

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA
(Virtual Court)**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

**I.T.A. No. 522/Kol/2020
Assessment Year: 2012-13**

M/s. Advent Commodities Pvt. Ltd.....Appellant
[PAN: AAFCA 5283 P]

Vs.

ITO, Ward-4(3), Kolkata.....Respondent

Appearances by:

Sh. S.M. Surana, Adv., appeared on behalf of the Assessee.

Smt. Ranu Biswas, Addl. CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : November 25th, 2020

Date of pronouncing the order : January 27th, 2021

ORDER

Per J. Sudhakar Reddy, AM:

This appeal filed by the assessee is directed against the order of the Ld. Commissioner of Income Tax (Appeals)-13, Kolkata, [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dated 04.09.2020 for the Assessment Year 2012-13.

2. The assessee is a company and is in the business of dealing and trading in commodities and commodity derivatives through recognised exchanges. During the year it filed its return of income declaring total income of ₹ 16,64,635/-. The AO in the assessment order records that this profit is in accordance with the market position.

2.1. During the year, the assessee issued one 1,25,000 shares of ₹10/- each at a premium of ₹190/-. The assessee filed details of share capital raised along with the names and the addresses of the shareholders, their PAN, IT acknowledgement of filing of return, copy of bank statement, copy of the audited accounts, copy of returns filed with ROC returns as well as copy of the minutes recorded for allotment of shares at the board meetings, when the AO, during the course of assessment proceedings, called for

these details. Thereafter the AO issued notices u/s 131 of the Act to the share applicant companies. These were not complied with. The AO was not satisfied with the question of the share premium charged for issue of shares. He also recorded that few share allottee companies were facing prosecution under the Company's Act. As there was no compliance to notices issued u/s 131(1) of the Act, the AO passed a best judgement assessment order u/s 144(1) of the Act determining the total income of the assessee at ₹2,54,14,635/- inter alia, making in addition of ₹2,37,50,000/- being share premium received by the assessee company as unexplained cash credit u/s 68 of the Act. The fresh share capital issued and subscribed to the extent of this value of share of ₹10/- was accepted as genuine by the AO and no addition made. The assessee carried the matter in appeal.

2.2. The first appellate authority called for a remand report. During the remand proceedings, fresh summons were issued to the share applicant companies u/s 131 of the Act. The representatives of the share allottee companies appeared before the AO, in response to these notices issued u/s 131 of the Act. The AO, in his remand report records that, the persons who appeared before him in response to the summons u/s 131 of the Act, do not have any credibility as directors. He further records that the amounts invested by the share applicant companies as the share capital of the assessee company was received from other companies by way of proceeds from sale of shares. He observes that the revenue from operations, of the share allottee company, are much less than the amount received from them from other companies by way of sale of shares. Hence, the AO is of the view that genuineness of the transaction and the creditworthiness of the share allottee companies were not proved. The assessee replied that all the share applicant companies are Non-Banking Financial Companies registered with R.B.I. and body corporates and that all of them have received the notices u/s 131 of the Act and that the allottee companies through their representatives have appeared before the AO and the AO recorded their statements and that all the details of the companies and their share holding were filed and therefore the identity, creditworthiness of the companies were proved and the genuineness of the transaction was also proved. It was submitted that the directors who appeared had educational qualifications of Higher Secondary, Matriculation and Graduation and were in business and hence, it is not correct to say that these persons have no credibility. It was further

submitted that the net worth of these companies and the investment made by these companies in the assessee company justify the transactions. He further justified the premium of ₹190/- charged by the assessee company by pointing out to high turnover of the assessee company and the profits earned by it. He took this Bench through the facts and figures of turnover and profits earned in the last few year to justify the share premium charged. He relied on case law in support of his contention that the addition is bad in law. We will refer to these case law as and when necessary.

2.3. The ld. CIT(A) relied on certain case laws and specifically on the decision of the Hon'ble Supreme Court in the case of *Pr. CIT (Central-1) vs. NRA Iron & Steel Pvt. Ltd.* arising out of *SLP (Civil) No. 29855 of 2018* and uphold the order of the AO. Aggrieved, the assessee is in appeal before us.

3. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the case law cited, we hold as follows.

4. The companies which had applied for share capital and the creditworthiness of these companies is given in the following table:

Name of the Party	Amount Received	Net Worth as per B/s
RAMESH MERCANTILE PVT LTD	30,00,000	5,41,03,400
SWASTIK SECURITIES & FINANCE LIMITED	30,00,000	37,56,09,293
ROHAN FINANCE & SECURITIES LTD	30,00,000	38,87,62,077
PRA TIUS COMMERCIALS PVT LTD	30,00,000	4,94,65,886
ZIWANI BARTER PVT LTD	30,00,000	36,56,71,889
JPRECHHA COMMERCIALS PVT LTD	20,00,000	5,07,00,999
TRAMMEL TRADING PVT LTD	30,00,000	35,07,76,604
BACHCHI FINANCE PVT LTD	20,00,000	19,09,58,640
JP ENGINEERING CORPN PVT LTD	30,00,000	64,01,28,457

4.1. Each of these share allottee companies are non-banking financial companies registered with RBI. Hence, their identity cannot be doubted. These share allottee companies have been filing the income tax returns and are being assessed to income tax. In response to notice issued u/s 131(1) of the Act, the representatives of all these share allottee companies appeared before the AO. The AO has not given any cogent reason for coming to a conclusion that, these representatives of the share allottee companies do

not have any credibility. He also did not give any cogent reasons as to why he has come to a conclusion that each of the share allottee companies, investment in share capital of the assessee company is not a genuine transaction. There is no dispute that the net worth of each of these registered NBFCs is much higher than the amount invested by them by way of share application money in this company as is evident from the table given above. Four shareholder companies have their assessment completed u/s 143(3) of the Act. The AO as well as the Id. CIT(A) have not, in this case doubted the identity of the shareholder or the capacity of the shareholder company. Their only doubt is on the genuineness of the transaction and that too because in their view the share premium of ₹190/- charged is high. This is factually incorrect. The turnover of the assessee company is ₹17.01 crores for the AY 2012-13 and ₹13.85 crores for AY 2011-12. The profits declared are ₹23.01 lakhs for AY 2012-13 and ₹20.10 lakhs for AY 2011-12.

4.2. The legal issue that arises is whether such an addition is sustainable in law as what was brought to tax was only the share premium.

4.3. We now discuss the case law on this issue. The ITAT Kolkata Bench in the case of *ITO vs. M/s. Savera Towers Pvt. Ltd.* in ITA No. 2275/Kol/2016 for the AY 2012-13 order dated 05/12/2018 held as follows:

"6. We have heard the rival submissions. The facts stated hereinabove remain undisputed before us by either of the parties and hence the same are not reiterated for the sake of brevity. At the outset, we find that the assessee had received share capital of Rs. 54,200/- from 4 corporate entities and Rs. 2,70,45,800/- from the very same shareholders towards share premium. The share capital received by the assessee has been duly accepted by the Id. AO within the ken of section 68 of the Act. However, share premium component has been doubted by the Id. AO. We find that the assessee in the instant case had duly complied with by furnishing the complete details of share subscribers to prove their identity, genuineness of the transaction and creditworthiness of share subscribers beyond doubt. These are duly supported by the documentary evidences which are enclosed in the paper book. The Id. AO had not found any falsity or any adverse inference of the said documents. We find that the Ld. CIT(A) had placed heavy reliance on these documents and had granted relief to the assessee. All the share subscribers are duly assessed to income tax and the transaction with the assessee company are duly routed through banking channels and are duly reflected in their respective audited balance sheets which are also placed on record before us. In any case, once the receipt of share capital has been accepted as genuine within the ken of section 68 of the Act, there is no reason for the Id. AO to doubt the share premium component received from the very same shareholders as bogus. We held that all the three necessary ingredients of section 68 had been duly complied with by the assessee with proper documentary evidences. We find that notices issued u/s 133(6) have been duly complied with. The only grievance of the Id. AO was that the assessee could not produce the directors of the share subscribing companies. In our considered opinion, for this reason alone, there cannot be any addition u/s 68 of the Act as held by the Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation Pvt. Ltd. reported in 159 ITR 78 (SC). We find that the decision of Hon'ble Delhi High Court in the case of Novo Promoters and Finelease Pvt. Ltd. reported in 342 ITR 169 (Del) vehemently relied upon by the Id. DR before us, is not

applicable in the instant case, as in the facts before the Hon'ble Delhi High Court, the notices u/s 133(6) have not been duly complied with. Hence the decision rendered by the Hon'ble Delhi High Court in the case referred to supra is not applicable to the facts of the instant case and is factually distinguishable.

6.1. We find that the reliance placed by the ld. AR in the decision of Hon'ble Bombay High Court in *Pr. CIT vs. Apeak Infotech* reported in 88 Taxmann.com 695 dt 08.06.2017 wherein the question raised before the Hon'ble Bombay High Court are as under:

"A. Whether on the facts and circumstances of the case and in law, the Tribunal was correct to uphold the decision on Commissioner of Income Tax (Appeals) that the share premium received by the assessee-company cannot be taxed u/s 68 of the Act ignoring the ratio laid down by this Court in its decision reported in the case of *Major Metals Ltd. vs. Union of India* [2013] 359 ITR 450 (Bom)?

B. Whether on the facts and circumstances of the case and in law, the Tribunal as well as the Commissioner of Income Tax (Appeals) was right in deleting addition made by the AO, by holding that the share premium receipt is capital in nature?"

The Hon'ble Court held as under:

Regarding Question A:

(a) The issue raised by the Revenue in this question is to bring to tax the share premium received u/s 68 of the Act. We find that the issue of bringing the share premium to tax u/s 68 of the Act was not an issue which was urged by the appellant Revenue before the Tribunal. The only issue which was urged before the Tribunal as recorded in para 11 of the impugned order is the addition of share capital and share application money in the hands of the assessee as income u/s 28(iv) of the Act. We find that the Commissioner of Income-tax (Appeals) did consider the issue of applicability of section 68 of the Act and concluded that it does not apply. The Revenue seems to have accepted the same and did not urge this issue before the Tribunal. Mr. Bhoot, ld. counsel appearing for the Revenue also fairly states that the issue of applicability of section 68 of the Act was not urged by the Revenue before the Tribunal.

(b) It is a settled position in law as held by this court in *CIT v. Tata Chemicals Ltd.* [2002] 122 Taxman 643/256 ITR 395 (Bom.) that in an appeal u/s 260A of the Act, the High Court can only decide a question if it had been raised before the Tribunal even if not determined by the Tribunal. Therefore, no occasion to consider the question as prayed for arises.

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

(d) We may also point out that decision of this court in *Major Metals Ltd. v. Union of India* [2012] 19 taxmann.com 176/207 Taxman 185/[2013] 359 ITR 450 Bom. proceeded on its own facts to uphold the invocation of section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers to shares of the assessee's company were not creditworthy inasmuch as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000 at premium at Rs. 990 per share. It was

this finding of the fact arrived at by the Settlement Commission which was not disturbed by this court in its writ jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the AO as recorded by the Tribunal. No finding in this case has been given by the authorities that shareholder/share applicants were unidentifiable or bogus.

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

Regarding Question B:

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

(b) It is further pertinent to note that the definition of income as provided u/s 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from April 1, 2013 and thus, would have, no application to the share premium received by the respondent "assessee in the previous year relevant to the assessment year 2012-13. Similarly, the amendment to section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject assessment year 2012-13 and cannot be invoked. It may be pointed out that this court in CIT v. Gagandeep Infrastructure (P.) Ltd. [2017] 80 taxmann.com 272/247 Taxman 245/394 ITR 680 (Bom.) has while refusing to entertain a question with regard to section 68 of the Act has held that the proviso to section 68 of the Act introduced with effect from April 1, 2013 will not have retrospective effect and would be effective only from the assessment year 2013-14.

(c) In view of the above, question No. B as proposed also does not give rise to any substantial question of law as it is an issue concluded by the decision of this court in Vodafone India Services (P.) Ltd. (supra) and in the apex court in G. S. Homes and Hotels (P.) Ltd. (supra). Thus not entertained.

Therefore, all the six appeals are dismissed. No order as to costs."

6.2. We find that the issue under dispute was the subject matter of adjudication on exactly similar facts by this tribunal in the case of ITO vs Trend Infra Developers Pvt Ltd in ITA No. 2270/Kol/2016 dated 26.10.2018 for Asst Year 2012-13, wherein the addition made towards share premium was deleted. The findings given therein are not reiterated for the sake of brevity."

4.4. The ITAT in the above case has held that share premium cannot be brought to tax. The judgement of the Hon'ble Supreme Court in the case of *NRA Iron & Steel Pvt. Ltd.* (supra) relied on by the ld. D/R is not applicable to the facts of this case, as in that case the share applicant companies were not traceable nor they appeared before the authorities.

4.5. The assessee justified the share premium by referring to the turnover of the assessee company and the profit declared. The AO has not stated the reason as to why he is of the opinion that the share premium charge is excessive.

5. In view of the above discussion, we are of the considered opinion that the assessee has proved the identity and creditworthiness of the creditors as well as the genuineness of the transaction. Moreover, the Tribunal has held that no addition can be made of share premium only, in the case of *M/s. Gateway Enclave Pvt. Ltd.* in *ITA No. 2269/Kol/2016* order dated 01.05.2019 and in the case of *M/s. Savera Towers Pvt. Ltd.* (supra). Consistent with the view taken therein, we delete the addition u/s68 of the Act and allow the appeal of the assessee.

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

Kolkata, the 27th January, 2021.

Sd/-
 [Aby T. Varkey]
 Judicial Member
 Dated: 27.01.2021

Sd/-
 [J. Sudhakar Reddy]
 Accountant Member

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***M/s. Advent Commodities Pvt. Ltd., 1, R.N. Mukherjee Road, R. No. 64, 4th Floor, Kolkata-700 001.***
2. ***ITO, Ward-4(3), Kolkata.***
3. CIT(A)-13, Kolkata. (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
 ITAT, Kolkata Benches