

In the Income-Tax Appellate Tribunal,
Delhi Bench 'F', New Delhi

Before : Shri Bhavnesh Saini, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA No. 1122/Del/2014
Assessment Year: 2008-09

Psychotropics Leasing & Finance (P) Ltd., C/o RRA Taxindia, D-28, South Extension Part-I, New Delhi. PAN- AAACP 9110 F (Appellant)	vs.	Income-tax Officer, Ward 14(4), New Delhi. (Respondent)
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Appellant by	Sh. Ashwani Taneja, Advocate Sh. Saurabh Goyal, CA
Respondent by	Sh. Surender Pal, Sr. DR

Date of Hearing	10.09.2018
Date of Pronouncement	11.10.2018

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order of Id. CIT(A)-XVII, New Delhi dated 06.12.2013 for the assessment year 2008-09 on the following grounds :

- 1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs. 1,07,25,000/- on account of share capital/premium received*

2. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.42,60,340/- on account of alleged unexplained unsecured loans.*

3. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. AO in disallowing the deduction fully as claimed by the assessee u/s 24(a) of the Income Tax Act, 1961.*

4. *That having regard to the facts and circumstances of the case, Ld. CIT(A) erred in law and on facts in confirming the action of the Ld. AO in making the impugned additions/disallowances and in framing the impugned assessment order which is contrary to law and facts and was framed without providing adequate opportunity of hearing and without confronting the entire adverse material which was used against the assessee and that too by recording incorrect facts and findings.*

5. *That having regard to the facts and circumstances of the case the ld. CIT(A) erred in law and on facts in confirming the action of the A.O. in charging interest u/s. 234A, 234B and 234C of the Income-tax Act.*

2. From the above grounds of appeal, it emerges out that the issues involved in this appeal, which need adjudication, pertain to the following additions made by the Assessing Officer and sustained by the ld. CIT(A) :

- (i). Addition of Rs. 1,07,25,000/- made on a/c of unexplained share Premium Received by the assessee.
- (ii). Addition of Rs.42,60,340/- made on account of unexplained unsecured loans received by the assessee.
- (iii). Disallowance of Rs.10,114/- out of Rs.2,91,135/- claimed by assessee u/s. 24(a).

3. The brief facts relating to the first issue are that the assessee has declared income from house property, lease rent, interest and interest on FDR, dividend income and profit on sale of car. It filed its return of income on 11.10.2008 declaring income of Rs.4,08,720/-. The Assessing Officer observed that during the search operation at the premises of Shri Tarun Goel, CA on 15.09.2008, he admitted to have been indulged in providing accommodation entries through various companies run by him. The Assessing Officer noticed that during this year, the share capital of assessee was increased by Rs.3,00,000/- (actual amount Rs.2,75,000/-) and the assessee had received share premium of Rs.1,07,25,000/- from such companies run by Shri Tarun Goel, who was indulged in providing accommodation entries. Therefore, the assessee was required to justify the claim by explaining the nature and source of the money received as share premium. As per assessment order, the assessee, in compliance to various notices, filed details of the credit alongwith supporting evidences before the Assessing Officer. The Assessing Officer issued notices u/s. 133(6) to share subscribers, which stood responded with confirmation of the transactions. However, the Assessing Officer made the addition of Rs.1,07,25,000/- on account of unexplained share premium received on the sole ground that the assessee failed to produce the share applicants before him for statements. On the basis of same facts and reasoning, the Assessing Officer also made addition of Rs.42,60,340/- on account of unexplained unsecured loan received from M/s. Derma Care India (P) Ltd.

4. The assessee challenged these additions in appeal before the Id. CIT(A), who after considering the detailed submissions of the assessee, remand report of the Assessing Officer and various case laws, as mentioned in the impugned order,

sustained the additions made by the Assessing Officer. Aggrieved, the assessee is in appeal before the Tribunal.

5. The Id. Authorized representative of assessee, reiterating the detailed submissions made before the Id. CIT(A), has also filed a small written synopsis – ground-wise - before us which reads as under :

GROUND NO.1: it relates to the addition of Rs. 1,07,25,000/- on account of share premium on the ground that assessee failed to justify the impugned credit with supporting documentary evidence and failed to produce the parties.

Ld. A.O. has discussed this issue at **Page 1-2** of the assessment order, whereas Ld. CIT(A) has discussed this issue from **Page 2-19** of the appeal order.

PB 166-175 are the submission before Ld. CIT(A) inter-alia submitting that share capital has been accepted but share premium received from those very shareholders through banking channel were not accepted which is not possible, more so when there were overwhelming evidences from these shareholder-companies confirming the share premium and that all the shareholder-companies were assessed to tax and such shareholder-companies confirmed the transaction to Ld. A.O. directly and relying upon **various pages of the paper book and meeting adverse observation of Ld. A.O. and relying several decisions,** which are relied upon here also.

PB 185-207 are further submissions to Ld. CIT(A) in response to the enquiry made by her and submitting fresh confirmations, copies of income tax returns of A.Y. 2008-09 and 2009-10, master-data chart downloaded from RoC website, bank statements of the shareholder companies and requesting that these may be examined by Ld. CIT(A) or Ld. A.O.

PB 208-209 are further submissions to Ld. A.O. during remand proceeding giving him the existing addresses and submitting that evidences furnished establish the genuineness of the share capital and submitting at **PB 219** that these may be verified by him.

PB 220-221 is the submission to Ld. CIT(A) submitting that request has been made to Ld. A.O. to get the facts verified and the hearing may be fixed after the remand report to be furnished by Ld. A.O.

Adverse observations of Ld. CIT(A) are met as under:-

1. Ld. CIT(A) has relied upon various case laws without showing as to how those judicial decisions are applicable to the facts of the assessee's case.
2. Ld. CIT(A) has mentioned in **Para 8.11 , 8.12 , 8.13 & 8.14** at **Page 16 & 17** of the appeal order that enquiries conducted by Ld. A.O. establish that identity and creditworthiness of four companies were not proved and the genuineness of the

transaction was not established and summons were issued but no one from these companies made appearance and that four companies could not be located at the address 13/34, WEA, 4 Floor, Main Araya Samaj Road, New Delhi and that persons giving loans were showing meager income and insufficient cash and the transactions were not through undisputed banking channels and no bank account of the appellant was submitted and that these companies were of Mr. Tarun Goyal who was proved accommodation entries provider and the directors of all these companies were working in his office as peons.

In, rely it is respectfully submitted that above mentioned pages of the paper book establish the necessary ingredients, more so when in remand and also before Ld. CIT(A) we are consistently making prayer that enquiries may be done now and yet case was closed abruptly.

3. Ld. CIT(A) has mentioned in **Para 8.15** about all the four companies mentioning that their returns are showing nil income and bank accounts are showing deposits and withdrawal of large amounts, which is usually the case of the entry providers and no bank details were submitted prior to the date of withdrawal.
4. In reply, it is submitted that in this Para Ld. CIT(A) mentions about the existence of the bank account of the shareholder companies, whereas in the preceding paras, Ld. CIT(A) mentions that bank account of the shareholder companies were not filed by the assessee. Thus, this shows the contradictory findings by Ld. CIT(A) and proves that the earlier finding was incorrect.

It is further submitted that investment is made out of the funds available and not out of the income and therefore, even if there was nil income in the hands of the shareholder-companies, it does not go to establish that those companies were not creditworthy, more particularly when bank statements and other evidences filed by the assessee clearly show the source of the investment made. Ld. CIT (A) has found the deposits and withdrawals as typical example of entry providers. In reply, it is submitted that this conclusion of Ld. CIT(A) is nothing but surmise and conjecture.

5. Ld. CIT(A) has mentioned in **Para 8.16** that the director of all the four companies was Sh. Jitender Kumar but none of the returns have been signed by him and the affidavits have also been signed by Mr. Parmod Kumar.

In reply, it is submitted that in a company, there has to be more than one director. It is not the case of the Ld. CIT(A) that Mr. Parmod Kumar was not the director of the shareholder companies and therefore, to give this as a finding is also based on surmise

6. Ld. CIT(A) has mentioned that all the four companies show nil income and invest substantial amount in share capital, which is strange fact and that these companies do not have substantial opening balance and make investment in share capital out of the deposits and thus these shareholder companies were not able to prove creditworthiness and no

details have been given about the source of their income and the details of cheques to prove the genuineness of the transaction.

In reply, it is submitted that the cheques received for share capital were the same for the share premium also and when the share capital has been accepted, there is no justification not to accept share premium. Having income and making investment may be different as investment is made out of fund flow, which has been admitted by Ld. CIT(A) herself that investment are made out of deposits. In fact above mentioned evidences clearly establish the necessary ingredients of section 68.

Reliance is placed on the following judicial decisions:-

CIT vs. Goelsons Golden Estate (P) Ltd. (DHC) in ITA no. 212/2012 reproduced as under:-

"We have examined the said contention and find that the assessee during the course of assessment proceedings has filed confirmation letters from the companies, their PAN number, copy of bank statements, affidavits and balance sheet. Thereafter the Assessing Officer had asked the assessee to produce the said Directors/parties. Assessee expressed its inability to produce them. The Assessing Officer did not consequent thereto conduct any inquiry and closed the proceedings. This is a case where the Assessing Officer has failed to conduct necessary inquiry; verification and deal with the matter in depth specially after the affidavit/confirmation along with the bank statements etc. were filed. In case the Assessing Officer had conducted the said enquiries and investigation probably the challenge made by the Revenue would be justified. In the absence of these inquiries and no verification of the details at the time of assessment proceedings, the factual findings recorded by the Assessing Officer were incomplete and sparse. The impugned order passed cannot be treated and regarded as perverse. The appeal is dismissed as no substantial question of law arises".

CIT vs. Oasis Hospitalities (P) Ltd., 333 ITR 119 (Delhi High Court)

Income—Cash credit—Share application money—Though the share applicants were not produced in spite of specific direction of the AO, assessee company has filed copies of PAN, acknowledgement of returns of the share applicants and their bank account statements of the relevant period when the cheques were cleared—Thus, primary onus was discharged by the assessee—Assessee was not confronted with the investigation carried out by the Investigation Wing or given any opportunity to cross-examine the persons whose statements were recorded by the Investigation Wing to draw adverse conclusion against the assessee—As regards discrepancies in the bank statements, these statements were provided by the shareholders and were printed on the bank stationery—Assessee was never confronted with these discrepancies by the AO—In any case, it does not follow from these discrepancies that the amount of share capital was undisclosed income of the assessee—Even the correct bank statements as claimed by the AO show that the assessee has received cheques from the shareholders—Though source of cash deposits in the bank accounts of some shareholders is questionable, AO has not further probed the matter—Therefore, remedy lies in reopening the case of these investors and addition cannot be made in the hands of the assessee

CIT vs. Value capital services (P) Ltd. 307 ITR 334 (DHC)

Income—Cash credit—Share application money—CIT(A) accepted the existence of the applicants—It is very difficult for the assessee to show the creditworthiness of strangers—Revenue has not shown that the applicants did not have the means to make the investment and that such investment actually emanated from the coffers of the assessee company—Addition rightly deleted by the Tribunal—No substantial question of law arises.

COMMISSIONER OF INCOME TAX IV vs. FAIR FINVEST LTD in ITA 232/2012 dated 22.11.2012 (DHC)

The Commissioner of Income Tax vs. Goa Sponge and Power Ltd., Tax Appeal No. 16 OF 2012 dated 13th February, 2012 in High Court of Bombay at Goa.

ACIT vs. Panchanan International (P) Ltd. in ITA No.50/Del/2011 dated 23.11.2012

Further reliance is placed on the decision in the case of **CIT vs. Nipuan Auto Pvt. Ltd in ITA 225/2013 dated 30.04.2013 (DHC).**

CIT vs. Dwarkadhish Investment Pvt. Ltd. (2011) 330 ITR 298

Income—Cash credit—Share application money—Though in s. 68 proceedings, the initial burden of proof lies on the assessee yet once he proves the identity of the creditors/share applicants by either furnishing their PAN or income-tax assessment number and shows the genuineness of transaction by showing money in his books either by account payee cheque or by draft or by any other mode, then the onus of proof would shift to the Revenue—Just because the creditors/share applicants could not be found at the address given, it would not give the Revenue the right to invoke s. 68—Revenue has all the power and wherewithal to trace any person—Moreover, it is settled law that the assessee need not to prove the ‘ source of source ’ —In the instant case, the Tribunal has confirmed the order of the CIT(A) deleting the impugned addition holding that the assessee has been able to prove the identity of the share applicants and the share application money has been received by way of account payee cheques—No question of law arises.

CIT vs. Victor Electrodes Ltd. (2010) 329 ITR 271 (Del)

Income—Cash credit—Share application money—Assessee filed copies of resolutions passed by the board of directors of applicant companies, besides their bank statements and IT returns in which addresses of the applicant companies are recorded—Genuineness of these documents is not doubted—AO did not make any verification nor summoned the records of the banks on which cheques issued were drawn—There was no legal obligation on the assessee to produce the director or other representatives of the applicant companies before the AO—If the AO had any doubt about identity of the share applicants, he could have summoned the directors of the applicant companies—

Assessee had established the identity of share applicants and the genuineness of the transactions—Therefore no addition could be made under s. 68.

Without prejudice to the above, reliance is placed on the decision in the case of **CIT vs. Dataware (P) Ltd.** in ITA 263/2011, dated 21-09-2011 for the proposition that Ld. AO can make direct enquiry from the Ld. AO of shareholder.

“In our opinion, in such circumstances, the assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the assessing officer should enquire from the assessing officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the assessing officer of the creditor but instead of adopting such course, the assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. So long it is not established that the return submitted by creditor has been rejected by its assessing officer, the assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established.”

GROUND NO.2 it relates to the addition of Rs. 42,60,340/- on account of unsecured loans.

Ld. A.O. has discussed this issue at **Page—2** of the assessment order whereas Ld. CIT(A) has discussed this issue at **Page 19-21** of the appeal order.

PB 175- 184 are the submissions before Ld. CIT(A) submitting that the loan was received from the sister company through banking channel and confirmed by the lender and relying upon **various pages of the paper book and case laws which are hereby also relied upon.**

Ld. A.O. without any basis or material has given this finding that the loan was from the company pertaining to Mr. Tarun Goel and it may please be seen that this is only surmises and conjecture and no basis has been mentioned.

Ld. CIT(A) has also mentioned nothing to reject the evidences filed by the assessee and has held that the lender company was showing loss and yet advancing Rs. 42,60,340 as loan.

This is based on surmise and conjectures as the evidences placed by the assessee and mentioned at **PB 175-176** clearly show the necessary ingredients of genuineness of the impugned loan and so much so the lender company filed the confirmation to Ld. A.O. in response to his notice **PB 66**.

GROUND NO. 3 it relates to the disallowance of deduction u/s 24(a), assessee claimed an aggregate amount of Rs. 2,91,135/- (1,81,500+1,09,635) u/s 24(a), which was reduced by Ld. A.O. to Rs. 2,81,021/-, thus giving short deduction u/s Rs. 10,114/- which seems to be calculation error at the end of Ld. A.O.

PB 184 is the submissions before Ld. CIT(A)

Ld. CIT(A) has discussed this issue at **Page—22** of the appeal order and has mentioned that appellant has not given any evidence to go against the decision of Ld. A.O.

It has surprising that when assessee is pointing out arithmetical error based on **PB— 6**, to say that there was no evidence, highly unjustified.

Apart from the above, the ld. AR also relied on following decisions :

(i). CIT vs. Jalan Hard Coke Ltd., 95 taxmann.com 330 (Rajasthan), SLP filed by the Revenue stands dismissed by Hon'ble Supreme Court reported in 95 taxmann.com 331(SC)

(ii). Order of ITAT, Hyderabad in M/s. Hariom Concast & Steel Pvt. Ltd., Vs. ITO (ITA No. 1775/Hyd/2014 dated 05.10.2016).

6. On the other hand, the ld. DR relying on the orders of authorities below, submitted that the assessee failed to substantiate the identity and creditworthiness of the creditors and as such failed to discharge the onus that lay upon him by section 68 of the Act. Therefore, the ld. Authorities below were quite justified in sustaining the addition on account of unexplained share premium and unexplained unsecured loans. The ld. DR also relied on the decisions, as relied by the ld. CIT(A) in the impugned order and submitted that the decisions relied by the ld. AR are not applicable to the present case.

7. We have heard the rival submissions and have gone through the material available on record. A perusal of assessment order reveals that the Assessing Officer appears to have framed the assessment order in a very haphazard manner. He has not even addressed the provision of law under which the

impugned additions on account of unexplained share premium and unexplained unsecured loan have been made. However, it indeed appears to have been made u/s. 68 of the Act, as reveals the impugned order. Before we proceed to adjudicate upon the issue, we feel it appropriate to mention that as per section 68 of the Act, where any sum is found credited in the books of the assessee maintained for any previous year, and the assessee offers no explanation about the nature and source of the same or the explanation offered by him is not satisfactory in the opinion of the Assessing Officer, the sum so credited may be charged to income tax as the income of the assessee of that previous year. A bare perusal of above section makes it clear that the basic precondition for invocation of section 68 is that there should be absence of explanation of assessee as to the source and nature of credit and the dissatisfaction of the Assessing Officer as to the credibility of assessee's explanation, if furnished by him. The factual matrix of the present case, if examined on the anvil of above section, we find that the assessee, in order to discharge the onus cast upon him by this section, has furnished explanation before the Authorities below as to the nature and source of credits, being share application money received from different companies, and unsecured loan received from M/s. Derma Care India Ltd. whose details were also filed before the authorities below. A perusal of the impugned order shows that the assessee in support of his explanation, admittedly filed following documentary evidences:

- (i). Copy of assessee's audited balance sheet , where there was increase in share capital of Rs.2,75,000/- and share premium of Rs.1,07,25,000/-.

- (ii). Copy of letters given to the Id. Assessing Officer giving the details of share capital/share premium alongwith confirmations and other evidences.
- (iii). Copy of account of share application money showing an aggregate amount of Rs.1,10,00,000/- received in the form of share capital of Rs.2,75,000/- and share premium of Rs.1,07,25,000/- from M/s. Bhawani Portfolio P. Ltd. (Rs.25,00,000), Campari Fiscal Services P. Ltd. (Rs.35,00,000), M/s. Rishabh Shoes P. Ltd. (Rs.30,00,000) and M/s. Thar Steels P. Ltd. (Rs.20,00,000).

8. It is apparent on record that none of the authorities below have bothered to rebut the contentions of the assessee that he issued 27,500 equity shares of Rs.10 each at premium of Rs.390/- per share during the year to above share holders. The authorities below have no objection on increase of share capital of Rs.2,75,000/-, rather accepted the same, but have proceeded to disbelieve the share premium on the issue of these very shares @ 390/- per share, amounting to Rs.1,07,25,000/- received from the same very share holders through account payee banking instruments, which also included the amount of share capital of the face value of Rs.2,75,000/-. Such a partial acceptance and partial disallowance out of the two segments of same transactions, in our opinion, leads to contradictory approach of the authorities below which is not tenable under law.

9. The Co-ordinate Bench of Hyderabad Tribunal in the case of M/s. Hariom Concast & Steel Pvt. Ltd. (supra) in the identical facts of the case has held as under :

“7. We have considered the rival contentions and perused the orders of authorities. There is no denial that all the said nine companies are assesseees on record and they

have confirmed investing in the assessee-company. Whatever may be the reason for issuing shares at a premium, the share premium *per se* cannot be considered as 'cash credits' in the absence of any evidence to the contrary. It is a fact that those companies invested in the share capital and they were allotted shares also. If it is kept as a share application money, then a presumption can be raised that the amounts were received as 'share application money' instead of loans or credits, however, in this case, these amounts are received as share capital and shares were allotted to those companies. It is also true that those companies also reflected the investments and shown the amounts invested in assessee-company in its Balance Sheets. However, AO instead of enquiring with those companies, simply drew presumptions which are not based on any facts. If he is doubting the extent of premium as well as receipt of moneys, he should enquire from those companies or at least record some statements from those parties so as to examine the very nature of the transaction. Nothing was done by the AO.

7.1. Co-ordinate Bench in the case of M/s. Green Infra Ltd., in ITA No. 7762/Mum/2012 dt. 23-08-2013, has considered similar treatment of share premium of Rs. 47,97,10,000/- on the issue of equity shares to the shareholders as income of that assessee. The ITAT considered the issues which are similar to the present case and held as under:

"10. We have considered the rival submissions and carefully perused the orders of the lower authorities and the material evidences brought on record in the form of Paper book. The entire dispute revolves around the charging of share premium of Rs. 490/- per share on a book value of Rs. 10/- each. This dispute is more so because of the fact that the assessee company was incorporated during the year under consideration. Therefore, according to the revenue authorities, it is beyond any logical reasoning that a company with zero balance sheet could garner Rs. 490/- per share premium from its subscribers. Such transaction may raise eyebrows but considering the subscribers to the assessee company, the test for the genuineness of the transaction goes into oblivion. It is an undisputed fact admitted by the Revenue authorities that 10,19,000 equity shares has been subscribed and allotted to IDFC PE Fund-II which company is a Front Manager of IDFC Ltd., in which company Government of India is holding 18% of shares. The contributors to the IDFC PE Fund-II who is a subscriber to the assessee's share capital, are LIC, Union of India, Oriental Bank of Commerce, Indian Overseas Bank and Canara Bank which are all public sector undertakings. Therefore, to raise eyebrows to a transaction where there is so much of involvement of the Government directly or indirectly does not make any sense.

10.1. *No doubt a non-est company or a zero balance company asking for a share*

premium of Rs. 490/- per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the share holders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. Details of subscribers were before the Revenue authorities. The AO has also confirmed the transaction from the subscribers by issuing notice u/s. 133(6) of the Act. The Board of Directors contains persons who are associated with IDFC group of companies, therefore their integrity and credibility cannot be doubted. The entire grievance of the Revenue revolves around the charging of such of huge premium so much so that the Revenue authorities did not even blink their eyes in invoking provisions of Sec. 56(1) of the Act

10.2. *Let us consider the provisions of Sec. 56(1) of the Act:*

56.1. "Income from other Sources

Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E."

10.3. *A simple reading of this section show that income of every kind which is not to be excluded from the total income shall be chargeable to income tax. The emphasis is on that 'income of every kind', therefore, to tax any amount under this section, it must have some character of "income". It is a settled proposition of law that capital receipts , unless specifically taxed under any provisions of the Act , are excluded from income. The Hon'ble Supreme Court has laid down the ratio that share premium realized from the issue of shares is of capital in nature and forms part of the share capital of the company and therefore cannot be taxed as a Revenue receipt. It is also a settled proposition of law that any expenditure incurred for the expansion of the capital base of a company is to be treated as a capital expenditure as has been held by the Hon'ble Supreme Court in the case of Punjab State Industrial Corporation Ltd. Vs CIT 225 ITR 792 and in the case of Brooke Bond India Ltd. VS CIT. Thus the expenditure and the receipts directly relating to the share capital of a company are of capital in nature and therefore cannot be taxed u/s. 56(1) of the Act. The assessee succeeds and Revenue fails on this account.*

11. *The Ld. Departmental Representative has raised an altogether plea by stating that the nature of the transaction should also be judged within the parameters of the Sec. 68 of the Act. The counsel for the assessee strongly objected to this but in the interest of justice and fair play, we allowed the DR to raise this issue. For this, we draw support from the decision of the Hon'ble Supreme Court in the case of Kapurchand Shrimal Vs CIT 131 ITR 451, wherein the Hon'ble Supreme Court has laid down the ratio that*

“It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh, unless forbidden from doing so by statute.”

11.1. *Considering the submissions of the Ld. DR in the light of the above ratio, let us test the transaction in the light of the provisions of Sec. 68 of the Act. As per Section 68 - the initial onus is upon the assessee to establish identity, genuineness of the transaction and the capacity of the lender or the depositor. The subscribers to the share capital are all companies. The confirmations of the transactions have been received by the AO by issuing notice u/s. 133(6) of the Act, therefore, identity has been established beyond all reasonable doubts nor the Revenue authorities have questioned the identity of the share holders. The genuineness of the transaction can also be safely concluded since the entire transaction has been done through the banking channels duly recorded in the books of accounts of the assessee duly reflected in the financial statement of the assessee. The bank statement is exhibited at pages 101 and 102 of the Paper book in which the transaction relating to the allotment of shares are duly reflected. In the instant case, the capacity of the share holders cannot be doubted as has been pointed out elsewhere in our order that 98% of the share is held by IDFC Private Equity Fund-II which is a front manager of IDFC Ltd., and the contributors in IDFC Private Equity Fund-II are LIC, Union of India, Oriental Bank of Commerce, Indian Overseas Bank and Canara Bank which are public sector undertakings.*

11.2. *Now the only point of dispute is the nature of transaction which according to the Revenue authorities is beyond any logical sense and which is the charging of share premium at the rate of Rs. 490/- per share. According to the Revenue authorities this is a sham transaction. So far till now, we have seen and examined the sources of funds. Let us see the application of funds and who are the ultimate beneficiaries of this share premium which may clear the clouds over the transaction alleged to be a sham. We find that the assessee company has invested funds in its three subsidiary companies namely (i) Green Infra Corporate Wind Ltd. (ii) Green Infra Wind Assets Ltd and (iii) Green Infra Wind Farms Ltd., wherein the assessee is holding 99.88% of share capital which means that the funds have not been diverted to an outsider. This clears the doubt about the application of funds and the credibility of the company in whom the funds have been invested. Since the assessee itself is holding 99.88% of shares and in turn the assessee company's 98% of shares are held by IDFC PE Fund-II, this entire share holding structure cannot be said to generate any transaction which could be said to be sham.*

12. *We have considered the grievance of the Revenue from all possible angles and by applying the provisions of Sec. 56 of the Act and at our stage we have gone to the extent of testing the transaction within the parameters of Section 68 of the Act. We could not find a single evidence which could lead to the entire transaction as sham. Our view is also fortified by the share holding pattern as explained to us and as substantiated by the material evidence on record. We find that the share holders in all the related transaction under issue are directly or indirectly related to the Government of India. Therefore, considering the entire issue in the light of the material evidence brought on record, in our considerate view, the Revenue authorities have erred in treating the share premium as income of the assessee u/s. 56(1) of the Act. In our considerate view, for the reasons discussed hereinabove, we do not find it necessary to apply the provisions of Sec. 68 of the Act. We, therefore, direct the AO to delete the addition of Rs. 47,97,10,000/-. Ground No. 2 & 3 are accordingly allowed”.*

8. The other case law relied on by assessee is also on the issue that share premium cannot be brought to tax invoking the provisions of Section 68, unless there is a link with either *quid pro quo* transaction or investing by assessee-company in their accounts so as to receive it back as share capital. No such evidence was brought on record. On the given facts of the case, and on the basis of the confirmation filed by the companies, we cannot hold that this amount can be brought to tax invoking the provisions of Section 68. The genuineness and credit worthiness of those companies is not in dispute. What AO disputed was the amount of premium. Moreover, if the amounts are doubted from those companies, the amount of share capital at Rs.10 was not doubted. Only amount of premium was doubted. Therefore, the companies transactions with assessee are partly accepted as genuine. On facts of the case provisions of Sec. 68 can not be invoked. Respectfully following the principles laid down by the Coordinate Bench in the case of M/s. Green Infra Ltd., in ITA No. 7762/Mum/2012 dt. 23-08-2013 (supra), we have no hesitation in holding that the orders of the AO and CIT(A) are bad in law. In view of this, we delete the addition so made by AO and confirmed by CIT(A).”

10. Apart from the above, the assessee also filed following documents pertaining to the share holders before the Id. Authorities below :

(i). Confirmations of all the investor companies confirming the fact of subscription of assessee’s shares, which contained the following details :

Shareholder	No. of shares of Rs.10/- each at a premium of Rs.390/- per share	Amount	Bank through which payment made.
M/s. Bhawani Portfolio P. Ltd.	6,250	25,00,000	HDFC Bank Karol Bagh, New Delhi
M/s. Thar Steels (P) Ltd.	5,000	20,00,000	-----do-----
M/s. Campari Fiscal Services P. Ltd.	8,750	35,00,000	-----do-----
M/s. Rishabh Shoes P. Ltd.	7,500	30,00,000	-----do-----

- (ii). Copy of acknowledgement of ITRs of the share applicants
- (iii). Copies of bank statements of the creditors showing the investments in the impugned share capital.
- (iv). Affidavits of the directors confirming the fact of investment made with the assessee company and mentioning PANs.
- (v). Copies of letters sent by the investor companies directly to the Assessing Officer confirming the investment in share capital and share premium of the assessee company.
- (vi). Copies of annual reports and balance sheets of the creditors showing the impugned investments.
- (vii). Copies of master data of the shareholders downloaded from the website of MCA showing the investment of share holder companies.
- (viii). Copy of return of allotment in Form-2 filed to RoC in respect of impugned share capital and share premium.

11. In presence of all these evidences, submitted by the assessee, on authenticity of which no objection or doubt has been raised by any of the authorities below to doubt the explanations of the assessee regarding the three ingredients of section 68 of the Act. Once, all the above documentary evidences

are produced, the assessee had discharged the onus cast upon him. It is also not in dispute that the notices issued by the Assessing Officer u/s. 133(6) of the Act stood served upon the shareholders/creditors and the same were directly responded to the Assessing Officer. Hon'ble Gujrat High Court in a recent decision of PCIT vs. D&H Enterprises, (2016) 72 taxmann.com 91 (Gujrat) on such issue held as under :

“7. Thus, from the facts noted hereinabove, it is evident that the assessee had produced all relevant details in its possession, namely, names, permanent account numbers, income tax returns, and bank statements of all the investors. The amounts in question had been received by way of account payee cheques. Having regard to the fact that the permanent account numbers and the income tax returns of all the investors had been furnished by the assessee, the Assessing Officer could have easily verified the same. He, however, placed reliance upon the fact that the summons issued to the parties under section 131 of the Act could not be served and hence, did not accept the genuineness of the transactions. In the opinion of this court, taking into account the concurrent findings of fact recorded by the Commissioner (Appeals) and the Tribunal, it cannot be said that the conclusion arrived at by the Tribunal is, in any manner, contrary to the record or that the same suffers from any legal infirmity so as to give rise to any question of law, much less a substantial question of law warranting interference.”

In such view of the matter, in our considered opinion, the dissatisfaction of the Assessing Officer cannot be sustained only on the basis of suspicion.

12. A perusal of the assessment order further reveals that the Assessing Officer has laid emphasis only and only on the reason that the assessee failed to produce the shareholders for statement. There is no reference of any enquiry to doubt the evidences submitted by the assessee nor is there any cogent material on record

to discard the same. The Assessing Officer has also not bothered to enforce the presence of creditors by issuing summons u/s. 131 despite specific request therefor as contended by the ld. AR. We, accordingly are not inclined to support the orders of the authorities below.

13. ITAT, Delhi Bench-F in Prinku Landfin (P) Ltd. vs.ITO, (2018) 91 taxmann.com 120 (Delhi - Trib) vide order dated 02.02.2018, in the identical facts and circumstances, has also decided the issue in favour of he assessee. The Head-Notes of this decision read as under :

Section 68 of the Income-tax Act, 1961 - Cash credits (Share application money) - Assessment year 2008-09 - During search conducted upon premises of one, STG, it was found that assessee-company had received share application money from several shareholders - To prove identity and creditworthiness of applicants and genuineness of transactions, assessee furnished copies of their certificates of incorporation, copy of ITR, bank statements, balance sheet and payment details - However, Assessing Officer added amount of share application money to income of assessee on grounds that share applicants had never appeared before Assessing Officer - It was noted that assessee produced all replies filed by these investors in response to inquiry notice issued to them under section 133(6) before Assessing Officer in which these investors had confirmed making investments in assessee company - A request of assessee to Assessing Officer to issue summons against said investors under section 131 for their production at assessment stage was not considered and Assessing Officer passed assessment order on next day - Whether since assessee at assessment stage had produced sufficient evidences before Assessing Officer so as to discharge its initial onus to prove identity of investor companies, their creditworthiness and genuineness of transactions, impugned additions under section 68 were unjustified - Held, yes [Paras 5,5.2,5.9] [In favour of assessee]

14. It is also pertinent to note that the Id. CIT(A) while directing some enquiries to be conducted by the Assessing Officer vide letter dated 06.07.2011 has also pointed out various defects in the impugned assessment order such as non-specifying the sections under which the additions were made; how many companies were involved in the transactions and how many of them were connected with one Sri Tarun Goel; how many shares were allotted to various companies or the share premium paid by these companies; absence of number of parties to whom notices u/s. 133(6) were issued and number of companies who responded to them is also not clear and to make enquiries on existence of various companies. After pointing out all these defects, the Id. CIT(A) directed the Assessing Officer to file its remand report. However, on perusal of the remand report, we find that none of the above defects, stand meet out in the remand report. The Assessing Officer has only referred to some ITI report stating that none of the four companies were found in existence. The remand report further categorically speaks that the Assessing Officer needs 30 days' more time to conduct deep enquiry from the Assessing Officers of various companies regarding the transactions made, but the Id. CIT(A) in the impugned order sustained the addition, without giving any further time to the Assessing Officer sought for making proper enquiries. Such conclusion of the Id. CIT(A), in our considered opinion, is not sustainable, which appears to have been reached on the basis of some alleged enquiries in other cases or with reference to the general statement of Shri Tarun Goel.

15. The Id. CIT(A) appears to have stressed on the fact that the impugned share holders has shown meager income in their return of income. In our opinion, the

income/losses declared by the investor companies is not a sole criterion to examine the creditworthiness of the shareholders. None of the authorities below have brought any material on record to falsify the fund flow shown in the bank statements of creditors filed by the assessee. For this view, we stand fortified by recent decision of Hon'ble jurisdictional High Court in the case of CIT v. Vrindavan Farms (P) Ltd., 2015(11) TMI 279 dated 12 August 2015, where, the Hon'ble court has held as under :

“3. The ITAT has in the impugned order noticed that in the present case the Revenue has not doubted the identity of the share applicant. The sole basis for the Revenue to doubt their creditworthiness was the low income as reflected in their Income Tax Returns. The entire details of the share applicants were made available to the AO by the assessee. This included their PAN numbers, confirmations, their bank statements, their balance sheets and profit and loss accounts and the certificate of incorporation etc. It was observed by the ITAT that the AO had not undertaken any investigation of the veracity of the above documents submitted to him. It has been rightly commented by the ITAT that without doubting the documents, the AO completed the assessment only on the presumption that low return of income was sufficient to doubt the creditworthiness of the share holders.”

Similar view has been taken by Hon'ble jurisdictional High Court in another decision in the case of PCIT vs. M/s. Goodview Trading Pvt. Ltd. dated 21 November, 2016 reported in 2016 (12) TMI 617 – Delhi High Court, observing as under :

8. It is quite evident from the CIT(A)'s reasoning in paragraph 4.3, that the materials clearly pointed to the share applicants' possessing substantial means to invest in the assessee's company. The AO seized certain material to say that minimal or insubstantial amounts was paid as tax by such share applicants and did not carry out a deeper analysis or rather chose to ignore it. In these circumstances, the inferences drawn by the CIT(A) are not only factual but facially accurate.”

16. We have gone through various decisions relied by the assessee and those referred by the Id. CIT(A) and we find that in the attending facts and circumstances of the present case, as narrated above, the decisions relied by the Id. CIT(A) are found distinguishable on facts for one reason or the other.

17. In view of what has been discussed above, we are not inclined to support the impugned order and accordingly, the additions made on account of unexplained share premium and unsecured loans received by the assessee deserve to be deleted. We, therefore, delete the additions.

18. As far as the next issue regarding short deduction u/s. 24(a) amounting to Rs.10,114/- is concerned, the averment of the assessee has been that it was due to some calculation error at the end of Assessing Officer. The Id. CIT(A) has also not given any cogent reasoning on this issue. Accordingly, the Assessing Officer is directed to verify the claim of assessee and to give benefit thereof, if found admissible under law.

19. Ground No. 5 regarding charging of interest u/s. 234A, 234B & 234C is consequential in nature and the Assessing Officer is directed to give its consequential effect.

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

Order pronounced in the open court on 11th Oct., 2018.

Sd/-

(Bhavnes Saini)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 11th October, 2018

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