IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' C '

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

I.T. A. No.665/Bang/2017
(Assessment Year : 2008-09)

M/s. Cornerstone Property Investments Pvt. Ltd.,
583, 9th Main, Off CMH Road,
Indiranagar 1st Stage, Bangalore-560 038. .... Appellant.

Vs.

Income Tax Officer,
Ward 2(1)(2), Bangalore. ..... Respondent.

Appellant By : Shri H.N. Khincha, C.A.
Respondent By : Shri Nagendra Prasad,CIT (D.R)

Date of Hearing : 28.11.2017.
Date of Pronouncement : 09.02.2018.

O R D E R

Per Shri Jason P Boaz, A.M. :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-2, Bangalore dt.24.01.2017 for the Assessment Year 2008-09.

2. Briefly stated, the facts of the case are as under :-

2.1 The assessee, a company stated to be engaged in Real Estate business, filed its return of income for Assessment Year 2008-09 on

30.09.2008 declaring loss of (-) Rs.6,84,051. The assessee filed a revised return on 14.10.2008 declaring loss of (-) Rs.5,23,751. The revised return was processed under Section 143(1) of the Income Tax Act, 1961 (in short 'the Act'). On receipt of certain information the Assessing Officer initiated proceedings under Section 147 of the Act and after recording of reasons in this regard, the Assessing Officer issued notice under Section 148 of the Act on 18.4.2012. After receipt of the notice, the assessee filed its response thereto and on receipt of the same, the Assessing Officer dropped the proceedings initiated under Section 147 of the Act and this was communicated to the assessee vide letter dt.4.6.2013. Subsequently, proceedings under Section 147 of the Act were once again initiated in the case on hand and after recording reasons, notice under Section 148 of the Act was issued on 10.6.2013 along with copy of reasons recorded. The assessee vide reply dt.18.7.2013 submitted that since no income of the assessee had escaped assessment for the year under consideration, therefore the notice issued under Section 148 of the Act is illegal without jurisdiction, void ab-initio and consequently proceedings initiated under Section 147 of the Act be dropped. The assessee submitted that the return filed on 30.09.2008 and revised return filed on 14.10.2008 be treated as filed in response to the notice under Section 148 of the Act. The assessment was completed under Section 143(3) r.w.s. 147 of the Act vide order dt.20.3.2015 wherein the assessee's income was determined at Rs.49,44,76,249.

2.2 Aggrieved by the order of assessment dt.20.3.2015 for Assessment Year 2008-09, the assessee filed an appeal before the CIT (Appeals) – 2, Bangalore; challenging the order both on the issue of validity of notice issued under Section 148 of the Act and on merits of the addition of Rs.49.50 Crores. The learned CIT (Appeals) dismissed the assessee's appeal on both the aforesaid issues vide the impugned order dt.24.1.2017.

3. Aggrieved by the order of CIT (Appeals) – 2, Bangalore dt.24.1.2017, the assessee preferred an appeal before this Tribunal, wherein it has raised the following grounds :-

1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The order of re-assessment is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist and have not been complied with and consequently, the re-assessment requires to be cancelled.

2.1 The learned CIT[A] is not justified in upholding the re-opening of the assessment without appreciating that the re-opening was on a mere change of opinion and hence impermissible under the facts and in the circumstances of the appellant's case.

2.2 The learned CIT[A] is not justified in upholding the re-opening of the assessment without appreciating that the reasons recorded by the learned A.O. do not show that there is any income escaping assessment under the facts and in the circumstances of the appellant's case.

2.3 The learned CIT[A[ought to have appreciated that the reasons recorded merely showed a reason to suspect and there was no reasons to believe that income has escaped assessment.

3. Without prejudice to the above, the learned CIT[A] is not justified in sustaining the addition of a sum of Rs.49,50,00,000/- as income from other sources under the facts and in the circumstances of the appellant's case.

3.1 The addition made is totally opposed to law and facts of the appellant's case and has been made in gross violation of the principles of natural Justice and consequently, the same deserves to be deleted.

3.2 The learned CIT[A] is not justified in holding that the appellant has not expaliend the nature of the amount received from M/s. Walden Properties Pvt. Ltd., under the facts and in the circumstances of the appellant's case.

3.3 The learned CIT[A] ought to have appreciated that the share premium received by the appellant was not capable of being taxed being a capital receipts and the provisions of sec. 56[1][viib] of the Act was not applicable for the year under appeal and hence, the addition sustained by the learned CIT[A] is unjustified and the same deserves to be deleted.

4. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s. 234-B and 234-C of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.

5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

4. **Ground Nos.1, 4 & 5** - These grounds being general in nature and not urged before us, since no adjudication is called for thereon, they are dismissed as infructuous.

5. **Ground No.2 – Validity of Notice u/s.148 of the Act**.

5.1 From the details on record, it is seen that the assessee filed its original return of income for Assessment Year 2008-09 on 30.09.2008 declaring loss of (-) Rs.6,84,050. Revised return was filed on 14.10.2008 revising the loss of (-) Rs.5,23,751. The revised return was processed under Section 143(1) of the Act on 12.9.2009. The Assessing Officer initiated proceedings under Section 147 of the Act and after recording reasons in this regard, issued notice under Section 148 of the Act on 18.4.2012. As per the record, apparently after receipt of the assessee's reply and consideration thereof, the Assessing Officer dropped the proceedings initiated under Section 147 of the Act and the assessee was informed of this vide letter dt.4.6.2013. It is seen that subsequently, the Assessing Officer once again initiated proceedings under Section 147 of the Act and after recording reasons in respect of the assessee's income escaping assessment, issued notice under Section 148 of the Act dt.10.6.2013 along with copy of reasons recorded. In response thereto, the assessee challenged the validity of proceedings initiated under Section 147 of the Act and notice issued under Section 148 of the Act on 10.6.2013 and requested that these proceedings be dropped. It was submitted that the returns of income filed on 30.09.2008 and 14.10.2008 for Assessment Year 2008-09 be treated as filed in

compliance to the notice issued under Section 148 of the Act on 10.6.2013. The assessment was concluded under Section 143(3) r.w.s. 147 of the Act whereby the assessee's income was determined at Rs.49,44,76,249 in view of the single addition of Rs.49.50 Crores.

5.2.1 In the appeal before us, the assessee has assailed the action of the Assessing Officer in issuing the notice under Section 148 of the Act dt.10.6.2013, mainly on the following grounds :-

(i) that the mandatory requirements to assume jurisdiction under Section 148 of the Act did not exist and hence the reassessment was bad in law.

(ii) The proceedings for reopening of the assessment for Assessment Year 2008-09 was a mere change of opinion as the proceedings were initiated on the same grounds and for the same reasons that led to the issuance of earlier notice under Section 148 of the Act on 18.4.2012 which were proceedings dropped by the Assessing Officer vide letter dt.4.6.2013.

(iii) There was no reason to believe that income of the assessee liable to tax had escaped assessment for the year under consideration, as can be seen from the reasons recorded while issuing the notice under Section 148 of the Act dt.10.6.2013 for reopening the assessment for Assessment Year 2008-09.

5.2.2 In support of its contentions, the assessee made detailed submissions, filed Paper Book and a compilation of judicial decisions on

the issue of "Reason to Believe" and "Issue of Notice based on which the first notice was issued and dropped."

5.3 Per contra, the learned Departmental Representative for Revenue also made detailed submissions in support of the decision of the learned CIT (Appeals) and filed judicial pronouncements in support of Revenue's stand in the matter.

5.4.1 We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncements cited and they have been discussed wherever necessary and when the context so required. We find that this issue of the validity of notice issued by the Assessing Officer under Section 148 of the Act dt.10.6.2013 was raised before the learned CIT (Appeals), who has rendered a detailed finding in the matter. As observed by the learned CIT (Appeals) the Assessing Officer has followed the procedure necessary for issue of the notice. The Assessing Officer has recorded reasons for initiating proceedings under Section 147 of the Act after which the notice under Section 148 of the Act was issued, enclosing copy of reasons recorded which was provided to the assessee. The assessee's objections in this regard have been considered and disposed off by the Assessing Officer before the conclusion of assessment proceedings. From the reasons recorded, it clearly emerges that the Assessing Officer has recorded that he has "reasons to believe" that income of the assessee liable to tax has escaped assessment. It is settled principle that

at the time of issue of notice under Section 148 of the Act, it is sufficient if there is belief that income liable to tax had escaped assessment. It is sufficient if there was relevant material to form a requisite belief. We, therefore, agree with the learned CIT (Appeals) that the 'necessary' requirements for assuming jurisdiction under Section 148 of the Act has been satisfied and that from the reasons recorded, the Assessing Officer has made out a case that he had reason to believe that income of the assessee liable to tax had escaped assessment in the period under consideration.

5.4.2 We are unable to agree with the contention put forth by the assessee that the issue of notice under Section 148 of the Act as a result of a mere change of opinion. In the case on hand, the return of income was only processed under Section 143(1) of the Act. It is not the case of the assessee that the assessment for Assessment Year 2008-09 was completed under Section 143(3) of the Act. Therefore, the issue of notice under Section 148 of the Act is for assessment of income and not reassessment, as is normally understood. Since no assessment had taken place and no opinion has been formed on the issue on which the Assessing Officer had reason to believe that the assessee's income liable to tax had escaped assessment, it cannot be said that there has been a change of opinion. Since no opinion had been formed earlier, the question of change of opinion does not arise.

5.4.3 The first notice issued under Section 148 of the Act on 18.4.2012 was dropped and a second notice under Section 148 of the Act was issued on 10.6.2013. This, in itself, does not constitute "Change of Opinion." This fact comes out clearly from the Assessing Officer's letter dt.4.6.2013 wherein the Assessing Officer has mentioned that the proceedings initiated by issue of the earlier notice under Section 148 of the Act dt.18.4.2012 was dropped as the reasons have not been properly recorded. As pointed out by the learned Departmental Representative for Revenue, the Hon'ble Allahabad High Court in the case of Sukhlal Ice and Storge Co. 199 ITR 129 has upheld the issue of second notice when the first notice was found to be illegal and found wanting in jurisdiction. Therefore, in our considered view, the issue of the second notice under Section 148 of the Act on 10.6.2013 for Assessment Year 2008-09 is valid, as all the other procedures mandated in the Act have been followed by the Assessing Officer. Also, since substantive issue in question was never examined under the proceedings in the first notice issued on 18.4.2012, the question of change of opinion does not arise. In this view of the matter, as discussed above, we find no infirmity in the decision of the learned CIT (Appeals) in upholding the action of the Assessing Officer in issuing the notice under Section 148 of the Act on 10.6.2013. Consequently, Ground No.2 of assessee's appeal is dismissed.

6. **Ground No.3** - **Addition of Rs.49,50,00,000.**

6.1 The only issue for consideration and adjudication on merits before us in the addition of Rs.49.50 Crores shown as "Share Premium" as 'Income from other sources'. It was observed by the Assessing Officer that a company by name, M/s. Walden Properties Pvt. Ltd., had invested an amount of Rs.50 Crores and in lieu thereof the assessee had issued 5 lakh shares of face value of Rs.10 per share. Therefore, the amount of Rs.50 Crores represents Rs.50 lakhs of share capital and Rs.49.50 Crores as share premium @ Rs.990 per share. For the detailed reasons in the order of assessment for Assessment Year 2008-09, the Assessing Officer held the aforesaid transaction to be a conduit as part of a layering process and held the said premium amount of Rs.49.50 Crores as income of the assessee under the head "Income from other sources." On appeal, the learned CIT (Appeals) upheld the Assessing Officer's view in the matter and the assessee is now before us in the present appeal.

6.2 In the reasons recorded by the Assessing Officer for issue of notice under Section 148 of the Act, it has been mentioned that an amount of Rs.50 Crores intended for some illegal payments has been routed through various layers of companies and the assessee is one such conduit in the layering process. As part of the layering process, the assessee had received an amount of Rs.50 Crores from M/s. Walden Properties Investment Pvt. Ltd., @ Rs.1,000 per share as against the face value of Rs.10 per share. In the order of assessment, the Assessing

Officer examined the issue from the prerspective of procedures and principles, from the angle of the investor company and the recipient company (i.e. the assessee in the case on hand) and held the transaction to be not a genuine one and added the premium amount of Rs.49.50 Crores to the income of the assessee.

6.3 From the submissions put forth, the gist of the assessee's contentions are that;

(i) The said transaction is a genuine, bona fide transaction, as evident by the fact that the entire transaction has been through regular banking channels and is properly documented.

(ii) The source of funds and identity of the payee has been established;

(iii) How much premium should be charged on the issue of share capital is in the domain of the decision making of the assessee company and Revenue authorities cannot dictate as to how much premium can be charged on the shares issued;

(iv) Since Revenue has accepted the transaction of investment in the hands of the investor, i.e. M/s. Walden Properties Investment Pvt. Ltd., therefore the addition of Rs.49.50 Crores made in the hands of the assessee is untenable.

(v) It is settled principle, upheld by the Hon'ble Apex Court, that bogus share transactions cannot be added in the hands of the company in

which the investment is made and therefore, the action of the Assessing Officer is bad in law.

(vi) The provisions of Sec. 56(1)(viib) has been introduced by Finance Act, 2012 w.e.f. 1.4.2013 and do not apply to Assessment Year 2008-09, i.e. the year under appeal in the case on hand.

6.4 At the outset, it needs to be mentioned that the argument of the assessee that the provisions of Sec.56(1)(viib) of the Act does not apply to the case on hand for the year under consideration as it has been introduced by Finance Act, 2012 w.e.f. 1.4.2013 is a misplaced one. From a reading of the order of assessment, it is clear that the Assessing Officer has invoked the provisions of Sec. 68 of the Act. This leads us to the question of whether the provisions of Sec. 68 of the Act can be invoked for the nature of transactions involved in the case, where sums of money are credited in the name of share premium. This question has been addressed by the Hon'ble Calcutta High Court in the case of Pragati Financial Management Pvt. Ltd. Vs. CIT in C.A. 887 & 998 of 2016 and others dt.7.3.2017. In its order (supra) on the issue of whether enquiry under Section 68 of the Act can be carried out for examining the genuineness of the share premium transaction, the Hon'ble High Court held that Sec. 68 of the Act can be invoked to conduct enquiry on the genuineness of share premium transactions. At paras 5 to 15 thereof, the Hon'ble High Court held as under :

" 5. The direction for inquiry, as contained in the order of the C.I.T., is essentially a step towards charging the receipts reflected as share capital issued at premium to income tax as income of the assessee of that previous year in the event the assessing officer remained unsatisfied with explanation of the assessee given after conducting the inquiry in the manner provided in the order of the C.I.T. The assessee preferred an appeal before the Income Tax Appellate Tribunal against this order of the Commissioner issued under Section 263 of the Act. It was contended before the Tribunal that the order of the assessing officer was neither erroneous nor prejudicial to the interest of the Revenue, and sufficient inquiry was made by the assessing officer. The Tribunal dealt with several appeals pertaining to the assessment years 2008–09 and 2009–10 relating to different assessees and the appeal of Pragati was dismissed by a common order passed on 4th November, 2015. Orders in respect of other appellants were passed on different dates, but as we have already observed, reasoning in all the orders of the Tribunal has been substantially the same. The Tribunal, while dismissing the appeals followed an earlier order by which a large number of cases on similar issues were dismissed. The lead case on which reliance was placed by the Tribunal was its own decision in the case of Subhalakshmi Vanijya Pvt. Ltd. Vs. C.I.T. (I.T.A No.1104/Kol/2014), which was decided on 30th July 2015, pertaining to the assessment year 2009–10. In the case of Subhalakshmi (supra), the Tribunal examined the question as to whether such an inquiry was permissible or not. While addressing this question, the Tribunal examined as to whether the assessing officer could examine genuineness of transactions of receipt of share capital with premium or not. If such a course was permissible, and upon completion of the inquiry the assessee failed to satisfy the assessing officer on the identity and capacity of the subscribers and genuineness of transactions, then, the Tribunal opined, addition under Section 68 of the Act would have been called for. That would be the ultimate outcome of the inquiry directed by the C.I.T., provided of course, the assessing officer remained unsatisfied with the explanation furnished by the assessees. Section 68 of the Act permits adding the sum credited to the income of an assessee in situations

specified under that provision. For the assessment years concerned, Section 68 of the Act read:-

> *"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."*

6. There was amendment to the aforesaid Section and following provisos were added to Section 68 by the Finance Act, 2012, with effect from 1st April, 2013:-

> *"Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee- company shall be deemed to be not satisfactory, unless –*
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> *(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*

(b) Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."

7. Along with this provision, Section 56(2) (viib) and Sections and 92BA and 92C were also amended by the Finance Act, 2012. These amended provisions were incorporated in the statute book primarily to introduce the concept of arm's length pricing in share transactions particularly in relation to closely held companies. For the purpose of adjudication of these appeals, however, reproduction of these provisions is not necessary. Since in course of hearing Mr. Abhratosh Majumdar, learned counsel for the appellants brought to our notice these amendments, we are referring to these provisions in this judgment. In the decision of Subhalakshmi Vanijya Pvt. Ltd. (supra), the Tribunal rejected the appeal of the assessee, inter alia, holding that the amended provision of Section 68 of the Act was retrospective in operation. The Tribunal specifically observed:-

"We, therefore, hold that though amendment to section 56 (2) (viib) is prospective, but to section 68 is retrospective. If that is the position, then the assessee is always obliged to prove the receipt of share capital with premium etc. to the satisfaction of the A.O, failure of which calls for addition U/S.69."

8. The Tribunal rejected the appeal of Pragati as well as the appeals of other appellants before us, relying on the aforesaid decision, and sustained the order of the C.I.T. directing inquiries, as we have referred to earlier.

9. Main thrust of the appellant's case is that the provisions of Section 68 of the Act as amended could not be given retrospective operation and if that position of law was accepted, then it was not open to the C.I.T. to direct an enquiry to ascertain the source and genuineness of the sums being projected by the appellants as capital receipts. Mr. Majumdar wants us to reject the finding of the Tribunal that Section 68 of the Act, as amended, has retrospective operation. In support of his submissions on this point, he has relied on a Constitution Bench judgment of Supreme Court delivered in the case of the Commissioner of Income Tax Vs. Vatika Township Pvt. Ltd. [(2015) 1 SCC 1]. Argument of the appellant is that in the event the amendment made to section 56 (2) of the Act is given prospective effect along with provisos to Section 68, then sums received as share capital or share premium would not be taxable in the light of particulars already disclosed by each appellant, and the exercise directed by the C.I.T. would be a futile or redundant exercise. Mr. Majumdar wants the appeal to be admitted on formulating the following question, which, according to him, would involve substantial question of law:-

> *"Whether in the facts and circumstances of the case and in law, the learned Tribunal erred in holding that the proviso to Section 68 inserted by the Finance Act, 2012 with effect from April 1, 2013 would be applicable to Assessment Year 2008 – 09?"*

10. A Coordinate Bench of this Court in dealing with an almost identically worded order of the C.I.T. in the case of Rajmandir Estates Private Limited Vs.

Principal Commissioner of Income Tax, Kolkata – III, Kolkata, [G.A No.509 of 2016 with I.T.A.T No.113 of 2016] found such order to be sustainable in law. In the judgment, Their Lordships construed the provisions of section 68 as it was before the aforesaid amendment being the law which prevailed in the relevant previous year in that proceeding, and held, inter alia:-

> *"We are unable to accept the submission that any further investigation is futile because the money was received on capital account. The Special Bench in the case of Sophia Finance Ltd. (supra) opined that "the use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine as was held in the case of CIT –Vs– Nova Promoters and Finlease (P) Ltd. (supra). Similar views were expressed by this Court in the case of CIT –Vs– Precision Finance Pvt. Ltd. (supra). We need not decide in this case as to whether the proviso to Section 68 of the Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd. (supra) held that "the ITO may even be justified in trying to ascertain the source of depositor". Therefore, the submission that the source of source is not a relevant enquiry does not appear to be correct. We find no substance in the submission that the exercise of power under Section 263 by the Commissioner was an act of reactivating stale issues."*

12. This judgment was carried up in appeal by the assessee before the Hon'ble Supreme Court by filing a

petition for special leave to appeal (Petition(s) for Special Leave to Appeal (c) … cc No

(s) 22566-22567/2016). On 9th January, 2017, the Hon'ble Supreme Court was pleased to dismiss the special leave petition finding no reason to entertain the same. A copy of the order of the Hon'ble Supreme Court has been made available to us by Mr. Nizamuddin, learned counsel representing the Revenue.

13. In that judgment, the Coordinate Bench had referred to particulars of the assessee's account in detail. Reference was made specifically to its subsisting share capital, quantum rise in share capital and reserve and surplus on issue of share capital with high premium during the relevant previous year. In this judgment, we do not consider it necessary either to reproduce the particulars of accounts of individual assessees or to refer to the manner in which the capital receipts were realised. The factual background of these cases are more or less similar to the facts involved in the case of Rajmandir Estates Private Ltd. (supra), and learned counsel for the parties have also confined their submissions to points of law only. The capital receipts in respect of which inquires have been ordered by the C.I.T. have similar features, being fresh share capital issued at high premium. Mr. Majumdar, however, drew his strength to urge the point that it was only after the aforesaid amendments such inquiries would have relevance. He sought to take cue from the observation of the Coordinate Bench that the question as to whether proviso to Section 68 of Income Tax Act is retrospective in nature or not was being kept open. He also cited the judgment of the Hon'ble Supreme Court in the case of Sneh Vs. Commissioner of Customs [(2006)7 SCC 714] to contend that a judgment is the authority on the proposition which it decides and not what can logically be deduced from, and sought to distinguish the case of Rajmandir Estates Pvt. Ltd. (supra) on that basis. Submission of the appellants is that the points of law urged in these appeals were not raised before the Coordinate Bench. Main argument of the appellants before us has been that the amendment to Section 68 does not have retrospective operation. According to the appellants, if it is found that the amended provisions of Section 68

of the Act do not have retrospective operation, then having regard to what has been held by the Tribunal in the case of Subhalakshmi Vanija Pvt. Ltd. (supra), the inquiry, as directed would be impermissible.

14. We have already observed that the judgment in the case of Rajmandir Estates Private Ltd. (supra) was delivered considering the unamended provision of Section 68 of the Act. In the case of the assessees before us, there is no differing feature so far as applicability of the said statutory provision is concerned, even though the Tribunal in Subhalakshmi Vanijya Pvt. Ltd. (supra) had held that the provisos to Section 68 of the Act are retrospective in their operation, and delivered the decision against the assessee in that case that reasoning. In the appeal of Rajmandir Estates Private Ltd. (supra), the Coordinate Bench did not consider it necessary to examine the question of retroactivity of the aforesaid provision. The Coordinate Bench found the order of the C.I.T. to be valid examining the order applying the unamended provision of Section 68 of the Act only. We do not find any other distinguishing element in these appeals which would require addressing the question as to whether the amendment to Section 68 of the Act was retrospective in operation or not. Neither do we need to address the issue that if the inquiries, as directed, revealed that share capital infused were actually unaccounted money, whether the same could be taxed in accordance with Section 56(2) (vii b) or not. The ratio of the Constitution Bench decision of the Hon'ble Supreme Court in the case of Vedika Township Private Ltd. (supra) does not apply in the legal context in which we are deciding these appeals. It is not necessary in these appeals to deal with the question of retroactivity of the aforesaid provisions, for which that authority was cited.

15. Arguments in all these appeals have been advanced in the same line, and for that reason we have not recorded in this judgment the submissions made individually in each appeal. Another decision of

a Coordinate Bench in ITA No. 723 of 2008 in the case of Commissioner of Income Tax, Central II, Kolkata Vs. Shyam Sel Ltd. decided on 28th June 2016 was referred to on behalf of the appellants. This decision was cited to contend that the assessee cannot be asked to discharge the onus of proving the genuineness of transaction relating to the source of its source of share application. But in the decision of Rajmandir Estate Pvt. Ltd. (supra), the Coordinate Bench had directly addressed this issue and observed that source of source can be relevant inquiry."

6.5 What emerges from the aforesaid decision of the Hon'ble Calcutta High Court (supra), are the following principles :-

(i) Sec. 68 of the Act can be invoked to make enquiries on the genuineness of amounts credited in the books of account in the nature of share premium (the above cited decision covers the assessment year in question i.e. ;A.Y. 2008-09).

(ii) The use of words, "any sum found credited in the books " in Section 68 of the Act indicates that the said section is very widely worded and the Assessing Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money.

(iii) The mere fact that the payment was received by cheque OR that the applicants were companies, borne on the file of Registrar of Companies (ROC) were held to be neutral facts and did not prove that the transaction was genuine.

6.6 From the above, it is clear that the Assessing Officer is empowered to examine the genuineness of the transactions characterized as share premium by invoking the provisions of Section 68 of the Act. As per Section 68 of the Act, the initial onus is upon the assessee to establish not only the identity and capacity of the creditor, but also the genuineness of the transaction. From the order of assessment, it is clear to us that the Assessing Officer has sought to do just this; i.e. to examine the genuineness of the transaction and therefore his action cannot be faulted on this score.

6.7 Another submission put forth by the assessee is that no addition can be made on account of share application money received and in this regard reliance was placed by the learned Authorised Representative on the decision of the ITAT, Delhi Bench in the case of ACIT Vs. NRA Iron & Steel Pvt. Ltd. in ITA No.3611/Del/2014 dt.15.1.2017 wherein the additions were made towards unexplained share capital and reference and reliance was placed on the decision of the Hon'ble Apex Court in the case of CIT Vs. Lovely Exports Pvt. Ltd. (2008) 216 CTR 195 and many other judicial pronouncements. In all these cases, a clear finding has been rendered that the assessee has discharged the onus of establishing the genuineness of the investment made in the share capital of the company. In the above cited case, placing reliance on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Kamadhenu Steel & Alloys Ltd. (2012) 206 Taxman 54 (Delhi) the following paras 39 & 40 thereof were extracted by the Tribunal which indicates the thought process and

line of reasoning that went into the Tribunal's decision in NRA Iron & Steel Pvt. Ltd. (supra) :-

> " 39. We may repeat what is often said, that a delicate balance has to be maintained while walking on the tight rope of sections 68 and 69 of the Act. On the one hand, no doubt, such kind of dubious practices are rampant, on the other hand, merely because there is an acknowledgement of such practices would not mean that in any of such cases coming before the Court, the Court has to presume that the assessee in questions as indulged in that practice. To make the assessee responsible, there has to be proper evidence. It is equally important that an innocent person cannot be fastened with liability without cogent evidence. One has to see the matter from the point of view of such companies (like the assessee herein) who invite the share application money from different sources or even public at large. It would be asking for a moon if such companies are asked to find out from each and every share applicant/subscribers to first satisfy the assessee companies about the source of their funds before investing. It is for this reason the balance is struck by catena of judgements in laying down that the Department is not remediless and is free to proceed to reopen the individual assessment of such alleged bogus shareholders in accordance with the law. That was precisely the observation of the Supreme Court in Lovely Export (supra) which holds the fields and is binding.
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> 40. In conclusion, we are of the opinion that once adequate evidence/material is given, as stated by us above, which would prima facie discharge the burden of the assessee in proving the identity of shareholders, genuineness of the transaction and creditworthiness of the shareholders, thereafter in case such evidence is to be discarded or it is proved that it has 'created" evidence, the Revenue is supposed to make thorough probe of the nature indicated above before it could nail the assessee and fasten the assessee with such a liability under Sections 68 and 69 of the Act."

6.8 As can be seen from the above, the judicial pronouncements in the cases cited in the ITAT, Delhi Bench order (supra) have been rendered in the context of the facts of that particular case. In those cases, the companies had invited share application money from different sources and there being multiple investors, it was held that the company cannot be expected to be having the details of source of their funding and it is the Revenue that should conduct the enquiry in the case of individual

shareholders. Even then it was held that Revenue should carry out a thorough probe.

6.9 However, in the case on hand, the content and factual matrix are different. A finding has been rendered that there has been routing of money for illegal purposes through a chain of companies in which the assessee is a conduit in the layering process. The Assessing Officer has highlighted several factors before concluding that the real purpose of transfer of funds is not for the purpose of investment but is only a conduit to route the funds involved as a layering process. The Assessing Officer has pointed out that -

(i) The Director of the assessee company has been allotted shares at par around the same time that M/s. Walden Properties Pvt. Ltd., were allotted shares at a huge premium of Rs.990 per share.

(ii) The assessee was unable to furnish a proper valuation report to justify the high premium charged.

(iii) The assessee could not substantiate the high premium, based on the manner in which such valuations are done supported by financials.

(iv) Based on the financial details of the assessee, the value of the said shares is very much less and no genuine investor would buy the shares at a hefty premium of Rs.990 per share.

(v) Several discrepancies / abnormal features were highlighted which are clear pointers to the fact that the aforesaid transaction is “made up” to camouflage the real purpose / intention.

(vi) In respect of the project for which the investor was supposed to have made the investment, even application for the same has not been made by the assessee company.

6.10 After bringing on record several facts and factors, the Assessing Officer was of the view that the genuineness of the said transaction of purchase of 5 lakh shares of the assessee company @ Rs.1,000 per share i.e. at a premium of Rs.990 per share by M/s. Walden Properties Pvt. Ltd. in the year under consideration has not been established. It is settled principle that the burden of proof lies with the assessee to prove the credits in its books of account are not its income, which onus, in our view has not been discharged by the assessee in the case on hand. Even before us, the assessee has not put forth any cogent reasons to controvert and repudiate any of the above findings rendered by the Assessing Officer. The arguments put forth by the assessee has been only to state and reiterate the principle that share premium cannot be assessed in the hands of the company. As we had already held, the facts of the case on hand are different from the facts and context in which the cited judicial pronouncements were rendered. The case on hand is one in which the Assessing Officer has examined the genuineness of the credits in the books of account, in continuation of earlier enquiries which

established that the assessee is a conduit as part of a layering process. In view of the facts and circumstances of the case, as discussed above, we do not find any infirmity in the decision of the Assessing Officer in holding that the receipt of Rs.49.50 Crores by the assessee as its income under the head "Income from Other Sources" and confirm the decision of the learned CIT (Appeals) in upholding the aforesaid addition of Rs.49.50 Crores. Consequently, Ground No.3 of the assessee's appeal is dismissed.

7. In the result, the assessee's appeal for Assessment Year 2008-09 is dismissed.

Order pronounced in the open court on the 9th day of Feb., 2018.

Sd/-	Sd/-
(SUNIL KUMAR YADAV)	**(JASON P BOAZ)**
Accountant Member	Judicial Member

Bangalore,
Dt.09.02.2018.

*Reddy gp

Copy to :

1	Appellant	4	CIT(A)
2	Respondent	5	DR. ITAT, Bangalore
3	CIT	6	Guard File

Senior Private Secretary
Income Tax Appellate Tribunal
Bangalore.