आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI C.N PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.4860/Mum/2016

(**निर्धारण वर्ष /** Assessment Year : 2012-13)

DCIT, 1(1)(2), 579, Aayakar Bhavan, M.K. Road, Mumbai-400020	**बनाम**/ v.	M/s. Finproject India Private Ltd., SP-1013, Sitapura, Industrial Area, Phase-III, Mahatma Gandhi Hospital Road, Jaipur, Rajasthan-302022
		स्थायी लेखा सं./ PAN : AABCF4445N
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by :	Shri Rajat Mittal (DR)
Assessee by:	Shri Prem Prakash Pareek Mrs. Sudha Shetty

सुनवाई की तारीख /**Date of Hearing : 25.04.2018**

घोषणा की तारीख /**Date of Pronouncement : 02.05.2018**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue , being ITA No. 4860/Mum/2016 , is directed against appellate order dated 29.04.2016 passed by learned Commissioner of Income Tax (Appeals)-2, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2012-13, the appellate proceedings had arisen before learned CIT(A) from the assessment order dated 25-03-2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> *1. " Whether on the facts and in the circumstances of the case and in law, the CIT(A) was correct in deleting the addition made on share premium u/s.68 of the Act despite the fact that the assessee did not satisfactorily explain the "nature" of share premium by Justifying the excess premium received compared to its intrinsic value?'*
>
> *The appellant craves leave to add to, amend or withdraw the aforesaid ground of appeal."* .

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing of soles for footwear. The assessee filed return of income for the impugned assessment year wherein it declared its total income to the tune of Rs. 1,54,62,230/- . The case of the assessee was selected for scrutiny by Revenue for framing an assessment u/s 143(3) and notices u/s. 143(2) were issued by the AO to the assessee. During the course of assessment proceedings u/s 143(3) r.w.s. 143(2), it was observed by the AO that the assessee had allotted 41,86,583 equity share of face value of Rs.10 each at a premium of Rs. 10 each , wherein the total amount of Rs. 8,37,31,660/- were received by the assessee from following shareholders , as detailed here under:-

Subscribed by	Number of Shares	Face Value	Equity share capital	Share Premium per share	Share premium account	Total amount received
Asian Compounds Limited, Hongkong	10,37,315	10	10,37,3150	10	10,37,3150	2,07,46,300
Asian Compounds Limited, Hongkong	31,07,428	10	31,07,4280	10	31,07,4280	6,21,48,560
Finproject Asia Ltd. , Hongkong	10,358	10	1,03,580	10	1,03,580	2,07,160
Finproject Asia Ltd., Hongkong	31,482	10	3,14,820	10	3,14,820	6,29,640

Total	41,86,583		4,18,65,830		4,18,65,830	8,37,31,660

The AO observed that equity shares of the face value of Rs. 10 each were issued at the premium Rs. 10 each by the assessee during the impugned assessment year, the assessee was asked by the AO to submit details and explanation vide notice u/s. 142(1) was issued by the AO along with questionnaire, as detailed hereunder:-

> *"Reason for share premium of 4,18,65,830/-, Provide ROC forms for allotment of shares. Copy of income tax returns of the shareholders along with computation of income. Copy of incorporation certificate of foreign investor along with its share holding pattern. Justify the share premium and the financial position of the shareholders to invest in the shares of the Assessees Company at such high premium amount. The business was commenced on 11/01/2011. Show cause why the share premium taken at the start of business operation cannot be treated as normal business income and taxed in the hands of the assesse company".*

The assessee submitted its replies vide written submissions filed on 03-03-2015 and 23-03-2015 before the AO . The AO after considering the submissions of the assessee made additions to the income of the assessee u/s. 56(1) of the 1961 Act with respect to premium charged on allotment of share to the tune of Rs.4,18,65,830/- by observing as under:-

> *(i) The assessee issued 4,18,65,83/-shares of Rs.10 each at a premium of Rs.10 per share to subscribers and group entities. Thus a capital representing face value of Rs. 4,18,65,830/- and the premium of Rs.4,18,65,830/- totalling to Rs. 8,37,31,660/- was collected during the year.*
>
> *(ii) During the course of assessment proceedings the assessee was specifically asked to give justification for the premium charged. The assesee's submission is that the issuance of-shares at a premium was a commercial decision and issues as per the terms of issue to group concerns and known persons. The valuation was done using Discounted Cash Flow Method and the same was adopted for charging the premium. The assessee further contended that all the subscribers have the explained sources of income and the assessee group has also shown substantial growth in the subsequent years in a consolidated form. The submission of the assesse in this regard has been made in the context of the newly introduced provisions of section 56(2)(viia) of the Act and CBDT notification dated 29/11/2012. This provision however has no relevance in the present assessment year and as such needs no deliberation at this stage.*

(iii) The assessee company's return of income filed for the current year as well as the preceding year shows consistent losses. In this scenario the valuation done by adopting DCF method without considering the Income Tax liability of the preceding year which is confirmed and crystallized in appellate proceedings is meaningless and once these liabilities are taken into consideration the share valuation will be much below the value arrived at by the assesse. Therefore the valuation arrived at by assesse and reliance on the valuation report in this regard cannot be accepted to justify the premium.

(iv) The assessee furnished certain details and documents with regard to the issue and filing compliance made with ROC.

(v)As regards the justification and the factors considered for allotting shares at a premium it is submitted that, the assesse placed reliance on the investments in its subsidiary companies and other companies and its present diversified activities and revenue earning potential, future business plans and its impact and returns to the investors etc. These submissions are farfetched in so far as the future prospects are concerned. The subsequent financial results though shows taxable revenues, the same are not exclusively derived from the factors staled now to justify the valuation. As could be seen from the assessee's financial statements the major sources of income in succeeding two years is from interest and dividend on investments. This further authenticates the department's stand that the assessee's projections have not been materialized. Hence the valuation is lacking proper base.

4.4.2 Now coming to the fresh capital of Rs, 4,18,65,830/- collected as premium of Rs.10/- per share from the investor, the taxability of this amount u/s.56(1) of the Act are analyzed as under:

(a) As far as the valuation of the shares and charging a premium of Rs. 10/-, is concerned the submission on valuation based on volatile investments in other companies scrips are nothing but hypothetical situations relied upon by assesse and not at all backed by facts which are purely future events without any certainty.

(b) Moreover, the entities subscribing to the preferences shares are admittedly group companies/concerns of the assesse.

(c) The assessee's reply to a specific query on applicability of provisions of section 56(1) of the Act to this amount is silent on the pretext that the utilization is in accordance with section 78 of the Companies Act.

(d) During the course of assessment proceedings the assesse was specifically asked to give justification for the premium charged. It could be seen from the above submissions and the details provided no indication or evidence as to how the assesse has charged the share premium at Rs. 10/-per share on allotment of shares.

(e) In the event of any hidden assets in the form of patents, copy right, intellectual property right, or even realistic investments etc belonging to the company based on which the company would be likely to

substantially enhance its profits, the same would have a bearing on the premium to be charged on allotment of the fresh shares. However, the notes to accounts forming part of the final accounts as well as the director's report do not indicate any such hidden assets with its present market values. Therefore, the company has no justification for charge of a huge amount of premium for fresh issue of shares. The same has to be viewed from the angle as to whether any person being a prudent investor would after due diligence of the financial state of affairs of the company would be willing to pay the same without any vested interest or in connivance with the recipient.

In this scenario, the basis on which the valuation needs to be done is:
i) Nature of assesses business and its past, present and future potentiality to grow.
(ii) Memorandum and articles of association of the company,
(iii) Projected working results of the company, at least for a base period,
(iv) Measurement of any material contingent liabilities expected in future,
(v) Company's estimations regarding its taxability positions in future, based on past assessment, tax shields available and current rates of taxation;
(vi) Information regarding non-business assets and unusually high values of assets.
(vii) Other information and statements of fact submitted orally or in writing relating to the company by Directors, key employees.
(viii) Discussion with the Senior Executives of the company.
(ix) Working capital requirement based on Management's plans and projections;
(x) Capital expenditures requirements based on Management's plans and projections etc.

The three methods which are commonly used in this kind of a valuation of shares are:

(a) The Profit Earning Capacity Value (PECV) Method, which presumes the continuity of business and uses the past earnings and futures projections to arrive at an estimate of future maintainable profits. These profits are capitalized at a rate, which, in the opinion of the value, is equivalent to the yield or returns likely to be expected by a potential investor.

(b) Net Asset Value (NAV) Method, which indicates the asset backing to the business. Though this method is inconsistent with the 'going concern concept' it is definitely indicative of the minimum net worth of the business.

(c) The Discounted Cash Flow (DCF) Method, which principally advocates the use of Free Cash Flow over and explicit period, with a terminal value for perpetuity. This method deals with capitalization of present value of future cash flows by a factor, keeping in view the weighted average cost of capital and assumed growth rate for terminal value of perpetuity.

The basis of and Approach to Valuation should be:

(a) Exercising on the widely accepted valuation methods. For this purpose, a review of various documents, and certain assumptions, discussions with management, and the information, particulars and explanations received from directors and management.

(b) Normally, valuation of share is made on a consideration of some or all, or a number of relevant factors. Thus, dividend paid, growth prospects values of net assets, earning power, and cash flows, etc are some of the main factors, on which any valuation is usually based. The answer to the question whether some or all of these factors can be applied depends upon the circumstances of each case;

The valuation adopted in this case in unrealistic and for which no supporting evidence exists. The realistic figures and actual achievements do not reflect any such valuation.

It is only common sense that past performance should be given suitable weightage for the valuation of a company and its shares. Furthermore, no correspondence or any documentary evidence has been brought on record in the course of the assessment proceedings to justify the higher valuation of the shares.

(f) To summarize, the valuation, that seeks to justify share premium chargeable amounting to Rs. 10/- per share deserves to be rejected for the following reasons:

No authentic documentary evidence has been filed to justify the basis on which premium is charged.

No weightage has been given nor any reason assigned for non-consideration past or future performance of the company for the valuation purposes or its promoters' or directors.

As already discussed the company does not possesses any patent, copy right, intellectual property rights etc, which could be considered as hidden assets which could have enhanced the value of the shares of the company and therefore justified to some extent the charging of very high premium for allotment of shares.

All the assets held as on date by assessee are volatile with no certainty of realization or realizable values as contended by assesse.

Determination of virtual certainty that sufficient future taxable income will be available is a matter of judgment based on convincing evidence and will have to be evaluated on a case to case basis. Virtual certainty refers to the extent of certainty, which for all practical purposes, can be considered certain. Virtual certainty cannot be based merely on forecasts of performance such as business plans. Virtual certainty is not a matter of fact. To be convincing, the evidence should be available at the reporting date in concrete form.

Thus the assesse company has totally failed to justify the charging of the premium and therefore the receipt of money amounting to Rs. 4,18,65,830/-. Even otherwise, the assesse company has failed to submit the relevant information which is mandatory under law to prove genuineness, purpose and justification for a transaction. The assesse has not been able to prove beyond reasonable doubt, the genuineness of the transaction.

4.5.3 The alleged share premium and share collected on 31/03/2012 amounting to Rs. 4,18,65,830/- and is not utilized for the purpose of the objectives for which the same was collected and as such the conditions specified under the Companies Act, 1956 are violated:

(a) Section 78 of the Companies Act, 1956, provides that the amount in the share premium account can only be utilized towards;
1. Issue of fully paid bonus shares,
2. Writing off of preliminary expenses of the Company,
3. Writing off of the expenses, commission or discount on issue of shares or debentures,
4. Providing for premium payable on redemption of preference shares or debentures;
5. Buy-back of equity shares.

(b). The rules relating to maintenance of capital are designed to ensure that:
1. The money that the company received from, or is promised by the shareholders for, their share is equivalent to the nominal value and premium payable for the shares;
2. The money received by the company is maintained as capital fund to which the creditors can look as security for their debts.

(c) The facts available on record shows, the alleged share premium received has not been utilized for any of the above specified purposes. These funds are in fact utilized for investments in inventories, deposits. This fact establishes that, the alleged share premium received by assesse has not been utilized for the specified purposed meant and has been diverted for non-specified purposes in violation of the provisions of the Companies Act, 1956.

(i) Therefore the amount brought in to the books of assesse in the form of share premium is not a share premium within the meaning of the provisions of the Companies Act and hence the same needs to be treated as such for the purpose of the Income tax Act. Therefore the very nature of the amount brought in the books is not a share premium but the receipt the purpose of which the assesse in the form of share premium is not a share premium within the meaning of the provisions of the companies Act and hence the same needs to be treated as such for the purpose of the income tax Act.

(ii) As regards utilization of share premium, the assesse's only submission is that there is no violation u/s. 78 of the companies act in its case. The funds in fact have flown out of the designated account and in to highly risk bearing other activities. As such the assesse's cannot now contend that the amount has been maintained as capital fund as

required under the companies act. The amounts received back or which may be received back subsequently from the assesse's business activities are thus clearly different from share premium but it represents only return on such business activity. The utilization of such funds subsequently for any purpose is clearly distinguishable and separate from the share premium account. The book entry in reduction in share premium is only an accounting formality and cannot represent the transaction in real sense. Hence this contention of assesse is not acceptable and not substantiated with evidences.

iii) Hence the introduction of the fresh capital at a premium of Rs. 10/- amounting to Rs. 4,18,65,830/- partakes the character of income u/s. 56(1) of the Act.

4.5.4 having established above facts and in law that the transaction in question is not genuine and the form in which it is brought in the books of assesse (i.e. the introduction of alleged share premium) the taxability of the same in the hands of assesse under section 56(1) under the head income from other sources is analyzed as under.

(a) Having established the fact that the amounts received by the assesse in the guise of share premium is in fact is not a share premium but transfer of funds in the nature of revocable transfer of assets within the meaning of section 61 to 63, the same is well within the scope of income defined u/s. 5 and the changing provisions of section of the income tax Act. Therefore the income arising by virtue of a revocable transfer of assets shall be chargeable to income tax as the assesse and shall be included in its total income.

(b) Further the assesse has no liability to repay this amount to the alleged investors as the return on investment for the investor is a subject matter of high volatility.

(c) As per section 56(1) 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. This income is not chargeable under the head "income from other sources".

(d) In view of the above stated facts, the amount of Rs. 4,18,65,830/- which is collected and utilized in violation of section 78(2) of the companies Act during, the year is taxed as assessee's income for the year under the head income from other sources within the meaning of section 56(1) of the I.T. Act, 1961.

4.5.5 the following guiding factors laid down by various courts have been considered in concluding that the amounts received by assesse are taxable in the hands of assessee under the head income from the other sources:

There must be an identification sources - Before a particular amount can be characterized as an income, there should be definite source which can be an identifiable one, maybe an individual or an institution,

or a body of people or any other source - CIT vs. Ramdeo Samadhi [1986] 160 ITR 179 (Raj.).

Source need not legal - There is nothing to indicate that the source must be one which is recognized under the law for if that were so, then the income derived from illegal business could not be liable to tax - CIT vs. Smt. Shanti Meattle [1973] 90 ITR 385 (All.) / Addl. CIT v. Ramkripal Tripathi [1980] 125 ITR 408(All.}.

Illegal income - Primary function of income- tax Act is to bring income of various kinds into tax net and tax authorities are not concerned about manner or means of acquiring income. Income might have been earned illegally or by resorting to unlawful means, but illegally or by resorting to unlawful means, but illegality tainted with earning has no bearing on its taxability and income earned by an offender still would be an income liable for assessment. Thus income earned by assesse from income tax refunds collected by him illegally by producing bogus TDS certificate would be assessed under Act- CIT v. K. Thangamani [2009] 177 Taxman 499/309 ITR 15{Mad.).

Legal effect prevails over substance of transaction - In taxing a receipt to income -tax the authorities are only concerned with the legal effect or character of the transaction and not the substance of the transaction - Pandit Lakshmikanta Jha Vs. CIT [1970] 75 ITR 790(SC).

Legality or otherwise of activity - under the Indian Income- Tax Act, the authorities are not concerned with whether the activities of an assessee are legal or illegal - Harinder Singh v. ITO [1987] 166 ITR 763(All.).

The income tax law is not concerned with any illegality in respect of the earning of any income - Satyanarayan Rungta v. CIT[1983] 115 ITR 382(Cal).

Name/label given - Name or label given by a party to particular amount is not conclusive - CIT v. J.D. Italia [1983] 141 ITR 984(AP.).

The name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. In such a situation, the question always it what is the real character of the payment , not what the parties call it - Eklingji Trust v, CIT [1986] 158 ITR 810(Raj.).

Book entries - the matter of taxability cannot be decided on the basis of the entries which the assesse may choose to make in his accounts but has to be decided in accordance with the previous of law - CIT v. Mogul Line Ltd. [1962] 46 ITR 590 (Bom.)-

Alternatively , in the opinion of the AO the share premium charged was in excess of the intrinsic valuation of shares, additions were confirmed by the AO u/s. 68 of the Act, as the assessee , in the opinion of the AO , could not offer satisfactory explanation with respect to the nature of credit entry and as per AO the assessee did not justified the excessive share premium on the

bases of intrinsic credit entry which as per AO remained unexplained warranting additions to the income of the assessee u/s 68 of the 1961 Act, vide assessment order dated 25-03-2015 passed u/s 143(3).

4. Aggrieved by assessment order dated 25-03-2015 passed by the AO u/s 143(3), the assessee came in appeal before learned CIT-A and made following submission here under:-

> *"5.2 The assessee company has made the following submissions.*
>
> *"That the assessee M/s. Finproject India Pvt. Ltd. (Appellant) is a Private Limited Company incorporated on 06.01.2010 with 100% FDI.*
>
> *2. The Company is engaged in manufacturing of Soles for footwear at F-1292, Sitapura Industrial Area, Phase-111, Jaipur, and has two foreign companies as its shareholders & Promoters. Promoter Company has vast experience in its products and raw material required for product because it is using the same technology as its parent company, name as Finproject Spa who is an Italian company, has already 45 years in using in such technology. Finproject Spa is the Leader and Pioneer Company in the market of expansion material. It has operations in 6 countries; Italy, Romania, Canada, Mexico, China and India with 8 production units. The parent company has based most of its activity in invention of new compounds and relatively for them new technologies for their molding, hence has intensive R&D. The parent company is the owners of the brand XL Extralight which is used by the company as trademark. They are also owners of the Patent for the Injection Molding Process. Such patent is also registered in India via Reg. No. Pat. IN 18747. The company is also using such injection moulding process machine and mainly producing the Soles for footwear from EVA Compound Material.*
>
> *3. As mentioned, company was floated by 2 international companies, who wanted to set-up the manufacture facilities in the country and, therefore, the above company was incorporated in which both the companies have invested their own funds. The Company has only two shareholders namely, Asian Compounds limited, Hongkong and Finproject Asia Limited, Hongkong. Meaning thereby, there is 100% FD1 Investment and there is not even a single Indian Shareholders of the Company.*
>
> *4. That the Assessee has filed its Return of Income declaring taxable income of Rs. 1,54,62,234/- on 30-9-2012.*
>
> *5. That the Id. Assessing Officer selected our case for scrutiny and same were attended and required details were filed before him from time to time and the Id. Assessing Officer passed his order u/s 143(3) of the Income-tax Act, 1961 on 25-03-2015.*
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> *6. That the. Id. Assessing Officer accepted the results declared by the Company after detailed scrutiny but while passing the order,*

erroneously made an addition of Rs.4,18,65,830/-represented as "Premium for Allotment of Shares" of Rs. 4,18,65,830/-. The basis on which this addition has been made is annexed for your ready reference in Annexure-1 (relevant pages of DCIT Order is page 2 to 12)
7. It seems while passing the order, the Id. Assessing Officer mixed the reply/detail of some other Assessee's proceedings as barring the factual detail of premium amount or some routine details most of the points were neither been submitted by the Assessee in the Return nor during scrutiny proceedings and were not reflected in the Audited Financial Statements, Audit Report and Return filed.

8. The Id. Assessing Officer has referred the letters of 3rd March 2015 and 23rd March 2015 in Para 5.3, both these letters are enclosed herewith as Annexure-2 and Annexure-3. You will find that most of the facts/details mentioned in Assessment order were not mentioned in these letters, more particularly Para highlighted in the Annexure-1.

9. The Id. Assessing Officer has considered premium charged on allotment of shares taxable U/s 56(1} of the Act in para 5.4A and 5.4.1(1), page number 3 to page number 12 which is enclosed as Annexure-1.

III. Without prejudice to the apparent mistake pointed out in the earlier para, we want to submit on the illegality of the order passed on the merits:

1.1 That this company was formed by the two international renowned company and both these companies are shareholders at the time of incorporation and at the time of further issue of shares and even as on date. It is further submitted that there is no Indian shareholders, who have any shareholding in the company.

1.2. It is submitted that any Foreign Direct Investment (FDI) coming from abroad is subjected to FEMA (Foreign Exchange Management Act} and various Regulations and other applicable Circulars issued by the Reserve Bank of India from time to time in this regard. At the relevant time, shares were allotted by the Company in compliance of the Circular No. A.P. (DIR Series) Circular No. 49 dated 4.5.2010, Refer Annexure-II - Notification No. FEMA 205/2010- RB dated April 7,2010. Copy of Circular alongwith Notification is marked and enclosed as Annexure-4.

1.3 In the Para 5(b) of above Notification, it has been very clearly stated that for allotment of share to Non-Resident, issuing Company will have to value the shares on the basis of Discounted Cash Flow. Relevant Para 5(b) is reproduced hereunder.

> *"5. Issue price Price of shares issued to persons resident outside India under this Schedule, shall not be less than -*
> *(b) the fair valuation of shares done by a SEBI registered Category - I Merchant Banker or a Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognised stock exchange in India."*

1.4 Here we would also like to mention that not only in FEMA but also in the Income Tax Act, as per Explanation to Clause (vii)[a) and (vii}[b) of Sub-Section 2 of Section 56, in case of allotment of shares Fair Market Value is determined in accordance with Rule 11UA.

1.5 It is clear that as per FEMA Provision and as per Income Tax Act, 1961, it is imperative on the Company's part to issue shares after determining Fair Market Value, which should be on the basis of Discounted Free Cash Flow Method. The Appellant has complied this requirement in letter and spirit and got the valuation done from a firm of Chartered Accountants as required under FEMA and Income Tax Act, 1961 (Copy of Valuation done by M/s. Madhukar Garg & Co., Chartered Accountants is enclosed as Annexure-5), the basis on which Shares have been allotted.

1.6 We reiterate that there was no choice before the Company except to get the share valued on the Discounted Cash Flow Method in compliance with the provisions of FEMA and Income Tax and that valuation was done by a firm of Chartered Accountants, accordingly shares were allotted to the company hence the question of considering it as income from other sources is beyond imagination. As there cannot be any direct or indirect benefit to the Company, Investor or any third party, which were earlier used as tax planning and to plug that section 56(2)(vii(a) and 56(2)(vii)(b) were introduced in Income Tax Act,1961 w.e.f. 01.04.2013.

1.7 There would have not be any difference if the shares were allotted to both the shareholders at par, as both are the only shareholders and the intrinsic value in both the situation would have been the same but for the compliance of FEMA and Income Tax Act, Company would have not issued shares on premium Act, 1961 w.e.f. 01.04.2013.

1.8 In view of above, it is clear that whatever Company has done, is as per law of land that is in compliance of FEMA and Income Tax Act, 1961, in which the Discounted Free Cash Flow method was recommended as fair value of the share for allotment at the time of issue.

2.1 Without prejudice to above, here we would also like to draw your attention in the case of Honble Supreme Court in the case of CIT Vs. Allahabad Bank Ltd. 73 ITR 745 that the share premium received on the issue of shares has to be included in the paid up capital irrespective of whether the share premium has been maintained in a separate account and it is a capital receipt. Drawing support from this decision of the Hon'ble Supreme Court, that share premium received on the issue of shares is a capital receipt and the same cannot be taxed as a revenue receipt u/s. 56(1) of the Act.

2.2 Here we would further like to draw your attention on the decision of Delhi High Court in the case of ACIT Vs Om Oils and Oil Seeds Ltd. 152 ITR 552 and CIT Vs Krishnaram Baldeo Bank (P) Ltd. 144 ITR 600, in which it has been clearly stated that Share Premium amount is a capital receipt.

3. The investment has come from two reputed international companies namely, Asian Compounds Limited, Hongkong and Finproject Asia Limited, Hongkong who are holding 100% shares between both of them. Some facts, explanations, references seem to have been wrongly taken from some other assessee's file. He has wrongly concluded and applied 56(1) to consider share premium amount as "Income from other sources". The facts is as under:-

a) The investment has come only from two reputed international companies namely, Asian Compound and Finproject Asia Ltd. who are holding 100% equity through banking channel.

b) The valuation was done on the Discounted Cash Method approved by RBI for investment from abroad u/s FEMA/RBI Rules and also as per rules of Income Tax Act

c) The utilization of funds as has been stated in the Assessment Order is factually erroneous, hence Application of 56(1} is totally against the provisions and spirit of the Income Tax Act, 1961.

4. The Learned Assessing Officer has also stated in his Order at Page No. 8 that the Company has not complied with the provisions of Section 78 of the Companies Act, 1956. For this purpose, we are reproducing here under Section 78 of the Companies Act, 1956:

"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 subsection (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 Assessee has used this Premium Amount for creation of Industrial Unit and other business purposes.

It is respectfully submitted that the Learned Assessing Officer has grossly misunderstood Section 78 of Companies Act, 1956 and confused with the word Application of Share Premium Account with utilization of money received as Share Premium. The simple reading of

the Section 78 clearly indicates that Application means the adjustment/application of the liability head or intangible assets with the Share Premium Account rather utilization of cash received i.e. (Asset) for a specific purpose. Meaning thereby that in case of Company, who has issued share on premium and also carries in the Balance Sheet the above head of liability or asset head, then a entry can be passed by which the Share Premium Account can be reduced of the relevant heads mentioned in sub-section 2 of Section 78 of Companies Act, 1956, which will bring down the "Share Premium Account" in the Balance Sheet.

If a narrow meaning as has been interpreted by the Learned DCIT, there would be interesting situation, where most of the profit making companies who issue share on premium at the time of issue of share capital or further raising of capital on premium may not be permitted to use money for the business purposes.

5, The Learned Assessing Officer in Para 3 and 4 of his Order has stated certain facts and applied the Section 56(1) of the Income Tax Act, 1961. [(Page 4 -Para (iii), (iv), (v) , 4.4.2 and at Page 5, Para (a), (b), (c), (d), (e)].

In this connection, it is respectfully submitted that none of above para(s) are true in our case, more particularly stating that-

(i) Company is incurring loss - whereas Company is earning profit from very first year of its incorporation,
(ii) Company has carried forward losses - As the Company incorporated only two years back and there is no carried forward losses.
(iii) That the Company has invested money in the Share Market, which is volatile- this fact is again wrong - no investment is made in Share Market by the Company.

6.1 The Learned Assessing Officer has further tried to bring this amount U/s 68, which is mainly meant for bringing sham transaction. It is respectfully submitted that the identity of the investor, who are promoter shareholder of the company are not under doubt:
(i) The money has come through Banking Channel.
(ii} It is strict monitoring and control of RBI and FEMA Authorities.
(iii) The required return under FEMA, RBI has been filed with them. The RBI after scrutiny has accepted the Return hence question of brining this income U/s 56(1) and Section 68 is erroneous and needs to be deleted.

6.2 The Learned Assessing Officer has tried to revoke Section 68 of Income Tax Act, 1961. To our understanding, this section is not applicable to Non-Residents, which is clear from the simple reading of Section 68 itself which is reproduced hereunder:
"68 ..... (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and....."

In view of above, it is clear that Section 68 of Income Tax Act, 1961 is not applicable on the Non-Resident, therefore, same should be deleted.

7. Without prejudice to our above submissions, it is further submitted that even the definition of income, which is inclusive does not consider any receipt for issue of shares as income before 1st April, 2013 even if the consideration received for issue of shares exceeds the fair market value.

8. It is further submitted that transactions more particularly from the foreign/investing company only if started being treated income U/s 56(1) and 68 will send seriously adverse indication to the foreign investors, to whom the Hon'ble Prime Minister is encouraging in his campaign to "Make in India". It is respectfully submitted that this case is a live example of' 'Make in India', where both the investors are sitting abroad and Company is having 100% FDI and have invested money in a State like Rajasthan to manufacture products on the best technology."

5. The learned CIT-A after considering the submissions of the assessee allowed the appeal of the assessee vide appellate order dated 29.04.2016, by holding as under:-

"5.3 I have gone through the assessment order dated 25.03.2015 wherein the AO has added a sum of Rs. 4,18,65,830/- towards Share Premium account citing the reason that the appellant company has not followed proper method of arriving at the value of share premium and also no giving proper explanation for the nature of such credits in his books of accounts. I have gone through submissions given by the AR of the appellant wherein he pleads that the appellant company received share Premium from Asian Compounds Limited, Hongkong and Finproject Asia Limited, Hongkong of Rs. 4,14,47,430/- and Rs. 4,18,170/- respectively. Both the companies are found to be non residents and no single Indian shareholder is involved.

5.4 Further the AR of the appellant relies on the following judicial decisions
> Hon'ble Supreme Court in the case of CIT vs. Allahabad Bank Ltd. 73 ITR 745
>ACIT vs Om Oil Seeds Ltd. 52 ITR 552 and CIT Vs Krishnaram Baldeo Bank (P) Ltd. 144 ITR 600
> Vodafone India Services Pvt. Ltd. v Union of India & Others (2014) 268 ITR 01 (Bom HC)
> Shell India Markets Pvt. Ltd. v Union of India and Others (2014) 369 ITR (Bom HC)
> Green Infra v ITO (ITA No. 7762/Mum/2012)

5.5 Further the AR of the appellant also brought to my notice CBDT Instruction No. 2/2015 dated 29.01.20I5 which is reproduced as under :

"In reference to the above cited subject, I am directed to draw your attention to the decision of the High Court of Bombay in the case of Vodafone India Services Pvt. Ltd. for AY 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 an 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 judgement, it is directed that the ratio decidenal of the judgment must be adhered to by the filed officers in all cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs and CIT(Appeals)"

I have gone through Vodafone India Services Pvt.Ltd. Vs. Union of India & Others (2014) 368 ITR 01 (Bom HC) wherein it is as under :

"For all the above reasons, we find that in the present facts issue of shares at a premium by the Petitioner to its non resident holding company does not give rise to any income from an admitted International Transaction. Thus, no occasion to apply Chapter X of the Act can arise in such a case."

5.6 After considering the above submissions given by the AR of the appellant and taking into account the jurisdictional Bombay High Court decision in the case of Vodafone India Services Pvt. Ltd. vs. Union of India &. Others (2014)and Hon'ble ITAT "G" Bench order in the case of Green Infra Ltd. ITA No. 7762/Mum/2012 dated 23.08.2013 and also the CBDT Instruction No. 2/2015 dtd. 29.01.2015, I am of the considered opinion that share premium of Rs. 4,18,65,830/- treated as income by the Assessing Officer is not justifiable and accordingly I direct the Assessing Officer to delete the addition of Rs.4,18,65,830/-. Accordingly Ground no. 1 to 3 are disposed off.

4. Ground No 4 relates to initiation of penalty proceedings under section 271(l)(c) of the Act. As the penalty proceedings are consequential to appellate order need not be adjudicated and hence this ground of appeal is dismissed.
5. In the result, the appeal is partly allowed."

6, Aggrieved by the appellate order dated 29-04-2016 passed by learned CIT(A) , the Revenue has come in an appeal before the tribunal . The Ld. DR submitted that the Revenue is aggrieved and is in appeal so far additions stood deleted by the Ld. CIT-A for additions made by the AO under Section 68 of the Act , wherein the assessee did not satisfactorily explained the 'nature' of share premium and the assessee could not justify the excess premium received compared to the intrinsic value of shares which is evident from grounds of appeal filed by the Revenue. The learned DR strongly distinguished the case of Vodafone India Services Limited (supra) relied upon by the assessee and also by the learned CIT-A while granting relief to

the assessee . The learned DR submitted that Vodafone India Services Limited(supra) case is related to Transfer Pricing additions and not to additions made u/s. 68 of the Act. The learned DR relied upon the assessment order passed by the AO .

The Ld counsel for the assesse on the other hand submitted that it is a company floated by World Class Companies in footwear business for manufacturing sole for footwear for which manufacturing unit was set up by the assessee company in Jaipur, Rajasthan. It was submitted that there were only two shareholders of the assessee company namely Asian Compound Limited , Hongkong and Finproject Asia Limited , Hongkong , who are Limited companies incorporated abroad who had promoted the assessee company . It was submitted that this is the second year of operation and company is in profit from the very first year itself and taxes were also paid to Revenue for these first two years of operations. It was submitted that share capital was raised by the assessee during the previous year relevant to the impugned assessment year after obtaining RBI approvals and valuations have been done following Discounted Cash Flow method(DCF) which is an approved method for valuation of shares notified by RBI and shares cannot be issued by a closely held companies whose shares are not listed on recognized stock exchanges below fair price determined under DCF method to foreign investors . The fair value of shares to be determined using DCF method is to be certified by CA or SEBI registered Category-1 , Merchant Banker. Our attention was drawn to RBI circular no. RBI/2009-10/445 A.P.(DIR Series) Circular no. 49 dated 04-05-2010 which stipulate that the fair value of shares is to be determined using DCF method and consideration for shares has to be not less than the fair value of shares as determined using DCF method in case of closely held companies whose shares are not listed on recognized stock exchanges. It was submitted that equity shares of Rs. 10 each were issued at premium of Rs. 10 each for total consideration price of Rs. 20 per equity shares to the two promoting companies of the assessee company namely Asian Compound Limited , Hongkong and Finproject Asia Limited , Hongkong based on the fair value of shares determined by a qualified chartered accountant using DCF method wherein fair value of the equity shares comes to Rs. 20 per equity share as against face value of Rs.10 per equity shares. Thus it was

submitted that fair valuation of the equity shares was done following rules prescribed by the RBI and it was also submitted that there was no losses in the earlier years as well in the impugned assessment year as was stated by the AO in its assessment order . It was submitted that the AO erred in holding that there are accumulated losses and it was submitted that it is a newly incorporated company. It was submitted that the assessee has neither issued preference shares nor invested its money in subsidiary/other companies as was mentioned by the AO in the assessment order. Our attention was drawn to the audited financial statement of the assessee company which is placed in paper book/page 101-141. Thus , it was submitted that it is a classic case of 'cut & paste' action undertaken by the AO wherein the AO had 'cut & paste' the material from the some other assessment order of some other tax-payer and pasted the said content of some other assessment order in the assessee's assessment order without application of mind which caused great prejudice to the assessee. It was submitted that all facts as are narrated by the AO are incorrect and not applicable to the assessee. Our attention was drawn to page no. 44/ paper book wherein RBI vide letter dated FED.MRO.CAP/ 5380/04.56.198/2012-13 dated 21.09.2012 has recorded/noted the transaction of issue of equity shares of face value of Rs. 10 each at a premium of Rs. 10 each to the two foreign promoting companies by the assessee . Our attention is drawn to page 46 wherein discounted cash flow of the assessee certified by C.A vide certificate dated 10.10.2011 is placed , wherein CA has computed fair value of equity shares at Rs. 20/- each as against the face value of Rs. 10 each. Our attention was also drawn to the audited accounts which are placed in paper book at page 101 to 141 and it was pointed out that the company is in profit from the very first year i.e. period ended 31-03-2011 and this is the second year of operation wherein the company was also in profits . The assessee has also placed certificate of incorporation of the assessee company issued by MCA wherein date of incorporation of the assessee is stated to be 06-01-2010. It was also submitted that the AO misdirected itself by holding that the assessee did not applied share premium for the purposes as are stipulated u/s 78 of the Companies Act, 1956 rather it was submitted that share capital proceeds including share premium was raised for setting up of manufacturing unit for sole for footwear in Jaipur and for business purposes, for which the proceeds of share premium were used . It was

submitted that application of share premium for specified purposes as are mentioned in Section 78 of the 1956 Act is directed for application by write off of 'Share Premium Account' as is appearing in the books of accounts for the specified purposes and is not meant for utilisation of funds from the proceeds of share premium. Thus, it was submitted that the AO completely erred and misdirected himself while holding that there is a breach of Section 78 of the 1956 Act.

7. We have considered rival contentions and perused the material on record . We have observed that the assessee is engaged in the business of manufacturing of soles for footwear and had set up manufacturing unit at Jaipur, Rajasthan for said manufacturing .The assessee is stated to be promoted by two foreign companies who are its shareholders namely Asian Compound Ltd., Hongkong and Finproject Asia Ltd., Hongkong . Both the above entities are non-resident which is undisputed between rival parties as is emerging from material on record before us. In the audited financial statements filed before the tribunal for the relevant period by the assessee which is placed in paper book/page 101-141, both these companies are stated to be holding companies of the assessee company wherein Asian Compounds Limited, Hongkong is holding company directly holding 98.99% equity shares of the assessee company as at 31-03-2012, while Finproject Asia Limited,Hongkong is also stated to be holding company indirectly of the assessee company to whom also shares were allotted during the previous year relevant to impugned assessment year. During the relevant previous year , the assessee has issued 41,86,583 equity shares at consideration price of Rs. 20 per equity shares consisting of face value of Rs. 10 of each equity share and premium of Rs. 10 for each equity shares , to the following non-resident entities:-

Subscribed by	Number of Shares	Face Value	Equity share capital	Share Premium per share	Share premium account	Total amount received
Asian Compounds Limited, Hongkong	10,37,315	10	10,37,3150	10	10,37,3150	2,07,46,300

Asian Compounds Limited, Hongkong	31,07,428	10	31,07,4280	10	31,07,4280	6,21,48,560
Finproject Asia Ltd. , Hongkong	10,358	10	1,03,580	10	1,03,580	2,07,160
Finproject Asia Ltd., Hongkong	31,482	10	3,14,820	10	3,14,820	6,29,640
Total	41,86,583		4,18,65,830		4,18,65,830	8,37,31,660

The Revenue had invoked provisions of Section 56(1) wherein additions were made in the hands of the assessee by the AO towards share premium charged by the assessee to the tune of Rs. 4,18,65,830/- . The learned CIT-A deleted the said additions towards share premium as were made u/s. 56(1) of the Act. The Revenue is not aggrieved by the said relief granted by learned CIT-A with respect to the deletion of additions made u/s. 56(1). However , without prejudice in alternate the AO also confirmed additions u/s 68 on the grounds that the share premium charged is in excess of the intrinsic valuation of shares because in the opinion of the AO , the assessee is not only required to explain the 'source' of credit entry but also its 'nature' which as per AO the assessee could not explain . The learned CIT(A) also deleted the said addition u/s 68, wherein the learned CIT(A) relied on the decisions of Vodafone India Services Limited(supra) , decision of ITAT, Mumbai in the case of Green Infra Limited(supra) and CBDT instruction no. 2/2015 dated 29.01.2015. **The learned CIT(A) while deleting the addition noted that the assessee has received share premium from non-resident companies and no single Indian shareholder is involved.** This finding of fact arrived at by learned CIT(A) so far as receipt of share premium by assessee from non-resident entities is not disputed by Revenue and is not in challenge before us which has attained finality. It is pertinent to mention here that Section 56(2)(viib) which was placed in statute by Finance Act, 2012 w.e.f. 01-04-2013 is applicable

for consideration received by a company in which public are not substantially interested , from a person who is resident while in the instant appeal before us , this finding of fact that shares were issued by the assessee to two non-resident entities is not in dispute and per-se Section 56(2)(viib) has no applicability as the assessee received consideration for issuance of shares from non-resident entities. The learned CIT(A) held that treating share premium received by the assessee as income is not justifiable even u/s 68 of the Act keeping in view factual matrix of the case. The Revenue is aggrieved by the deletion of the addition by learned CIT(A) within the provisions of Section 68 of the Act , for the reasons as are emanating from the Revenue's ground of appeal taken before the tribunal that the assessee did not satisfactorily explained the 'nature' of share premium and the assessee could not justify the excess premium received compared to the intrinsic value of shares. Thus, main grievance of the Revenue is w.r.t. share premium being received of Rs. 10 per share as against face value of shares of Rs. 10 each , wherein as per Revenue the said share premium of Rs. 10 per equity shares is not supported by intrinsic value of the shares leading to bringing it within the regime of taxability as income within the deeming fiction of Section 68 of the 1961 Act. The assessee has placed its audited financial statements on record which are placed in paper book/page 101-141. The assessee has also filed its certificate of incorporation issued by MCA which shows the date of incorporation of the assessee as 06-01-2010, which is placed in the file. The Directors Report (page 104/pb) states that this is 2nd Annual Report of the company. The company has set up a manufacturing unit for manufacturing soles for footwear at Jaipur, Rajasthan. The assessee company is promoted by two non-resident entities who have subscribed to the shares of the assessee company. The majority shareholding of the assessee company to the tune of 98.99% is held by Asian Compound Limited, Hongkong who is its parent company directly and shares are also held by Finproject Asia Limited, Hongkong who is assessee's holding company indirectly (page 138/pb). The assessee has issued equity shares to its holding company namely Asian Compound Limited , Hongkong as well to said Finproject Asia Limited, Hongkong Limited of Rs. 10 each at premium

of Rs. 10 each during the impugned year under consideration, details are tabulated in table above. The perusal of audited financial statement reveals that the share capital at the end of the preceding previous year viz. 31-03-2011 was Rs. 48.47 lacs while reserves and surplus were to the tune of Rs. 77.79 lacs. The assessee share capital as at the end of the current previous year i.e. 31-03-2012 was Rs. 4.67 crores while reserves and surplus were to the tune of Rs. 6.09 crores. The assessee has achieved turnover of Rs. 3.49 crores for the financial year ended 31-03-2011 with profit before tax of Rs. 1.12 crores while for the financial year ended 31-03-2012 , the turnover was Rs. 7.78 crores with profits before tax of Rs. 1.73 crores. The assessee has made provisions for payment of income-tax in its audited financial statements for both the said years and the income declared by the assessee for the impugned assessment year 2012-13 was Rs. 1.55 crores in the return of income filed with the revenue. Thus, as is evident from audited financial statements placed on record before us, neither the assessee incurred any loss during the first two years of its existence nor do it have any accumulated losses in its books of accounts as at 31-3-2011 as well as at 31-03-2012 , as is alleged by AO in assessment order which is a perverse finding of fact arrived at by the AO that the assessee is making losses and has accumulated losses in its balance sheet and these finding of fact arrived by the AO needs to be discarded . The AO has questioned and disputed the fair value arrived at by the assessee of the equity shares on these perverse finding of facts as to losses in both the years as well accumulated losses held by it, wherein both these observations of the AO to discard fair value of shares adopted by the assessee are perverse finding of facts arrived at by the AO which cannot be relied upon to prejudice assessee . On perusal of the audited financial statements, it is also revealed that the assessee only issued one class of shares viz. Equity shares of the face value of Rs. 10 each and it never issued any preference shares till the end of the financial year 2011-12. It also transpires from the audited financial statements placed on record that the assessee's investments as on 31-03-2011 and 31-03-2012 were at 'Nil' . The AO has given finding of fact that the assessee has issued preference shares as well the assessee had

made investment in volatile companies to prejudice assessee by discarding valuation of shares arrived at by the assessee , which finding of fact are again perverse finding of facts which need to be discarded . Thus, errors had been made by the AO in recording perverse finding of facts not supported by the material/evidence on record to discredit fair valuation of shares arrived at by the assessee by adopting approved valuation method viz. DCF method which valuation was certified by a qualified chartered accountant . It is not shown before the Bench by learned DR that these perverse finding of facts as were arrived at by the AO were indeed correct finding of facts recorded by the AO and the assessee is hiding the correct facts from the authorities . The AO also erred in holding that there is a violation of Section 78 of the 1956 Act by holding that the assessee ought to have utilised the proceeds of share premium for certain specified purposes as is stipulated in the said Section 78 of the 1956 Act viz. paying up unissued shares of the company as bonus shares, writing off preliminary expenses , buy-back of shares etc. as are specified in the said section 78 of the 1956 (see preceding para wherein Section 78 of the 1956 Act is reproduced). The AO erred in not distinguishing what is meant by utilisation of the funds being proceeds of share premium raised for the specified approved purposes as per terms and condition of invitation to offer issued by the assessee for raising share capital , and the creation of 'Share Premium Account' in the books of accounts for share premium received to be reflected as part of 'Reserves & Surplus' as stipulated u/s 78 of the 1956 Act which is to be applied for certain specified purposes as specified in Section 78 of the 1956 Act. The proceeds of the funds raised towards share premium account can only be utilised for the purposes specified as per agreed terms and conditions of invitation to offer for issuing securities by the issuing company with the shareholders, such as in the instant appeal before us is stated to be for setting up of manufacturing unit for soles for footwear and business purposes , while application of 'Share Premium Account' which was created in books of accounts is more concerned with protection of capital base in the tax-payer company and reflection of true and fair view of affairs of the taxpayer company which entails writing off 'Share Premium

Account' from books of accounts to be set off against specified purposes which can be for applying towards issuance of bonus shares, writing off of preliminary expenses , buy back of shares etc as specified u/s 78 of the 1956 Act, so thus utilisation of proceeds of funds raised towards share premium in accordance with terms and conditions agreed with shareholders as per invitation to offer by the assessee and application of share premium account created in books of accounts for specified purposes u/s 78 of the 1956 Act by writing off/knocking against the said specified purposes by book entry as application of 'Share Premium Account' for non specified purposes such as writing off normal losses against Share Premium Account will not reflect true and fair view of affairs of the taxpayer company and similarly paying dividends despite losses in the books of the tax-payer company out of 'Share Premium Account' will erode capital base of the taxpayer company, thus these are altogether different concepts which AO ought to have understood in right perspective, while AO erred in making such erroneous conclusion that the assessee did not utilised the funds raised through share premium for specified purposes u/s 78 of the 1956 Act without any basis and understanding the rational for both concepts which are altogether meant for different purposes , while the assessee did rightly utilised the proceeds of funds raised towards share premium for setting up manufacturing unit for manufacturing soles for footwear at Jaipur and business purposes as the funds were stated to be entrusted by the shareholders for the said approved purposes of setting up the said unit / business purposes as per terms and conditions of the invitation to offer , and the assessee do transfer share premium raised to 'Share Premium Account' under the head 'Reserves and Surplus' in books of accounts as is mandated u/s 78 of the 1956 Act . Section 78 of the 1956 Act allows application of Share Premium Account for certain specified purposes by way of write off/knocking against issuance of bonus shares, writing off preliminary expenses , buy-back of shares etc by book entry . Thus as is emerging from material on record, the conclusions arrived at by AO so far as violation of Section 78 of the 1956 Act by the assessee were wrong and misconceived and are hereby rejected/discarded. Now, coming to the allegation of the

AO that share premium being higher than the intrinsic worth/fair value of the equity shares, the assessee has supported the said fair value of equity shares being Rs. 20 per equity share as against face value of Rs.10 per equity share with a certificate issued by a chartered accountant using DCF method which is an approved method as prescribed by RBI . The AO has arrived at wrong finding of facts as to the losses in the last two years as well accumulated losses in the audited financial statements while the assessee is in profits since its inception as well there are no accumulated losses in the audited financial statements which are placed in paper book filed with tribunal. The assessee's valuation is discredited by the AO using these perverse finding of fact . The tax-payer 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 tax-payers 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 tax-payer will create an 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 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 is placed in paper book at page 80-86. 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(page 46/pb). The AO tried to demolish this fair value of Rs. 20 per equity share by basing its decision based on perverse finding of facts which are already discarded by us. 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, which is placed in file(pb/44-45). The assessee has filed its bank statements as well FIRC issued by its bankers as an evidences which are placed in file. Thus based on material on record before us, 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. It is pertinent to mention that Section 56(2)(viib) r.w.s. 2(24)xvi) of the 1961 Act were placed in statute by Finance Act, 2012 w.e.f. 01-04-2013 and the said sections are relevant for issuance of shares to residents while in the instant case , undisputedly equity shares were issued by the assessee to non-resident in the instant case. Thus the said section 56(2)(viib) r.w.s. 2(24)(xvi) of the 1961 Act are not made applicable to the shares issued to non residents mainly to encourage foreign investments .The Revenue has accepted the receipt of share capital from both the above stated foreign investors to the extent of the face value of the equity shares issued to the tune of Rs. 4.19 crores and as per Revenue ingredients of Section 68 stood complied with so far as equity shares issued by the assessee to the tune of Rs. 4.19 crores comprising face value of equity shares issued to these two non-resident entities. Thus, the Revenue has accepted compliance of provisions of Section 68 of the 1961 Act to the extent of face value of equity shares issued to these two non resident entities and as per Revenue version their identity, creditworthiness and genuineness of the transactions by way of raising of equity share capital at the face value to the tune of Rs. 4.19 crores stood proved , the only grievance of Revenue being share premium to the tune of Rs. 4.19 crores being in excess of intrinsic value of share so issued is an income chargeable to tax within provisions of Section 68 of the 1961 Act. The assessee has also received External Commercial Borrowing (ECB) to the tune of Rs. 7.50 crores from the said holding company namely Asian Compounds Limited, Hongkong during the previous year relevant to the impugned assessment year which was also

accepted by Revenue and no additions were made by Revenue by invoking provisions of Section 68 of the 1961 Act w.r.t. ECB raised by the assessee and once again identity , creditworthiness and genuineness of transaction of raising ECB to the tune of Rs. 7.50 crores from its holding company Asian Compounds Limited, Hongkong stood proved. This holding company namely Asian Compounds Limited, Hongkong is also the major subscriber of the equity shares issued by the assessee during the previous year relevant to impugned assessment year (see table above). The learned CIT(A) has rightly relied upon decision of Hon'ble Bombay High Court in the case of Vodafone India Services Private Limited v. UOI reported in (2014) 368 ITR 1(Bombay) which was further reiterated by Hon'ble Bombay High Court in Vodafone India Services Private Limited v. UOI reported in (2014) 369 ITR 511(Bombay) to hold that issue of shares at share premium by the taxpayer to non resident holding companies is on account of capital transactions and does not give rise to an income chargeable to tax. Section 56(2)(viib) r.w.s. 2(24)(xvi) of the 1961 Act were introduced by Finance Act, 2012 w.e.f. 01-04-2013 and had applicability to the receipt of consideration towards shares from resident entities and has no application when consideration towards shares are received from non-resident entities which are excluded in order to encourage foreign investments. The learned DR erred in making contentions that the said decision of Hon'ble Bombay High Court is relevant for TP proceedings while in Vodafone case, Hon'ble Bombay High Court has held that TP provisions as are contained in chapter X are machinery provisions while there has to be firstly an income chargeable to tax and then only machinery provisions can be applied. The issue of shares at share premium by tax-payer to non-resident holding entities was held to be on account of capital transaction which were not found to be having character of income chargeable to tax. CBDT has also accepted this position vide instruction no. 2 /2015 dated 29-01-2015 . Thus, this contention of learned DR that decision of Hon'ble Bombay High Court in the case of Vodafone India Services Private Limited(supra) is not applicable to the facts of the instant appeal is hereby rejected. The Revenue has already accepted the share capital to the tune of face value of equity

shares amounting to Rs. 4.19 crores raised by the assessee from these two non-resident holding companies during the year as no additions were made , wherein by implication ingredients of Section 68 were deem to have been fulfilled and even ECB to the tune of Rs. 7.50 crore raised by the assessee from Asia Compound Limited , Hongkong during the impugned assessment year was accepted by Revenue and ingredients of Section 68 was accepted to be fulfilled by the assessee as no addition has been made by Revenue. The incriminating information used by the AO to discredit the valuation of Rs. 20 per equity shares arrived at by assessee using DCF method is based on perverse finding of facts recorded by the AO , which findings of the AO are already rejected by us. Thus, we have no hesitation in confirming/sustaining well reasoned appellate order of learned CIT(A) keeping in view factual matrix of the case and hence no addition is warranted towards share premium of Rs.4,18,65,830/- received by the assessee from its holding companies namely Asian Compounds Limited, Hongkong and Finproject Asia Limited, Hongkong, who are non resident entities as the said share premium is on account capital transaction and is not an income within charging Sections of the 1961 Act . So far as deeming fiction of Section 68 of the 1961 Act is concerned , there is no reliable incriminating finding of fact available on record justifying our interference to the well reasoned order of learned CIT(A) which we sustain. Thus, the appellate order of learned CIT(A) stood confirmed. Revenue fails in this appeal which stood dismissed. We order accordingly .

8. In the result appeal of the Revenue is dismissed.

Order pronounced in the open court on 02.05.2018

आदेश की घोषणा खुले न्यायालय में दिनांकः 02.05.2018 को की गई ।

Sd/-	Sd/-
(C.N PRASAD)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 02.05.2018

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI