

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO.3380/MUM/2017 (A.Y: 2012-13)

Income Tax Officer – 2(2)(3) Room No. 542, Aayakar Bhavan, M.K. Road, Mumbai-400 020	v.	M/s. J.M. Realty (P.) Ltd. 702/A, Sambhav CHS Ltd., Venkatesh Park, Opp MTNL, Bhayander (West), Thane – 401 101 PAN: AABCN 5213 A
(Appellant)		(Respondent)

Assessee by : Shri Prakash G. Jhunjunwala

Shri Vishnu Agarwal

Department by : Shri Rejeev Gubgotra

Date of Hearing : 25.10.2018

Date of Pronouncement : 30.11.2018

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)–5, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 24.02.2017 for the A.Y. 2012-13.

2. The sole issue in the appeal of the Revenue is in respect of deletion of addition made u/s.68 of the Act by the Assessing Officer in respect of the share premium received by the assessee.

3. Briefly stated the facts are that, during the course of assessment proceedings Assessing Officer noticed that assessee issued 2,00,000 lakh shares of face value of ₹.10/- each for a premium of ₹.190 per share, thereby showing the share capital at ₹.20 lakhs and share premium at ₹.3.80 Crores. Therefore, the Assessing Officer is of the view that the assessee introduced substantial sum of cash credit in the book profits in the nature of share premium. He required the assessee to substantiate the genuineness of the transactions and furnish various details in respect of the shareholders. The details in the form of identify of the persons, capacity and credit worthiness, proof of transaction, bank statements confirmations, share application form, basis of valuation etc., Assessing Officer also issued notices u/s.133(6) of the Act to the 25 shareholders who invested in the assessee's company. The Assessing Officer stated that only partial details were furnished like balance sheet and P&L account of the shareholders, bank statements of the shareholders by the assessee. He observed that assessee has not produced the evidences called for, not established the identity, capacity and credit worthiness of the creditors. He also observed that the investors are all Kolkata based companies, the basis for valuation is not filed, therefore according to the Assessing Officer the assessee has miserably failed to establish the genuineness of the transactions, capacity and credit worthiness and

identity of the creditors. Thus he treated the entire amount of share capital and share premium of ₹.4 Crores as unexplained cash credit u/s. 68 of the Act.

4. Before the Ld. CIT(A) the assessee filed various details like PAN Card, Certificate of incorporation, CIN Master Data (ROC), Share application form, Board Resolution, Confirmation of Account, I.T. acknowledgement receipt, Balance sheet and Bank statements to establish the genuineness of the transactions, credit worthiness and identity of the creditors. Considering the evidences filed by the assessee, the Ld. CIT(A) was satisfied that the transactions are genuine and since the assessee has proved the identity, credit worthiness of the creditors, he held that the share capital and share premium received by the assessee cannot be added as unexplained cash credit u/s.68 of the Act, against which the Revenue is in appeal before us.

5. The Ld. DR strongly supported the orders of the Assessing Officer. He submitted that there is no basis for value of share premium and there was no business conducted by the assessee and therefore the investment made by the shareholders in a company not doing business is suspicious. Therefore, the Ld. DR submits that the assessee has not proved the genuineness of the transactions and therefore, he submitted that the

Assessing Officer is justified in treating the share capital and share premium as unexplained cash credit u/s. 68 of the Act.

6. Ld. Counsel for the assessee submitted that the assessee is into real estate business. The assessee has filed all the information before the Assessing Officer to prove the genuineness of the transactions, identity and credit worthiness of the creditors. Ld. Counsel for the assessee further submitted that the Assessing Office himself stated that the notices issued u/s.133(6) to the parties have been served and the replies have been received from all the 25 shareholders except in the case of M/s. NMJ Developers (P.) Ltd. and M/s Statford Textile Specialties Ltd. Ld. Counsel for the assessee submitted that in the course of assessment proceedings even these two companies have furnished the information to the Assessing Officer. Ld. Counsel for the assessee submitted that none of these companies are Kolkata based companies as alleged by the Assessing Officer. Ld. Counsel for the assessee submitted that the basis for valuation for share premium have been submitted to the Assessing Officer with valuation report. Ld. Counsel for the assessee submitted that the Net Asset Value (NAV) per share of the assessee company was arrived at ₹.125/- and the share premium was calculated at ₹.190/- and after the issue the NAV stood at ₹.206/- per share.

7. Ld. Counsel for the assessee further submitted that the share capital and reserves of the shareholder companies even as per the Assessment Order is much more than the investment made by the shareholders in the assessee company, this fact is admitted by the Assessing Officer.

Ld.Counsel for the assessee submitted that the assessee has provided all the necessary details in the form of addresses of the shareholders, PAN details, amount invested by the shareholders, confirmations of the shareholders along with the income tax returns, Share Application Form, bank statements, ROC return of allotment in respect of the shareholders and proved the genuineness of the transactions, credit worthiness and identity of the creditors and therefore the share capital and share premium cannot be added as unexplained cash credit u/s.68 of the Act.

8. Ld. Counsel for the assessee referring to the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Gagandeep Infrastructure (P.) Ltd. [394 ITR 680] submitted that the Hon'ble High court held that the share capital along with the premium received would be on capital receipt and not a revenue receipt and therefore, it cannot be added as unexplained cash credit u/s 68 of the Act. Ld. Counsel for the assessee further referring to the said decision submitted that the Hon'ble High Court also held that proviso to section 68 inserted by the Finance Act 2012, w.e.f. 01.04.2013 is effective only from the A.Y 2013-14. Ld. Counsel for

the assessee also relied on the decision of the Bombay High Court in the case of Pr.CIT v. Apeak Infotek [397 ITR 148] wherein it has been held that proviso to section 68 of the Act cannot be invoked on the increase of share capital by issue of shares at premium as the assessee filed the evidences before the Assessing Officer regarding the identity, capacity of the investor as well as the genuineness of the investment. He further relied on the decision of the Bombay High Court in the case of CIT v. Orchid Industries (P.) Ltd. [397 ITR 136] for the said proposition.

9. Ld. Counsel for the assessee also placed reliance on the decision of the Jurisdictional High Court in the case of Pr.CIT v. Veedhata Tower (P.) Ltd. [403 ITR 415] and also the Hon'ble Gujarat High Court in the case of Pr.CIT v. Vaishnodevi Refoils & Solvex [253 taxman.com 135] for the proposition that assessee is not required to explain the source of shareholder funds. Ld. Counsel for the assessee submitted that SLP filed by the Revenue against the decision of the Hon'ble Gujarat High Court is also dismissed by the Hon'ble Supreme Court which is reported in 257 taxman.com 440.

10. We have heard the rival submissions, perused the orders of the Authorities below and the decisions relied on. The Assessing Officer in the course of the assessment proceedings required the assessee to prove the genuineness of the transactions, credit worthiness and identity of the

creditors for the share capital and share premium allotted to them. The assessee filed various details like PAN Card, Certificate of incorporation, CIN Master Data (ROC) Share application form, Board Resolution, Confirmation of Account, I.T. acknowledgement receipt, Balance sheet and Bank statements before the Assessing Officer as well as the Ld.CIT(A). Since the assessee has shown the endorsement for filing of evidences before the Assessing Officer, the Ld. CIT(A) in order to verify the fact of filing of various details before the Ld. Assessing Officer by the assessee, assessment records were requisitioned by the Ld.CIT(A) and the Assessing Officer had forwarded the same to the Ld. CIT(A). All the details filed by the assessee before the Ld. CIT(A) have been verified with the assessment records by the Ld CIT(A).

11. The Assessing Officer also issued notices u/s 133(6) of the Act to all the 25 shareholders to which except two all the shareholders have replied with required information sought for by the Assessing Officer which is also evident from the Annexure B of the Assessment Order. However not convinced with this information furnished by the assessee and the shareholders, the Assessing Officer treated the share capital and share premium as unexplained cash credit relying on the certain case laws. He also observed that the assessee has not furnished complete information required, however, this appears to be not correct. The Ld. CIT(A) called

for the assessment record and verified whether the assessee has furnished the information as furnished before him. It is the categorical finding of the Ld. CIT(A) that the assessee has furnished all the information before the Assessing Officer. This finding of the Ld. CIT(A) has not been rebutted.

12. Ld. CIT(A) also observed that assessee has furnished addresses of the shareholders, PAN details, amount invested by the shareholders, confirmations of the shareholders along with the income tax returns, Share Application Form, bank statements ROC return of allotment. Even before us the assessee furnished all these details and these details are enough to prove the identity of shareholders. All the shareholders have furnished their bank statements along with income tax return acknowledgement and the bank statements reflects the investments made by the shareholders in the assessee company through banking channels and this prove the genuineness of the transactions. It is the finding of the Ld. CIT(A) at Para No. 4.10 that, when the balance sheet of each shareholders is examined the share capital and reserves and the amount invested in assessee company shows that the shareholders have enough funds to invest in the assessee company and this proves the credit worthiness of the shareholders. It is also the finding of the Ld. CIT(A) that none of these companies are Kolkata based companies. These findings

of the Ld. CIT(A) have not been rebutted by the Revenue with evidences. Ld.CIT(A) referring to the decision coordinate Bench in the case of M/s. Gagandeep Infrastructure (P.) Ltd. in ITA.No. 5784/Mum/2011; M/s. Green Infra Ltd v. ITO [38 taxman 253] and the Bombay High Court in the case of CIT v. Goa Sponge and Power Ltd., deleted the addition made u/s. 68 of the Act, with which we are in agreement.

13. In the case of ACIT v. M/s. Gagandeep Infrastructure (P.) Ltd. (supra) the Coordinate bench held as under:

"11. We have carefully perused the orders of the lower authorities. In our considered view, the issue of shares at premium is always a commercial decision which does not require any justification. Further the premium is a capital receipt which has to be dealt with in accordance with Sec 78 of the Companies Act, 1956. Further, the company is not required to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature in a capital receipts and is not income for its ordinary sense. It is not in dispute that the assessee had filed all the requisite details/documents which are required to explain credits in the books of accounts by the provisions of Sec. 68 of the Act. The assessee has successfully established the identity of the companies who have purchased shares at a premium. The assessee has also filed bank details to explain the source of the share holders and the genuineness of the transaction was also established by filing copies of share application forms and Form No. 2 filed with the Registrar of Companies. The entire dispute revolves around the fact that the assessee has charged a premium of Rs. 190/- per share. No doubt a non-est company or a zero balance sheet company asking for Rs. 190/- per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of the company to decide the premium amount and it is the wisdom of the share holders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such huge premium without any bar from any legislated law of the land. The amendment has been brought in the Income Tax Act under the head "Income from other sources" by inserting Clause (viib) to Sec. 56 of the Act wherein it has been provided that any consideration for issue of shares, that exceeds the fair value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be treated as the income of the assessee but the legislature in its wisdom has made this provision applicable w.e.f 1.4.2013 i.e. on and from A.Y. 2013-14. In so far as the year under consideration is concerned, the transaction has to be considered in the light of the provisions of Sec. 68 of the Act. There is no dispute that the assessee has given details of names and addresses of the share holders, their PAN Nos, the bank details and the confirmatory letters.

11.1. Considering all these undisputed facts, it can be safely concluded that the initial burden of proof as rested upon the assessee has been successfully discharged by the assessee. Even if it is held that excess premium has been

charged, it does not become income as it is a capital receipt. The receipt is not in the revenue field. What is to be probed by the AO is whether the identity of the assessee is proved or not. In the case of share capital, if the identity is proved, no addition can be made u/s. 68 of the Act. We draw support from the decision of the Hon'ble Supreme Court in the case of Loevely Exports Pvt. Ltd. 317 ITR 218. We, therefore do not find any error or infirmity in the findings of the Ld. CIT(A). Ground No. 1 is accordingly dismissed."

14. This decision has been affirmed by the Hon'ble Bombay High Court in the case of CIT v. Gagandeep Infrastructure (P.) Ltd. (supra) wherein the Hon'ble High Court held as under: -

"(c) Being aggrieved, the Revenue carried the issue in the appeal to the Tribunal. The impugned order of the Tribunal holds that the respondent assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares. The identity was established by the very fact that the detailed names, addresses of the shareholders, PAN numbers bank details and confirmatory letters were filed. The genuineness of the transaction was established by filing a copy of share application form, the form filed with the Registrar of Companies and as also bank details of the shareholders and their confirmations which would indicate both the genuineness as also the capacity of the shareholders to subscribe to the shares. Further the Tribunal while upholding the finding of CIT(A) also that the amount received on issue of share capital alongwith the premium received thereon, would be on capital receipt and not in the revenue field. Further reliance was also placed upon the decision of Apex Court in Lovely Exports (P) Ltd. (supra) to uphold the finding of the CIT(A) and dismissing the Revenue's appeal.

(d) Mr. Suresh Kumar, the learned counsel appearing for the Revenue contends that proviso to Section 68 of the Act which was introduced with effect from 1st April, 2013 would apply in the facts of the present case even for A.Y. 200809. The basis of the above submission is that the de hors the proviso also the requirements as set out therein would have to be satisfied.

(e) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 201314 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the preproviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the preamended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus

shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

(f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.”

15. In the case of Pr.CIT v. Apeak Infotek (supra) the Hon'ble Jurisdictional High Court of Nagpur Bench held as under: -

“8. Regarding Question A:-

(a) The issue raised by the Revenue in this question is to bring to tax the share premium received under Section 68 of the Act. We find that the issue of bringing the share premium to tax under Section 68 of the Act was not an issue which was urged by the Appellant – Revenue before the Tribunal. The only issue which was urged before the Tribunal as recorded in Para 11 of the impugned order is the addition of share capital and share application money in the hands of the Assessee as income under Section 28(iv) of the Act. We find that the CIT(A) did consider the issue of applicability of Section 68 of the Act and concluded that it does not apply. The Revenue seems to have accepted the same and did not urge this issue before the Tribunal. Mr. Bhoot, learned counsel appearing for the Revenue also fairly states that the issue of applicability of Section 68 of the Act was not urged by the Revenue before the Tribunal.

(b) It is a settled position in law as held by this Court in CIT vs. Tata Chemicals Ltd., 256 ITR 395 that in an appeal under Section 260A of the Act, the High Court can only decide a question if it had been raised before the Tribunal even if not determined by the Tribunal. Therefore, no occasion to consider the question as prayed for arises.

(c) In any case, we may point out that the amendment to Section 68 of the Act by the addition of proviso thereto took place with effect from 1st April, 2013. Therefore, it is not applicable for the subject Assessment year 2012-13. So far as the pre-amended Section 68 of the Act is concerned, the same cannot be invoked in this case, as evidence was led by the Respondents- Assessee before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment. Therefore, admittedly, the Assessing Officer did not invoke Section 68 of the Act to bring the share premium to tax. Similarly, the CIT(A) on consideration of facts, found that Section 68 of the Act cannot be invoked. In view of the above, it is likely that the Revenue may have taken an informed decision not to urge the issue of Section 68 of the Act before the Tribunal.

(d) We may also point out that decision of this Court in Major Metals Ltd. vs. Union of India, 359 ITR 450 proceeded on its own facts to uphold the invocation of Section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers to shares of the Assessee – Company were not creditworthy in as much as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000/- at premium at Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by this Court in its writ-jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this case has been

given by the Authorities that shareholder/share applicants were unidentifiable or bogus.:

(e) In the above view Question No. A is not being entertained in view of the decision in *Tata chemical Ltd.*, (supra). Accordingly, the question (A) is not entertained.

9. Regarding Question B.:-

(a) We find that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income. This conclusion was reached by the impugned order following the decision of this Court in *Vodafone India Services Pvt. Ltd.* (supra) and of the Apex Court in *M/s G.S. Homes and Hotel P. Ltd.* (supra). In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income.

(b) It is further pertinent to note that the definition of income as provided under Section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assessee in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of prov so was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that this Court in *Commissioner of Income Tax vs. M/s. Gangadeep Infrastructure (P) ltd* (Income Tax Appeal No.1613 of 2014 decided in 20 March 2017) has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1 April 2013 will not have retrospective effect and would be effective only from Assessment year 2013 14.

(c) In view of the above, Question No.B as proposed also does not give rise any substantial question of law as it is an issue concluded by the decision of this Court in *M/s Vodafone India Services Pvt. Ltd.* (Supra) and in the Apex Court in *M/s G.S. Homes & Hotels P Ltd.* (supra). Thus not entertained.

16. Hon'ble Bombay High Court further in the case of *CIT v. Orchid Industries (P.) Ltd.* (supra) held as under: -

"4] We have considered the submissions.

5] The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

6] The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of

shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case.”

17. In the case of Pr.CIT v. Veedhata Tower (P.) Ltd. the Jurisdictional High Court held as under: -

“7. The grievance of the appellant is that, even in the absence of the amendment to Section 68 of the Act, it is for the respondent-assessee to explain the source of the source of the funds received by an assessee. It is submitted that the respondent has not able to explain the source of the funds in the hands of M/s. LFPL and therefore this Appeal needs to be admitted.

8. This Court in Commissioner of Income Tax V/s. Gangadeep Infrastructure Pvt. Ltd, 394 ITR 680 has held that the proviso to Section 68 of the Act has been introduced by the Finance Act, 2012 w.e.f. 1st April, 2013 and therefore it would be effective only from Assessment Year 2013-14 onwards and not for the earlier assessment years. In the above decision reliance was placed upon the decision of the Apex Court in Lovely Exports (supra) in the context of the pre-amended Section 68 of the Act. In the above case the Apex Court while dismissing the Revenue's Appeal from the Delhi High Court had observed that, where the Revenue urges that the money has been received from bogus shareholders then it is for the Revenue to proceed against them in accordance with law. This would not entitle the Revenue to invoke Section 68 of the Act while assessing the respondent for not explaining the source of its source. In any event, the impugned order of the Tribunal has raised a finding of fact that the respondent had discharged the onus which is cast upon it in terms of the pre-amended Section 68 of the Act by filing the necessary confirmation letters of the creditors, their Affidavits, their full address and their pan.

9. Thus, the Tribunal has rendered a finding of fact which is not shown to be perverse. In any event, the question as proposed in law of the obligation to explain the source of the source prior to 1st April, 2013, Assessment Year 2013-14, stands concluded against the Revenue by the decision of this Court in Gangadeep Infrastructure (supra).

10. Therefore, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.”

18. Therefore, in view of the what is discussed above and various decisions referred to above and also in view of the evidences furnished by the assessee, the assessee has discharged the onus of proving the

genuineness of the transactions, credit worthiness and identity of the creditor. Even assuming that the assessee has not discharged his primary onus of proving the genuineness of the transactions, the share capital and premium received by assessee is capital in nature and the same cannot be treated as unexplained cash credit u/s. 68 of the Act. Hence the Assessing Officer is not correct in treating the share capital and share premium as unexplained cash credit u/s 68 of the Act. Thus, we hold that the Ld. CIT(A) has rightly deleted the addition. Hence, the order of the Ld. CIT(A) is confirmed.

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

Order pronounced in the open court on the 30th November, 2018

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER
Mumbai / Dated 30/11/2018
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum