

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER**

I.T.A. No. 1775/HYD/2014

Assessment Year: 2009-10

M/s. Hariom Concast & Steel Pvt. Ltd., HYDERABAD [PAN: AABCH8825N]	Vs	Income Tax Officer, Ward-2(2), HYDERABAD
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(Appellant)

(Respondent)

For Assessee : Shri Laxminiwas Sharma, AR
For Revenue : Shri K.J. Rao, DR

Date of Hearing : 19-09-2016
Date of Pronouncement : 05-10-2016

ORDER

PER B. RAMAKOTAIAH, A.M. :

This is an appeal by assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-III, Hyderabad dated 05-09-2014, confirming the addition of Rs. 2,18,50,000/- as income of assessee which was received towards share premium, invoking the provisions of Section 68 of the Income Tax Act [Act].

2. Briefly stated, assessee during the year has issued shares of Rs. 27,50,000/- with a premium of Rs. 2,18,50,000/- i.e., Rs. 10/-face value share was issued at Rs. 200/- with a

premium of Rs. 190/-. The shares were received from the following companies and the details are as under:

Share Premium	Share Capital (Rs)	Share Premium (Rs)
Sahuwan Motors Finance Pvt Ltd	75,000	14,25,000
Eastern Credit Capital Ltd	50,000	9,50,000
Procal Dealcomm Pvt Ltd	75,000	14,25,000
Dashmesh Fincap Pvt Ltd	1,00,000	19,00,000
Aasma Mercantile Pvt Ltd	1,00,000	19,00,000
Virgo Textiles Pvt Ltd	2,75,000	52,25,000
Inex Infotech Pvt Ltd	1,75,000	33,25,000
Essen Marketing Pvt Ltd	2,00,000	38,00,000
Nanchi Marketing Pvt Ltd	1,00,000	19,00,000
Total:	11,50,000	2,18,50,000

3. AO acknowledged that these companies were neither associate companies nor sister concerns nor any of the Directors of the company has influence over these companies. However, he asked for confirmation of the above investments from various companies which assessee has furnished. AO questioned the rationale for issuing shares at a huge premium. Assessee explained that:

- a) *The assessee-company is a running company making profits;*
- b) *The company has all the licenses and permissions for running industry in place;*
- c) *The company is already established and has good future potential of earning profits;*
- d) *The company has goodwill among investors;*
- e) *Investors unanimously have been allotted shares at Rs. 200/- per share;*

It has also been brought to AO's notice that the share premium do not go with the books value, since there are various other aspects such as future profitability, potentiality and expectation to earn profit by the investor.

It was further justified stating *“During the FY. 2008-09 there was a boom in the stock market. The Reliance power shares, before even the company started operating were issued at Rs. 480/- and Eenadu shares issued to Morgan Stanley at Rs. 300/- per share when the company was making losses. Similarly in the steel sector the shares of SAIL, JSW steel and many other companies were sold at very high premium. The net profit of the company which was Rs. 27.53 Lakhs for period ended 31-03-2008 has increased to Rs. 216.98 Lakhs for the period 31-03-2009. Keeping in view all these things, the investors have looked into the potentiality of the company’s growth”*.

3.1. However, AO did not agree and invoking the provisions of Section 68 treated the amounts as ‘unexplained cash credits’ holding that as the *genuineness and creditworthiness of the party giving premium is doubtful and defies business logic*.

3.2. Before the Ld. CIT(A), assessee filed detailed submissions and justification. However, Ld. CIT(A) notes that assessee has not furnished any assessment particulars of the companies as sought for and rejected the contentions by stating as under:

“6.1 It is clear that the issue of share premium charged by the companies mentioned in the assessment order namely Sahuwan Motors Finance Pvt. Ltd., Eastern credit capital ltd., Procal Dealcomm Pvt. Ltd., Dashmesh Fincap Pvt. Ltd., Aasma Mercantile Pvt. Ltd., Virgo Textiles Pvt. Ltd., Inex Infotech Pvt. Ltd., Essen Marketing Pvt. Ltd., Nanchi Marketing pvt. Ltd., all of which have just a total share capital of Rs.11,50,000/- is suspect in nature. None of these companies are public/listed companies to have charged a substantial share premium as they are not established or known entities. Hence, the share premium of Rs.2,18,50,000/- is nothing but a sham transaction and colourable and hence the ratio of the decision relied upon by the assessing, officer i.e., Mc. Dowell vs. CTO 154 ITR 148 of the Hon’ble Apex Court is applicable.

6.2 It is obvious that the appellant company has sought to introduce cash credits without establishing identity, creditworthiness and genuineness as required u/s.68 of the IT. Act. In this context, it would be

most pertinent to refer to the ratio of decisions in a plethora of cases including the cases of *Agarwal Coal Corporation vs Addl.CIT* [135 ITD 270-Indore], *Dhingra Global Credence (P) Ltd vs ITO* [1 ITR(T) 529 Delhi], *Nova Promoters & Finlease* [342 ITR 169-Delhi], *NR Portfolio(P) Ltd* [263 CTR 456-Delhi], *Onassis Axles(P) Ltd vs CIT* [364 ITR 53-Delhi], *Gayathri Associates vs ITO* [221 Taxman 143-Andhra Pradesh], *Dr. D. Siva Sankara Rao vs ITO*[356 ITR 117-Andhra Pradesh], *Sri Chakra Cements Ltd vs ITO* [221 Taxman 181-Andhra Pradesh], *Vijay Kumar Talwar vs CIT*[330 ITR 1-Supreme Court], *CIT vs MAF Academy(Pvt) Ltd*[361 ITR 258-Delhi]. Considering the ratio of the plethora of these decisions, in brief, it is clear that the three vital limbs of Section 68 of the IT Act i.e., identity, creditworthiness and genuineness have to be clearly established. While agreeing with the findings of the assessing officer, it is clear that the share premium received from the various companies is clearly cash credits as the identity, genuineness and creditworthiness of the companies mentioned in the assessment order is doubtful and there is no reason to interfere with the finding of the Assessing Officer. The assessment order in this case reflects a good attempt made by the assessing officer to bring out the modus operandi and hence the same has been brought out in detail in this appellate order. The order of the assessing officer is upheld”.

4. Assessee is aggrieved and contested by raising the following grounds:

- “1. The learned CIT erred in facts and law while passing the order.
2. The learned CIT erred in arriving at the conclusion that the company has sought to introduce cash credits without establishing identity, creditworthiness and genuineness as required u/s. 68 though the assessee has provided the details of the investor companies along with the letters confirming the investment.
3. The learned CIT (A) erred in treating the transactions as unexplained cash credits even though all the transactions were made through banking channels.
4. The learned CIT erred in concluding that any outsider will not pay such high amount of premium for the present situation of business of the assessee though the assessee has also provided the logical reasons for issue of shares at premium and it is the investor judgement to invest.
5. The CIT erred not to consider the case of *Green Infra Ltd. v. ITO* [TS-420-IT AT2013(Mum), Income-tax Appellate Tribunal (Tribunal) wherein it was held that the share allotment at premium by a newly

incorporated company cannot be taxed as income invoking section 56(1) of the Income Tax Act (Act). Furthermore, if the genuineness and identity of the depositor is established and the transaction was carried out through banking channels, the transaction cannot be taxed under section 68 of the Act.

6. For these and other grounds which may be raised during or before hearing of appeal, it is prayed that relief sought be granted”.

5. Ld. Counsel for assessee submitted that order of the CIT(A) is both factually incorrect as well as legally. It was submitted that those companies have their own share capital and what the Ld. CIT(A) has noted as total share capital of Rs. 11,50,000/- is the share capital allotted by the assessee-company to them as noted in the AO's order. Therefore, the finding of the CIT(A) that they have meager share capital is not correct. Further, it was submitted that assessee-company has allotted shares at a premium not only in this year, but also in earlier year as can be seen from the assessment order itself. In earlier year, as on 31-03-2008, 1.30 Crores of share capital was issued with a premium of Rs. 2.29 Crores. This was accepted. It was further submitted that assessee has justified the premium with market conditions at that point of time and business profile of assessee-company. Ld. Counsel relied on the case law for various propositions to submit that Revenue authorities cannot question the charging of such huge premium which has no bar by any legislated law of the land. It was further submitted that the details of the subscribers are before the authorities and without making any enquiries, the annual reports and other details filed by assessee were doubted and the transaction was held to be sham and bogus. He relied on the proposition that share premium realised from the issue of shares is of capital nature and forms part of share capital of the

company and therefore, cannot be taxed as 'revenue receipt'. It is also settled proposition of law that any expenditure incurred to the expansion of capital base of a company is to be treated as 'capital expenditure' as has been held by the Supreme Court in the case of CIT Vs. Allahabad Bank Ltd., [73 ITR 745]. It was submitted that the share premium received by the company cannot be taxed u/s. 56(1) of the Act. It was submission of Ld. Counsel that the share premium by its very nature as a 'capital receipt' and is not income in ordinary sense. He relied on the following case law:

- i. ITO Vs. Lanyard Foods Ltd. ITA No. 5549/Mum/2003;
- ii. CIT Vs. Divind Leasing & Finance Ltd., ITA No. 53/2005(Del);
- iii. CIT Vs. Lovely Export Pvt Ltd., ITA No. 305/2006 (Del);
- iv. DCIT Vs. M/s. Misty Meadows (P) Ltd., New Delhi ITA No. 422/JP/2012;
- v. ACIT Vs. Salasar Nylon Pvt. Ltd., ITA No. 2997/Ahd/2008;
- vi. ARL Infratech Ltd. Vs. ACIT, ITA No. 619/JP/2013;
- vii. ITO, Ward-11(1) Vs. M/s. Empire Buildtech Pvt. Ltd., ITA No. 4656/Del/2009;
- viii. ITO Vs. M/s. Trident Shelters Pvt. Ltd., ITA No. 1160/Hyd/2012;
- ix. Green Infra Ltd., Vs. ITO [TS-420-ITAT-2013(Mum)];

6. Ld. DR submitted that there is no justification for receiving so much premium and therefore, the same is to be considered as 'cash credits' and hence the orders of the AO and CIT(A) are correct on facts.

7. We have considered the rival contentions and perused the orders of authorities. There is no denial that all the said nine companies are assessee on record and they have confirmed investing in the assessee-company. Whatever may be the reason for issuing shares at a premium, the share premium *per se* cannot be considered as 'cash credits' in the absence of any evidence to the contrary. It is a fact that those companies invested in the share capital and they were allotted shares also. If it is kept as a share application money, then a presumption can be raised that the amounts were received as 'share application money' instead of loans or credits, however, in this case, these amounts are received as share capital and shares were allotted to those companies. It is also true that those companies also reflected the investments and shown the amounts invested in assessee-company in its Balance Sheets. However, AO instead of enquiring with those companies, simply drew presumptions which are not based on any facts. If he is doubting the extent of premium as well as receipt of moneys, he should enquire from those companies or at least record some statements from those parties so as to examine the very nature of the transaction. Nothing was done by the AO.

7.1. Co-ordinate Bench in the case of M/s.Green Infra Ltd., in ITA No. 7762/Mum/2012 dt. 23-08-2013, has considered similar treatment of share premium of Rs. 47,97,10,000/- on the issue of equity shares to the shareholders as income of that assessee. The ITAT considered the issues which are similar to the present case and held as under:

"10. We have considered the rival submissions and carefully perused the orders of the lower authorities and the material evidences

brought on record in the form of Paper book. The entire dispute revolves around the charging of share premium of Rs. 490/- per share on a book value of Rs. 10/- each. This dispute is more so because of the fact that the assessee company was incorporated during the year under consideration. Therefore, according to the revenue authorities, it is beyond any logical reasoning that a company with zero balance sheet could garner Rs. 490/- per share premium from its subscribers. Such transaction may raise eyebrows but considering the subscribers to the assessee company, the test for the genuineness of the transaction goes into oblivion. It is an undisputed fact admitted by the Revenue authorities that 10,19,000 equity shares has been subscribed and allotted to IDFC PE Fund-II which company is a Front Manager of IDFC Ltd., in which company Government of India is holding 18% of shares. The contributors to the IDFC PE Fund-II who is a subscriber to the assessee's share capital, are LIC, Union of India, Oriental Bank of Commerce, Indian Overseas Bank and Canara Bank which are all public sector undertakings. Therefore, to raise eyebrows to a transaction where there is so much of involvement of the Government directly or indirectly does not make any sense.

10.1. No doubt a non-est company or a zero balance company asking for a share premium of Rs. 490/- 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 a 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 of huge premium without any bar from any legislated law of the land. Details of subscribers were before the Revenue authorities. The AO has also confirmed the transaction from the subscribers by issuing notice u/s. 133(6) of the Act. The Board of Directors contains persons who are associated with IDFC group of companies, therefore their integrity and credibility cannot be doubted. The entire grievance of the Revenue revolves around the charging of such of huge premium so much so that the Revenue authorities did not even blink their eyes in invoking provisions of Sec. 56(1) of the Act.

10.2. Let us consider the provisions of Sec. 56(1) of the Act:

56.1. "Income from other Sources

Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E."

10.3. A simple reading of this section show that income of every kind which is not to be excluded from the total income shall be chargeable to income tax. The emphasis is on that 'income of every kind', therefore, to tax any amount under this section, it must have some character of

“income”. It is a settled proposition of law that capital receipts , unless specifically taxed under any provisions of the Act , are excluded from income. The Hon’ble Supreme Court has laid down the ratio that share premium realized from the issue of shares is of capital in nature and forms part of the share capital of the company and therefore cannot be taxed as a Revenue receipt. It is also a settled proposition of law that any expenditure incurred for the expansion of the capital base of a company is to be treated as a capital expenditure as has been held by the Hon’ble Supreme Court in the case of Punjab State Industrial Corporation Ltd. Vs CIT 225 ITR 792 and in the case of Brooke Bond India Ltd. VS CIT. Thus the expenditure and the receipts directly relating to the share capital of a company are of capital in nature and therefore cannot be taxed u/s. 56(1) of the Act. The assessee succeeds and Revenue fails on this account.

11. The Ld. Departmental Representative has raised an altogether plea by stating that the nature of the transaction should also be judged within the parameters of the Sec. 68 of the Act. The counsel for the assessee strongly objected to this but in the interest of justice and fair play, we allowed the DR to raise this issue. For this, we draw support from the decision of the Hon’ble Supreme Court in the case of Kapurchand Shrimal Vs CIT 131 ITR 451, wherein the Hon’ble Supreme Court has laid down the ratio that

“It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh, unless forbidden from doing so by statute.”

11.1. Considering the submissions of the Ld. DR in the light of the above ratio, let us test the transaction in the light of the provisions of Sec. 68 of the Act. As per Section 68 – the initial onus is upon the assessee to establish identity, genuineness of the transaction and the capacity of the lender or the depositor. The subscribers to the share capital are all companies. The confirmations of the transactions have been received by the AO by issuing notice u/s. 133(6) of the Act, therefore, identity has been established beyond all reasonable doubts nor the Revenue authorities have questioned the identity of the share holders. The genuineness of the transaction can also be safely concluded since the entire transaction has been done through the banking channels duly recorded in the books of accounts of the assessee duly reflected in the financial statement of the assessee. The bank statement is exhibited at pages 101 and 102 of the Paper book in which the transaction relating to the allotment of shares are duly reflected . In the instant case, the capacity of the share holders cannot be doubted as has been pointed out elsewhere in our order that 98% of the share is held by IDFC Private Equity Fund-II which is a front manager of IDFC Ltd., and the contributors

in IDFC Private Equity Fund-II are LIC, Union of India, Oriental Bank of Commerce, Indian Overseas Bank and Canara Bank which are public sector undertakings.

11.2. Now the only point of dispute is the nature of transaction which according to the Revenue authorities is beyond any logical sense and which is the charging of share premium at the rate of Rs. 490/- per share. According to the Revenue authorities this is a sham transaction. So far till now, we have seen and examined the sources of funds. Let us see the application of funds and who are the ultimate beneficiaries of this share premium which may clear the clouds over the transaction alleged to be a sham. We find that the assessee company has invested funds in its three subsidiary companies namely (i) Green Infra Corporate Wind Ltd. (ii) Green Infra Wind Assets Ltd and (iii) Green Infra Wind Farms Ltd., wherein the assessee is holding 99.88% of share capital which means that the funds have not been diverted to an outsider. This clears the doubt about the application of funds and the credibility of the company in whom the funds have been invested. Since the assessee itself is holding 99.88% of shares and in turn the assessee company's 98% of shares are held by IDFC PE Fund-II, this entire share holding structure cannot be said to generate any transaction which could be said to be sham.

12. We have considered the grievance of the Revenue from all possible angles and by applying the provisions of Sec. 56 of the Act and at our stage we have gone to the extent of testing the transaction within the parameters of Section 68 of the Act. We could not find a single evidence which could lead to the entire transaction as sham. Our view is also fortified by the share holding pattern as explained to us and as substantiated by the material evidence on record. We find that the share holders in all the related transaction under issue are directly or indirectly related to the Government of India. Therefore, considering the entire issue in the light of the material evidence brought on record, in our considerate view, the Revenue authorities have erred in treating the share premium as income of the assessee u/s. 56(1) of the Act. In our considerate view, for the reasons discussed hereinabove, we do not find it necessary to apply the provisions of Sec. 68 of the Act. We, therefore, direct the AO to delete the addition of Rs. 47,97,10,000/-. Ground No. 2 & 3 are accordingly allowed".

8. The other case law relied on by assessee is also on the issue that share premium cannot be brought to tax invoking the provisions of Section 68, unless there is a link with either *quid pro quo* transaction or investing by assessee-company in their accounts so as to receive it back as share capital. No such

evidence was brought on record. On the given facts of the case, and on the basis of the confirmation filed by the companies, we cannot hold that this amount can be brought to tax invoking the provisions of Section 68. The genuineness and credit worthiness of those companies is not in dispute. What AO disputed was the amount of premium. Moreover, if the amounts are doubted from those companies, the amount of share capital at Rs.10 was not doubted. Only amount of premium was doubted. Therefore the companies transactions with assessee are partly accepted as genuine. On facts of the case provisions of Sec. 68 can not be invoked. Respectfully following the principles laid down by the Coordinate Bench in the case of M/s.Green Infra Ltd., in ITA No. 7762/Mum/2012 dt. 23-08-2013 (supra), we have no hesitation in holding that the orders of the AO and CIT(A) are bad in law. In view of this, we delete the addition so made by AO and confirmed by CIT(A).

9. In the result, appeal of assessee is allowed.

Order pronounced in the open Court on 05th October, 2016

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 05th October, 2016

Copy to :

- 1. M/s. Hariom Concast & Steel Pvt. Ltd., 15-8-511/1/2, Feelkhana, Hyderabad.*
- 2. The Income Tax Officer, Ward-2(2), Hyderabad.*
- 3. CIT (Appeals)-III, Hyderabad.*
- 4. The CIT-II, Hyderabad.*
- 5. D.R. ITAT, Hyderabad.*
- 6. Guard File.*