash inflow with the assessee company was not sufficient to meet these exigencies. Thus, there was a

reasonable cause with the assessee company to accept the share application money in cash. In this regard, please find enclosed the copies of cash book of the respective dates whish duly substantiates the contention of the assessee company, Even otherwise, the Act does not prohibit the acceptance of share application money in cash.

The Counsel of the assessee vide the above referred submission has again tried to justify the cash deposits by saying that the cash deposits are share application money and were to be utilized for the purpose of repayment of loan on the schedule date to avoid any delay in the repayment. Further, he has also submitted that there were some regular commitment on account of various expenses which were to be met and since the routine cash inflow with the assessee company was not sufficient to meet these exigencies. The assessee's arguments about the cash deposits as being share application money have been discussed and rejected vide discussion in earlier paras. This submission of urgency and reasonable cause is nothing but an afterthought to justify the receipt of cash. To say that in today's age and technology the assessee has to shift cash from one account to another to pay a loan etc. is just not acceptable considering that the cash was received from the directors who are professional businessman running the affairs of a professional organization and online transfer, NEFT, RTGS etc. facilities are available for immediate transfer of funds.

8. In the discussion forming part of above paragraphs, the assessee' contentions that the amounts in question are Share Application money have been examined and rejected. The contention of urgency and reasonable cause has also been considered, examined and rejected in Para 7 above. However, for the sake of argument, if the assessee' argument that the amounts in question are Share Application money are considered, though not conceded, still the assessee has no case as the provisions of Sec 269SS do not provide any exception to the amount received in cash in current account or to the receipt of share application money in cash that they would be exempted from the said provisions. Further, again without prejudice to the discussion in earlier paragraphs, reliance is placed, only to counter the reliance made on some other case laws by the assessee on the decision of the Hon'ble Jharkhand High Court In the case of Bhalotia Engineering Works (P) Ltd vs CIT (275 1TR 399) wherein it was held that the share application money will come within the definition of the deposits as defined u/s 269SS of the I T Act.

Further, while arguing its case, the assessee has also placed reliance on the jurisdictional Hon'ble ITAT' decision in the case of Eqbal Inn & Hotels Ltd., Patiala dated 30.01 2014 The reliance placed itself is misplaced in view of the facts being distinguishable and in view of detailed discussion forming part of the earlier paragraphs. Even otherwise, in that case the construction of the hotel was going on and no loans had been sanctioned by the Banks which is not the case even remotely in the case of the assessee. Further, the special resolution to increase the authorized share capital was not even passed in this Public Ltd. Company to increase the Authorized share capital when the sums were received and was passed subsequently in circumstances as discussed before, despite there apparently being an ongoing dispute amongst the shareholders. Further, it is respectfully submitted that it is gathered that the said order of the Hon ITAT has not been accepted by the department and an appeal has been filed before Hon P&H High Court.

In view of the foregoing discussion, and without prejudice to the discussion forming part of earlier paragraphs, it is again emphasized that no exception to the provisions of Sec 269SS to receive sums in cash as share- application money can be accepted when none exists in the Act.

9. Therefore, it is clear that the assessee has contravened the provisions of section 269SS of the Income Tax Act, 1961 by accepting loan/deposits of Rs. 1,75,00,000 in cash which is much more than the threshold limit of Rs. 20,000/- prescribed u/s 269SS from Haravtar Singh Arora of Rs. 70.00,000/- and Sh. Ajmair Singh Bhullar of Rs. 70,00,000/- and Rs. 35,00,000/- in cash.

10. In view of the facts as discussed above, it is clear that the assessee was unable to bring on record any reasonable cause with regard to these loans/deposits amounting to Rs. 1,75,00,000/- accepted in cash from Haravtar Singh Arora and Sh. Ajmair Singh Bhullar despite specific opportunity provided to the assessee. In view of above discussion, I am of the considered opinion that the assessee has contravened the provisions of section.269SS of the Act and therefore, penalty u/s 271D is levied at Rs, 1,75,00,000/- i.e. equal to the amount accepted in cash otherwise than by account payee cheque."

7. Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) and challenged the order passed by the Ld. Add.CIT as barred by limitation as well as on merits of the case. It was submitted by the assessee that the AO has initiated the penalty proceedings under section 271D and referred the matter to JCIT hence the time limit for passing the order for initiation of penalty under section 271D expires on 30/09/2015 i.e; within six months of passing of the assessment order under section 143(3) dt. 31/03/2015 and since the Addl. CIT, Chandigarh has passed the penalty order on 20/11/2015, the same is barred by limitation as provided under section 275(1)(c) of the Act. The submissions so filed by the assessee were considered but not found acceptable to the Ld. CIT(A). As per Ld. CIT(A), the AO in her order under section 143(3) has merely referred the matter to the JCIT, Chandigarh for initiation of penalty proceedings and she has not herself initiated the penalty proceedings. It was held by the Ld. CIT(A) that it is the Additional CIT who had infact initiated the action for imposition of penalty by issuing of notice under section 271D dt. 29/06/2015 and therefore, as per 275(1)(c) the time limit for passing the order expires only on 31/12/2015 wherein the order has been passed by the Additional CIT on 20/11/2015 which is well within the prescribed limitation period. Accordingly, the ground

of appeal challenging the penalty order on ground of limitation so taken by the assessee was dismissed. The assessee has not challenged the said findings of the Ld. CIT(A), hence the same has attained finality and is not subject matter of present adjudication.

8. Coming to the merits of the case, during the appellate proceedings before the Ld. CIT(A), the assessee has submitted that the Additional CIT vide order dated 20.11.2015 had levied the penalty of Rs. 175 Lacs u/s 271D of Income Tax Act for alleged violation of section 269SS of Income Tax Act, on account of receipt of share application money in cash. The assessment for assessment year 2012-13 u/s 143(3) of Income Tax Act was completed by AO vide her order dated 31.03.2015. During the assessment proceedings, the AO has observed that the Company has accepted cash from the following Directors/shareholders, Sh. Avtar Singh Arora - Rs. 70 Lacs and Sh. Ajmair Singh Bhullar Rs. 105 Lacs. The assessee company was asked to explain the source of cash deposited and the credit worthiness of these two Directors. Submissions made by the assessee company in this regard were accepted by the AO and no adverse inference as to the source of cash accepted and credit worthiness of the Directors / shareholders was drawn by the AO. Necessary details including confirmations from the persons who had contributed the amount towards the share capital of the company was submitted and no faults have been found with such explanation. The AO had also enquired regarding the violation of section 269SS of Income Tax Act. It was submitted by the assessee company that promoter Directors of the Company during the financial year 2011-12 had deposited the cash towards share application money and provisions of section 269SS are not applicable in such case. It was also explained that total share application money received during the year amounts to Rs. 2948 Lacs out of which only Rs. 175 Lacs was received in cash. The assessee company is a Public Limited Company and accounts of the entity are required to be audited every year. Extracts of audited accounts for the financial year 2011-12 & 2012-13 were

submitted with the AO as well as with the Additional CIT, wherein amount received from these Directors was clearly shown as Share Application Money. Audited accounts / books of accounts have not been rejected either by the AO or by the Additional CIT. However, they have tried to deviate from the accepted accounting principles and treated the share application money received from the Directors as Unsecured Loans/Advances and opined that 269SS provisions are applicable. The Learned Additional CIT has treated the amount received towards share application money in cash as contravention of section 269SS of Income Tax Act and levied the penalty u/s 271D of Income Tax Act. It was explained during the assessment proceedings that the provisions of section 269SS are applicable only to the transactions of loans and advances and the amount received towards allotment of shares which has been duly reflected as such as share application money in the audited accounts of the assessee in Note No. 1.3, by no stretch of imagine can be equated with the loans and advances within the meaning of section 269SS of the Income Tax Act. However, the Ld. AO in the Assessment Order has treated this explanation of the assessee as a colourable device to show it as share application money. The Ld. AO lost sight of the fact that the balance sheet of the assessee was audited and signed by the auditors as well as Directors of the company on 03.08 2012 and assessment proceedings were being undertaken in March 2015. How and under what circumstances, the assessee had given this transaction of share application money a colourable device is not coming out from the order of AO Such allegations in Assessment Order about this transaction are nothing but just imagination of the Ld. AO and is based on conjectures and surmises which is prayed to be dismissed as such. While arriving at the conclusion, neither the AO nor the Additional CIT has brought to the record any conclusive evidence to deviate from the accounting treatment of Share Application Money and treated the amount as Unsecured Loans.

8.1 It was further submitted that the provisions of Income Tax are required to be interpreted in the strict possible manner. Even if there was some irregularity from Companies Act point of view, although in the opinion of the assessee there was no irregularity about the issue of share capital or enhancement of authorized share capital because these issues were being conducted in accordance with regulations by the SEBI due to the disturbed financial status of the company, no adverse inferences can be drawn while judging the genuineness of the transaction from the prespective of income tax, especially when even the AO has accepted the transaction as genuine under the provisions of section 68 of the Income Tax Act which means that identity of the person, creditworthiness of the persons contributing the money and genuineness of the transactions has been duly accepted in the regular assessment proceedings.

8.2 It was submitted that the nature of transaction which was admittedly the share application money between the transacting parties cannot be reclassified as loan and advances as has been done by the Ld. AO in the Assessment Order and later-on by the Additional CIT who has passed the penalty order. The AO has no powers to reclassify the transaction from share application money to loans and advances. This proposition has been laid down by ITAT in the case of Dhruv Chaudhary v/s ADIT 2019-TII-261-ITAT-Delhi-TP. In the aforesaid case also, the Transfer Pricing Officer and thereafter the Ld. AO changed the nature of transaction from share application money and treated it as loan on which notional interest was computed and the Tribunal held that AO has no power to reclassify the transaction from the share application money to loan.

8.3 It was further submitted that while levying the penalty, Additional CIT has only relied upon the judgment of Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works Pvt Ltd vs. CIT (2005) 275 ITR 399 Jharkhand. Said judgment of Hon'ble Jharkhand High court has clearly been distinguished by Hon'ble Delhi High Court in the case of CIT vs. LP. India Pvt

Ltd (2012) 343 ITR 353 (Delhi) wherein the above judgment of Jharkhand High Court was distinguished and was held that provisions of section 269SS of Income Tax Act will not be applicable in respect of share application money received by the assessee in cash and the same would not account either to a loan or a deposit within the meaning of section 269SS of Income Tax Act. While arriving at the conclusions Hon'ble Delhi High Court has followed the principle pronounced by the same Court in the case of DIT exemption vs. Acme Educational Society (2010) 326 ITR 146 (Delhi).

8.4 It was further submitted that there is no prohibition in the Companies Act, 1956 that the share application money cannot be received in cash by the assessee company. Further, there is also no prohibition that share application money cannot be received without having sufficient authorized capital. The only requirement under the Companies Act, 1956 is that the shares cannot be allotted unless and until the Company has sufficient authorized capital. It was duly represented before the Additional CIT that Company had called for increase in authorized capital and allotment of Optionally Convertible Preference Shares against share application money received by the assessee company, through posted ballots to be received by the company on or before 12.12.2011. However, Company Law Board, New Delhi, vide its order dated 13.12.2011, upon complaint made by some minority shareholders had allowed the Company to increase the Authorized Share Capital, however, stayed the allotment of Optionally Convertible Preference Shares, till further orders. All these documents in support of the contention of the assessee company, that these amounts were received on account of share application money and not towards the Unsecured Loan, as alleged by the Additional CIT in his penalty order, were duly filed and are again enclosed for your honour's ready reference and records.

8.5 It was further submitted that whether the transaction is share application money or loans and advances can at best be subject to some debate and judicial interpretation. It is settled law that when there are two

possible interpretation in a taxing statute then an interpretation which helps the taxpayer is required to be adopted. Reliance is being placed upon Hon'ble Supreme Court Order in the case of CIT vs. Vegetable Products Limited (1973) 88 ITR 192 (SC) wherein it was held that if the Court finds that tax provision or penalty provision can give rise to two meanings, then it should adopt that meaning which favors assessee

8.6 It was further submitted that the Ld. Additional Commissioner of Income Tax while imposing the penalty has declined to follow the judgment of ITAT of Chandigarh in the case of Iqbal Inn & hotels Ltd. Patiala, wherein the facts were identical on the plea that the said judgment has not been accepted by the Department and an appeal has been filed to the Hon'ble P&H High Court against the said judgment. However, it is hereby clarified that the said judgment of Chandigarh ITAT has been upheld by the Hon'ble P&H High Court by dismissing the appeal filed by the department, copy of the same is enclosed for your ready reference and records.

8.7 It was accordingly submitted that the penalty has been levied mechanically by treating the share application money as loan and advances by reclassifying the transaction of share application money on presumption and surmises and on the facts which are not relevant to the issue of deciding the issue of levy of penalty and the penalty so levied be directed to be deleted.

9. Taking into consideration the findings of the Add.CIT and the submissions and documentation so filed by the assessee, the Ld. CIT(A) has deleted the penalty so levied by the Add.CIT and the ground of appeal so taken on merits of levy was decided in favour of the assessee. Against the said findings, the Revenue is in appeal before us.

10. Before we proceed further and examine the contentions advanced by both the parties before us, it would be relevant to refer to the findings of the

Ld. CIT(A) which are under challenge before us and the same reads as under:

> *"7.2 As noted from the impugned penalty order, the Addl. CIT found that special resolution to increase the authorised share capital has been passed on 14.12.2011 i.e; after the above amount of Rs. 175 lakhs in cash have been received. Therefore, Addl.CIT considered the amount received from shareholders including Rs. 1,75,00,000/- in cash as loans or deposits and not share application money as claimed by the appellant. Relying on the decision of the Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works (P) Ltd vs CIT (275 ITR 399) wherein it was held that the share application money will come within the definition of the deposits as defined u/s 269SS of the Act, the Addl. CIT held that the appellant has contravened the provisions of section 269SS of the Act and therefore, levied penalty u/s 271D of Rs, 1,75,00,000/- i.e. equal to the amount accepted in cash otherwise than by account payee cheque.*
>
> *7.3 The appellant has submitted that the provisions of section 269SS are applicable only to the transactions of loans and advances; that the amount received towards allotment of shares which has been duly reflected as such as share application money in the audited accounts of the assessee in Note No. 1.3, by no stretch of imagine can be equated with the loans and advances within the meaning of section 269SS of the Act; that the balance sheet of the assessee was audited and signed by the auditors as well as Directors of the company on 03.08.2012 and assessment proceedings were being undertaken in March 2015; that even if there was some irregularity from Companies Act point of view, although in the opinion of the assessee there was no irregularity about the issue of share capital or enhancement of authorized share capital because these issues were being conducted in accordance with regulations by the SEBI due to the disturbed financial status of the company, no adverse inferences can be drawn while judging the genuineness of the transaction from the prospective of income tax; that there is no prohibition in the Companies Act, 1956 that share application money cannot be, received without having sufficient authorized capital and the only requirement under the Companies Act, 1956 is that the shares cannot be allotted unless and until the Company has sufficient authorized capital; that reliance placed by the Additional CIT on the judgment of Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works Pvt Ltd vs. CIT (2005) 275 ITR 399 is not correct as the said judgment of Hon'ble Jharkhand High court has clearly been distinguished by Hon'ble Delhi High Court in the case of CIT vs. LP. India Pvt Ltd (2012) 343 ITR 353 (Delhi) wherein it was held that provisions of section 269SS of Act will not be applicable in respect of share application money received by the assessee in cash and the same would not account either to a loan or a deposit within the meaning of section 269SS of Act; that Ld. Additional Commissioner of Income Tax white imposing the penalty has declined to follow the judgment of Hon'ble ITAT of Chandigarh in the case of Iqbal Inn & hotels Ltd. Patiala (supra), wherein the facts were identical on the plea that the said judgment has not been accepted by the Department and an appeal has been filed to the Hon'ble P&H High Court against the said judgment. However, the said judgment of Hon'ble Chandigarh ITAT has been upheld by the P&H High Court by dismissing the appeal filed by the department, in ITA No. 256 of 2014 dt. 21.09.2015.*

7.3.2 I have carefully considered the submission of the appellant. It is an admitted that the appellant has received Rs. 175 lakhs in cash and it has been duly reflected as such as share application money in the audited accounts of the appellant. Further, there is no prohibition in the Companies Act, 1956 that share application money cannot be received without having sufficient authorized capital. Even if there was some irregularity from Companies Act point of view, no adverse inferences can be drawn while judging the genuineness of the transaction from the prospective of income tax. Further, the jurisdictional Hon'ble Punjab and Haryana High Court in the case of M/s. Eqbal Inn & Hotels Limited in ITA No. 256 of 2014 dated 21.09.2015 has held that amount received towards share application money would not fall under loan or deposit u/s. 269SS of the Act and consequently, the penalty u/s. 271D of the Act was not leviable. The judgment of Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works Pvt Ltd (supra), relied by the Additional CIT, has been considered and distinguished by Hon'ble P&H High Court in the above case.

7.4 In view of the above discussion and following the above decision of the jurisdictional Hon'ble Punjab and Haryana High Court, it is held that amount of Rs. 1,75,00,000/- received towards share application money would not fall under loan or deposit u/s. 269SS of the Act and consequently, the penalty u/s. 271D of the Act was not leviable. The AO is, therefore, directed to delete the penalty of Rs. 1,75,00,000/-levied u/s. 271D of the Act. The ground no.3 is, accordingly, allowed."

11. Now, coming to the contentions advanced by both the parties. During the course of hearing, the matter was argued at length by both the parties and written submissions were filed. In the following paragraphs, we refer to the contentions so advanced as found mention in the written submissions so filed by both the parties.

12. In his submissions, the Ld. AR has submitted that the assessee company is a listed public limited company engaged in the business of Hospitality through Hotel Park Plaza, Sector 17A, Chandigarh. During the year under assessment, the assessee company has received Rs. 2,948 lacs as share application money from directors/shareholders against which 10% optionally convertible non-cumulative redeemable preference shares were to be allotted. The details of share application money received during the year are as under:-

Particulars	Amount (Rs.)
Opening Balance (01.04.2011)	8,03,00,000
Add:- Received during the year	29,48.40,000

Closing Balance (31.03.2012)	37,51,40,000

12.1 Out of Rs. 2,948 lacs received during the year as share application money, the assessee company had received Rs. 175 lacs in cash from these directors/shareholders, the details of which is as under:-

Name of Applicant	Date	Amount (Rs.)
Haravtar Singh Arora	28.08.2011	70,00,000
Ajmair Singh Bhullar	05.04.2011	70,00,000
Ajmair Singh Bhullar	26.09.2011	35,00,000
Total		1,75,00,000

12.2 It was submitted that there is no dispute on these basic facts except that the Ld. AO has treated the share application money received in cash as loans or deposits.

12.3 It was submitted that the return of income was filed by the assessee on 14.09.2012 declaring Nil Income, which was processed on 09.05.2013.The case was selected for scrutiny through CASS. In response to the notices issued by the Ld. Assessing Officer ('AO'), the assessee furnished the necessary information/details including the confirmations from the persons who had contributed the amounts towards the share capital of the company and no faults have been found with such explanations. These amounts received were treated as genuine by the AO.

12.4 It was submitted that the Ld. AO during the course of assessment proceeding had also enquired about the applicability of the provision of section 269SS of the Income Tax Act against the receipt of cash. Against which, the assessee company submitted that promoter/directors of the company during the financial year 2011-12 had given the cash towards 'share application money' and not as 'loan or deposit'. Therefore, the provision of section 269SS are not applicable in the instant case. It was also explained that total share application received during the year amounts to Rs. 2,498 lacs out of which only Rs. 175 lacs was received in cash.

12.5 It was submitted that the Ld. AO had completed the assessment u/s 143(3) of the Act for assessment year 2012-13 vide order dated 31.03.2015 and observed that assessee has violated the provisions of Sec 269SS of the Income Tax Act, on account of receipt of share application money in cash and treated the same as deposits. Thus, Ld. AO initiated the penalty proceedings u/s 27ID of Income Tax Act and accordingly the matter was referred to JOT, Range II, Chandigarh.

12.6 It was submitted that the ld. Additional CIT, Range II, Chandigarh issued a penalty notice u/s 27ID of the Act on 29.06.2015 against which the Assessee Company had filed the requisite details. Thereafter, the Learned Additional CIT has passed the penalty order u/s 27ID of the Act on 20.11.2015 levying a penalty of Rs. 1,75,00,000/- by treating the share application money received in cash in contravention to the provisions of section 269SS of Income Tax Act. In doing so the learned Assessing Officer and later on learned Additional Commissioner of Income Tax has reclassified the transaction of share application money as "loans or deposits" for the purposes of section 269SS of the Income Tax Act.

12.7 It was submitted that against the penalty order u/s 27ID of the Act, the assessee company filed an appeal before the CIT(A). The Ld. CIT(A) decided the appeal in favour of the assessee and deleted the penalty u/s 27ID of the Act by following the decision of the jurisdictional Hon'ble Punjab and Haryana Court in the case of Eqbal Inn & Hotels Limited [(2014) ITA No. 256] wherein it was held that amount of Rs. 1,75,00,000/- received towards share application money would not fall under the preview of 'loan or deposit' u/s 269SS of the Act and consequently the penalty u/s 27ID of the Act was not liveable and the AO was therefore, directed to delete the penalty of Rs. 1,75,00,000/- levied u/s 271D of the Act. It was submitted that against the favourable CIT(A) order, the department has filed the present appeal before the Tribunal.

12.8 It was submitted that the penalty provision under section 27ID of the Act will get attracted if a person takes or accepts any loan or deposit in contravention of the provision of Sec 269SS of the Act i.e. takes or accept any loan or deposits in cash in excess of Rs. 20,000/-. The assessee company had received cash of Rs. 1,75,00,000/- from the Directors/ shareholders as share application money during the year and the same has also been shown as share application money pending for allotment in the Audited Financial Statement. The assessee company had already submitted Audited accounts / books of accounts before ld. AO and Additional CIT and the same have not been rejected. In fact, Audited Financial Accounts were filed with the ITR itself. It was also filed with ROC & SEBI. Extracts of the Audited Financial statements as on March 2012 and March 2013 enclosed at PB. (Refer Pg. No. 20 and 25 of PB). However, the Ld. AO/Additional CIT deviated from the accepted accounting principles treated the share application money received from the Directors as Unsecured Loans/Advances. It is also submitted that the nature of amount received is clearly of share application money because if the intention was to receive them as loan or deposit, there must have some terms regarding their repayment, chargeability of interest etc., which are not there in the present case. Therefore, there was no reason to suspect the transaction in question; it unequivocally constitutes share application funds as reflected in the audited Balance Sheet, not a 'loan or deposit' as erroneously alleged and treated by the Ld. AO/Additional CIT.

12.9 It was submitted that as per the Rule 2(b) of the Companies Rules, 2014, any amount received by way of subscriptions of shares and pending for allotment of the said shares is not a deposit which reads as under:

> *"Rule 2(b): deposit means any deposit of money with, any includes any amount borrowed by, a company, but does not include-*
>
> *(i)to (vi)*
>
> *(vii) any amount received by way of subscriptions to any shares, stock, bonds, debentures such bonds or debentures as are covered by sub clause.*

(x) pending the allotment of the said shares, stock, bonds or debentures any any amount received by way of calls in advance on shares, in accordance with the articles of association of company so long as such amount is not repayable to the members under the articles of Association of the company."

12.10 It was submitted that the cash received from the Directors/ shareholders as share application money is not a 'loan or deposit' as per the provision of Rule 2(b) of the Companies Rule, 2014, accordingly the provision of Sec 27 ID of the Act is not applicable on the transaction of cash received from the Directors/ shareholders as share application money.

12.11 It was submitted that the main reason for the Ld. Additional CIT to treat the above transaction as 'loan or deposit' by relying on the Hon'ble Company Law Board (CLB) order dt. 13.12.2011 which barred the company for making allotment of 37514000 shares in order to protect the interest of 40% public shareholder other than the promoters and held that special resolution to increase the Authorized Share Capital has been passed on 14.12.2011 i.e. a day after the CLB order date 13.12.2011 barring the allotment of shares and prior to that date, there was no decision to enhance the Authorized Share Capital and also disputes/ complaints were pending before SEBI and CLB. Thus, based solely on this event, the amounts received from shareholders/ directors, to the extent of Rs. 1,75,00,000/- received in cash, were treated as loans or deposits and not share application money, as claimed by the assessee. Surprisingly the balance amount has not been doubted and the same has been treated as share application money. In this respect, the sequence of events pursuant to share application money received is mentioned as below:

"A. That a total of Rs. 2948.40 lacs was received as share application money during the year from the directors/ shareholders which included a sum of Rs 175.00 lacs in cash. Further a sum of Rs. 803.00 lacs was outstanding as share application money pending allotment as on 01.04.2011, thus raising a total share application money to Rs. 3751.40 lacs (Refer Pg. No. 20 and 25 of PB).

B. Your honour will appreciate that a proper legal procedure is required to be followed under the company law and passing of resolution is not a day's job. Initial notices are required to be issued to all shareholders wherein the agenda

of the meeting i.e. decision on share capital, how business to be done etc. is required to be disclosed etc.

C. On 14.10.2011 & again on 01.11.2011, notices for voting though postal ballot was sent by company to members for approval of Item No. 1 to 3. Heading of the Item No. 1 to 3 are specified below for your reference.

Item No. 1:- Increase in Authorized share capital and consequent amendment in the memorandum of association.
Item No. 2:- Alteration of Articles of Association of Company
Item No.3:- Issue of 10% optionally convertible non-cumulative redeemable preference shares on preferential basis. (Refer Pg. No. 89-91 of PB)

D. It appears that after receipt of these notices, certain shareholders filed complaint against the company/directors that such optionally convertible non-cumulative redeemable preference shares are being allotted to give an all undue advantage/favour to the directors/shareholders. {Refer Pg. No. 92-96 of PB)

E. On 13.12.2011, the Hon'ble Company Law Board (CLB) passed an interim order for keeping in abeyance the resolution vide Item No. 3 i.e. allotment or preference shares (Refer Pg. No. 92-96 of PB).

F. On 14.12.2011, a meeting of the shareholders of the company was held for which notice had already been on 14.10.2011 & against on 1.11.2011 wherein a special resolution vide Item No. 1 to Item No. 3 was passed. However, since CLB order came to light in the meeting so accordingly it was decided in the meeting to keep in abeyance the implementation of resolution vide Item no. 3. i.e. allotment of 37514000 no of 10% optionally convertible non-cumulative redeemable preference shares to these director/ share holder. (For the copy of the minutes of the meeting of shareholders kindly refer Pg. No. 97-103 of PB). Thus, the entire share application money of Rs. 3751.40 lacs continued to be reflected under the head share application money. There was no bar by the CLB to enhance the share application money from 14 crore to 52 crore for which Ld. AO/Add. CIT has raised doubts to treat the share application money as loans or deposits."

12.12 It was submitted that based on the above sequence of events, the Ld. Add. CIT allegation that there was no decision about share application money prior to the date of CLB order is totally wrong and misleading, since on 14.10.2011 and again on 1.11.2011, the company had already send the notices through postal ballot for approval of Item No. 1 i.e. INCREASE OF AUTHORISED SHARE CAPITAL. So, even before the CLB order dt. 13.12.2011 or at the time of receiving of money, the intention of the company was very much clear i.e. share application money and not as 'loan or deposit'. Thus, the penalty levied by the Add. CIT considering the above share application

money as 'Loan or deposit' is totally wrong and erroneous. The allegation made by the Add. CIT that depicting the amount as share application money in the audited balance sheet as on 31.3.2012 is an after-thought is not correct and erroneous.

12.13 In respect to the allegation that the special resolution to increase of authorized share capital has been passed on 14.12.2011 i.e. a day after the CLB order dt. 13.12.11 barring the allotment of shares, it was submitted the CLB order dated 13.12.11 merely barred the allotment of shares (Item No. 3), and not the increase of authorized share capital (Item No.I). Therefore, it is submitted that the increase in authorized share capital was in accordance with the provisions of the law by following proper legal procedure on which there was no bar by the CLB also as it being made out.

12.14 It was further submitted that from the CLB order dt. 13.12.2011, that petitioner's requested for abeyance of the allotment of optionally convertible redeemable preference shares in order to safeguard the interests of the 40% shareholder indicates that at the time of filing the petition before the CLB, the petitioners were also aware that the company intended to issue preference shares to shareholders/directors. The natural conclusion is that amount received from shareholders was towards 'share application money' and not 'loans or deposit' as has been made out by Ld. AO/Ld. Add. CIT. This evidence supports the argument that the company had a clear intention to issue shares against the amounts received from shareholders/directors, thus the amount is share applicable money and not as 'loan or deposit'. Therefore, the Ld. Addl. CIT allegation that showing the share application money against the amount received from the shareholders/directors is an after thought is not correct and erroneous.

12.15 It was further submitted that there is no prohibition in the Companies Act, 1956 that the share application money cannot be received in cash by the assessee company. Further, there is also no prohibition that share

application money cannot be received without having sufficient authorized capital. The only requirement under the Companies Act, 1956 is that the shares cannot be issued/allotted unless and until the Company has sufficient authorized capital. Relevant extract of the Company Act, 2013 is re-produced herein below for your reference.

> *"As per Section 2(8) of the Companies Act, 2013 "authorised capital" or "nominal capital" means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company;*
>
> *As per Section 2(64) of the Companies Act, 2013 "paid-up share capital" or "share capital paid-up" means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called."*

12.16 It is further submitted that the provisions of Income Tax especially the penalty provision are required to be interpreted in the strict possible manner. Even if there was some irregularity from Companies Act point of view, although in the opinion of the assessee, there was no such irregularity about the issue of share capital or enhancement of authorized share capital because these issues were being conducted in accordance with regulations by the SEBI and company law due to the disturbed financial status of the company, no adverse inferences can be drawn while judging the genuineness of the transaction from the prospective of income tax, especially when even the AO has accepted the transaction as genuine under the provisions of section 68 of the Income Tax Act which means that identity of the person, creditworthiness of the persons contributing the money and genuineness of the transactions has been duly accepted in the regular assessment proceedings. On the above issue, we hereby places reliance on the following judicial pronouncements which states that any violations under the provision of Companies Act may not get trigger provisions of the Income Tax Act:

> *a) High Court of Bombay in the case of Shendra Advisory Services (P.) Ltd. v. DCIT [2024] 159 taxmann.com 557 (Bombay) wherein it was held that* "even if assessee had breached provisions of section 78(2) of Companies Act,

> 1956, it would be penalized by provisions of Companies Act and breach would never turn a capital receipt into revenue receipt or vice versa under the provision of Income Tax Act. "
>
> *b) Hon'ble Delhi ITAT in the case of Serco India Pvt. Ltd [TS-363-ITAT-2023(DEL)] has held that "it* is also well settled that ratio decidendi of a case from one enactment, cannot be applied to an altogether different legislation."

12.17 It was further submitted that the nature of transaction which was admittedly the share application money between the transacting parties cannot be reclassified as loan and advances as has been done by the Ld. AO in the Assessment Order and lateron by the Hon'ble Additional CIT who has passed the penalty order. The AO has no powers to reclassify the transaction from share application money to loans and advances. This proposition has been laid down by Hon'ble ITAT in the case of Dhruv Chaudhary v/s ADIT 2019-TII-261-ITAT-Delhi-TP. In the aforesaid case also, the Ld. Transfer Pricing Officer and thereafter the Ld. AO changed the nature of transaction from share application money and treated it as loan on which notional interest was computed. Hon'ble ITAT held that AO has no power to reclassify the transaction from the share application money to loan.

12.18 It was further submitted that while levying the penalty, Additional CIT has relied upon the judgment of Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works Pvt Ltd vs. CIT (2005) 275 ITR 399 Jharkhand. The said judgment of Hon'ble Jharkhand High Court has been distinguished by Hon'ble Delhi High Court in the case of CIT vs. LP. India Pvt Ltd (2012) 343 ITR 353 (Delhi) wherein the above judgment of Jharkhand High Court was distinguished and was held that provisions of section 269SS of Income Tax Act will not be applicable in respect of share application money received by the assessee in cash and the same would not account either to a loan or a deposit within the meaning of section 269SS of Income Tax Act. While arriving at the conclusions Hon'ble Delhi High Court has followed the principle pronounced by the same Court in the case of DIT exemption vs. Acme Educational Society (2010) 326 ITR 146 (Delhi).

12.19 It was further submitted that the Additional CIT levied the penalty u/s 27 ID of the Act by rejecting the assessee's reliance on the Jurisdictional Hon'ble Chandigarh ITAT in the case of Eqbal Inn & Hotels Limited by holding that the said order of Hon'ble ITAT has been appealed and pending before the Hon'ble Punjab & Haryana High Court. In this respect, it was submitted that the Hon'ble Punjab & Haryana High Court in the case of Eqbal Inn & Hotels Limited (2014) ITA No. 256 (Punjab & Haryana) has since decided the matter in favour of the assessee.

12.20 Reliance was placed the judgement of the Hon'ble High Court in the case of CIT, Delhi-IV v. LP. India (P.) Ltd. [2011] 16 taxmann.com 407(Delhi) wherein it was held that "*share application monies received by the assessee company in cash for allotment of shares would not amount either to a 'loan' or 'deposit' within the meaning of section 269SS of the Act.*"

12.21 Reliance was also placed on the judgement of the Hon'ble High Court of Calcutta in the case of CIT v. Vamshi Chemicals Ltd. [2024] 162 taxmann.com 906 (Calcutta) wherein it was held as under:

> *"The words loan or deposit has been defined in Explanation (iii) to section 269T which is not an expansive definition. It provides that "loan or deposit" mean any loan or deposit o f money which is repayable after notice or repayable after a period and, in case o f a person other than a company including loan or deposit o f any nature. Share application money is neither repayable after notice nor repayable after a period. It is for participation in the capital of the company. Therefore, neither as per the definition of the words "loan or deposit" as given in the Explanation (iii) to section 269T nor in ordinary sense, share application money can be said to be a loan or deposit. Once share application money is neither loan nor deposit, then neither section 269SS nor 269T shall attract. Consequently, no penalty either under section 27ID or under section 27IE could be imposed.* **"**

12.22 It was submitted that the CIT(A) after considering the assessee's submission decided the appeal in favour of the assessee and deleted the penalty u/s 27ID of the Act by following the jurisdictional Hon'ble Punjab and Haryana Court [(2014) ITA No. 256 (Punjab and Haryana)] and held that amount of Rs. 1,75,00,000/- received towards share application money would

not fall under the preview of 'loan or deposit' u/s 269SS of the Act and consequently the penalty u/s 27ID of the Act was not leviable.

12.23 It was accordingly submitted that based on the above submissions, judicial pronouncements and facts on record, the order of the ld CIT(A) be affirmed and the appeal of the Revenue be dismissed as this is not a case of receipt of 'loan or deposit' and the transaction of the share application money received, would not fall under the preview of loan or deposit u/s 269SS of the Act and consequently, the penalty u/s 27 ID of the Act would not be leviable.

13. In his submission the Ld. CIT/DR submitted the assessee has accepted cash amounts of Rs. 70 Lakhs, Rs. 70 Lakhs and Rs. 35 Lakhs on 05.04.2011, 28.08.2011 and 26.09.2011 (totalling to Rs. 1,75,00,000) from Sh. Ajmair Singh Bhullar, Sh. Haravtar Singh Arora and Sh. Ajmair Singh Bhullar respectively. The assessee has claimed these amounts to be in the nature of share application money. The Assessing Officer averred that the amount of Rs. 1,75,00,000/- received in cash was in the nature of deposits and not share application money and accordingly recommended to the Addl.CIT for initiation of proceedings u/s 27ID r.w.s. u/s 269SS. The Addl.CIT after initiating the proceedings imposed a penalty of Rs. 1,75,00,000/-u/s 27ID on the assessee. The Addl.CIT concluded that the amount received was in the nature of deposits as given u/s 269SS of the Act, and not share application money.

13.1 During appellate proceedings, the Ld. CIT(A) gave relief to the assessee by holding the amount of Rs. 1,75,00,000/- as share application money. Vide para 7.3 of his order dated 10.07.2023, the Ld. CIT(A) wrongly agreed with the assessee's contention that there was no bar in the Companies Act, 1956 to raise share application money without having sufficient authorized capital. The Ld. CIT(A) also relied on the jurisdictional Hon'ble Punjab and Haryana High Court decision dt. 21.09.2015 rendered in

the case of M/s Eqbal Inn and Hotels Ltd. (ITA no. 256 of 2014) wherein it was held that share application money would not fall under loan or deposit u/s 269SS of the Act and consequently, the penalty u/s 27ID was not leviable.

13.2 It was submitted that the assessee had received Rs. 1,75,00,000/- in cash purportedly as share application money, without actually being authorized to raise fresh share application money. This is because the assessee's issued and paid up capital was already exceeding its authorized share capital, meaning thereby that the assessee was not competent to raise fresh share application money without increasing its authorized share capital. It is also pertinent to mention here that the assessee company issued a notice for voting through postal ballot dated 01.11.2011 to its shareholders/members whereby agenda Item No. 1 was to increase the authorized share capital of the company from Rs. 14 crores to 52 crores. The date fixed for this agenda item to be taken was 14.12.2011 (kindly refer to assesse's Paperbook page no. 89). The meeting was convened on 14.12.2011 wherein it was agreed to enhance the authorized share capital from Rs. 14 crores to Rs. 52 crores (kindly refer to pages 97 and 98 of assessee's Paperbook). Further, it is important to note that in the wake of certain disputes going on with Securities Exchange Board of India (SEBI), the assessee had been specifically prohibited by the Hon'ble Company Law Board (CLB) to issue any new/fresh shares vide the Company Law Board proceedings dt. 13.12.2011 (kindly refer to pages 93 to 96 of assessee's Paper Book). Thus, it is very clear that the assessee has raised an amount of Rs. 1,75,00,000/- in cash on 05.04.2011, 28.08.2011 and 26.09.2011 where as it was not authorized to raise any fresh share application money prior to 14.12.2011.

13.3 It was submitted that the Ld. CIT(A) has woefully failed to appreciate the above incapacity of the assessee to raise any amount as share application money prior to 14.12.2011. He has also failed to appreciate that the assessee company has been specifically debarred from raising any fresh

share capital by the SEBI /CLB in order to protect the interest of 40% public shareholders who were other than the Promoters of the company. The Hon'ble Bench may kindly appreciate that as per the provisions of the Companies Act, no company is authorized to raise more share application money than its authorized share capital. It is only upon convening of a meeting of the Board of Directors and thereafter, passing a special resolution to that effect and after amending the Memorandum of Association of the company that a company can raise its authorized share capital.

13.4 It was submitted that the assessee company in the instant case has raised an amount of Rs. 1,75,00,000/- without following the prior procedure elaborated in the preceding paragraph. Therefore, it needs to be argued that the amount so raised by the assessee company can be in the nature of anything but certainly not share application money. When one is not authorized to raise fresh share application money before 14.12.2011, how can he label it by that name? Thus, what has been received by the assessee company is a deposit other than share application money. The assessee has, vide his submissions dt. 18.06.2024 before the Hon'ble Bench, placed reliance on the judgements of the Hon'ble Delhi High Court in the case of CIT vs. LP. India Pvt. Ltd. (2012) 343 ITR 353 (Delhi), Hon'ble High Court of Calcutta in the case of CIT v. Vamshi Chemicals Ltd. [2024] 162 taxmann.com 906 (Calcutta) and on the jurisdictional Hon'ble Punjab & Haryana High Court in the case of Eqbal Inn & Hotels Limited (2014) ITA no. 256 of 2014 (Punjab & Haryana). Vide the above referred judgements of the Hon’ble High Courts, it has been held that share application money would not fit into the definition of deposits u/s 269SS. The Hon'ble Bench may kindly appreciate that there are decisions to the contrary also, wherein the Hon'ble Courts have held that share application money is in the nature of deposits only as defined u/s 269SS of the Income Tax Act. In this regard, reliance is placed on the three decisions of the Hon'ble ITAT Delhi Bench, Hon'ble High Court of Jharkhand and the Hon'ble Supreme Court of India in the below mentioned cases :-

		Name of the case	Citation/Date of order
1.	Hon'ble Supreme Court of India	CIT, Chennai Vs. Object Frontier Software (P) Ltd.	[2016] 75 taxmann.com 196 (SC) 09.09.2016
2.	Hon'ble High Court of Jharkhand	Bhalotia Engineering Works (P) Ltd. Vs. CIT	[2005] 275 ITR 399 (Jharkhand) 24.08.2004
3.	Hon'ble ITAT Delh Bench	ITO, Ward 13(1). New Delhi Vs. Nandi Promoters (P) Ltd.	[2011] 13 taxmann .com 213 (Delhi) 21.04.2011

13.5 It was submitted that the ld. counsel for the assessee has tried to argue that the Ld. CIT(A) has correctly given him relief by following the decision of the jurisdictional Hon'ble Punjab & Haryana High Court in the case of M/s Eqbal Inn & Hotels Limited, wherein the Hon'ble High Court has duly taken into account the judgement rendered by the Hon'ble High Court of Jharkhand in the case of Bhalotia Engineering Works (P) Ltd. Vs. CIT. However, this contention of the Ld. Counsel is misplaced since the facts and circumstances in the case of M / s Eqbal Inn & Hotels Limited are clearly distinguishable and differentiable from the instant case. In this case, as already discussed above, the assessee has raised fresh share application money without first increasing its authorized share capital. Therefore, the amount or the deposits received by the assessee can at best be categorized as deposits and not as share application money. So, the question of deciding whether or not share application money is a deposit u/s 269SS does not arise in this case. Whether the definition of deposits (as given u/s 269SS) would include share application money or not, does not require adjudication in the instant case. What is important in the instant case is to appreciate that the amount raised by the assessee company is certainly not share application money. So, the question of share application money being in the nature of deposits or otherwise, would not arise in the instant case. In the case of M/s Eqbal Inn & Hotels Ltd., there is nothing to suggest that the assessee was not authorised to raise share application money beyond its authorized share capital. So, what was raised by the assessee M/s Eqbal Inn and Hotels Ltd. was indeed share application money and nothing else. The Hon'ble Punjab and Haryana High Court ruled

that the share application money so received, could not be categorized as deposits u/s 269SS. The issue that whether the receipts of the assessee can actually be categorized as share application money in the first place or not, never came place up for the examination of the Hon'ble Punjab and Haryana High Court.

13.6 It was accordingly submitted by the ld CIT/DR that the cash of Rs. 1,75,00,000/- received by the assessee in the instant case cannot be defined as share application money since the assessee was never authorized to raise share application money in the first place. The receipts of Rs. 1,75,00,000/- in cash can only be defined as deposits and nothing else. In the wake of the unique facts and circumstances of this case, the assessee would not be covered under the beneficial provisions of the judgement rendered by the Hon'ble Punjab 8s Haryana High Court in the case of M/s Eqbal Inn and Hotels Ltd.

14. In his rejoinder, the Ld. AR has contested the submissions so made by the ld CIT/DR and has submitted as under:

> *1. "At the outset, it is reiterated that the case of the assessee is fully covered on all fours by the judgement of the Hon'ble Jurisdictional High Court in the- case of Eqbal Inn & Hotels Limited [(2014) ITA No. 256 (Punjab and Haryana)] as read with the Judgement of Hon'ble ITAT, Chandigarh in that case. The averments and submissions made by the Ld. CIT DR to the contrary that facts of the assessee's case are distinguishable are factually incorrect, it is respectfully submitted. Copy of Judgement of Hon'ble ITAT, Chandigarh in the case of M/s Eqbal Inn & Hotels Ltd. v. JCIT [ITA No. 876 to 879/CHD/2013] enclosed as Annexure -1 for your ready reference and records. It was this judgement of Hon'ble ITAT which the Ld. Addl. CIT who passed the impugned penalty order did not opt to follow due to the reasons amongst others, that departmental appeal is pending against the said judgment before the Hon'ble HC . However, judgement of Hon'ble HC is also now available, a copy of which has been filed in the PB filed by the assessee at Page No 74 to 88.*
>
> *2. Against, the submissions filed by the Ld. CIT (DR-2) before your honour on 25.06.2024, in continuation of our earlier synopsis dt. 18.06.2024, the appellant's para wise rejoinder is as below for your kind perusal.*
>
> *Para No. 1 of CIT (DR) Submissions*

Ld. CIT (DR) has reproduced the facts under the Para No. 1. Hence, these facts are not disputed.

Para 2 of Ld. CIT(DR) Submissions

The Ld. CIT-DR has submitted that CIT(A) wrongly agreed that there was no bar in the Companies Act, 1956 to raise share application money without having sufficient authorised capital.

Assessee's submissions:

In this regard, this submission of Ld. CIT DR is strongly objected to. The Ld. CIT DR has failed to point out any specific provisions of the Companies Act, 1956 in which such legal prohibition exists. The Scheme of the Companies Act has been explained in our previous synopsis. There are various types of capital as identified in Schedule-XIII of the Companies Act, i.e. authorized, issued, subscribed and paid up share capital. As per the law, paid up share capital cannot exceed the authorized share capital. However, there is no specific bar in receiving share application money in advance without having authorised share capital, as also explained in the later part of these synopsis. Hence, Ld. CIT (Appeals) finding on this issue are correct as there is no such bar to receive share application money in excess of authorized share capital. However, authorized share capital needs to be increased before any capital is issued, subscribed or paid up.

Para No. 3 of CIT (DR) Submissions

CIT (DR) Observations/Submissions

Ld. CIT (DR) has referred to the Company Law Board (CLB) order dated 13.12.2011 (Refer Pg. No. 93 -96 of PB) which according to Ld. CIT PR specifically prohibited to issue the new/fresh shares. Thus, it is very clear that the assessee has raised an amount of Rs. 1,75,00,000/- in cash on 05.04.2011, 28.08.20211 and 26.09.2011 where as it was not authorized to raise any fresh share application money prior to 14.12.2011.

Assessee's Submissions

In this regard, as already submitted in our synopsis dt. 18.06.2024 that Hon'ble Company Law Board (CLB) order dt. 13.12.2011 merely barred the company for making allotment of 37514000 shares in order to protect the interest of 40% public shareholder other than the promoters (i.e. Item No. 3 of notice dated 01.11.2011). However, the increase of authorized share capital (i.e. Item No.I of notice dated 01.11.2011) had not been prohibited by the CLB. Similarly receiving of share application money was not prohibited as has been observed by the Ld. CIT-PR. Therefore , it is submitted that the inferences drawn by the Ld. CIT PR that the assessee was not authorized to raise any fresh share application money is erroneous and factually incorrect as the CLB order only barred the allotment of shares and not receiving of share application money or increase of authorized share capital. CLB order is available at PB 93-96 of PB filed by the assessee from where aforesaid facts can be verified.

Notice dated 01.11.2011 in continuation of earlier notice dated 14.10.2011 was issued to the shareholders for seeking approval on 3 items. Item No. 1 - Increase of authorized share capital, Item No. 2 - Alter the Article of

Association and Item No. 3 - Issue/allotment of shares to director against which company had received share application money (refer page no 89 to 91 of the assessee's PB). What was kept in abeyance by the CLB was item no 03(refer page no 92 to 93 of assessee's PB). Hence Ld. CIT DR's contention that CLB debarred assessee from receiving the authorized share capital is not correct, it is respectfully submitted.

Para 3 & 4 of the CIT DR Submission

Ld. CIT (DR) Observation/Submissions

Ld. CIT (DR) has submitted that that as per the provision of Companies Act, no company is authorized to raise share application money more than its authorized share capital. Thus, the assessee company was not competent to raise the fresh share application money without increasing its authorized share capital. Thus, the amount of Rs. 1,75,00,000/- received in cash is certainly not a share application money, however in the nature of deposit or otherwise.

Assessee's Submissions

In this regard, as already submitted that there is there is no bar in the Companies Act for receiving the share application money in excess of authorized share capital and the only bar is that paid up capital cannot be more than the authorized share capital. Relevant extract of the Company Act, 2013 is re-produced herein below for your reference

As per Section 2(8) of the Companies Act, 2013 "authorised capital" or "nominal capital" means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company;

As per Section 2(64) of the Companies Act, 2013 "paid-up share capital" or "share capital paid-up" means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called;"

As per the above definition of 'authorised capital', the authorised capital means the maximum amount of share capital of the company and as per the definition of "share capital paid-up" means the aggregate amount of money credited as paid-up but does not include the share application money. Therefore, as per the above definition of 'authorised share capital' and 'paid-up share capital' under the Companies Act, 2013 there is no restriction in the Companies Act for receiving the share application money in excess of authorized share capital and the only restriction is that paid up capital cannot be more than the authorized share capital. Authorized Share Capital can be increased at any time by any company after following the necessary guideline/rules/laws as per the Companies Act.

In the instant case also, the assessee company has received the share capital money before increase of authorised share capital as the same is not barred under the provision of the Companies Act, 2013. However, the assessee company has increased the authorised share capital in the same financial year after the receipt of share application money. The Authorized Share Capital as on 01.04.2011 was 14 Crore's & as on 31.03.2012 was Rs 52 Crore's. (Refer page no 20 of assessee's PB)

Here it would be appropriate to refer to the judgment of Hon'ble Chandigarh ITAT, wherein identical facts were involved the issue has been specially addressed by the Hon'ble Chandigarh ITAT in the case of M/s Eqbal Inn & Hotels Ltd. v. JCIT [ITA No. 876 to 879/CHD/2013].

The above order of the Hon'ble Chandigarh ITAT has been upheld by the jurisdictional Hon'ble Punjab and Haryana Court in the case of Eqbal Inn & Hotels Limited [(2014) ITA No. 256 (Punjab and Haryana) - Refer Pg. No. 74-88 of PB

It would be seen that in the aforesaid judgments of Eqbal Inn & Hotel Ltd, the authorized share capital was increased after 5 years and allotment was made. However, assessee's facts are much stronger as opposed to Eqbal Inn because the authorized share capital was increased during the same financial year in which such share application was received, as evidenced from audited Balance Sheet (Refer page no 20 of PB). However, special resolution No 03 was also passed for allotment of shares in the shareholders meeting on 14.12.2011, yet allotment of shares was kept in abeyance on account of CLB order dated 13.12.2011.(Refer Page No 103 of PB). Further in case of Eqbal Inn, Share application money was reportedly received in cash from AY 2003-04 to AY 2007-08, whereas in assessee's case it was solitary transaction which had to be done to meet the financial debt equity ratio structuring as also submitted before the Ld. Add CIT. Page No 6 of Penalty Order u/s 271D of the Income tax Act.

Considering the above submissions and in view of Jurisdictional High Court, it is hereby submitted that there is no prohibition in the Companies Act for receiving the share application money in excess of authorized share capital, therefore the share application money received including cash of Rs. 1,75,00,000/- without the increase of authorized share capital is in accordance with the law and the ld. CIT (DR) allegation that assessee company was not competent to raise the fresh share application money without increasing its authorized share capital is totally wrong and not based on any provision of the law, it is just an argument without any legal backing , it is respectfully submitted.

Para 5 of the CIT DR Submission

The Ld. CIT (DR) referred the certain judgements under which the share application was treated as 'loan and deposit'. In regard to these judgements, it is hereby submitted that the facts of these judgements are distinguishable to the assessee's case due to the following reasons:-

S. No.	Judgement issued by	Name of the case and Citation	Assessee Contention
1.	Hon'ble Supreme Court	CIT, Chennai v. Object Frontier Software (P) Ltd. [2016] 75 taxmann.com 196 (SC) 09.09.2016	In this case, the Hon'ble Supreme Court has indeed merely admitted the revenue's appeal in SLP filed by the department. It is important to note that the mere admission of the appeal by the Supreme Court should not be construed as sufficient grounds for rejecting the assessee's contention and concluding that the share application constitutes a loan or deposit. The Hon'ble Supreme

			Court has not stayed the judgment of Hon'ble Madras High Court. Hence, nothing turns on this SLP admission, it is respectfully submitted.
2.	Hon'ble High Court of Jharkhand	Bhalotia Engineering Works (P) Ltd. v. CIT [2005] 275 ITR 399 (Jharkhand) 24.08.2004	Said judgment of Hon'ble Jharkhand High court has clearly been distinguished by Hon'ble Delhi High Court in the case of CIT vs. LP. India Pvt Ltd (2012) 343 ITR 353 (Delhi) (Refer Pg. No. 65-68 of PB) as also by Hon'ble P&H High Court, which opted not to follow this judgment, wherein the above judgment of Jharkhand High Court was distinguished and was held that provisions of section 269SS of Income Tax Act will not be applicable in respect of share application money received by the assessee in cash and the same would not account either to a loan or a deposit within the meaning of section 269SS of Income Tax Act. (Refer page no 86-88 of assessee's PB)
3.	Hon'ble ITAT Delhi Bench	ITO, Ward 13(1), New Delhi vs. Nandi promoters (P) Ltd. [2011] 13 taxmann.com 213 (Delhi) 21.04.2011	Under this case, the assessee has not increased the authorised share capital till the date of passing the assessment order. This case pertains to AY 2005-06 and the assessee company has not increased its authorized share capital till the date of assessment order i.e. 17.12.2007. However, the assessee company has increased the authorized share capital almost immediately after receiving the share application money within same financial year, therefore the facts of this case is clearly distinguishable to the assessee's facts. (Refer page no 20 of PB) Furthermore, it is pertinent to note that the contention of the Ld. CIT DR case does not stand valid as of the Subsequent judgment, since the Hon'ble High Court of Delhi, in the case of CIT vs. LP. India Pvt Ltd (2012) 343 ITR 353 (Delhi), held that the provisions of Section 269SS of the Income Tax Act do not apply to share application money received by the assessee in cash. To the same effect in judgment of jurisdictional HC in the case of Eqbal Inn.

Based on the above submissions, the facts of the above judgements relied by the Ld. CIT DR are clearly distinguishable and differentiable to the assessee's case. Accordingly, the same should not be applied in the assessee's case. It is respectfully submitted.

It is further clarified that even in the case of Eqbal Inn, the learned CIT-DR had raised similar arguments before the Hon'ble ITAT as would be noted from Para-11 of the said judgement. For the sake of ready reference, the arguments raised by the learned CIT-DR as noted in Para-11 are as under;

> *"11. On the other hand, the Ld. DR strongly supported the penalty order of JCIT as well as the order of CIT(A). He referred to various observations made by JCIT. He submitted that Assessee Company has accepted Share Application Money exceeding the authorized capital which is not possible. However, when the Bench put a specific query whether he can show any provision in Companies Act through which there was any bar on acceptance o f Share Application Money in excess o f authorized capital, he could not show any provision in the Companies Act. The Ld. DR further submitted that it was stated by the Ld. Counsel that shares have been issued at premium but no permission seems to have been taken from any authority for issuing the shares at premium. He contended that case was squarely covered by the decision of Hon 'ble Jharkhand High Court in the case of Bhalitia Engineering Works Pvt Ltd (supra)."*

However, the ITAT has disposed of these submissions of the learned CIT-DR in Para-23 of the said judgement which has already been reproduced in the earlier part of our submissions. Hence, it is prayed that the said arguments of the learned CIT-DR has nothing new and have already been considered and disposed of by the Hon'ble ITAT in the case of Eqbal Inn (supra).

It would be noted that the Hon'ble ITAT in the case of Eqbal Inn had also noted various judgements both in favour of the assessee as well as against the assessee on this issue and has finally concluded in Para-22 of the said judgement that when there are contradictory judgements of various High Courts and there is no judgement of the jurisdictional High Court then as per the settled legal propositions the view which favours the assessee requires to be adopted as has been held by the Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products (1973) 88 ITR 192 (SC). However, at that stage of rendering the judgement by the Hon'ble ITAT, there was no judgement available of the jurisdictional High Court. But now this judgement of Hon'ble ITAT has been upheld by Hon'ble Punjab & Haryana High Court and therefore it is prayed that the judgement of Hon'ble Punjab & Haryana in the case of Eqbal Inn (supra) is directly applicable to the facts of the assessee's case and the same is prayed to be followed by dismissing the appeal of the Department

Para 6 of the CIT DR Submissions

The LD. CIT DR has observed that assessee has raised fresh share application money without first increasing its authorized share capital, thus the facts and circumstances in the case of Eqbal Inn & Hotels Limited [(2014) ITA No. 256 (Punjab and Haryana) are clearly distinguishable and differentiable to the assessee case.

Assessee's Submissions

In this respect, it is hereby respectfully submitted that the facts and circumstances in the case of Eqbal Inn & Hotels Limited are very much similar to the assessee case and in that case also the assessee has received the share application money without the authorised share capital and the same has been held as valid by the by the Hon'ble Chandigarh ITAT in the case of

M/s Eqbal Inn & Hotels Ltd. v. JCIT [ITA No. 876 to 879/CHD/2013] - Refer Para 23 of Hon'ble ITAT order enclosed. Furthermore, this decision was subsequently upheld by the Hon'ble Punjab and Haryana Court in the case of Eqbal Inn & Hotels Limited [(2014) ITA No. 256 (Punjab and Haryana). Therefore it is not correct to say that Eqbal Inn is distinguishable as pleaded by the Ld. CIT DR, it is respectfully submitted.

Therefore, based on the above submissions, judicial pronouncements and facts on record, your honour is requested to affirm the decision of Hon'ble CIT(A) and dismiss the appeal of the revenue as this is not a case of receipt of 'loan or deposit' and the transaction of the share application money received without authorized share capital is not a contravention to the provision of companies Act and, would not fall under the preview of loan or deposit u/s 269SS of the Act and consequently, the penalty u/s 27 ID of the Act would not be leviable."

15. We have heard the rival contentions and perused the material available on the record. The relevant facts as emerging from the records are that the assessee company is a public limited company engaged in the running Hotel Park Plaza in Section 17A, Chandigarh and its shares are listed on a stock exchange. As per the audited balance sheet for the financial year ended 31/03/2012, it has authorized share capital of Rs. 1400.00 lacs as on beginning of the financial year i.e. 01/04/2011 and subscribed capital (issued and paid up) of Rs. 800.00 lacs and share application money pending allotment of Rs. 803.00 lacs. During the financial year 2011-12, the assessee company has received Rs. 12,91,13,000/- from Shri Haravtar Singh Arora, out of which Rs. 70.00 lacs has been received on 28/08/2011 in cash, Rs. 14,74,20,000/- has been received from Ajmair Singh Bhullar, out of which Rs. 1,05,00,000/- has been received in cash whereby Rs. 70,00,000/- has been received on 05/04/2011 and Rs. 35,00,000/- has been received on 26/09/2011, Rs. 1,61,00,000/- has been received from Shri Ajit Pal Singh and Rs. 22,07,000/- has been received from Shri Paramjit Singh, totaling to Rs. 29,48,40,000/-. Taking into consideration the share application money pending allotment as on the beginning of the year amounting to Rs. 8,03,00,000/-, the total share application money pending allotment as on the close of the financial year comes to Rs. 37,51,40,000/- as so accounted for in the books of account of the assessee company and duly reflected under the head "share application money pending allotment".

16. With regard to issue and allotment of shares, the assessee company issued a notice on 14/10/2011 through book post to its shareholders/members for seeking the necessary approval by way of voting through postal ballot pursuant to Section 192A of the Companies Act, 1956. Thereafter, as per the postal ballot Rules, 2011 which requires the issue of notice by registered post, a fresh notice for voting through postal ballot was issued to its the Members / Share holders on 01/11/2011.

17. On perusal of the notice dt. 01/11/2011 placed at assessee's paper book pages 89 to 91, it is noted that the notice was issued to the Members / share holders to pass certain resolutions and to seek their approval by way of voting through postal ballot and the copy of the Draft resolutions which needs to be approved by the Members form part of the said notice. On perusal of the same, it is noted that there were three draft resolutions which are contained in the said notice whereby the company intend to increase its authorized capital and consequent amendment in the Memorandum of Association (MOA) whereby the company seeks to increase its authorized capital from Rs. 14.00 Crores to Rs. 52.00 Crores and to substitute Clause 5 in the MOA relating to the authorized share capital of the company. In terms of second draft resolution, the company seeks to substitute new Article 5 in place of existing Article 5 in the Article of Association (AOA) relating to the authorized share capital. The third draft resolution relates to issue of 10% optionally convertible non cumulative redeemable preference shares on preferential basis to the Promoters of the assessee company and the contents of the draft of the third resolution which was sought to be passed as the special resolution reads as under:

> *"ISSUE OF 10% OPTIONALLY CONVERTIBLE NON CUMULATIVE REDEEMABLE PREFERENCE SHARES ON PREFERENTIAL BASIS*
>
> *"RESOLVED THAT pursuant to the provisions of Section 80,81(IA) and other applicable provisions, if any, of the Companies Act 1956 and all other applicable Acts(including any statutory modification(s) or re-enactment thereof for the time being on force) and in accordance with the provisions of the Memorandum and Articles of Association of the Company as amended, the Listing Agreement entered into by the Company with the stock exchange,*

where the shares of the Company are listed, Guidelines for Preferential Issue contained in Chapter of the SEBI (issue of capital and Disclosure Requirements) Regulation, 2009 as may be modified or re-enacted from time to time (hereinafter referred as "ICDR Regulations") the applicable rules notifications, guidelines issued by Government of India, Reserve Bank of India, provisions of Foreign Exchange Management Act, 1956 and subject to the approvals, permissions, sanctions and consents as may be necessary from the regulatory and other appropriate authorities and subject to such conditions, modifications or alterations as may be prescribed by the regulatory and other appropriate authorities which may be agreed to by the Board of Directors of the company, which term shall be deemed to include any Committee thereof authorized to exercise the power of the Board, consent of the members of the Company be and is hereby accorded to the Board to offer, issue and allot 3,75,14,000 10% Optionally Convertible Non Cumulative Redeemable Preference Shares of the face value of Rs. 10/-(Rupees Ten) each for cash at par, on one or more tranches to the following promoters of the company:-

Name of the Proposed Allottee	No. of Preference Shares
Mr. Ajmair Singh Bhullar	1,87,57,000
Mr. Haravtar Singh Arora	1,69,26,300
Mr. Ajit Pal Singh	16,10,000
Mr. Paramjit Singh	2,20,700
Total	3,75,14,000

RESOLVED FURTHER THAT the holders of 10% Optionally Convertible Non-Cumulative Redeemable Preference Shares of the face value of Rs. 10/-(Rupees Ten) each shall be entitled to apply for conversion of the said preference shares or any part thereof into such number of equity shares of the face value of Rs. 10/- each of the Company at a price ("issue price")to be determined in accordance guidelines for preferential issue contained in Chapter VII of the ICDR Regulations provided however that the option to convert the aforesaid preference shares into equity shares shall be exercised within a period of 18 months from the date of their allotment.

RESOLVED FURTHER THAT the relevant date for pricing of equity shares to be allotted on conversion of 10% Optionally Convertible Non Cumulative Redeemable Preference Shares as per ICDR Regulations Shall be the date 30 days prior to the date on which the holders of the 10% Optionally Convertible Non Cumulative Redeemable Preference Shares become entitled to apply for the equity shares.

RESOLVED FURTHER THAT in case the proposed allottees do not exercise option to convert the aforesaid 3,75,14,000 preference shares of any part thereof into equity shares such preference shares shall be redeemable after the expiry of 18 months at par in one or more tranches at the option of the Company as may be decided by the Board of Directors of the Company from time to time.

RESOLVED FURTHER THAT the preference shares so issued and to be allotted shall be subject to the provisions of the Companies Act, 1956, Memorandum and Articles of Association of the Company."

RESOLVED FURTHER THAT for the purpose of giving effect to the aforesaid resolution(s),the Board be and is hereby authorized on behalf of the Company to take all such acts, deeds, matter and things as it may in its absolute

discretion deem necessary proper or desirable for such purpose and to modify accept and give effect to any modifications in the terms and conditions of the issue or in the above proposal as may be suggested by the statutory, regulatory and other appropriate authorities (including but not limited SEBI, Corporate Debt Restructuring Empowered Group, Reserve Bank of India)and as may be agreed by the Board and to settle all questions difficulties or doubts that may arise in the proposed issue, pricing of the issue, offer and allotment of the said preference shares and equity shares arising there from, including utilization of the issue proceeds and to execute all such deeds, documents, writing, agreements, application in connection with the proposed issue as the Board may in its absolute discretion deem necessary or desirable without being required to seek any further consent for approval of the members or otherwise with the intent that the members shall be deemed to have given their approval thereto expressly by the authority of this resolution.

RESOLVED FURTHER THAT the Board be and is hereby authorized to delegate all or any of the powers herein conferred to any committee of Directors to give effects to the resolution."

18. Before the said resolutions could be considered and passed in terms of the postal ballots, on petitions filed by certain aggrieved persons, apparently certain shareholders of the assessee company, the Company Law Board passed an interim order on 13/12/2011 to keep resolution on Item No. 3 passed through postal ballot in abeyance and the contents of the said order read as under:

"Respondents have raised preliminary objections to the maintainability of the CP. The Respondents are allowed to file a Company Application, if any, within two weeks on the maintainability of the CP. The Petitioners (112 in number) (2 petitioners who are supposed to be filing the CP. are also included in the consenter's list and there are other objections as well). Counsel has drawn my attention to page 222 to 227 of volume II - Notice for voting through Postal ballot, the Notice dated 1-11-11 posted on 11-11-11 and on 12-11-11 in CP. filed on 9-12-11, at item 3 shows issue of 10%. Optionally convertible Non-Cumulative Redeemable Preference Shares on preferential basis - to allot 10% 3,75,14,000 shares @ Rs. 10/- each to the MD, WTD and other two Directors only in this Public Listed Company wherein Public holds 40% equity, and the value of these shares (which in fact are equity shares according to the Petitioner) is 227/- and the petitioner are ready to buy at Rs. 250/- or 255, there is already a complaint to the SEBI in this regard. In the facts and circumstances of this case, to safeguard the interest of 40% shareholders other than the promoters, in the interest of justice, till SEBI looks into the compliant, till the maintainability CA after filing and completion of pleadings is heard, the R-I company is hereby required to keep Resolution on Item 3, pass through Postal Ballot, in abeyance."

19. Thereafter on 14/12/2011, a meeting of the share holders of the company was convened and on perusal of the minutes of the share holders meeting as available as part of the assessee's paper book pages 97 to 103, it is noted that in the said meeting, the results of the postal ballot was declared and the special resolution for increase in the authorized share capital and consequent amendment in the MoA and AoA was passed. Similarly, special resolution for issue of 10% optionally convertible non cumulative redeemable preference shares on preferential basis was passed with 92.61% vote cast in its favour. At the same time, in view of the interim order passed by the Company Law Board on 13/12/2011, the implementation of special resolution for issue of such shares on preferential basis was kept in abeyance. Thereafter, the authorized share capital of the assessee company was increased from Rs. 14.00 Crores to Rs. 52.00 Crores after making necessary compliances before the Competent authority and payment of the requisite fee for increase in the authorized share capital amounting to Rs. 19.00 lacs as shown under the head "unamortized expenses". And as far as share application money was concerned, as against the opening share application money pending allotment of Rs. 8,03,00,000/-, after adding the share application money received during the year amounting to Rs. 29,48,40,000/-, Rs. 37,51,40,000/- was shown pending allotment of shares and duly reflected under the head "share application money pending allotment" as on the close of the financial year as per the audited financial statements of the assessee company.

20. During the course of assessment proceedings, the AO observed that there were huge cash deposits amounting to Rs 175 lacs as reflected in assessee's bank statement and the assessee was asked to explain nature and source of such cash deposits. In response, the assessee submitted that the amount has been received from the share holders/ Directors as share application money whereby Rs 70,00,000/- has been received from Shri Haravtar Singh Arora on 28/08/2011, Rs 70,00,000/- and Rs 35,00,000/- has

been received from Shri Ajmer Singh Bhullar on 5/04/2011 and 26/09/2011 and the said amount has been paid by them out of sale proceeds of the property sold by them. Though the AO did not record any adverse findings regarding the nature and source of such deposits received from the share holders and their creditworthiness, at the same time, given the fact that the amount has been received in cash, the AO held that the assessee has violated the provisions of Section 269SS of the Act and the matter was referred to JCIT Range -2 Chandigarh for initiation of penalty proceeding. While referring the matter to the JCIT, Range-2, the AO refuted the contention of the assessee company and held that it has received the cash and deposited in its bank account and to give it a colorful device, the amount has been shown as share application money and held that the assessee has violated the provision of Section 269SS of the Act. How the AO has arrived at a finding that the assessee has adopted a colorful device to show the amount as share application money is not discernable from the records. Without bringing any contrary material on record and thus accepting the fact that transaction so reported in the audited balance sheet wherein the amount of Rs 37,51,40,000/- (which includes the amount of Rs 175 lacs) has been duly reflected as share application money pending allotment, passing of the special resolution for increase in the authorized share capital and subsequent increase in the authorized share capital from Rs 14 crores to Rs 52 crores and the amendment in the MOA and AOA as well the resolution for issue and allotment of shares of 3,75,14,000/- of face value of Rs 10/- on preferential basis against the amount so received and the fact that the certain share holders reached out to the Company Law Board and Company Law Board passed an interim order directing to keep the allotment of share in abeyance till further order, how the AO has arrived at such a finding is beyond our comprehension. We therefore find that the very basis of reference by the AO to the JCIT for initiation of penalty proceedings for violation of Section 269SS of the Act is wholly and solely guided by the fact that the amount of share application money has been received from the

existing promoters/shareholders in cash. Similarly, we find that the JCIT while initiating the penalty proceedings has solely relied on the reference so received from the AO and without any independent application of money, has initiated the penalty proceedings and issued the penalty notice u/s 271D of the Act.

21. Now, coming to the findings of the Addl CIT wherein he has held that the assessee has contravened the provisions of section 269SS by accepting loans/deposits in cash beyond the prescribed threshold from shareholders/directors and penalty u/s 271D is very much attracted. On perusal of the findings of the ld Add.CIT, we find that he has laid great emphasis on the fact that inspite of the interim order passed by the Company Law Board barring the allotment of shares, the assessee company went ahead and passed the special resolution to increase the authorized share capital and that too, within a day of passing of the interim order of the Company law Board. Secondly, the Add.CIT has held that the special resolution to increase the authorized share capital was passed after the receipt of money by the company and therefore, the amount so received from the share holders prior to the decision to increase the authorized share capital is in nature of loans/deposits and not in nature of share application money as so claimed by the assessee company. Further, he has referred to disputes pending before SEBI and CLB and he went ahead and reclassified the share application money as loans/deposits and levied the penalty u/s 271D of the Act.

22. We have carefully gone through the interim order dated 13/12/2011 so passed by the Company Law Board, the contents thereof have been referred supra and find that the Company Law Board was ceased of entire agenda/business and approval to be sought from the shareholders through the postal ballot in terms of increase in the authorized share capital, alteration/amendment/substitution of relevant articles in the memorandum and articles of the association in so far as it relates to authorized share capital

as well as offer, issue and allotment of shares on preferential basis to the promoters and it is only the matter relating to offer, issue and allotment of shares on preferential basis to the promoters, it was directed by the Company Law Board that to safeguard the interest of the 40% shareholders other than the promoters and in the interest of justice, till the time SEBI looks into the complaint, till the maintainability CA after filing and completion of the pleadings and the matter is heard, the assessee company was directed to keep the resolution on item no. 3 (relating to offer, issue and allotment of shares on preferential basis to the promoters), where passed through the postal ballot, in abeyance. We therefore find that there is nothing in the interim order so passed by the Company law Board in so far as directing and restraining the assessee company from passing the necessary resolution and seeking the approval of the shareholders in respect of increase in the authorized share capital and alteration in the memorandum and articles of the association. Therefore, reading anything further beyond what has been clearly stated in the interim order so passed by the Company Law Board is in the realm of assumptions and presumptions and the same cannot be sustained.

23. Regarding the findings of the Add.CIT that the special resolution to increase the authorized share capital was passed after the receipt of money by the company. The same is an admitted and undisputed fact and there is thus no denial as such on part of the assessee in this regard. However, the subsequent finding of the Add.CIT that the amount so received from the share holders prior to the decision to increase the authorized share capital is in nature of loans/deposits and not in nature of share application money as so claimed by the assessee company, we find that the same has no legal legs to stand. The same has been rightly rejected by the ld CIT(A) wherein he has stated that there is no prohibition in the Companies Act that share application money cannot be received without having sufficient authorized capital. In this regard, useful reference can be drawn to Section 2(8) of the

Companies Act, 2013 which defines the "authorised capital" or "nominal capital" to mean such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company and as per Section 2(64) of the Companies Act, 2013, "paid-up share capital" or "share capital paid-up" has been defined to mean such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called. Therefore, as per the above definition of 'authorised share capital' and 'paid-up share capital' under the Companies Act, 2013, there is no restriction in the Companies Act for receiving the share application money in excess of authorized share capital and the only restriction is that paid up capital cannot be more than the authorized share capital.

24. We find that similar findings were recorded by the JCIT while levying the penalty u/s 271D in case of **M/s Eqbal Inn & Hotels Ltd** *(Supra),* wherein the Coordinate Chandigarh Benches have rejected the same holding that there is no bar in the Companies Act for receiving share application money in excess of the authorized capital and the only bar is that the paid up capital cannot be more than the authorized capital and the relevant findings read as under:

> *"23. The JCIT has given one more finding that Share Application Money along with paid up capital has exceeded the authorized capital from assessment year 2005-06. We do not find anything wrong with the same. First of all, there is no bar in the Companies Act for receiving Share Application Money in excess of authorized capital. The only bar is that paid up capital cannot be more then the authorized capital. Consequently, the shares have been issued on 1.4.2011 as per form No.2 of the allotment filed with the Registrar of Companies, copy of the same has been placed at pages 74 to 78 of the paper book. The allotment form clearly shows that shares have been issued at a premium of Rs. 90/ -. In fact 2,35,284 equity shares were allot ted on 1.4.2011 consisting of Rs. 10/- at a premium of Rs. 90/ -, therefore, i f this premium is excluded, then paid up capital would not exceed the authorized capital . The assessee had filed following chart in respect of the Authorized Capital and Issued & paid up Capital in the written submissions before CIT(A).*

From the above it becomes clear that paid up capital never exceeded the authorized capital, therefore, provisions of the Companies Act were not violated."

25. The ld CIT(A) has therefore rightly followed the decision of the Coordinate Chandigarh Benches in the aforesaid case more so for the reason that the same has since been confirmed by the **Hon'ble Punjab and Haryana High Court on** appeal by the Revenue against the order so passed by the Coordinate Bench in case of **M/s Eqbal Inn & Hotels Ltd** *(supra)*. In the said decision, the Hon'ble High Court has referred to Rule 2(b) of the Companies Rules, 2014 which *interalia* provides that deposit doesn't include any amount received by way of subscription to any shares and any amount received pending allotment of shares and has held that the amount received by the assessee towards share application money would not fall under loan or deposits u/s 269SS of the Act and consequently, the penalty u/s 271D was not leviable. The said decision of the Hon'ble Jurisdictional High Court thus supports the case of the assessee and has rightly been followed by the ld CIT(A) wherein he has rejected the reclassification of share application money as loans/deposits as so done by the Add.CIT.

26. Further, nothing has been brought on record by the Revenue as to the nature of disputes pending before SEBI and any findings/orders so passed by SEBI and more so, any bearing thereof on the issue of receipt of share application money by the assessee company. As far as matter before the Company Law Board is concerned, as we have noted above, it is only the issue and allotment of shares that has been directed to be kept in abeyance and the said directions have been followed by the assessee company as the amount so received as share application money continued to be shown and reflected as share application money pending allotment at the end of the financial year.

27. The fact that issue and allotment of shares has been directed to be kept in abeyance cannot be read and understood and more so, empower

the Revenue authorities, in context of taxing statue and more so, penalty proceedings which have to be construed strictly, to reclassify the amount received initially as share application money as loans/deposits where no such reclassification was undertaken during the regular assessment proceedings and the transactions so undertaken was duly accepted by the AO after proper enquiry as we have noted earlier.

28. In so far as the decision in case of CIT Chennai vs Object Frontier Software (P) ltd is concerned, we find that Hon'ble Supreme Court has admitted an SLP against the decision of the Hon'ble Madras High Court and mere admittance of an SLP doesn't support the case of the Revenue. The decision of Hon'ble Jharkhand High Court in case of Bhalotia Engineering Works has been considered by the Hon'ble Punjab and Haryana High Court in case of M/s Eqbal Inn & Hotel wherein it has held that there are unable to subscribe to the view taken by the Jharkhand High Court and bowing to the wisdom of the Hon'ble Jurisdictional High Court which binds all the authorities including this Tribunal under its jurisdiction, the said decision doesn't support the case of the Revenue

29. In light of aforesaid discussion and in the entirety of facts and circumstances of the case and respectfully following the decision of the Hon'ble jurisdictional Punjab and Haryana High Court referred supra, we find that there is no material and justifiable basis to reclassify the share application money as loans/deposits and the amount received by the assessee towards share application money would not fall under loan or deposits u/s 269SS of the Act and consequently, the penalty u/s 271D was not leviable. We accordingly confirm the findings of the ld CIT(A) who has rightly set-aside the order of the Add.CIT and has directed to delete the penalty of Rs 1,75,00,000/- levied u/s 271D of the Act.

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

Order pronounced in the open Court on 01/10/2024.

Sd/-	**Sd/-**
आकाश दीप जैन	**विक्रम सिंह यादव**
(AAKASH DEEP JAIN)	**(VIKRAM SINGH YADAV)**
उपाध्यक्ष / VICE PRESIDENT	**लेखा सदस्य/ ACCOUNTANT MEMBER**

AG

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
5. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar