आयकर अपीलीयअ धिकरण,'डी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एस. आर.रघुनाथा, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND SHRI S. R. RAGHUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA Nos.: 800 & 799/Chny/2023**

निर्धारणवर्ष / Assessment Years: 2013-14 & 2014-15

Assistant Commissioner of Income Tax, Central Circle -1(1), Chennai. (अपीलार्थी/Appellant)	v.	M/s. RKM Power Private Limited, No.14, Dr Giriappa Road, T.Nagar, Chennai – 600 017 **[PAN: AADCR-0301-B]** (प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/Appellant by : Shri. A. Sasikumar, CIT
प्रत्यर्थीकीओरसे/Respondent by : Shri. V. Ravichandran, CA

सुनवाईकीतारीख/Date of Hearing : 13.08.2024
घोषणाकीतारीख/Date of Pronouncement : 06.11.2024

आदेश /O R D E R

PER S. R. RAGHUNATHA, ACCOUNTANT MEMBER:

These appeals filed by the revenue are directed against the common order passed by the learned Commissioner of Income Tax (Appeals)-18, Chennai, dated 20.03.2023 and pertains to assessment year 2013-14 & 2014-15.

2. At the outset, we find that there is a delay of 19 days in both the appeals filed by the revenue, for which petition for condonation of delay along with reasons for delay has been

filed. After considering the petition filed by the revenue and also hearing both the parties, we find that there is a reasonable cause for the revenue in not filing appeal on or before the due date prescribed under the law and thus, in the interests of justice, we condone delay in filing of appeal and admit appeal filed by the revenue for adjudication.

3. The revenue has raised the following grounds of appeal for the A.Y. 2013-14:

"2. The learned CIT(A) erred in deleting the addition made u/s. 56(1) of the IT Act, amounting to Rs.615.34 crores, being income from other sources of the assessee, assessable for the A.Y. 2013-14, after giving a finding that the payment towards equipment purchase was not at arms length price.

2.2 The learned CIT(A) erred in deleting the addition made u/s. 56(1) of the IT Act, without appreciating the fact that the assessee had taken out of its own unaccounted money in the form of purchase cost, by inflating the purchases from Non-residents and the same excess money was brought back to the assessee's own account in the form of share premium, which is nothing but round tripping of the assessees' own unaccounted funds in the quise of share premium.

2.3. The Ld. CIT(A) erred in considering the transaction between the assessee and the non-residents as genuine investments in shares with a premium, covered by the Bombay High Court decision in the case of M/s. Vodafone India Services Private limited (2014) 50 taxmann.com 300 (Bombay), and the Board's circular No. 2 of 2015 dated 29.6.2015, without appreciating the fact that the said share premium transactions are not genuine transactions and was only a colourable devise, in order to accommodate the assessees' own un accounted funds, through non-residents, and the receipts are taxable as Income from other sources.

3. For these grounds and any other ground including amendment of grounds that may be raised during the course of the appeal proceedings, the order of ld. CIT(A)may be set aside and that of the Assessing Officer be restored."

3.1 The revenue has raised the grounds of appeal for the A.Y. 2014-15, similar to A.Y. 2013-14 with the following changes:

"1. The order of the ld. Commissioner of 1.T. (Appeals) is erroneous on facts of the case and in law.

2. The learned CIT(A) erred in deleting the addition made u/s. 56(1) of the IT Act, amounting to Rs.525.59 crores, being income from other sources of the assessee, assessable for the A.Y. 2014-15, after giving a finding that the payment towards equipment purchase was not at arms' length price.

2.1 The learned CIT(A) erred in deleting the addition made u/s.56(1) of the IT Act, without appreciating the fact that the investments made by the non–resident assessee represent remittance out of the excess billed sums arising out of the supplies by the non -residents, which is evidenced by the downward TP adjustment carried out by the TPO in the assessee's own case for the A.Y. 2014-15,to the tune of Rs. 832.06 crores, which was confirmed by the CIT(A).

2.2 The learned CIT(A) erred in deleting the addition made u/s. 56(1) of the IT Act without appreciating the fact that the assessee had taken out of its own unaccounted money in the form of purchase cost, by inflating the purchases from Non-residents and the same excess money was brought back to the assessee's own account in the form of share premium, which is nothing but round tripping of the assessee's own unaccounted funds in the guise of share premium.

2.3 The Ld. CIT(A) erred in considering the transaction between the assessee and the non-residents as genuine investments s in shares with a premium, covered by the Bombay High Court decision in the case of M/s. Vodafone India Services Private limited (2014) 50 taxmann.com 300 (Bombay), and the Board's circular No. 2 of 2015 dated 29.6.2015, without appreciating the

fact that the said share premium transactions are not genuine transactions and was only a colourable devise in order to accommodate the assessee's own un accounted funds, through non-residents, and the receipts are taxable as Income from other sources.

3. For these grounds and any other ground including amendment of grounds that may be raised during the course of the appeal proceedings, the order of ld. CIT(A)may be set aside and that of the Assessing Officer be restored."

4. The brief facts of the case are that, the Assessee M/s.RKM Powergen Private Limited ('appellant' or 'company') is a private limited company incorporated in the year 2004. The assessee is a Joint Venture between R.K.Powergen Private Limited ('RKP') and Mudajaya Corporation Berhad, Malaysia ('MJC") and Enerk International Holdings Limited, Seychelles (`Enerk'). During the previous years' relevant to the AY 2010-11 to AY 2015-16, the assessee was engaged in setting up a 1440 MW coal based thermal mega power plant comprising 4 Units of 360 MW each at Chhattisgarh State (hereafter referred to as "Project"). The Project is funded by a consortium of lenders with more than 75% of the loans coming from Power Finance Corporation Limited and Rural Electrification Corporation Limited and the balance loan from nationalized banks and financial institutions. The Project was under construction during the assessment years 2010-11 to 2015-16. Unit 1 & 2 commenced generation of power in A Y 2016-17

and Unit 3 and Unit 4 in A Y 2018-19 and A Y 2019-20 respectively. The Project has been accorded Mega Power Plant status by the Government of India. The project has been commissioned in phases and one phase was in operation during the AY 2018-19. The plant is now in operation. The appellant entered into a Shareholders Agreement on 08.02.2007 and a supplemental Shareholders Agreement on 20.02.2009 with RKP and MJC for issue of shares in the following proportion:

MJC and Associates - 26%

RKP and Associates - 74%

The valuation of the shares was agreed based on the future potential of the assessee, pursuant to the above agreement, the assessee issued equity shares of Rs.10 each at a premium of Rs.240 per share to MJC and Enerk. On allotment, certificate was obtained from a Chartered Accountant valuing the shares using Discounted Cash flow Method (DCF") as prescribed by RBI to comply with the FEMA guidelines. As per FEMA Regulations dealing with Foreign Direct Investments, the shares should be issued to foreign investors only at a price equal to or higher of the value determined under the DCF

method. The year wise details of the shares issued are given in the below table:

Name of Party	FY	AY	No.of shares issued	Share capital (Rs. in crores)	Share premium (Rs.in crores)
MJC	2009-10	2010-11	78,86,163	7.88	189.27
MJC	2010-11	2011-12	1,19,32,223	11.93	286.37
MJC	2011-12	2012-23	96,02,715	9.60	230.46
MJC	2012-13	2013-14	2,28,08,394	22.80	547.40
Enerk			28,30,976	2.83	67.94
MJC	2013-14	2014-15	6,39,837	0.64	15.35
Enerk			2,12,60,091	21.26	510.24

4.1 The share application money was received through banking channels with Foreign Inward Remittance Certificates. The receipt of the share application money and the allotment of shares were communicated to RBI in Form FCGPR. MJC being an "associated enterprise" as defined in Section 92CA(l) of the Act, the issue of shares was reported in the Form 3CEB issued by a Chartered Accountant certifying that the shares were issued at arms' length price for AY 2012-13, A Y 2013-14 and A Y 2014-15. MIPP International Limited, Mauritius ('MIPP') is said to be a subsidiary SPV of the MJC Group, engaged in supplying equipment and related activities for power projects. Enerk is also a shareholder in MIPP. The relationship between the appellant and MIPP was disclosed to the Project lenders and in

all corporate filings. The majority of the plant and equipment for the appellant's Project were imported from MIPP. Since MIPP was an "associated enterprise" as defined in Section 92CA(1) of the Act, the assessee furnished report in Form 3CEB from a Chartered Accountant certifying that the price of the equipment purchased are at arm's length in accordance with Section 92E of the Act. The appellant filed the return of income for the AY 2010-11 to AY 2015-16 declaring total income as under:

Asst Year	Date of filing of ROI	Returned Income/(Loss) under normal provisions	Book profits u/s. 115JB of the Act
2010-11	25-09-2010	(89,63,844)	-
2011-12	29-11-2011	Nil	-
2012-13	27-11-2012	(5,89,47,420)	-
2013-14	29-11-2013	(22,54,86,166)	-
2014-15	28-11-2014	(60,35,08,083)	18,09,08,099
2015-16	27-11-2015	(12,64,23,594)	-

The receipt of the share capital from MJC and Enerk and the purchase of equipment from MIPP were duly reported in the financials of the relevant years and disclosed in the return of income. The returns of income for these years were selected for scrutiny and also reference was made to the Transfer Pricing Officer ('TPO') under Section 92CA of the Act for AY 2011-12 to AY 2013-14. The details of the Transfer Pricing orders are tabulated below:

Asst year	Date of Reference to TPO	TP order/date	TP adjustment (Rs. in cores)	Remarks
2011-12	01.10.2013	Order u/s. 92CA(3)/ 21.01.2015	No adjustment	TPO concluded that the Import of Equipment from MIPP is at arm's length price
2012-13	20.11.2014	Order u/s. 92CA(3)/ 08.09.2015	No adjustment	TPO concluded that the import of equipment from MIPP and the shares issued to MJC are at arm's length price
2013-14	25.08.2015	Order u/s. 92CA(3)/ 01.02.2017	407.26	TPO proposed downward adjustment to the value of imports from MIPP

4.2 The assessment under Section 143(3) was completed for the above assessment years after a detailed scrutiny of the books and after consideration of share capital and share premium received during the relevant years:

AY	Order u/s. / dated	Disallowance/ Adjustment	Amount of Addition	Assessed total income
2010-11	143(3) / 20.03.2013	14A r.w.r. 8D(2)	1,39,08,709	5,12,22,100
		Advance paid u/s. 40(a)(ia)	4,36,788	
		Cash payment u/s. 40A(3)	16,39,817	
		Refund of land advance u/s. 68	5,12,22,100	
2011-12	143(3) r.w.s. 92CA/ 27.03.2015	14A r.w.r. 8D(2)	9,71,30,943	2,18,34,576
		ROC Fee	45,00,000	
		FD Interest as IOS	2,18,34,576	
2012-13	143(3) r.w.s. 92CA /	14A r.w.r. 8D(2)	21,90,94,574	3,09,15,322

	10.03.2016	FD Interest as IOS	3,09,15,322	
2013-14	143(3) r.w.s. 92CA / 31.03.2017	TP Adjustment	4,07,25,95,597	25,93,58,803
		14A r.w.r. 8D(2)	1,70,83,176	
		FD Interest as IOD	25,93,58,803	
2014-15	143(3) / 20.12.2016	14A r.w.r. 8D(2)	66,48,047	
		FD Interest as IOS	51,56,40,547	51,56,40,547

For AY 2010-11, reassessment proceedings were initiated under Section 148 of the Act and order u/s.143(3) r.w.s.147 was passed on 24.03.2016 without any disallowance/addition.

4.3 Search and seizure operations under Section 132 of the Act were carried out in the premises of the assessee in Tamilnadu and Chhattisgarh on 23.11.2015, on 09.12.2015 and concluded on 13.01.2016. During the search, certain documents were seized from the premises of the appellant. The reassessment for AY 2010-11 and the assessment for AY 2012-13 to AY 2014-15 were concluded after the search and the details of receipt of share capital from MJC and Enerk was accepted without any adjustment. The Transfer Pricing order u/s.92CA(3) of the Act for the AY 2013-14 was completed after the conclusion of the search, wherein the TPO proposed TP downward adjustment of Rs.407.25 crores on the imports from

MIPP. The TPO did not propose any adjustment on the receipt of share capital reported in the Form 3CEB. The assessee had filed appeal against the order u/s.143(3) r.w.s.92A(3) for AY 2013-14 and the same was pending before the CIT(A)-18, Chennai.

4.4 Further, on 13.11.2017, after two years of the search, the Assistant Commissioner of Income Tax, Central Circle 1(1), Chennai (Assessing Officer') issued a notice under Section 153A r.w.s 153C of the Act. In response to the said notice, the assessee filed the return of income on 30.11.2017 for the assessment years from AY 2010-11 to AY 2014-15. Subsequently, a notice under Section 143(2) and notice under Section 142(1) of the Act were issued on 01.12.2017. The assessee replied to the notice on 07.11.2017. On 26.11.2017, the Assessing Officer made reference under Section 92CA(1) to the TPO for the AY 2014-15 to AY 2016-17. The notices issued under Section 153C were all towards completed assessments and not abated assessments.

4.5 Subsequently, notice u/s. 142(1) was issued on 11.12.2018 calling for various information including that of issue of shares to the foreign investors and the share premium

received. In respect of the share capital, the assessee provided inter alia, Shareholders Agreement, Foreign Inward Remittance Certificates, Valuation Certificate, Forms FC GPR filed with Reserve Bank of India and RBI's acknowledgment of the same. The reference made to the TPO during the assessment proceedings under Section 153C for A Y 2014-15 was concluded and order under Section 92CA(3) was passed on 20.12.2018 proposing downward adjustment of Rs.832.05 crores to the cost of equipment imported from MIPP. The TPO did not propose any adjustment on the receipt of share capital reported in the Form 3CEB.

4.6 Subsequently, a show cause notice ('SCN') was issued on 11.02.2019 to show cause why share capital and share premium received from foreign investors should not be treated as unexplained income for the AY 2010-11 to AY 2014-15. A detailed reply was submitted on 15.02.2019, both on merits and law, particularly on the jurisdiction of the Assessing Officer and how share capital could never be treated as income with reference to the series of judgements of the Hon'ble Supreme Court.

4.7 The assessee submitted additional reply on 18.02.2019 with various details and documents. The Assessing Officer without considering the explanation and detailed reply submitted, relying on the order of the TPO for AY 2013-14 & AY 2014-15, assessed the share premium as other income on the basis that profits made by MIPP on supply of equipment to the assessee were invested as 'share capital' by framing the assessment u/s.143(3) r.w.s 153B r.w.s 153C r.w.s 153A of the Act vide order dated 19.02.2019 for A Y 2010-11 to AY 2013-14 and draft assessment order for AY 2014-15 as under:

AY	Treatment of shares premium as Income	TP Adjustment	Assessed total income	Demand raised
2010-11	189,26,79,120		189,26,79,120	134,00,32,126
2011-12	286,37,33,520		288,55,68,096	186,64,95,391
2012-13	230,46,51,600		233,55,66,922	137,83,70,108
2013-14	615,34,48,800		641,28,07,603	352,92,52,393
2014-15	525,59,82,720	832,05,84,608	577,16,23,267	

"8. The contentions and submissions of the assessee company have been considered carefully and found that the same are not tenable for the following reasons:

8.1.Original assessments: The assessee's contention that the issues mentioned in the show Cause notice were already considered in the original assessment made for the A.Y. 2013-14 dated 31/03/2017 is factually incorrect, since the issue of unexplained income in the nature of share premium was not discussed in the said order.

8.2. Jurisdiction u/s.153C of the Act: The assessee's contentions regarding jurisdiction is not tenable for the following reasons:

i. As mentioned in para 4.1 above, page Nos. 1 to 35 of the seized annexure-"ANNIST/RKM/LS/S1" contain details of MOA & AOA of M/s

Enerk International Holdings Limited and its HSBC bank account statements etc. Page Nos. 36 to 67 of the said annexure contain details of financial statements of M/s.Enerk International Holdings Limited for the F.Y. 2012-13 & 2013-14. From these seized materials, it is noticed that M/s.Enerk International Holdings Limited has invested in its associated company víz., M/s.R.K.Powergen Private Limited i.e. the assessee company to the extent of USD 3,22,50,000 ason 31/03/2013 i.e., upto F.Y.2012-13 (which includes the investment made during the FY.2009-10 relevant to the A.Y. 2010-11 by M/s Enerk International Holdings Ltd.). Further, itis also seen from page nos. 149 to 171 of the seized annexure "ANNIST/RKM/LSIS1"contains a copy of Shareholders Agreement dated 08/02/2007 between M/s.Mudajaya Corporation Berhad and M/s.R.K.Powergen Private Limited and M/s.R.K.M.Powergen Private Limited.

ii. Page Nos. 1 to 38 of the seized Annexure- ANNIST/RKMILS/S2 contains a copy of Secretarial and FEMA Due Diligence Report of M/s.R.K.M.Powergen Private Limited dated31/01/2014 containing various details including Share Capital increase, Allotment of sharesto M/s.Mudajaya Corporation Berhad, M/s.Enerk International Holdings Private Limited, M/s.R.K.Powergen Private Limited and others during the F.Ys. 2004-05 to 2013-14. PageNos.94 to 122 contain details of Review Reports of M/s.R.K.M.Powergen Private Limited for Phase I and Phase II for the period from 01/10/2014 to 31/12I2014 containing details of various aspects including the details of investments in shares made by M/s.Enerk International Holdings Limited and M/s Mudajaya Corporation Berhad.

iii. From this data, it is noticed that M/s.Mudajaya Corporation Berhad had invested shares at a premium of Rs.240/- per share in M/s.R.K.M.Powergen Pvt. Ltd. for the A.Y. 2010-11.Also, it is noticed from the financials of M/s.R.K.M.Powergen Pvt. Ltd., that M/s.R.K.Powergen Pvt. Ltd. made investment in the shares of M/s.R.K.M. Powergen at the face value of Rs.10 only, whereas the foreign shareholder invested at a premium ofRs.240/- in the said shares of M/s.R.K.M.Powergen Pvt. Limited. Also, it is noticed from page nos.248 to 250 of the seized annexure - ANN/ST/RKMLS/S-1 that M/s.R.K.M.Powergen Pvt. Ltd. had passed on huge amounts running into crores of US Dollarsto M/s.MIPP International Ltd. towards supply of Plant and Equipments during the period from July, 2007 to March, 2010. Also, it is noticed from page nos. 68 to 74 of the seized annexure - ANNIST/RKM/LS/S-1 that M/s. R.K.M.Powergen Pvt. Ltd. had passed on huge amounts running into crores of US Dollars/INR to M/s MIPP International Ltd. Towards supply of Plant

and Equipments during the F.Y. 2010-11 to 2014-15 totalling to INR4071,64,01,520. Further, it is noticed from the financials of M/s.Enerk International Holdings Limited and M/s.Mudajaya Corporation Berhad that M/s.MIPP International is an associate company of M/s.Enerk lnternational Holdings Ltd. and M/s.Mudajaya Corporation RK from these seized material, it is categorically clear that funds flown out from M/s. Berhad. From these seized material, it Is categorically clear that funds flown out from M/s. RKM. Powergen Pvt. Ltd. passed on to M/s.MIPP International (a Mauritius based Company) in which M/s.Enerk International Holdings Ltd. is 20% shareholder and M/s.Mudajaya Corporation Berhad is 80% shareholder. M/s.R.K.M.Powergen Pt. Ltd. purchased equipment from M/s.MIPP International Limited. In turn, M/s MIPP International passed on the benefits (out of the sale of equipment to M/s.RKMPowergen Pvt. Ltd) to its shareholders M/s.Mudajaya Corporation Berhad and M/s.Enerk International Holdings to which in turn invested in the shares of M/s.RKMPowergen. Thus, there was a circuit offunds flown from M/s.R.K.M. Powergen Pvt. Ltd. to M/s.R.K.M.Powergen Pvt. Ltd. Through M/s.MIPP International Ltd., M/s Enerk International Holdings Ltd. and M/s Mudajaya Corporation Berhad. Accordingly, the seized annexures referred to above containin criminating material.

iv. As such, the proceedings u/s 153C in the instant case have been initiated on correct jurisdiction.

8.3Unexplained income in the nature of unexplained share premium:

8.3.1. Share premium is in excess of FMV worked out by the assessee:

M/s.Mudajaya Corporation Berhad and M/s.Enerk International Holdings Ltd. invested in the shares of the assessee company M/s.R.K.M.Powergen Pvt. Ltd. At a high premium of Rs.240(Rs.250 including face value of Rs.10) as against the FMV of Rs.99.96 as worked out by the assessee as per DCF method.

8.3.2. TPO findings indicating that inflated purchases were made from M/s MIPP International:

8.3.2.1It is seen that M/s.Enerk International Holdings Limited is 20% share holder in M/s.MIPP International Limited, Mauritius. Also, it is seen that M/s.RKM Powergen Private Limited is subsidiary company of the assessee and that M/s.RKM Powergen Private Limited had purchased/imported capital goods for its power plant from M/s.MIPP International Limited. It is also seen that on reference made to TPO in the case of M/s.RKM Powergen Private Limited with

regard to the purchase/import of the capital equipments from M/s.MIPP International Limited, the TPO (JCIT, TPO-2, Chennai) vide order u/s.92CA(3) of the Act dated 20/12/2018 for the AY 2014-15 proposed a downward adjustment of Rs.832,05,84,608/- out of the total value of imports made of Rs.1350,64,11,226/-. It is also seen that on reference made to TPO in the case of M/s.RKM Powergen Private Limited with regard to the purchase/import of the capital equipments from M/s. MIPP International Limited, the TPO (JCIT, TPO-2, Chennai) vide order u/s 92CA(3) of the Act dated 01/02/2017 for the AY 2013-14 proposed a downward adjustment of Rs.407,25,95,597I- out of the total value of imports made of Rs.1471,30,09,946/-. It is also noticed from the TPO's orders that the business of M/s MIPP International Limited was limited to procure and supply of power plant equipments to M/s.RKM Powergen Private Limited only and that M/s.MIPP International Limited did not do any other business. It is also noticed that from the huge/undue profits earned from the supply of equipments to M/s.RKM Powergen Private Limited, the said company M/s.MIPP International Limited distributed dividends to its shareholders viz.,M/s.Mudajaya Corporation Berhad and M/s.Enerk International Holdings Limited which in turn invested in the shares of M/s.RKM Powergen Private Limited i.e., in the assessee company with a huge premium of Rs.240 per share.

8.3.2.2.Further, the following findings were made in the order of the TPO dated 20/12/2018of the JCIT, TPO-2, Chennai made for the A.Y. 2014-15:

*i. M/s.R.K.M.PPL entered into a mechanical and electrical plant and machinery supply contrary with MIPP on 18/07/2007 (or phase-1 (1 360MVW) and on20/02/2009 for phase-2 (3*36OMW).*

ii. M/s R.K.M called for tenders for the power plant through a 'notice inviting tender published in "business line" on 19/08/2008, Whereas, the contract was awarded to M/s.MIPP for the first unit more than 1 year before the notice was published calling for bids for all the four units.

iii. Bids were called for only for three packages, whereas, the contract was awarded to M/s MIPP for a total of 17 packages for each one of the three units of phase-2.

iv. Tender notice was called for in the year 2008 from bidders who have successfully completed at least 10 units for 330/360MW and the equipments should have been in successful operation for at least 5 consecutive years within a period of 10 year still the date of publication of the tender notice. But the contract was awarded to M/s.MIPP which was incorporated in the Republic of Mauritius only on

03/05/2007.Furthermore, this was the first project for M/s MIPP. It is also seen that contract for the first unit was awarded to M/s MIPP within a period of 75 days of its existence.

v. M/s.Mudajaya Corporation Berhad setup M/s.MIPP of its subsidiary in Mauritius for the sole purpose of equipment contract to M/s.RKM.

Vi. M/s.MIPP International made a huge operating profit of 26.73% for the FY.2013-14.

vii. A survey u/s.133A(2A) of the Act was conducted-by the officers of International Taxation in the premises of the assessee on 22/01/2018. During the course of survey proceedings, a statement us 131 of the Act was recorded from Shri.Saravanan, Chief General Manager of M/s.RKM. From the said statement and information gathered during the course of the survey proceedings, it was noted that there were direct communications from the assessee's Chie! General Manager(then DGM) with Harbin group of companies of China which ultimately supplied Turbines and Generators to M/s.RKM through M/s MIPP

viii. Quotation for steam turbine was received before May 2007 by Shri Saravanan. Tender document of M/s.MIPP was prepared by M/s.Fichtner India (the consultant of M/s.RKM) which was appointed for a consideration of Rs.6 crores 67 travels were undertaken by Shri.Saravanan to China during the period from 25/08/2001 to 05/05/2012. Also 51 employees of M/s.RKM travelled to China during the last 5-6 years. It is also noticed that M/s MIPP was not making purchases on its own but M/s RKM decided the material to be purchased. identifies the suppliers and negotiates the price. Further, it is seen that M/s MIPP that only the job of placing formal orders with the suppliers and monitoring their supplies in time and ensuring shipment are the functions carried out by M/s MIPP.

ix. All these facts indicate that M/s MIPP International Lid. is equipment supplier for the sake of record only.

8.3.2.3. It is also pertinent to mention here that he TPO (JCIT, TPO-2, Chennai) made downward adjustment of Rs.407,25,95,597/- for the A.Y. 2013-14 vide his order u/s 92CA(3) of the Act dated 01/02/2017 out of the total value of Imports made of Rs.1471,30,09,946 and that the TPO made downward adjustment of Rs.32,05,84,608/- out of the total value of imports made of Rs.1350,64,11,226/- for the A.Y.2014-15 vide order w's 92CA(3) of the Act dated 20/12/2018.

8.3.3. Circuit of funds flow: M/s.Enerk International Holdings Ltd. is a 20% shareholder and M/s.Mudajaya Corporation Berhad is 80% shareholder (ultimate beneficiaries for the profits earned by M/s MIPP) which got funds from M/s MIPP in the form of dividends which were used to make investments in M/s.R.K.M. Powergen Pvt. Ltd. at a huge premium of Rs. 240.

8.3.4 Further, it is pertinent to mention here that shares were allotted to the assessee's associate company M/s.R.K. Powergen Private Limited at face value of Rs.10/- per share only, while the other investors were allotted shares at a huge premium of Rs.240 per share in addition to the face value of Rs.10 per share.

9. The case laws quoted by the assessee are not applicable to the instant case, as the facts of the cases quoted by the assessee company are different from the facts of the assessee company which were discussed elaborately in the aforementioned paras. Further, it is pertinent to note that the issue of high premium investment and the details of rationale/justification was already called for and discussed vide this office notice u/s. 142(1) dated 11.12.2018 almost 2 months back. Therefore, the assessee's contention that adequate time/opportunity was not provided is factually incorrect.

10. For the detailed reasons discussed in paras 1 to 9 above, the share premium amount of Rs.547,40,14,560/- received from M/s.Mudajaya Corporation Berhad against the issue of 2,28,08,394 shares and Rs.67,94,34,240/- received from M/s.Enerk International Holdings Limited against the issue of 28,30,976 shares by the assessee company totaling to Rs.615,34,48,800/- is treated as unexplained income and added to the total income of the assessee u/s. 56(1) of the Income tax Act, 1961.

Penalty proceedings u/s. 271(1)(c) of the Act are initiated separately for furnishing of inaccurate particulars of income

11. Accordingly, the total income of the assessee is determined as under:

Assessed income as per order u/s. 143(3) r.w.s. 92CA dated 31.03.2017	*Rs.25,93,58,803*
Add: Unexplained income u/s. 56(1) (as discussed in para 1 to 10 above):	*Rs.615,34,48,800*
Assessed income as per this order:	***Rs.641,28,07,603***

4.8 The appellant challenged the above orders in a writ petition filed before the Hon'ble Madras High Court on multiple

grounds. The Hon'ble High Court by order dated 27.07.2022 dismissed the Writ Petition and directed the assessee to file appeal within a period of four weeks from the date of receipt of the copy of the said order. The Hon'ble High Court permitted the assessee to raise all grounds other than the ground on limitation and validity of satisfaction note which has been decided against it. For AY 2014-15, the assessee had filed writ against the draft assessment order passed on 19.02.2019. Consequent to the order of the Hon'ble High Court referred above, the Assessing Officer passed the final order under section 143(3) r.w.s.144C(1) r.w.s.153B r.w.s.153C r.w.s.153A on 14.10.2022 served on the assessee on17.10.2022 assessing the total income at Rs.577,16,23,267/- and raised a demand of Rs.375,86,97,070/-.

4.9 Aggrieved by the order of the AO u/s.143(3) of the Act , the assessee preferred an appeal before the ld.CIT(A) in the appeal filed against the assessment under Section 143(3) for Assessment Year 2013-14, the ld.CIT(A) confirmed the downward adjustment made and further enhanced the downward adjustment. Further, the assessee preferred an appeal before the Ld.CIT(A) against the order passed u/s.153C

of the Act by the Assessing Officer for Assessment Years 2010-11 to 2014-15.

5. The ld.CIT(A) deleted the addition of share premia under Section 56(1) for Assessment Years 2010-11 to 2014-15but confirmed and enhanced the downward adjustment made by the TPO for Assessment Year 2014-15, holding as under:

"7.5 Addition u/s. 56(1):
7.5.1 The Assessing Officer has added the following share premia paid by the two foreign investors, as income of the assessee u/s. 56(1):

	Mudajaya Corporation Bhd			Enerk International Ltd			Addition to Income	
Asst Years	No. of shares	Paid up share capital Rs.10/ share	Share premium Rs. 240 per share	No. of shares	Paid up share capital Rs.10/ share	Share premium Rs. 240 per share		DCF value per share in Rs.
Allotments made								
2010-11	78,86,163	788,61,630	189,26,79,120	0	0	0	189,26,79,120	-NA-
2011-12	1,19,32,223	11,93,22,230	286,37,33,520	0	0	0	286,37,33,520	206.77
2012-13	96,02,715	960,27,150	230,46,51,600	0	0	0	230,46,51,600	206.77
2013-14	2,28,08,394	22,80,83,940	547,40,14,560	28,30,976	283,09,760	67,94,347,240	615,34,48,800	99.96
2014-15	6,39,837	63,98,370	15,35,60,880	2,12,60,091	21,26,00,910	510,24,21,840	525,59,82,720	125.72

7.5.2 The appellant is a joint venture between an Indian company R.K. Powergen Private Limited ("RK") and Mudajaya Corporation Berhad(hereafter referred to as "Mudajaya")' and Enerk International Holdings Limited (hereafter referred to as "Enerk") (Foreign Investors). During these assessment years, the Appellant was engaged in setting up a 1440 MW coal based thermal mega power plant comprising 4 Units of 360 MW each at Chhattisgarh State ("Project"). The Project was funded by a consortium of lenders with more than 75% of the loans coming from Power Finance Corporation Limited and Rural Electrification Corporation Limited and the balance loans from nationalised banks and financial institutions.

7.5.3 The assessee submitted that for the AYs 2012-13, 2013-14 and 2014- 15, it has duly shown the share transactions with Mudajaya in its Form 3CEB.

7.5.4 The assessee imported part of its equipments from MIPP International Ltd (MIPP), a subsidiary of Mudajaya and in which Enerk was a shareholder, duly shown in its Form 3CEB for AYs 2011-12, 2012-13, 2013-14 and 2014-15. For the AY 2013-14, the assessee's cost of such import was claimed at Rs.1471.30 crores; the TPO arrived at the ALP of the above transaction at Rs.1064.04 crores (refixed at

Rs.727.27 crores in the appeal order against the 143(3) order of AY 2013-14}and made a downward adjustment of Rs.407.26 crores (reworked at Rs.744.03 crores). For the AY 2014-15, such import cost claimed by the assessee was Rs.1350.64 crores; the TPO arrived at its ALP at Rs.518,58,26,618 and made a downward adjustment of Rs.832.06 crores.

7.5.5 For making the addition of share premium from Mudajaya (AYs 201011 to 2014-15) and Enerk (AYs 2013-14 and 2014-15) u/s 56(1) as shown in the table above, the AO quoted the following reasons:

- The share premium is in excess of the value arrived at through DCF by assessee itself.
- For the AYs 2013-14 and 2014-15, the TPO has made downward adjustments on the value of import from MIPP.
- Mudajaya and Enerk hold 80% and 20% shareholding in MIPP respectively. They are the ultimate beneficiaries of profits earned by MIPP. They obtained dividends from MIPP, which were used to make investments in the assessee company with huge premium of Rs.240 per share. There is circuit fund flow.

7.5.6 The Appellant submitted that the share prices are determined by commercial negotiations with investors. The valuation of shares based on the Discounted Cash Flow (DCF) method (for AY 2010-11, it is as per CCI guidelines) was done only to comply with the requirements of RBI Guidelines pertaining to allotments made to Non-Residents. As per the FEMA Regulations dealing with Foreign Direct Investments, shares should be issued to foreign investors only at a price equal to or ***higher*** *than the value of the shares as determined by the DCF method. While issuing shares to non-resident investors, companies create an obligation for India in favour of a foreign country and therefore RBI and FEMA require that shares are issued at a price equal to or higher than the price determined by valuation. The foreign direct investments (FDI") are regulated by the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (FDI Regulations'). These Regulations have been strictly followed by the assessee. RBI has also accepted the said fair price of shares supported by CA Certificate using DCF method and FC-GPR form filed by the Company was accepted by RBI and taken on record. Relying on the decision of the Income Tax Appellate Tribunal in DCIT vs Brand Marketing P Ltd 2020 113 taxmann.com 15, the appellant argued that once the shares were issued higher than the DCF value stipulated by*

RBI, no addition u/s 56(1) on the ground that it is higher than the DCF value so arrived at.

7.5.7 The assessee submitted that during the years 2005 to 2008 after the enactment of the Electricity Act 2003 permitting private investment in power generation and on account of the severe power shortage in the country and the projected power demand period, the power sector was considered a very attractive sector for investment and attracted substantial foreign investment on favourable terms to India. The Appellant was therefore able to obtain the investment from the foreign investors at the price of Rs.250 per share.

7.5.8 Appellant submitted that the share premium charged was in accordance with the valuations of power companies prevailing during the years 2005-2008. It is customary that the anchor Indian promoter gets shares issued at par whereas investors pay a premium based on the prospects of the company. Based on the prices at which shares were issued based on information obtained from the portals of SEBI, National Stock Exchange and Bombay Stock Exchange, the appellant stated that during the same period certain power companies have issued shares with the premium ranging from Rs.210 to Rs.480 per share. In that context, the assessee stated that in Reliance Power, the promoters were issued shares at par whereas in the IPO shares were issued at a premium and likewise, in the case of KSK Power Ventures Ltd, the promoters were issued shares at par whereas the investors were issued shares at Rs 250. It was in this commercial and financial context that the Appellant was therefore able to obtain the investment from the foreign investors at the price of Rs.250 per share.

7.5.9 Appellant stated that the share premium from foreign investors has been received based on the Shareholders Agreement. A Shareholders Agreement dated 8th February 2007 and a Supplemental Shareholders Agreement dated 20 February 2009, incorporating this share price for foreign investors was executed by the Appellant, RK and Mudajaya, copies of which have been furnished to the AO. This was approved by the shareholders at the EGM of Mudajaya Group Berhad, 100% Holding Company of MCB on 15th June 2007 and 28thApril 2009, copy of which has been furnished to the AO. Their Investment Banker, OSK Investment Bank, Berhad, had given an independent opinion dated 17@ May 2007 and 8th April 2009 on the fairness of the subscription price of the equity shares. It is undisputed that Mudajaya is a listed company in existence for decades before RK or RKM were incorporated. It carries on independent business. It agreed to pay a price of

Rs.250 per share because of the commercial prospects of the Appellant and the track record of the Indian promoters. The decision to invest was approved by their shareholders before whom a fairness opinion of an independent banker was placed. This information is in the public domain. This is the commercial context in which the foreign investor invested at a large premium in the Appellant. It is trite law that AO should not step into the shoes of a businessman to decide what should be the right price. For this, the assessee has quoted the latest Hon'ble Supreme Court decision in Shiv Raj Gupta v CIT ***[2020] 117 taxmann.com 871*** *(SC).The assessee also relied: on the decisions in the cases of CIT v. Walchand & Co, [1967] 3 SCR 214, J.K. Woollen Mfgr. v. CIT [1969] 1 SCR 525, CIT v. Panipat Woollen & General Mills Co. Ltd. [1976] 103 ITR 66 (SC) and Shahzada Nand &Sons v. CIT [1977] 103 ITR 358 (SC).*

7.5.10 The appellant stated that the share allotments were made in accordance with the Companies Act, 1956 and duly reported to the Ministry of Corporate Affairs, which has accepted the filings. The Appellant has made the allotments in accordance with the Companies Act 1956. The Appellant has allotted shares at Rs.10 each to RK Power, the Indian promoter, and at Rs.250 to foreign investors. The allotments were complete by 31st March 2014. Share allotments during this period were governed by Companies Act, 1956. Although Companies Act 2013 had been enacted in 2013, Sections 42 and 62 in relation to issue of shares were notified to be effective from 1st April 2014 and as such all the allotments were governed by Companies Act, 1956. Section 81 of the Companies Act, 1956 dealt with the further issue of capital. It provided that shares shall be issued in proportion to the persons who are shareholders. Sub-section (lA) provided for allotment on a non-proportionate preferential basis if it was authorized by a special resolution.

However, sub-section (3) excluded the application of Section 81 to private companies. As a result, under Companies Act, 1956, private companies were free to allot shares to any persons at differential prices and on differential rights. In accordance with Section 75 of the Companies Act, 1956 appellant filed all the returns of allotment with RoC. The Ministry of Corporate Affairs have taken on record these returns and no questions have been raised in relation thereto. As per Section 78 of the Companies Act, 1956 when shares are issued at premium, the aggregate amount of premium is to be transferred to an account called the share premium account. This share premium account is not distributable as income just like as

any other capital assets. On winding up, the surplus monies in the share premium account are to be returned to the shareholders as capital. So long as the company is a going concern, the monies in share premium account can never be returned to the shareholders except through the medium of a reduction petition, or, in other words, except under exactly the same conditions as those under which any other capital asset can reach the shareholders hands. Distribution of share premium amount is not permitted through dividend. It is taken out of the category of divisible profits. The provisions in respect of issue of shares at premium are the same in the old company Act as well as in the new company Act. ***Hence Companies Act clearly mentions that amount received as premium is a capital receipt and not a revenue receipt.*** *The share premium is also verifiable from returns of allotment submitted in ROC. As per departmental circular (MCA) No. 3/77 dated 15.04.1977 the monies in the share premium account cannot be treated as free reserves, as they are in the nature of capital reserves.*

7.5.11 With reference to the share transactions with Mudajaya and Enerk, the assessee further stated that as required by the Foreign Exchange Management Act (hereafter "FEMA") and the Rules and Regulations made thereunder, the Appellant also filed all necessary forms and returns with Reserve Bank of India (RBI") in respect of the allotment of shares to the foreign investors, including valuation report of the shares. All such returns have been duly accepted and acknowledged by RBI. In respect of the share capital, the Appellant provided inter alia, Shareholders Agreement, Foreign Inward Remittance Certificates, Valuation Certificate, Forms FC GPR filed with Reserve Bank of India and RBI's acknowledgment of the FC GPRs. All the share application moneys have been received through banking channels; Foreign Inward Remittance Certificates have been issued; the receipt of the share application money was informed to RBI; the allotment of shares was communicated to RBI in forms FC GPR; banks have obtained KYC from the remitting banks; RBI has acknowledged all the allotment; copies of all these documents have been furnished to the AO. Details of DCF value of shares and copies of relevant DCF computation have been provided. The AO has not made any valuation on his own fixing the value of share at face value. The shares were issued at a premium of Rs.240/- per share above the DCF value as mandated by RBI. This valuation was agreed based on the future potential of the company. During this period, the power sector in India was booming and there was substantial investor interest in investing in a mega power plant. The per share price of

Rs.250/- was agreed taking into account the market conditions. A Shareholders Agreement dated 8 February 2007 and a Supplemental Shareholders Agreement dated 20 February 2009, incorporating this share price was executed by the Appellant, RK and Mudajaya, copies of which have been furnished to the AO. This was approved by the shareholders at the EGM of Mudajaya Group Berhad, 100% Holding Company of MCB on 15th June 2007 and 28 April 2009, copy of which has been furnished to the AO. Their Investment Banker, OSK Investment Bank, Berhad, had given an independent opinion dated 17thMay 2007 and 8thApril 2009 on the fairness of the subscription price of the equity shares. Mudajaya has been a listed company. The appellant stated that all these particulars were given to the AO. In the showcause notice, the AO proposed to assess the share premia as undisclosed income. It was stated that once, it was pointed out by the appellant that this was impermissible, he chose to assess the share premia under section 56(1).

Appellant stated that it cannot be assessed as unexplained income in view of the latest decision of the Hon'ble Supreme Court in PCIT v Bharat Securities ***[2020] 113 taxmann.com 32 (SC) and PCIT v Rohtak Chain Co P Ltd [2019] 110 taxmann.com 59 (SC)*** *in which it washeld that once the identity of the shareholders is proven share capital cannot be assessed under Section 68 that shares were issued at excess premium. The assessee also cited Bombay High Court in CIT v Gagandeep Infrastructure P Ltd [2017] 80 taxmann.com 272 (Bombay) and CIT v Green Infra Ltd [2017] 78 taxmann.com 340 to the same proposition that once the identity of the shareholders is proven and the amounts are received through banking channels, share capital cannot be assessed under Section 68 even if shares were issued at excess premium. The assessee also quoted the Delhi High Court decision in CIT v Steller Investments Ltd (1991) 192 ITR 287 (upheld by the Supreme Court in [2001] 115 Taxman 99), Supreme Court decision in CIT vs Lovely Exports P Ltd [2008] 216 CTR 195 (SC), the jurisdictional Madras High Court in CIT vs Electro Polychem Ltd [2007] 294 ITR 661, in which it has been held that share capital cannot be assessed under Section 68.*

7.5.12 The appellant further stated that the AO made the addition of the share premium u/s 56(1) on the reason that that the share premium of Rs.240 was huge and inflated. In other words, the AO has concluded that the fair value of the share was only Rs.10 without any valuation by him and that he has come to the conclusion that the share premium of Rs.240 was excessive. The issue of shares has

been reported in Form 3CEB as part of compliance with Transfer Pricing regulations. For Asst Year 2012-13, in the order dated 8.9.2015 passed by the Joint Commissioner of Income Tax, in paragraph 4, he refers to the transactions with Mudajaya Corporation for issue of shares and confirms as follows: "the transactions referred to are taken to be at arms' length and therefore no adjustment is suggested." In the Transfer Pricing Orders for the subsequent years Assessment Years 2013-14 and 2014-15, no downward adjustments were proposed on the share transactions. In the light of these facts, the AO's statement that the shares have been issued at a huge premium is unjustified. It was submitted that once a transaction is international transaction with AE, AO can make addition only as per the order of the TPO and he cannot make any addition independently and that once the AO has made a reference for determination of arm's length price to the Transfer Pricing Officer in respect of an international transaction with an AE, Section 92CA (4) requires that he determines the total income of the assessee in conformity with the arm's length price determined by the TPO.

7.5.13 The appellant submitted that the AO has surmised that the profits on the supply of equipment that were made by MIPP were distributed to Mudajaya and Enerkwho have in turn contributed to the share capital of the company. The TPO / AO have accepted the import value of the equipment in Assessment Years 2011-12 and 2012-13. Downward adjustments have been made only in the AYs 2013-14 and 2014-15. This downward adjustment cannot be the ground for another addition in the form of unexplained income. In fact, it is unclear from the impugned orders as to how this would be unexplained income in the hands of the Appellant. The downward adjustment made by the TPO cannot be ground for another addition in the form of unexplained income. Even if the statements made in the show cause notice that the profits made on the supply of equipment were the source of the share capital were assumed correct, it would still not constitute unexplained income of the assessee. The downward adjustment by the TPO can only result in the downward adjustment in the actual cost of the equipment for depreciation and cannot constitute income in the hands of the appellant. Even according to the TP order the profit margin of MIPP was 26.67%. Rs.245 Crores remains unpaid to MIPP. Downward adjustment made for two years only (AYs 2013-14 and 2014-15) and that does not match the share premium of Rs.1973.77 crores (Rs.1847.05 crores in RKM + Rs.126.72 crores in RK). According to transfer pricing orders, approx. 27% of value of imports was considered for downward adjustment. Even if the TPO orders were to be accepted, such profits would

amount to Rs.1120.55 crores out of total imports of Rs.4150.20 crores only, whereas the total additions proposed in the case of assessee and RK exceed this conjectured profit. Without prejudice, the entire share capital and premia could never have been funded through the downward adjustments. Even assuming without admitting, that the appellant had overpaid for the supply of the equipment which led to huge profits in the hands of MIPP and that such profits were used to fund the share capital and premium, such contribution cannot be treated as the income of the appellant. Such downward adjustment along with the addition of the share premium would constitute a double addition. The application of such income by MIPP by payment of dividend and the application of such dividend towards investment in share capital would hardly constitute income of the Appellant. To illustrate, let us assume that an assessee-company makes a revenue payment to a related person such as a director's relative or interested concern, source for such payment is equity/ secured loans and the AO believes that the payment is excessive; such excessive amount can be disallowed under Section 40A(2)(b) in a manner analogous to a TP downward adjustment; let us assume this disallowance is appropriate; let us further assume that such related person applies such receipt for investment as share capital or as a loan to the assessee or another company related to the assessee- would such investments or loan constitute income of the assessee or the recipient? The answer has to be in the negative since the consequence of Section 40A(2)(b) is only the disallowance of expenditure and does not extend to the application of the money received by the payee; the application of such funds thereafter has to be treated as a separate transaction and that would never be the income of the payee. The Appellant had not commenced its business or commercial operations and the payments to MIPP were made through banking channels. These remittances were funded by secured loans obtained from banks and financial institutions. As such these would not be said to constitute undisclosed income. Further, without prejudice, the downward adjustment of TPO for AYs 2013-14 and 2014-15 with reference to transaction with MIPP cannot be extrapolated by the AO to all the AYs and when specifically, the TPO held the equipment import transaction with MIPP for AYs 2011-12 and 2012-13 were at arm's length and cannot also be extrapolated to another assessee RK Powergen Pvt. Ltd for the AYs involved, where there was no such import transaction with MIPP.

7.5.14 Appellant relied on the Supreme Court decision in G. S. Homes &Hotels (P.) Ltd. [2016] 73 taxmann.com 120

(SC) to submit that the amount of share capital received from the various shareholders cannot be as assessed as business income.

7.5.15 Reliance has been placed by the assessee on the decisions of the Bombay High Court in PCIT v ApeakInfotech[2017] 88 taxrnann.com 695 (Bombay) for the proposition that share premium receipt is on capital account and cannot be assessed as income.

7.5.16 For the proposition thatSection 56(1) cannot be used to assess as income what does not fall under the definition of income under Section 2(24), assessee relied on the decisions of the Hon'ble Supreme Court of India in CIT v DP Sandu Bros [2005] 142 Taxman 713 (SC) and the Bombay High Court in Cadell Weaving Mill Co. v CIT [2011] 249 ITR 265/116 Taxman 77.

7.5.17 Assessee relied on the following case-laws that share premium cannot be taxed u/s 56(1):

(i) Bombay High Court in Vodafone India Services Private Limited v Additional CIT[2014] 50 taxrnann.com 300 (Bombay):
Share capital is a capital receipt not falling within the definition of income and that consequently it cannot be assessed under Section 56(1).

(ii) Mumbai Bench of the Income Tax Appellate Tribunal in ACIT vs Covestro India P Ltd [2021] 129 taxmann.com 50 (Mumbai - Trib.);

(iii) Mumbai bench of the Income Tax Appellate Tribunal in DCIT vs Brand Marketing P Ltd [2020] 113 taxmann.com 15; and

(iv) Hyderabad bench of the ITAT in Apollo Sugar Clinics Ltd v DCIT [2019] 105 taxmann.com 254 (Hyderabad - Trib.):

Share premium received from non-residents can neither be assessed under Section 56(1) or 56(2)(viib).

7.5.18 I have considered the order of the AO and the submissions made by the assessee. The general scheme of the Income tax Act is that only revenue receipts have to be taxed; capital receipts cannot be taxed unless it is so provided in a specific section. The residuary section 56(1) is to tax only revenue receipts which are not taxable under any other provisions of the Act. It cannot be used to tax a capital receipt, when taxation of which is not

specifically provided in the Act itself. It is because section 56(1) starts as 'Income of every kind which is not to be excluded from the total income …" and 'income' is defined in section 2(24). If a capital receipt is not defined as income u/s 2(24), it cannot be taxed. lt is also seen that the TPO has accepted and has not disturbed the ALP of the share transactions for the 2012-13, 2013-14 and 2014-15 with reference to Mudajaya, which ousts the jurisdiction of the AO on the issue, as the decision of the TPO on the international transaction with AE is binding on the AO. It is seen that the AO has simply relied on the TPO's findings with reference to equipment transaction for AYs 2013-14 and 2014-15 in making the addition u/s 56(1). The findings of the TPO are in different context of benchmarking the import transaction of equipment and the same cannot be applied simply here. The AO has not given any specific reasons as to how he treated the share premium as unexplained income to come under purview of Section 56(1) of the Act. The AO has not disputed the fact that share premium has been received by the assessee from Mudajaya and Enerk, which are nonresidents. Therefore, this is clearly a capital receipt. The AO has also not questioned genuineness of the transactions though he has taken the circuit of funds as one of the arguments for making the addition. Moreover, the AO has not given any reason to treat the receipts as unexplained income. It is settled law that share premium could never be considered as income under Section 56(1) of the Act and to that effect the assessee has quoted catena of decisions. In the case of Vodafone India Services Private Limited v Additional CIT [2014] 50 taxmann.com 300 (Bombay), it has been clearly held that share premium is a capital account transaction and it does not give rise to income. This decision has been accepted by the department and no further appeal filed before Hon'ble Supreme Court. CBDT has also given an Instruction No. 2 of 2015 dated 29 January 2015, refraining the officers of the department from treating the share premium as income. In view of the above, addition u/s 56(1) is not possible on the impugned share premium capital transactions.

7.5.19 In view of various details and documentary evidences filed by the assessee on identity and other elements during the assessment proceedings, it is seen that the AO himself was satisfied that there is no case u/s 68 and also in view of the decisions of Hon'ble Supreme Court in PCIT v Bharat Securities [2020] 113 taxmann.com 32 (SC) and PCIT v Rohtak Chain Co P Ltd [2019] 110 taxmann.com 59 (SC),Bombay High Court in CIT v Gagandeep Infrastructure P Ltd f2017] 80 taxmann.com 272 (Bombay) and CIT v Green Infra Ltd [2017] 78

taxmann.com 340, Delhi High Court decision in CIT v Steller Investments Ltd (1991) 192 ITR 287 (upheld by the Supreme Court in [2001] 115 Taxman 99), Supreme Court decision in CIT vs Lovely Exports P Ltd [2008] 216 CTR 195 (SC) and the jurisdictional Madras High Court in CIT vs Electro Polychem Ltd [2007] 294 ITR 661.

7.5.20 I now see whether the premium transaction could fall under any other specific section. The assessee argued that as per RBI Master Circular, the investment should be equal to or higher than DCF value and that the investment obtained as per negotiation above DCF value in commercial terms should not be viewed from taxation angle. Whether the premium received above NAV as determined u/r 11UA(1)(c)(b) could be deemed as gift to the assessee u/s 56(2)(vii)? Section 56(2)(vii) provides for assessment as income any properties received by an assessee for inadequate consideration, but it did not apply to companies and applies only to individuals and HUF. It was by Finance Act 2017 that with effect from Assessment Year 2018-19 that this provision was substituted by Section 56(2)(x) that extended these deeming provisions to companies also. Thus, there is no case u/s 56 (2)(ii)/ (x) for the impugned AYs.

7.5.21 Whether section 56(2)(viib) would apply to the premium transaction? This section applies only where the shareholder is a resident and does not apply to the premium received from non-residents read with Section 2(24)(xvi) introduced from 1.4.2013. Finance Bill 2023 proposes to extend these provisions to premium received from non-residents as well if it exceeds the fair market value determined u/r 11UA(2), which could be by DCF method. Clause 32 of the Finance Bill 2023 has proposed an amendment to Section 56 as follows: "In Section 56 of the Income Tax Act, in sub-section 2 with effect from the 1° day of April 2024- (a) in clause (vii b), the words "being a resident" shall be omitted'. This makes it crystal clear that it is only from Assessment Year 2024-25 that share premia received from a non-resident in excess of the fair market value can be taxed. Thus, there is no case u/s 56(2)(viib) also for the impugned AYs. This shows Parliament in its wisdom allowed more FDI flowing into India above DCF value (FMV) also till the AY 2023-24 which is not taxable u/s 56(2)(viib) till then.

7.5.22 With reference to differential rate of allotment of shares to the domestic investor (RK Powergen Pvt. Ltd) and the foreign investors, the issue is dealt u/ s 56(2)(viia) in terms of provisions of Rule 11 UA(l)(c)(b) separately and

it would be discussed in the order in the case of RK Powergen Pvt. Ltd under relevant AYs.

7.5.23 As mentioned in para 7 .5.13 above, the Appellant has stated that it had not commenced business or commercial operations and the payments to MIPP were made through banking channels; these remittances were funded by secured loans obtained from banks and financial institutions. The purchase of equipment from MIPP appears on the Assets side of the balance sheet and source for which appears on the liability side of the balance sheet as secured loans as admitted by the assessee itself. For the AY 2013-14, the assessee's cost of such import was Rs.1471.30 crores; the ALP of the above transaction was arrived at Rs.727.27 crores and downward adjustment isRs.744.03 crores. For the AY 2014-15, such import cost was Rs.1350.64 crores; the. TPO arrived at its ALP at Rs.518,58,26,618and made a downward adjustment of Rs.832.06 crores. Thus, it is clear that to the extent of downward adjustment, the interest bearing secured loans of the assessee have been diverted to the AE MIPP which is not attributable to purchase of equipment as held in the transfer pricing proceedings for AYs 2013-14 and 2014-15 and thus, there is a clear case that to that extent the interest claimed by the assessee is disallowable for the AYs 2013-14 and 2014-15.The issue for AY 2013-14 is separately dealt in the appeal of the assessee against the order u/s 143(3), in which the TP adjustment made for the first time. The issue for the AY 2014-15 is dealt hereunder.

7.5.24 In view of the above, the additions made u/s 56(1) are deleted for all the impugned AYs. Since the addition u/s 56(1) itself has been deleted, the connected grounds are therefore academic in nature and so they are not dealt here being infructuous."

5.1 Aggrieved by the order of the AO, the Assessee had filed an appeal (**IT(TP)A No. 44/ Chny/2023**) to this hon'ble Tribunal against the appellate order for Assessment Year 2013-14 (arising from the assessment under Section 143(3) and the TPO order). This appeal was disposed by an order dated

08.03.2024 wherein the downward adjustment was deleted in its entirety. This Tribunal had after careful appraisal of the evidence, concluded that the price paid by the Assessee was at arm's length and deleted the downward adjustment made by the TPO.

5.2 Aggrieved by the order of the Ld.CIT(A) dated 13.04.2023 for the A.Y. 2010-11 to 2014-15 (5 years) the Revenue has filed appeals against the said order for Assessment Years only for two (2) years i.e. A.Y. 2013-14 and 2014-15. Further, the Assessee has not filed any appeal against the said order since, the assessee had initiated writ proceedings, which are pending in the hon'ble Madras High Court.

6. The Ld.DR assailing the action of the Ld.CIT(A), stated that the ld.CIT(A) has erred in deleting the addition made u/s.56(1) of the Act, under income from other source after giving a finding that the payment towards equipment purchase was not at arms length price. Further, ld.DR argued that the Ld.CIT(A) action of deleting the addition u/s.56(1) of the Act, is erroneous for the fact that the investments made by the non-resident in assessee company represent remittance out of

excess billed sums arising out of the supplies made by the non-residents, which is evidenced by the downward TP adjustment carried out by the TPO for the A.Y.2013-14 for Rs.407.26 crores, which was later enhanced by the Ld.CIT(A) to Rs.744.03 Crores. The Ld.DR stated that the Ld.CIT(A) has not appreciated the fact that the assessee had taken out of its own unaccounted money in the form of purchase cost, by inflating the purchases from Non-residents and the same excess money was brought back to the assessee's account in the form of Share premium, which is nothing but round tripping of the assessee's own unaccounted funds in the guise of share premium.

6.1 Further, Ld.DR submitted that the Ld. CIT(A) erred in considering the transaction between the assessee and the non-residents as genuine investments in shares with a premium, covered by the Bombay High Court decision in the case of M/s. Vodafone India Services Private limited (2014) 50 taxmann.com 300 (Bombay), and the Board's circular No.2 of 2015 dated 29.6.2015, without appreciating the fact that the said share premium transactions are not genuine transactions and was only a colourable devise in order to accommodate the

assessee's own un accounted funds, through non-residents, and the receipts are taxable as Income from other sources. Hence, prayed for setting aside the order of the Ld.CIT(A) and reinstate the order of the AO.

8. Per contra, the Ld.AR submitted that the department has filed the present appeals only for Assessment Years 2013-14 and 2014-15 challenging the deletion of the addition of the share premia and not for other years mainly on the ground of the downward adjustment of the equipment purchased.

1. The Assessee's submissions are summarised below:

i. The basis of the appeals is the downward adjustment made by the TPO to the cost of equipment which has been deleted by this Tribunal in a detailed and reasoned order.

ii. The assessment made under Section 153C must be based on incriminating material found during the search and cannot be based on subsequent material such as the transfer pricing reports.

iii. The downward adjustment to the cost of equipment purchased from MIPP cannot be a ground for a further addition of share premia as income.

iv. The share premium charged was in accordance with the valuations of power companies prevailing during the years 2005-2008. Since the shares were issued to "associated enterprises," transfer pricing filings (Forms 3CEB) were filed, and the share premium was explicitly accepted as being at arm's length for one assessment year and no adverse adjustments were done in other years

v. The assessment of share premia u/s.56(1) is contrary to law.

2. <u>The basis of the appeals is the downward adjustment made by the TPO to the cost of equipment which has been deleted by this hon'ble in a detailed and reasoned order :</u>

The entire basis of the present appeals is the transfer pricing orders wherein downward adjustments were made to the price paid for the equipment imported by the AE. It is submitted that the Assessee had filed an appeal (IT(TP) A No. 44/ Chny/2023) to this hon'ble Tribunal against the appellate order for Assessment Year 2013-14 (arising from the assessment under Section 143(3) and the TPO order). This appeal was disposed by an order dated08.03.2024 wherein the downward adjustment was deleted in its entirety. This hon'ble Tribunal, which is the ultimate fact-finding authority, had after careful appraisal of the evidence, concluded that the price paid by the

Assessee was at arm's length. Thus, the entire basis of the appeal filed by the department stands vitiated and for this reason alone the appeals deserve to be dismissed.

3. <u>The assessment made under Section 153C must be based on incriminating material found during the search and not subsequent material such as the transfer pricing report.</u>

Two crucial facts must be noted:

1. The assessment for Assessment Years 2013-14 and 2014-15 were originally concluded under Section 143(3) on 31.3.2017 and 21.12.2016 respectively. As such the assessments under Section 153C are unabated assessments.
2. The date of the search is 23.11.2015. The dates of the Transfer Pricing Orders for Assessment Years 2013-14 and 2014-15 are 01.02.2017 and 20.12.2018 respectively, well after the search.

8.1 In such cases, it is now settled law by authoritative pronouncements of the hon'ble Supreme Court that any assessments under Sections 153A/153C in respect of unabated assessments must be based on incriminating materials obtained during search proceeding and not based on post-search materials. In PCIT v Abhisar Buildwell P Ltd [2023] 149 taxmann.com 399 (SC), it was held as follows:

"In view of the above and for the reasons stated above, it is concluded as under:

(i) that in case of search under section 132 or requisition under section 132A, the AO assumes thejurisdiction for block assessment under section 153A;

(ii) all pending assessments/reassessments shall stand abated;

(iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

(iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search undersection 132 or requisition under section 132A of the Act, 1961".

8.2 In respect of assessments under Section 153C the same principle was reiterated by the hon'ble Supreme Court in DCIT v U.K. Paints Ltd [2023] 150 taxmann.com 108 (SC). Even earlier the hon'ble Delhi Court had held in PCIT v Vikas Telecom Ltd [2022] 135 taxmann.com 362 (Delhi) had held that post-search enquiries cannot be the basis of assessments under Section 153A/153C. It is therefore submitted that reliance of post-search material such as the transfer pricing report for making additions in unabated assessments under Section 153C is illegal.

8.3 The downward adjustment to the cost of equipment purchased from MIPP cannot be the ground for a further addition of share premia.

In the Transfer Pricing Orders for Assessment Years 2013-14 and 2014-15, there had been a substantial downward revision of value of import of Capital Equipment from MIPP and as a result, the cost of the equipment would be marked down for depreciation. This downward adjustment cannot be the ground for another addition in the form of unexplained income. The Assessing Officer has surmised that the profits on the supply of equipment that were made by MIPP were distributed to Mudajaya Corporation and Enerk international who have in turn contributed to the share capital of the company. Even if the

profits made on the supply of equipment were the source of the share capital, it would still not constitute unexplained income of the company. The Assessee had not commenced business or commercial operations and the payments to MIPP were made through banking channels. These remittances were funded by secured loans obtained from banks and financial institutions. As such these would not be said to constitute undisclosed income. The only legal consequence of the TP Order would be a downward adjustment in the cost of the equipment for purposes of depreciation. The application of these profits, if any, cannot be assessed again in the hands of the Assessee.

To illustrate, let is assume that an assessee-company makes a revenue payment to a related person such as a director's relative or interested concern and the Assessing Officer believes that the payment is excessive. Such excessive amount can be disallowed under Section 40A(2)(b) in a manner analogous to a TP downward adjustment. This disallowance would be appropriate and legal.

Let us further assume that such related person applies such receipt for investment as share capital or as a loan to the

assessee or another company related to the assessee- would such investments or loan constitute income of the assessee or the recipient? The answer must be in the negative since the consequence of Section 40A(2)(b) is only the disallowance of expenditure and does not extend to the application of the money received by the payee. The application of such funds thereafter has to be treated as a separate transaction.

8.4 The share premium charged was in accordance with the valuations of power companies prevailing during the years 2005-2008. Since the shares were issued to "associated enterprises," transfer pricing filings (Forms 3CEB) were filed, and the share premium was explicitly accepted as being at arm's length for one assessment year and no adverse adjustments were done in other years

During the years 2005 to 2008 after the enactment of the Electricity Act 2003 permitting private investment in power generation and on account of the severe power shortage in the country and the projected increased demand on account of economic growth, the power sector was considered an extremely attractive sector for investment and attracted substantial investment on favourable terms. The Indian promoter R K Powergen P Ltd ("RK Power") was key to the setting up of the power plant. By its efforts:

i) The Assessee was able to enter into a Memorandum of Understanding with the state of Chhattisgarh for setting up of a mega (1440 Mw) power plant;

ii) And based on RK Power's track record the Assessee was able to get project financing with RK Power providing corporate guarantees for the loans.

iii) The Assessee was able to get coal linkage that was crucial for the project's viability.

iv) Nearly fifty statutory clearances including environment, pollution, aviation, water etc. were obtained.

It is customary that the anchor Indian promoter gets shares issued at par whereas investors pay a premium based on the prospects of the company. The following table gives the prices at which shares were issued based on information obtained from the portals of SEBI, National Stock Exchange, and Bombay Stock Exchange

Company	Listing Date	Par Value	Issue Price
Reliance Power Ltd	11.02.2008	Rs 10	Rs 450
BGR Energy Systems Ltd	03.01.2008	Rs 10	Rs 480
IL&FS Engineering & Construction Co. Ltd	25.10.2007	Rs 10	Rs 370
GMR Infrastructure Ltd	21.08.2006	Rs 10	Rs 210
KSK Energy Ventures Ltd	14.07.2008	Rs 10	Rs 240
GVK Power & Infrastructure Ltd	27.02.2006	Rs 10	Rs 310

It can be seen from the prospectus of Reliance Power that the promoters were issued shares at par whereas in the IPO shares were issued at a premium. Likewise, in the case of KSK Power Ventures Ltd, the promoters were issued shares at par whereas the investors were issued shares at Rs 250.

It was in this commercial and financial context that the Assessee was therefore able to obtain the investment from the foreign investors at the price of Rs 250 per share. Mudajaya is a listed company in existence for decades before RK Power or RKM were incorporated. A Shareholders Agreement dated 8th February 2007 and a Supplemental Shareholders Agreement dated 20th February 2009, incorporating this share price was executed by the Assessee and Mudajaya. This was approved by the shareholders at the EGM of Mudajaya Group Berhad, 100% holding Company of Mudajaya Corporation Berhad CB on 15th June 2007 and 28th April 2009. Their Investment Banker, OSK Investment Bank, Berhad, had given an independent opinion dated 17th May 2007 and 8th April 2009 on the fairness of the subscription price of the equity shares. This information is in the public domain. Mudajaya thus agreed to pay a price of Rs 250 per share because of the commercial prospects of the Assessee.

8.5 The Assessing Officer states that the share premium is inflated. It is trite law that an Assessing Officer should not step into the shoes of a businessman to decide what should be the right price. This principle has been stated in several cases by the Hon'ble Supreme Court of India-:

i. **Shiv Raj Gupta v CIT[2020] 117 taxmann.com 871 (SC):** *This finding flies in the face of settled law. A catena of judgments has held that commercial expediency has to be adjudged from the point of view of the assessee and that the Income Tax Department cannot enter into the thicket of reasonableness of amounts paid by the assessee.*

ii. ***CIT v. Walchand& Co. [1967] 3 SCR 214****: In applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the Revenue.*

iii. **J.K. WoollenMfgr. v. CIT [1969] 1 SCR 525***: in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the Income Tax Department.*

iv. **CIT v. Panipat Woollen& General Mills Co. Ltd. [1976] 103 ITR 66 (SC**): *that in order to determine the question of reasonableness of the expenditure, the test of commercial expediency would have to be adjudged from the point of view of the businessman and not of the Income Tax Department."*

v. **Shahzada Nand & Sons v. CIT [1977] 103 ITR 358 (SC)**: *The reasonableness of the payment with reference to these factors has to be judged not on any subjective standard of the*

assessing authority but from the point of view of commercial expediency…

vi. **S.A. Builders Ltd. v. CIT [2007] 158 Taxman 74/288 ITR 1 (SC):** *the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximise its profit. The Income-tax Authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own viewpoint but that of a prudent businessman.*

Thus, it has been repeatedly held by the Supreme Court in a number of cases that it was not open to the Assessing Officer to substitute his judgement over that of the businessmen.

8.6 To sum up: the share premia was agreed based on prevailing market conditions and it is not open to the Assessing Officer to step into the shoes of the Assessee or the foreign investor and decide the price at which shares are to be issued. Since the issue of shares to Mudajaya was a transaction with an "associated enterprise" as defined in Section 92A (1) of the Act, the Assessee had obtained and furnished a report of a Chartered Accountant that the price at which the shares were issued was at arm's length. The issue of shares has been reported in Form 3CEB as part of compliance with Transfer Pricing regulations. For Asst Year 2012-13, a reference was

made to the Transfer Pricing Officer. The TP Order dated 08.09.2015 passed by the Joint Commissioner of Income Tax, refers to the transactions with Mudajaya Corporation for issue of shares and confirms as follows:

"the transactions referred to are taken to be at arms' length and therefore no adjustment is suggested."

In the light of these facts, the Assessing Officer's statement that the shares have been issued at a huge premium is unjustified and at best constitutes a change of opinion, which cannot be a ground for assessment under section 153C. In subsequent Assessment Years 2013-14 and 2014-15 as well, the reference included the value of the shares so issued and no downward adjustment was proposed in the TP Orders for those years. On account of Section 92CA (4), the determination of the arm's length price by the TPO is binding on the Assessing Officer.

The Assessee had made the allotments in accordance with the Companies Act 1956. The Assessee has allotted shares at Rs 10 each to RK Power, the Indian promoter, and at Rs 250 to foreign investors. The allotments were complete by 31st March 2014. Share allotments during this period were governed by Companies Act, 1956. Although Companies Act 2013 had been

enacted in 2013, Sections 42 and 62 in relation to issue of shares were notified to be effective from 1st April 2014 and as such all the allotments were governed by Companies Act, 1956. Section 81 of the Companies Act, 1956 dealt with the further issue of capital. It provided that shares shall be issued in proportion to the persons who are shareholders. Sub-section (1A) provided for allotment on a non-proportionate preferential basis if it was authorised by a special resolution. However, sub-section (3) excluded the application of Section 81 to private companies. **As a result, under Companies Act, 1956, private companies were free to allot shares to any persons at differential prices and on differential rights.**

Section 75 of the Companies Act, 1956 provided as follows:

> *75. Return as to allotments.*
>
> *(1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within thirty days thereafter, -*
>
> *(a) file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and occupations of the allottees, and the amount, if any, paid or due and payable on each share:*

8.7 The Assessee has complied with Section 75 and filed all the returns of allotment as listed in Annexure 1. The Ministry of Corporate Affairs have taken on record these returns and no

questions have been raised in relation thereto. Section 78 of the Companies Act, 1956 provides as follows:

78. Application of premiums received on issue of shares.

(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called" the share premium account"; and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid- up share capital of the company.

(2) The share premium account may, notwithstanding anything in sub- section (1), be applied by the company-

(a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares;

(b) in writing off the preliminary expenses of the company;

(c) in writing off the expenses of, or the commission paid, or discount allowed on, any issue of shares or debentures of the company; or

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company.

The effect of this provision is that when shares are issued at premium, the aggregate amount of premium is to be transferred to an account called the share premium account. This share premium account is not distributable as income just like share capital. On winding up, the surplus monies in the share premium account are to be returned to the shareholders as capital. So long as the company is a going concern, the monies in share premium account can never be returned to the shareholders except through the medium of a reduction

petition, or, in other words, except under exactly the same conditions as those under which any other capital asset can reach the shareholders hands. Distribution of share premium amount is not permitted through dividend, which is taken out of the category of divisible profits. The provisions in respect of issue of shares at premium are the same in the Companies Act, 1956 and Companies Act, 2013. **Hence Companies Act clearly provides that amount received as share premium is a capital receipt and not a revenue receipt**. The share premium is also verifiable from returns of allotment submitted to the Ministry of Corporate Affairs. As per departmental circular (MCA) No. 3/77 dated 15.04.1977 the monies in the share premium account cannot be treated as free reserves, as they are in the nature of capital reserves.

8.8 To sum up: The Assessee had complied with the provisions of the Companies Act in the allotment of shares and the application of share premia and further because of the provisions of the Companies Act, 1956 the share premium is a capital receipt and cannot be treated as income. The foreign direct investments ("FDI") into India are regulated by the Foreign Exchange Management (Transfer or Issue of Security by

a Person Resident Outside India) Regulations, 2000 ('FDI Regulations') issued by RBI. The FDI Regulations require that shares should be issued to foreign investors only at a price equal to or **higher** than the value of the shares as determined by the discounted cash flow ("DCF") method since by the issue of shares to non-residents, companies create an obligation for India in favour of a foreign country. As required by the FDI Regulations:

(a) All the share application moneys were received through banking channels;
(b) Foreign Inward Remittance Certificates were obtained;
(c) Banks have obtained KYC from the remitting banks;
(d) Receipt of the share application money was informed to RBI;
(e) Allotment of shares was communicated to RBI in forms FC GPR; and
(f) RBI has acknowledged all the allotments.

Thus, the Assessee had complied in full with the FDI Regulations. When FDI Regulations require the issue of shares at a price higher than the value determined by the DCF method, the statement of the Assessing Officer that the premium received is inflated is misconceived. The Mumbai Bench of the

Income Tax Appellate Tribunal held in the case of DCIT v Finproject India P Ltd. (2018) 93 Taxmann.com 461 as follows:

> *"The assessee while issuing shares to non-resident investors create an foreign obligation for India in favour of third country and as per RBI/FEMA requirements, the assessee are required to issue shares using valuation methods which are approved method (DCF is approved method of valuation) and the consideration for issuance of shares has to be necessarily equal to or above fair value arrived at by such approved method because otherwise the assessee will create foreign obligations for India in favour of third country at a consideration price received which is below fair value of shares computed by an approved method of valuation which will be loss to India as it will create higher foreign obligation of India in favour of third country represented by fair value of shares wherein the consideration price received for issue of shares was lower than fair value of shares, thus to plug this loss to India, FEMA/RBI stipulate that issue price of shares should be equal to or more than fair value arrived at by approved method viz. DCF. The guidelines are issued by RBI vide RBI/2009-10/445 A.P. (DIR series) Circular no. 49 dated 04-05-2010 as was applicable during the relevant period. The CA has arrived at value of Rs. 20 per equity share which consisted of face value of Rs. 10 and share premium of Rs. 10 per share using DCF method which is an approved method specified by RBI in its circular dated 04-05-2010. The Assessing Officer tried to demolish this fair value of Rs. 20 per equity share by basing its decision on perverse finding of facts.* ***Thus, the assessee was on the right side of the law by issuing equity shares at a value of Rs. 20 per equity shares so far as FEMA/RBI compliances are concerned. RBI has also accepted the said fair price of shares supported by CA Certificate using DCF method and FC-GPR form filed by the assessee through its banker Axis Bank was accepted by RBI and taken on record. The assessee has filed its bank statements as well FIRC issued by its bankers as an evidence****. Thus, based on material on record, no fault lies with the assessee in issuing equity shares of face value of Rs. 10 each at share premium of Rs. 10 each so far as compliances under FEMA/RBI are concerned."*

8.9 The assessment of share premia under Section 56(1) is contrary to law.

Section 56(1) is a residual section to tax incomes that are not chargeable under other heads (Salaries, House Property, Business) and not to tax receipts that are not income. As stated

earlier, the Companies Act 1956 specifically provides that share premium should be kept in a separate account and cannot be used for distribution of dividend.

8.9.1 It is settled law that Section 56(1) cannot be resorted to assess a receipt that does not constitute income. The hon'ble Supreme Court of India in CIT v D P Sandu Bros [2005] 142 Taxman 713 (SC), where the Assessing Officer attempted to tax under Section 56 what could not be assessed under Section 45, held as follows:

> *"The argument of the appellant that even if the income cannot be chargeable under section 45, because of the inapplicability of the computation provided under section 48, it could still impose tax under the residuary head is thus unacceptable. If the income cannot be taxed under section 45, it cannot be taxed at all".*

8.9.2 Similarly, the Bombay High Court in Cadell Weaving Mill Co. v CIT [2011] 249 ITR 265/116 Taxman 77 held that:

> *It is well-settled that all receipts are not taxable under the Act. Section 2(24) defines income. It is no doubt an inclusive definition. However, a capital receipt is not income under section 2(24) unless it is chargeable to tax as capital gains under section 45. It is for this reason that under section 2(24)(*vi*) the Legislature has expressly stated,* inter alia, *that income shall include any capital gains chargeable under section 45".*

The Assessing Officer was conscious that the identity and the solvency of Mudajaya and Enerk had been well established. Mudajaya was a listed company in business for decades and listed on the Malaysian stock exchange even before the Assessee was incorporated. Mudajaya had a substantial net

worth and the investment in the Assessee had been funded out of its own funds and not out of borrowed funds. Enerk was a joint venture partner of Mudajaya and had a net worth with no borrowings that was the basis of the investment. Both parties had been subject to KYC verification by the banks as part of the process under FDI Regulations. The genuineness or credit worthiness of these parties has not been questioned in the impugned assessments.

8.9.3 The Hon'ble Supreme Court in PCIT v Bharat Securities [2020] 113 taxmann.com 32 (SC) and PCIT v Rohtak Chain Co P Ltd [2019] 110 taxmann.com 59 (SC)has held that once the identity of the shareholders is proven share capital cannot be assessed under Section 68 that shares were issued at excess premium. The Bombay High Court took a similar view in CIT v Gagandeep Infrastructure P Ltd [2017] 80 taxmann.com 272 (Bombay) and CIT v Green Infra Ltd [2017] 78 taxmann.com 340 and has held that once the identities of the shareholders are proved and the amounts have been received through banking channels and credited in the books of accounts, section 68 cannot be invoked because of the high premium. Similar views have been expressed by the Supreme Court in CIT v

Stellar Investment Ltd. [2001] 115 Taxman 99 (SC) and CIT vs Lovely Exports P Ltd [2008] 216 CTR 195 (SC). The jurisdictional Madras High Court has taken the same view in CIT vs ElectroPolychem Ltd [2007] 294 ITR 661 (Madras) and has held that even if the subscription to share capital was not genuine it cannot be treated as income.

8.9.4 The Bombay High Court in PCIT v Apeak Infotech [2017] 88 taxmann.com 695 (Bombay) has held that share premium receipt is on capital account and cannot be assessed as income. The Supreme Court in G. S. Homes & Hotels (P.) Ltd. [2016] 73 taxmann.com 120 (SC) held that the amount of share capital received from the various shareholders cannot be treated as business income. The Assessing Officer also was aware that Section 56(2)(viib) had no application on share premia received from non-residents. It is only proposed in Finance Bill 2023 to extend Section 56(2)(viib) to share premia received from non-residents with effect from Assessment year 2024-25. It is for this reason that the Assessing Officer invoked Section 56(1). As submitted earlier, Section 56(1) is a residual section and not a charging section that enables assessing share premia as held in a number of cases.

8.9.5 The Mumbai Bench of the hon'ble Income Tax Appellate Tribunal in ACIT vs Covestro India P Ltd [2021] 129 taxmann.com 50 (Mumbai - Trib.)held that share premia cannot be assessed under Section 56(1) as can be seen from the following extract:

> "*The receipt of share premium per se cannot be treated as income or the revenue receipt. In order to bring a particular receipt to be taxable within the ambit of section 56(1), the receipt should be in the nature of income as defined in section 2(24). The share premium received by the company admittedly forms part of share capital and shareholders' funds of the assessee - company. When receipt of share capital partakes the character of a capital receipt, the receipt of share premium also partakes the character of capital receipt only. Hence, at the threshold itself, the receipt in the form of share premium cannot be brought to tax as the revenue receipt and consequently treat the same as income under section 56(1). [Para 4.6]"*

8.9.6 The Bombay High Court in *Vodafone India Services Private Limited v Additional CIT* [2014] 50 taxmann.com 300 (Bombay)held:

> "*But we have examined the issue afresh. The word income for the purpose of the Act has a well understood meaning as defined in Section 2(24) of the Act. This even when the definition in Section 2(24) of the Act is an inclusive definition. It cannot be disputed that income will not in its normal meaning include capital receipts unless it is so specified, as in Section 2(24)(vi) of the Act. In such a case, Capital Gains chargeable to tax under Section 45 of the Act are, defined to be income. The amounts received on issue of share capital including the premium is undoubtedly on capital account. Share premium have been made taxable by a legal fiction under Section 56 (2)(viib) of the Act and the same is enumerated as Income in Section 2(24)(xvi) of the Act. However, what is bought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case what is being sought to be taxed is capital not received from a non-resident i.e., premium allegedly not received on application of ALP. Therefore, absent express legislation, no*

*amount received, accrued or arising on capital account transaction can be subjected to tax as Income***."**

8.9.7 After the decision of the Bombay High Court in the Vodafone India case, the CBDT issued an instruction No 2 of 2015 noting that the Court had held that share premium was a capital account transaction that does not give rise to income and that the Board had accepted the said decision and directed that all field officers should adhere to the ratio decidendi of this judgement. Extracts below:

*"1.In reference to the above cited subject, I am directed to draw your attention to the decision of the High Courtof Bombay in the case of Vodafone India Services Pvt. Ltd. for A.Y. 2009-10 (WP No.871/2014), wherein the Court has held, inter-**alia, that the premium on share issue was on account of a capital account transaction and does not give rise to income** and, hence, not liable to transfer pricing adjustment.*

*2**.** It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the abovementioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved."*

8.9.8 It was submitted that the said Instruction is binding on the Assessing Officer. The Mumbai Bench of the Income Tax Appellate Tribunal in DCIT vs Brand Marketing P Ltd (2020) 113 taxmann.com 15:

"*Whereas, the Ld. A.O in the instant case, had resorted to tax the receipt of share premium u/s56(1) of the Act. Hence, the*

amended definition of section 2 Sub section 24 cannot be made applicable in the instant case. We also find that the amended definition of section (2) sub section 24 (xvi) even w.e.f A.Y. 2013-14 would not be applicable in the instant case because the provisions of section 2(56)(viib) of the Act are not applicable for issue of share to non-residents."

8.9.9 The Hyderabad bench of the ITAT in Apollo Sugar Clinics Ltd v DCIT [2019] 105 taxmann.com 254 (Hyderabad - Trib.) held:

"11.1 The Assessing Officer instead of invoking Section 56(2)(viib), he went ahead by disallowing the excess of the premium received by assessee by invoking the provisions of Section 56(1) of the Act. In order to invoke Section 56(1), the income earned by the assessee should be classified as revenue income as per Section 14 but should not fall within any of the head of income A, C, D or E. Since section 56(1) is residuary head of income, it falls in the head of income 'F' i.e., "income from other sources". This head of income consists of two parts i.e., section 56(1) and section 56(2). The first part i.e., sub-section (1) deals with income of every kind, which does not fall in any of the head of income A - E and also which is not to be excluded from the total income under this Act. The important thing is it should fall within the definition of income u/s2(24) of the Act. At the same time, sub-section (2) of section 56, deals with specific income which is not income as per section 2(24) but specifically brought under the definition of income by the Legislature.Therefore, the income which cannot be brought to tax under section 56(2), under specific head, AO cannot bring to tax even u/s 56(1). As held in the case of S.G. Mercantile Corporation v. CIT 83 ITR 700 SC, "where there is a specific head for the income in question and specific section providing for the head, this residuary section cannot be called in aid". Similarly, when there is specific provision introduced by the Legislature to bring the specific transaction as income in section 56(2)(viib) because the transaction of issue of shares is capital in nature but under the circumstances as mentioned in above section, this transaction will be considered as income".

8.9.10 The position is reiterated in a recent decision of the hon'ble Bombay High Court in Shendra Advisory Services P Ltd v DCIT [2024] 159 taxmann.com 557 (Bombay) as can be seen from the following extracts:

*"**12.** The charge of tax under the Act is on income. The receipt of share premium on the issue of fresh shares is on capital account and constitutes a capital receipt, which is not chargeable to tax under the Act. There is no provision under the Act to tax the receipt of share premium for the assessment year under consideration. As held in Vodafone India Services (P.) Ltd. (supra) the amount received on issue of shares is admittedly a capital account transaction not separately brought within the definition of income during the relevant period. Thus, capital account transaction not falling within the statutory explanation cannot be brought to tax.*

***13.** After the judgment of Vodafone India Services (P.) Ltd. (supra) of this Court, the CBDT also issued instruction being Instruction No. 2/2015 [F.NO.500/15/2014-APA-I] DATED 29th January 2015, which reads as under:*
"SECTION 92C OF THE INCOME TAX ACT, 1961 - TRANSFER PRICING - COMPUTATION OFARM'S LENGTH PRICE -ACCEPTANCE OF ORDER OF HIGH COURT OF BOMBAY IN CASE OFVODAFONE INDIA SERVICES PVT. LTD. [2014] 50 TAXMANN.COM 300 (BOMBAY)
INSTRUCTION NO.2/2015 [F.NO.500/15/2014-APA-I], DATED 29-1-2015
In reference to the above cited subject, I am directed to draw your attention to the decision of the HighCourt of Bombay in the case of Vodafone India Services Pvt. Ltd. for A.Y. 2009-10 (WP No. 871/2014),wherein the Court has held, inter-alia, that the premium on share issue was on account of a capital account transaction and does not give rise to income and, hence, not liable to transfer pricing adjustment.

2. It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs and CsIT (Appeals).

3. *This issues with the approval of Chairperson, CBDT."*
(emphasis supplied)

A press note dated 28th January 2015 was also issued accepting the order of this Court in Vodafone India Services (P.) Ltd. (supra), which reads as under :

*"Acceptance of the Order of the High Court of Bombay in the case of Vodafone India Services Private Limited ** ** **i. accept the order of the High Court of Bombay in WP No. 871 of 2014, dated 10-10-2014, and not to file SLP against it before the Supreme Court of India: ******

The Cabinet decision will bring greater clarity and predictability for taxpayers as well as tax authorities, thereby facilitating tax compliance and reducing litigation on similar issues. This will also set at rest the uncertainty prevailing in the minds of foreign investors and taxpayers in respect of possible transfer pricing adjustments in India on transactions related to issuance of shares, and thereby improve the investment climate in the country.

The Cabinet came to this view as this is a transaction on the capital account and there is no income to be chargeable to tax. So, applying any pricing formula is irrelevant.

*** ** **(c) The tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of Arm's Length Pricing to transactional value/consideration itself does not arise."*

(d) If its income which is chargeable to tax, under the normal provisions of the Act, then alone Chapter of the Act could be invoked. Sections 4 and 5 of the Act brings/charges to tax total income of the previous year. This would take us to the meaning of the word income under the Act as defined in section 2 (24) of the Act. The amount received on issue of shares is admittedly a capital account transaction not separately brought within the definition of Income, except in cases covered by section 56(2)(viib) of the Act. Thus, such capital account cannot be brought to tax as already discussed herein above while considering the challenge to the grounds as mentioned in impugned order."

(e) The issue of shares at a premium is on Capital account and gives rise to no income. The submission on behalf of the revenue that the shortfall in the ALP as computed for the purposes of Chapter X of the Act is misplaced. The ALP is meant to determine the real value of the transaction entered into between AEs. It is a re-computation exercise to be carried out only when income arises in case of anInternational transaction between AEs. It does not warrant re-computation of a consideration received/given on capital account." (emphasis supplied)

Therefore, one thing is certain that share premium received by issuance of shares is on capital account and gives rise to no income."

Therefore, Section 56(1) is a residual section to assess incomes and cannot be used to assess share premia which is a capital receipt.

8.10 In light of the above submissions, the ld.AR prayed for dismissing the appeal of the revenue and confirm the orders of the ld.CIT(A).

9. We have heard the rival contentions, perused the materials available on record, gone through the orders of the authorities along with the plethora of judicial pronouncements of various hon'ble courts. The facts with regard to impugned order are not in dispute and hence for the sake of brevity the facts are not repeated. Search and seizure operations under Section 132 of the Act were carried out in the premises of the assessee in Tamilnadu and Chhattisgarh on 23.11.2015, 09.12.2015 and concluded on 13.01.2016. During the search, certain documents were seized from the premises of the assessee. The reassessment for AY 2010-11 and the assessment for AY 2012-13 to AY 2014-15 were concluded after the search and the details of receipt of share capital from MJC and Enerk was accepted without any adjustment.

9.1 The Transfer Pricing order u/s.92CA(3) of the Act for the AY 2013-14 was completed after the conclusion of the search, wherein the TPO proposed TP downward adjustment of Rs.407.25 crores on the imports from MIPP. The TPO did not propose any adjustment on the receipt of share capital reported in the Form 3CEB. In the original assessment, the downward adjustment was given effect to but the share premia was not assessed. On 13.11.2017, after two years of the search, the Assistant Commissioner of Income Tax, Central Circle 1(1), Chennai (Assessing Officer') issued a notice under Section 153A r.w.s 153C of the Act. During these proceedings a Transfer pricing reference was made for Asst Year 2014-15, where a downward adjustment was proposed.

9.2 The Assessing Officer relying on the order of the TPO for AY 2013-14 & AY 2014-15, assessed the share premium as other income on the basis that profits made by MIPP on supply of equipment to the assessee were invested as 'share capital' by framing the assessment u/s.143(3) r.w.s 153B r.w.s 153C r.w.s 153A of the Act vide order dated 19.02.2019 for A Y 2010-11 to AY 2013-14 and draft assessment order for AY 2014-15 as under:

AY	Treatment of shares premium as Income	TP Adjustment	Assessed total income	Demand raised
2010-11	189,26,79,120		189,26,79,120	134,00,32,126
2011-12	286,37,33,520		288,55,68,096	186,64,95,391
2012-13	230,46,51,600		233,55,66,922	137,83,70,108
2013-14	615,34,48,800		641,28,07,603	352,92,52,393
2014-15	525,59,82,720	832,05,84,608	577,16,23,267	

We note that the appeal of the assessee against the order of the TPO for the A.Y. 2013-14 in respect of downward adjustment of Rs.832.05 crores has been deleted by this Tribunal in IT(TP)A No.44/Chny/2023 dated 08.03.2024. This order was passed after the impugned order of the CIT Appeals referred to below. The appeal of the assessee in respect of the order of AO u/s.143(3) r.w.s 153B r.w.s 153C r.w.s 153A of the Act vide order dated 19.02.2019, the ld.CIT(A) deleted the additions made U/s.56(1) of the Act, for the A.Ys.2010-11 to 2014-15. The department has filed the current appeals only for Assessment Years 2013-14 and 2014-15.

9.3 The ld.CIT(A) deleted the addition of share premium stating that:

a) capital receipts cannot be taxed unless it is so provided in a specific section. The residuary section 56(1) is to tax only revenue receipts which are not taxable under any other provisions of the Act.

b) The findings of the TPO are in different context of benchmarking the import transaction of equipment and the same cannot be applied simply here. The AO has not given any specific reasons as to how he treated the share premium as unexplained income to come under purview of Section 56(1) of the Act. The AO has not disputed the fact that share premium has been received by the assessee from Mudajaya and Enerk, which are non-residents. Therefore, this is clearly a capital receipt

c) In the case of *Vodafone India Services Private Limited v Additional CIT* [2014] 50 taxmann.com 300 (Bombay), it has been clearly held that share premium is a capital account transaction and it does not give rise to income. This decision has been accepted by the department and no further appeal filed before Hon'ble Supreme Court. CBDT has also given an Instruction No. 2 of 2015 dated 29 January 2015, refraining the officers of the department from treating the share premium as income. In view of the above, addition u/s.56(1) is not possible on the impugned share premium capital transactions.

9.4 We note that the entire basis of the present appeals is the transfer pricing orders wherein downward adjustments were made to the price paid for the equipment imported by the AE. The Assessee had filed an appeal (IT(TP)A No.44/Chny/2023) to this Tribunal against the appellate order for Assessment Year 2013-14 (arising from the assessment under Section 143(3) and the TPO order). This appeal was disposed by an order dated 08.03.2024 wherein the downward adjustment was deleted in its entirety. This Tribunal, had after careful appraisal of the evidence, concluded that the price paid by the Assessee was at arm's length. Thus, addition u/s.56(1) made by the AO based on the TP order alone cannot stand in the eyes of law.

9.5 Further, it is observed that the assessment for Assessment Years 2013-14 and 2014-15 were originally concluded u/s.143(3) on 31.3.2017 and 21.12.2016 respectively. The date of the search is 23.11.2015. The dates of the TP orders for Assessment Years 2013-14 and 2014-15 are 01.02.2017 and 20.12.2018 respectively, well after the search. Therefore, any assessments under Sections 153A/153C in respect of unabated assessments must be based on incriminating materials obtained during search proceeding and

not based on post-search materials, in this case TP orders passed subsequent to search materials. The reliance placed by the assessee in support of this issue on Hon'ble supreme Court in PCIT v Abhisar Buildwell P Ltd [2023] 149 taxmann.com 399 (SC), it was held as follows:

> *"14. In view of the above and for the reasons stated above, it is concluded as under:*
>
> *(i) that in case of search under section 132 or requisition under section 132A, the AO assumes the jurisdiction for block assessment under section 153A;*
>
> *(ii) all pending assessments/reassessments shall stand abated;*
>
> *(iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and*
>
> *(iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961".*

9.6 Further, in respect of assessments under Section 153C the same principle was reiterated by the hon'ble Supreme Court in DCIT v U.K. Paints Ltd [2023] 150 taxmann.com 108 (SC). Even earlier the hon'ble Delhi High Court had held in PCIT v Vikas Telecom Ltd [2022] 135 taxmann.com 362 (Delhi) had held that post-search enquiries cannot be the basis of

assessments under Section 153A/153C. Therefore, the reliance placed by the AO on the TP orders passed after the search cannot be countenanced.

9.7 We also accept the assesse's submissions that an Assessing Officer should not step into the shoes of a businessman to decide what should be the right price for issue of shares. This principle has been stated in several cases by the Hon'ble Supreme Court of India, and cited by the AR. It has been repeatedly held by the Supreme Court in a number of cases that it was not open to the Assessing Officer to substitute his judgement over that of the businessmen. Moreover, in this case, the share premium was an international transaction with an associated enterprise that was duly reported in Form 3CEB and was referred to the TPO, who had not found any fault with the share premia. Therefore, it was not open to the Assessing Officer to hold that share premia was unduly inflated.

9.8 Coming to the next aspect of the applicability of Section 56(1), which is a residual section to tax incomes that are not chargeable under other heads (Salaries, House Property, Business) and not a deeming provision to assess to tax receipts that are not income. Hence, Section 56(1) cannot be resorted

to assess a receipt that does not constitute income. This proposition has been upheld by the hon'ble Supreme Court of India in CIT v D P Sandu Bros [2005] 142 Taxman 713 (SC), where the Assessing Officer attempted to tax under Section 56 what could not be assessed under Section 45, stating as follows:

> *"The argument of the appellant that even if the income cannot be chargeable under section 45, because of the inapplicability of the computation provided under section 48, it could still impose tax under the residuary head is thus unacceptable. If the income cannot be taxed under section 45, it cannot be taxed at all".*

9.9 It appears that the Assessing Officer resorted to Section 56(1) since he could not invoke Section 68, since the identity and the solvency of Mudajaya and Enerk had been well established. Both parties had been subject to KYC verification by the banks as part of the process under FDI Regulations. The genuineness or credit worthiness of these parties has not been questioned in the impugned assessments. The hon'ble Supreme Court in PCIT v Bharat Securities [2020] 113 taxmann.com 32 (SC) and PCIT v Rohtak Chain Co P Ltd [2019] 110 taxmann.com 59 (SC)has held that once the identity of the shareholders is proven share capital cannot be assessed under Section 68. The jurisdictional Madras High Court has taken the same view in CIT vs Electro Polychem Ltd [2007] 294 ITR 661

(Madras) and has held that even if the subscription to share capital was not genuine it cannot be treated as income. We note that the Assessing Officer also was aware that Section 56(2)(viib) had no application on share premia received from non-residents and Section 68 could not be used for the reasons stated above. It is for this reason that the Assessing Officer invoked Section 56(1).

9.10 Section 56(1) cannot be invoked since for it to apply a receipt should be income whereas share premia is capital in nature as held by the Bombay High Court in *Vodafone India Services Private Limited v Additional CIT* (supra). The matter is now beyond any dispute because after the decision of the Bombay High Court in the Vodafone India case, the CBDT issued an instruction No 2 of 2015 noting that the Court had held that share premium was a capital account transaction that does not give rise to income and that the Board had accepted the said decision and directed that all field officers should adhere to the ratio decidendi of this judgement. This Instruction is binding on the Assessing Officer under Section 119 of the Act, as per the decision of the Hon'ble Apex court in the case UCO bank Vs.CIT (1999) 237 ITR 889 (SC). Therefore the action of the learned

CIT Appeals in applying the CBDT Instruction to delete the addition cannot be faulted.

10. In light of the above discussions and in the present facts and circumstances of the case and by relying on the various decisions of the hon'ble courts, the action of the ld.CIT(A) in deleting the additions made by the AO u/s. 56(1) on account of share premium at Rs.240/- per share collected by the assessee through allotment of shares to the non-resident companies is upheld by dismissing the grounds of appeal of the revenue for both the assessment years 2013-14 and 2014-15.

11. In the result the appeal of the revenue for the both the Assessment years 2013-14 and 2014-15 are dismissed.

Order pronounced in the court on 06th November, 2024 at Chennai.

Sd/-	**Sd/-**
(महावीर सिंह)	(एस. आर.रघुनाथा)
(MAHAVIR SINGH)	**(S. R. RAGHUNATHA)**
उपाध्यक्ष/**Vice President**	लेखासदस्य/**Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated, the 06th November, 2024
JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT - Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF