

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ)  
and Shri A.T. Varkey, Judicial Member**

**I.T.A. No. 2090/KOL/2017  
Assessment Year: 2012-2013**

***Income Tax Officer,.....Appellant  
Ward-6(1), Kolkata,  
Aayakar Bhawan,  
P-7, Chowringhee Square,  
Kolkata-700 069***

**-Vs.-**

***M/s. Dhanganga Realtors Pvt. Limited,.....Respondent  
9/12, Lal Bazar Street, Kolkata-700 001  
[PAN: AAECD1941Q]***

**Appearances by:**

*Shri Robin Choudhury, Addl. CIT, Sr. D.R, for the Appellant  
Shri V.K. Jain, FCA, for the Respondent*

Date of concluding the hearing : July 11, 2019  
Date of pronouncing the order : September 25, 2019

**O R D E R**

**Per Shri P.M. Jagtap, Vice-President (Kolkata Zone):-**

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-2, Kolkata dated 20.07.2017 and the solitary issue involved therein relates to the deletion by the Id. CIT(Appeals) of the addition of Rs.9.81 crores made by the Assessing Officer under section 68 by treating the share capital and share premium received by the assessee during the year under consideration as unexplained cash credit.

2. The assessee in the present case is a Company, which filed its return of income for the year under consideration declaring total income of Rs.440/-. During the course of assessment proceedings, the claim of the assessee of having raised share capital of Rs.1,98,000/- with premium

of Rs.9,79,02,000/- was examined by the Assessing Officer. In this regard, he noted, at the outset, that the assessee-company had no track record or asset base and apparently with no visible future prospect, it had received high premium per share which defied all commercial and financial prudence and logic. During the course of the examination, summons under section 131 were issued by the Assessing Officer to the Directors of the assessee-company as well as to the Directors of the investor companies. None, however, appeared in response to the said summons for examination before the Assessing Officer. Nevertheless, certain details and documents were furnished on perusal of which, the Assessing Officer recorded his findings as under:-

- (i) All the Companies were in their initial years of operation;
- (ii) They were basically investment companies,
- (iii) Income tax returns filed by them showed a nominal income/loss;
- (iv) There was hardly any business activity carried on by these companies;
- (v) Investor-companies received share capital with huge premium, which in turn was invested in the assessee-company as well as similar other companies.

On the basis of the above findings recorded by him, the Assessing Officer arrived at a conclusion that there was absolutely no justification for the exorbitant premium received by the assessee-company on allotment of its equity shares. He also held that the claim of the assessee of having received exorbitant premium on allotment of its shares was not acceptable even in the light of preponderance of probability and normal human behaviour. Accordingly relying on the various judicial pronouncements discussed in his order, the Assessing Officer treated the entire amount of Rs.9.81 crores received by the assessee-company on account of share capital and share premium as unexplained cash credit and addition to that extent was made by him to the total income of the

assessee under section 68 in the assessment completed under section 143(3) vide an order dated 28.03.2015.

3. Against the order passed by the Assessing Officer under section 143(3), an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging the addition made by the Assessing Officer under section 68 on account of share capital and share premium amount and after considering the submissions made by the assessee as well as the material available on record, the Id. CIT(Appeals) deleted the addition made by the Assessing Officer under section 68 mainly by relying on the decision of the Hon'ble Calcutta High Court in the case of Jatia Investment Company -vs.- CIT [206 ITR 718]. The relevant observations and findings recorded by the Id. CIT(Appeals) in this regard in his impugned order are extracted below:-

*"The share transaction, added u/s 68 of the Act as unexplained cash credit will not come under the preview of cash credit, as there is no cash receipt or receipt of any money or credit of any money. The assessee allotted its shares through journal entries only. The allotment of shares is against the discharge of such debts only.*

*The AR of the appellate placed his reliance in Honble Jurisdictional High Court who had accepted the contention of the assessee and stated that in case there is no cash receipts, the question of cash credit does not arises. It is in the case of Jatia Investment Co vs. CIT [1994] 206 ITR 718 (Cal.).*

*The facts of the case are similar to the facts of the case of the Hon'ble Jurisdictional High Court in the case of Jatia Investment Co. [1994] 206 ITR 718 (Cal.).*

*The AO placed his reliance on the various judgments as mentioned in the assessment order. However AO's action in making addition U/S 68 by relying upon the decisions is totally misplaced. The facts of the cases, as cited by the AO in his order are totally different with the facts of the appellant. In those cases, as referred by the AO, the assessee had received monies by cheque/draft and allotted shares, whereas in the case under consideration, no money was received through banking channel by the*

*appellant. There is no cash transaction in the case of the appellant as the shares were issued against the shares of another companies. On the basis of submissions with document, it can safely concluded that the information that the shares were issued against the shares was very much available with the AO during the assessment proceeding.*

*The AO failed to appreciate the fact that there was no sum credited in the books of account of the appellate and no money was received. The assessee had allotted its shares against the discharge of debts by journal entries in books. The AO failed to verify the facts of the case. The shares were allotted against the acquisition of investments under the agreements. The copies these documents were also filed during the appellate proceedings. I find that there is no real cash entry on the credit side of the cash book. The shares were issued against the share. It is merely a notional entry and there is no real credit in the cash book and bank account. The question of inclusion of the amount of the entry unexplained cash credit cannot arise. Therefore, the question of cash credit does not come in, there being no actual passing or receipt of cash. In other words, the transactions are mere book entries. The transactions showing the amount as received in cash or in kind and discharged were not actual case but only notional by journal entries. As far as the question of section 68 is concerned, the nature of the transactions and the entries clearly show that no cash, in fact, flowed.*

*Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the AR that there is no cash involved in the issue of share capital in the appellate case. In view of the aforesaid findings and respectfully following the decisions of Hon'ble Jurisdictional High Court decision in the case of Jatia Investment Co, I have come to the conclusion that the issue is squarely covered by the decision of Jurisdictional Hi.gh Court as mentioned and discussed above. I have no option but to accept the arguments tendered by the AR of the appellant in this respect that there is no sum was credited in the books of account as per the provision u/s 68 of the act. Accordingly, the case of appellate does not come under the preview of the section 68 of the Act. Further, I have no hesitation to hold that the impugned addition made*

*by invoking the provisions of section 68 by the AO is not justified in the circumstances. Accordingly, the AO is directed to delete the addition made on this account. These grounds of appeal are allowed".*  
[page 13-16]

Aggrieved by the order of the Id. CIT(Appeals), the Revenue has preferred this appeal before the Tribunal.

4. The Id. D.R. submitted that neither the Directors of the assessee-company nor even the Directors of the investor companies had appeared before the Assessing Officer for examination in response to the summons issued under section 131. He contended that this vital aspect, however, was completely ignored by the Id. CIT(Appeals) and the addition made by the Assessing Officer under section 68 was deleted by him by relying on the decision of the Hon'ble Calcutta High Court in the case of Jatia Investment Company (supra). He contended that the case of Jatia Investment Co. (supra) decided by the Hon'ble Calcutta High Court and relied upon by the Id. CIT(Appeals) in his impugned order to give relief to the assessee is distinguishable on facts. He also contended that the following judicial pronouncements, on the other hand, are in favour of the Revenue on this issue:-

- (i) Smt. Rekha Krishna Raj -vs.- ITO [261 CTR 79];
- (ii) ITO -vs.- Blessings Commercial Pvt. Limited [91 taxmann.com 176 (Kolkata-Trib.)];
- (iii) Vimal Organics Limited -vs.- CIT [297 CTR 549 (Allahabad)].

The Id. D.R. also contended that none had appeared on behalf of the assessee during the course of assessment proceedings and in the written submission filed by the assessee, it was nowhere specifically pointed out that the amount of share capital and share premium in question was not received by the assessee in cash or by cheque. He invited our attention to the assessment order passed by the Assessing Officer to show that the

Assessing Officer in the absence of such specific case made out by the assessee had no occasion to examine/verify the case of the assessee in the light of the decision of the Hon'ble Calcutta High Court in the case of Jatia Investment Co. He contended that the Id. CIT(Appeals), however, overlooked this vital aspect and allowed a relief to the assessee by relying on the copies of agreements between the assessee and the share subscribers, which were filed for the first time before him. He contended that there is thus a clear violation of Rule 46A of Income Tax Rules, 1962 by the Id. CIT(Appeals) and urged that the matter may be sent back to the Assessing Officer for verification/examination of the case made out by the assessee for the first time before the Id. CIT(Appeals) by relying on the additional evidence.

5. The Id. Counsel for the assessee, on the other hand, strongly supported the impugned order passed by the Id. CIT(Appeals) giving relief to the assessee on the issue under consideration. He contended that the transactions involving raising of share capital and share premium made by the assessee during the year under consideration did not represent cash credit as there was no cash involved in the said transaction and its shares were issued by the assessee-company against investment made in the shares of other companies. He contended that the decision of the Hon'ble Calcutta High Court in the case of Jatia Investment Co. (supra) is squarely applicable to the facts of the assessee's case and the Id. CIT(Appeals) was fully justified in deleting the addition made by the Assessing Officer under section 68 by relying on the said decision of the Hon'ble Jurisdictional High Court.

6. We have considered the rival submissions and also perused the relevant material available on record. The first issue that is required to be considered and decided relates to the applicability of section 68 to the transactions where there is no cash involved and there is no credit to the cash account. In this regard, the Id. D.R. has relied on three judicial

pronouncements in support of the revenue's case. In the first case of Blessings Commercial Pvt. Limited (supra) relied upon by the Id. D.R., cheques of huge amount were issued in favour of the assessee against the issue of share capital and it was held by the Tribunal that section 68 was applicable as a sum of money was credited in the books of the assessee. In the case of Vimal Organics Limited (supra) relied upon by the Id. D.R., the assessee had received cheques for a sum of Rs.15,00,000/- and entries in this regard were made in the books of account of the assessee for having received the said amount by way of unsecured loans from various persons. In these facts of the said case, it was held by the Hon'ble Allahabad High Court that "sum found credited in the books of account of the assessee" included within its fold, the entry either by way of cash or by cheques irrespective of the encashment of the cheques and the essential conditions for applicability of section 68 stood fulfilled. Both these cases cited by the Id. D.R. thus involved different facts and the same, therefore, are not applicable in the present context, where we are considering the applicability of section 68 to the transactions which do not involve any cash and there is no credit to the Cash Account.

7. As regards the third case of Smt. Rekha Krishna Raj (supra) relied upon by the Id. D.R., Section 68 was held to be applicable by the Hon'ble Karnataka High Court even to an unexplained credit representing value of supplies made by suppliers on credit. While arriving at this conclusion, it was held by Their Lordships that there is no indication in section 68 that such a credit should be a cash credit. It was held that it may be a cash credit or it may be a credit representing the value of the supplies made by the suppliers on credit and the essence for applying section 68 is that the credit should be shown in the account of the assessee. Although this decision supports the case of the revenue on the issue under consideration, it is observed that the view taken by the Hon'ble Karnataka High Court in the said case is contrary to the decision of the Hon'ble Calcutta High Court in the case of Jatia Investment Co. (supra)

relied upon by the Id. CIT(Appeals) to give relief to the assessee on the issue under consideration. In the case of Jatia Investment Co. (supra), the three NBFCs had taken loans from the proprietary concern belonging to the same group. In the said case, they were required to be liquidated the loans borrowed from the said proprietary concern of Shri J.M. Jatia as per the RBI guidelines but there was no cash available to repay the shares held by the three NBFCs, which were transferred to an investment company, namely Jatia Investment Co. and the amounts were adjusted by the NBFCs against the loan amount payable to the proprietary concern. The partnership firm of Jatia Investment Co. thus received shares from the three NBFCs and also took over the loans payable by the said NBFCs to the proprietary concern. These transactions were entered into in its books of account by the partnership firm through cash book by debiting the investment in shares and crediting the loan amount of the proprietary concern. This credit appearing in the books of account of the partnership firm of M/s. Jatia Investment Co. (supra) was treated by the Assessing Officer as unexplained cash credit under section 68 and on confirmation of the same, the matter reached to the Hon'ble Calcutta High Court. It was held by Their Lordships that when the cash did not pass at any stage and since the respective parties did not receive cash nor did pay any cash, there was no real cash entry on the credit side of the cash book and the question of inclusion of the amount of the entry as unexplained cash credit would not arise. In our opinion, the ratio of the decision of the Hon'ble Jurisdictional High Court in the case of Jatia Investment Co. (supra) squarely covers the issue under consideration in favour of the assessee and respectfully following the same, we hold that section 68 is not applicable when the relevant transactions do not involve any cash and there is no credit to the Cash Account. We, therefore, hold that section 68 has no application to the transactions which does not involve cash and where there is no credit to cash account.



8. The next question that arises for our consideration in the context of present case is whether the transactions in question of issue of share capital with premium by the assessee-company involved any cash or not. In this regard, it is observed that even though the Id. CIT(Appeals) in his impugned order has recorded a finding of fact that no money was received through banking channel by the assessee and there was no cash transaction in the case of the assessee as the shares were issued against the shares of another companies, there was no such finding recorded by the Assessing Officer in the assessment order. As rightly pointed out by the Id. D.R., no such case, in fact, was specifically made out by the assessee before the Assessing Officer challenging the applicability of section 68 on the ground that the relevant transactions of the issue of shares did not involve cash and it was not a case of receipt of any money through banking channel against the issue of shares. As a matter of fact, neither the Directors of the assessee-company nor the Directors of the investor companies appeared before the Assessing Officer for examination in response to summons issued under section 131 and the relevant details and documents were furnished by the Assessing Officer in an attempt to explain the relevant transactions as if section 68 was applicable. It appears that the Id. CIT(Appeals), however, overlooked this vital fact and allowed the relief to the assessee by deleting the addition made by the Assessing Officer under section 68 by relying on a new stand taken by the assessee in the light of additional evidence without giving any opportunity to the Assessing Officer to verify the same. As rightly contended by the Id. D.R., there is thus a clear violation of Rule 46A of the Income Tax Rules, 1962 by the Id. CIT(Appeals) and this matter, therefore, should go back to the Assessing Officer in order to give him an opportunity to verify this stand taken by the assessee for the first time before the Id. CIT(Appeals). We, therefore, restore this issue to the file of the Assessing Officer for the limited purpose of verifying the claim of the assessee that the transactions in question of issue of shares did not involve any cash and there was no credit to the cash account and to

decide the same accordingly in the light of the decision of the Hon'ble Jurisdictional High Court in the case of Jatia Investment Co. (supra).

**9. In the result, the appeal of the Revenue is treated as allowed for statistical purposes.**

Order pronounced in the open Court on September 25, 2019.

**Sd/-  
(A.T. Varkey)  
Judicial Member**

**Sd/-  
(P.M. Jagtap)  
Vice-President (KZ)**

***Kolkata, the 25<sup>th</sup> day of September, 2019***

- Copies to :*
- (1) Income Tax Officer,  
Ward-6(1), Kolkata, Aayakar Bhawan,  
P-7, Chowringhee Square, Kolkata-700 069**
  - (2) M/s. Dhanganga Realtors Pvt. Limited,  
9/12, Lal Bazar Street, Kolkata-700 001**
  - (3) Commissioner of Income Tax (Appeals)-2, Kolkata,**
  - (4) Commissioner of Income Tax, Kolkata- , Kolkata;**
  - (5) The Departmental Representative**
  - (6) Guard File**

*By order*

*Assistant Registrar,  
Income Tax Appellate Tribunal,  
Kolkata Benches, Kolkata*

***Laha/Sr. P.S.***