

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD**

**BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

I.T.A. No.1053/Ahd/2023
(Assessment Year: 2011-12)

Kuna Impex Pvt. Ltd., 203, Nain Dhara, Besides GNFC Info Tower, Gandhinagar Sarkhej Highway Gujarat-380015 [PAN No.AABCK0194P]	Vs.	Deputy Commissioner of Income Tax, Circle-2(1)(2), Ahmedabad
(Appellant)	..	(Respondent)

Appellant by :	Shri Dhinal Shah, A.R.
Respondent by:	Shri Ravindra, Sr. DR

Date of Hearing	09.05.2024
Date of Pronouncement	22.05.2024

ORDER

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

This appeal has been filed by the Assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals), (in short “Ld. CIT(A)”), National Faceless Appeal Centre (in short “NFAC”), Delhi vide order dated 12.06.2023 passed for Assessment Year 2011-12.

2. The Assessee has taken the following grounds of appeal:-

“1.1 On the facts and circumstances of the case and in law, the learned CIT(A) erred in passing the order stating that the premium received on the issuance of shares by the Appellant is a capital receipt.

1.2 The provisions of section 56(2)(viib), which pertains to the taxation of excessive share premium, was introduced starting from the Assessment Year (‘AY’) 2013-14. Consequently, it is our position that this provision is not applicable to the year under consideration.

1.3 The Appellant has furnished sufficient documents and the evidence to meet the principles of section 68 of the Act and that once the principal amount of share capital is accepted as genuine under section 68, there is no question of making an addition of premium amount received on issue of shares.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

3. The brief facts of the case are that the assessee filed return of income for A.Y. 2011-12 declaring total income at Rs. 33,47,310/-, which was processed under Section 143(1) of the Act. Later on the Department received information that the assessee company had received share premium / share application money to the tune of Rs. 27,16,350/-. On perusal of the records, it was seen that during F.Y. 2010-11, the assessee company issued certain shares at the price which was over and above the nominal value and received total share premium of Rs. 27,16,350/-. The A.O. was of the view that this premium of Rs. 27,16,350/- was totally unjustified if it is compared with the book value of the assessee company and it is seen that in the garb of high share premium the assessee company has introduced its own undisclosed income. Accordingly, the A.O. issued notice under Section 148 of the Act and initiated re-assessment proceedings.

4. During the course of assessment proceedings, the assessee furnished names of shareholders, who had been allotted shares during the year under consideration. Therefore, for verification of genuineness and creditworthiness, notice under Section 133(6) of the Act was issued to both the share allottees, however, both the persons did not respond to notices and did not furnish the details as called for vide notice under Section 133(6) of the Act. Further, the assessee has also not been able to substantiate as to why such a hefty premium of Rs. 390 per share was received by the assessee company over and above the face / nominal value of the shares. Accordingly, the Assessing Officer held that in absence of any reply from the shareholders and any plausible explanation by the assessee, the

genuineness and creditworthiness of the allottees cannot be verified. Accordingly, the total share premium of Rs. 27,16,350/- received by the assessee was added to the total income of the assessee, by treating the aforesaid amount as unexplained income under Section 68 of the Act.

5. The assessee filed appeal before Ld. CIT(A), and before the Ld. CIT(A) the assessee submitted that at time of allotment of shares, the requisite Form No. 2 related to allotment of shares has been filed with the registrar of companies alongwith complete details of allottees and certified copy of Board Resolution dated 22.03.2010. It was submitted that during the year, the assessee had allotted 215 shares to Mr. Naithani, who is a promoter director of the company and 6750 shares have been allotted to Shri Ghanshyambhai Nanalal Charandas, who had applied for share allotment by submitting the share application form alongwith cheques for an amount of Rs. 27,00,000/- in the month of March, 2010. The Board of Directors had also passed a Resolution on 22.03.2010 recording allotment of shares to these two persons. The assessee submitted copy of Board of Resolution before Ld. CIT(A) for his records. Further, the assessee submitted that the share application money was received through account payee cheques and the amounts have been deposited in the assessee's bank account on 11.03.2010. Further, in order to prove the genuineness of the share allottees, the assessee produced copy of PAN of Shri Ghanshyambhai, copy of pass port of Shri Ghanshyambhai and also copy of the share capital account and share premium account for the relevant year in which the shares were issued. Regarding justification of shares issued at premium of Rs. 390 per shares, the assessee submitted that Shri Ghanshyambhai is a

friend and he approached the assessee to join their business. The assessee was in the business of industrial auto machine for last 15 years and has been on a continuous growth path. Mr. Ghanshaymbhai suggested new business proposals and shown keen interest to join the assessee and assured that he would invest huge amounts for fast business growth of the assessee company. Accordingly, after due discussions, the assessee appointed Shri Ghanshyambhai as Director of the company on 01.09.2009 and appropriate Form No. 32 for appointment as Director had also been filed with the ROC. After working with the assessee company for about six months, the the company decided to allot shares on the basis of planned growth of the company, the share premium has been decided. The assessee submitted that no allotment of shares was made to any outsiders but the shares were allotted to the Director of the assessee company itself. Further, on the issue as to why the share allottee did not respond to notices issued by the Ld. AO, it was submitted that the Assessing Officer had issued online show-cause notice on email id which did not belong to the share allottees and such email was received by the share allottees after the due date of appearance mentioned in such show-cause notice. However, the assessee submitted various details relating to the allottees Mr. Ghanshyambhai viz. acknowledgement of income tax return filed alongwith computation of total income for the relevant year, copy of PAN card, copy of pass port, copy of bank statement with ICICI bank showing that the amount of Rs. 27,00,000/- was given by Shri Ghanshyambhai to the assessee company for share application, copy of Form No. 32 filed to the ROC regarding appointment of Shri Ghanshyambhai as the Director of the assessee company.

6. With regards to the second allottee, Mr. Vedprakash Govindprasad Naithani the assessee submitted that he is a promoter / director of the company since the incorporation of the company itself and Mr. Naithani has been regularly filing his income tax return for the last 25 years and the share application has been paid by Mr. Naithani from his own funds. The assessee submitted copy of acknowledgement of income tax return of Mr. Naithani. Further, the assessee also enclosed Form No. 2 filed with the ROC for allotment of shares to Mr. Naithani before Ld. CIT(A). Further, the assessee also submitted an undertaking to the effect that he has purchased the shares of the assessee company from his own sources, which are verifiable from his bank statement.

7. However, Ld. CIT(A) did not agree with the contentions of the assessee and dismissed the appeal of the assessee on the ground that firstly the assessee has not given any explanation regarding with new business proposal which was suggested by Mr. Ghanshyambhai, the assessee company has not produced any detailed working giving the basis on which shares have been allotted at a premium and assessee has simply mentioned that the amount of share premium has been determined on the basis of planned growth method of the company. However, the above explanation does not help the case of the assessee and accordingly, Ld. CIT(A) confirmed the aforesaid amount as income of the assessee with the following observation:-

“During the course of assessment proceedings, the appellant was asked to explain as to why the share premium of Rs.27,16,350/- received during the year under consideration should not be added to the total income of the year under consideration. In response to the same, the appellant furnished its reply before the AO. The reply submitted by the appellant was considered carefully but not found to be acceptable. The AO stated that the appellant given reply in the routine/general manner. In the present case, the appellant company has allotted

215 shares to Mr. Ved Prakash Naithani and 6750 shares have been allotted to Ghanshyambhai Nandlal Charandas at face value of Rs. 10 per share at the premium of Rs. 390/- per share on 29-07-2010. The appellant contended that the company was in the business of industrial auto machine from last 15 years and continuously it is grooving and performing well enough in the business. Mr. Ghanshyambhai Nandlal Charandas suggested new business proposal and shown his interest to join the appellant company and also assured the appellant company to invest huge amount for fast business growth of the appellant company and therefore, Mr. Ghanshyambhai Nandlal Charandas appointed as a director and after 6 months the board has decided to allot the share on the basis of plan growth of the company, the share premium amount was decided. In support of this contention, the appellant has not produced what were the new business proposal suggested by Mr. Ghanshyambhai Nandlal Charandas and what was the amount of investment he wanted to invest in the appellant-company. The appellant has also not produced any detailed working on the basis of which the shares have been allotted at premium. Simply he mentioned that on the basis of plan growth of the company, the share premium has decided but he failed to produce the details on the basis of which the premium has been decided. The production of Income-tax return and copy of bank statement of Mr. Ghanshyambhai Nandlal Charandas and Mr. Vedprakash Govindprasad Naithani does not serve the purpose of justification for working premium at Rs. 390/- per share. Mere receiving the money through banking channel does not substantiate for issue of share at premium. The appellant should have produced justification/how the premium has been decided at Rs. 390/- per share. The appellant has also failed to prove that the factors which influence/contribute for the growth of business of the appellant. The appellant cannot generally and vaguely decide the premium. There should be scientific approach considering the various factors to decide the premium.

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The Hon'ble Supreme Court, in the case of **Chuharmal v. CIT [1988] 172 ITR 250 / 38 Taxman 190** highlighted the fact that the principle of evidence law are not to be ignored by the authorities, but at the same time, human probability has to be the guiding principle, since the AO is not fettered, by technical rules of evidence, as held by the Hon'ble Supreme Court in the case of **Dhakeswari Cotton Mills Ltd. v. CIT [1954] 26 ITR 775**. The Hon'ble Supreme Court, in the case of Chuharmal (supra) held that what was meant by saying that Evidence Act did not apply to the proceedings under Income-tax Act, 1961, was that the rigours of Rules of evidence, contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of Evidence Act, in proceedings before them, they were prevented from doing so. It was further held by the Hon'ble Apex Court that all that Section 110 of the Evidence Act, 1872 did, was to embody a salutary principle of common law jurisprudence viz, where a person was found in possession of anything, the onus of proving that he was not its owner, was on that person. Thus, this principle could be attracted to a set of circumstances that satisfies its conditions and was applicable to taxing proceedings.

Respectfully following the decisions of Supreme Court in various cases and as the appellant has not proved/filed justification for fixing the premium at Rs. 390/- per share. Mere receiving the premium amount through banking channel does not prove that the company has worth to issue share at premium. No scientific method has been followed by the appellant to decide the premium, the appellant has only contended that Mr. Ghanshyambhai Nandlal Charandas has suggested some growth plan to the appellant company but he failed to explain what are the plans suggested for the growth of the appellant company based on which the worth of the appellant company can be increased so that premium can be charged for allotment of shares. Therefore, it cannot be treated that premium charge is correct and genuine. Therefore, I hold that the AO's action is correct in making the addition of Rs. 27,16,350/- u/s. 68 of the I.T. Act, 1961 **Ground No. 1 is dismissed.**"

8. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(A) confirming the additions made by the Assessing Officer.

9. The Counsel for the assessee submitted that the identity and creditworthiness of the share allottees have been proved by the assessee and the same was never disbelieved by the tax authorities. Secondly, there is no specific allegation / findings that it is assessee's own unaccounted money which has flown back to it in the form of premium on share allotment. Thirdly, the assessee has furnished all possible details regarding the genuineness of the transaction viz. income tax return, relevant Board Resolution approving allotment of shares at a premium, the fact that money has been received from banking channels, the assessee has produced requisite Form No. 2 file before ROC at the time of allotment of shares to these two persons and that the share allottees are not third parties unknown too the assessee, but are the existing Directors of the assessee company etc. Accordingly, the assessee submitted that in this case, there is no basis for confirming the additions, since the only reason cited by the CIT(A) for confirming the addition is that the assessee has not given a precise working / computation for working out the amount of share premium received from the share allottees. Accordingly, in the instant facts, the addition is not liable to be sustained.

10. In response, Ld. D.R. placed reliance on the observations passed by the Ld. A.O. and Ld. CIT(A) in their respective order.

11. We have heard the rival contentions and perused the material on record.

12. On going through the facts of the instant case, we are of the considered view that assessee has filed all details regarding the identity of the shares allottees viz. their PAN card, copies of pass ports, acknowledgement of income tax returns, copies of bank statements from which the share allotment premium has been given. Further, it is also notable fact that the share allottees or not unknown third parties but have been appointed as Directors on the Board of the assessee company. Accordingly, in our considered view, this is not a fit case for invoking the provisions of Section 68 of the Act, looking into the instant facts.

13. In the case of **Siyaram Metals Udyog (P.) Ltd. 156 taxmann.com 432 (Gujarat)**, the Assessee-company was incorporated in relevant assessment year by converting proprietary concern. Thereafter, assessee-company allotted shares at premium to proprietor and also to other investors. During course of assessment proceedings, Assessing Officer noted that a search was conducted at premises of assessee wherein it was found that share certificates were not issued to investors. He, thus, made additions under section 68 of entire credit of sharecapital and premium. On appeal, Commissioner (Appeals) deleted said additions. The Tribunal upheld said order on ground that identity of party was established by furnishing name, address and PAN detail, bank details, ITR etc. The Tribunal further held that it was first year of operation of assessee-company and declaration of dividend by company had nothing to do with sharecapital received by assessee and thus, assessee discharged onus cast upon it under section 68. The High Court held that the Tribunal had rightly held that provisions of section 68 could not be invoked, more particularly when

addition was made on account of sharepremium and share application money by investors whose identity, creditworthiness and genuineness was proved by assessee.

14. In the case of **Agson Global (P.) Ltd. 134 taxmann.com 256 (Delhi)**, the High Court held that where assessee-company received sharecapital/premium money from several investors and was able to place sufficient documentary evidence to establish that money which assessee paid to investors was routed back to it in form of sharecapital / sharepremium, since identity, creditworthiness and genuineness of investors was proved, AO was not justified in making addition under section 68 of the Act.

15. In the case of **SLS Energy (P.) Ltd. 154 taxmann.com 400 (Bombay)**, the High Court held that where Assessing Officer had no doubt with regard to existence of entities in whose favour allotment of shares had been made by assessee-company upon receipt of share money as also amount of premium paid on said shares, reopening of assessment on ground that receipt of sharepremium amount was excessive and much beyond intrinsic value of shares of assessee-company was not justified

16. In the case of **Enrich Agro Food Products (P.) Ltd.** the High Court held that where assessee-company received sharecapital including sharepremium from an investor and during assessment proceedings assessee had furnished documents so as to establish identity and creditworthiness of investor and genuineness of transaction and also valuation report of CA for

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premium amount, impugned addition made under section 68 in respect of such sharecapital and premium amount was unjustified.

17. In the case of **Kunjai Synergies (P.) Ltd. 161 taxmann.com 672 (Kolkata - Trib.)**, the ITAT held that where assessee-company had raised sharecapital/sharepremium by issuing equity shares to five subscribers at a premium of Rs. 990 per share and assessee had filed all evidences consisting of copies of ITRs, audited accounts, certificates of incorporation, Memorandum and Articles, Annual Returns etc., to prove identity and creditworthiness of share subscribers, impugned addition made under section 68 was to be deleted.

18. Accordingly, looking into the instant facts and the judicial precedent cited above, the appeal of the assessee is allowed.

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

This Order pronounced in Open Court on 22/05/2024

Sd/-

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad; Dated 22/05/2024

TANMAY, Sr. PS

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

Sd/-

(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद/ ITAT, Ahmedabad