आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM

आयकर अपील सं./ ITA No. 2317/Mum/2017

(निर्धारण वर्ष / Assessment Year 2012-13)

The Dy. Commissioner of Income Tax, Circle 7(3)(2) Room No. 669A, Aayakar Bhavan, M.K. road, Churchgate, Mumbai-20	Vs.	Piramal Realty Pvt. Ltd. 8th Floor, Piramal Tower, Ganpatarao Kadam Marg, Lower Parel, Mumbai-13
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./**PAN No. AAFCP7696H**		

अपीलार्थी की ओर से / **Appellant by**	:	Shri HN Singh, CIT DR
प्रत्यर्थी की ओर से / **Respondent by**	:	Shri Yogesh Thar, Ms. Manshi Padhiar, ARs

सुनवाई की तारीख / **Date of hearing:**	23-08-2018
घोषणा की तारीख / **Date of pronouncement :**	16-11-2018

आदेश / O R D E R

PER MAHAVIR SINGH, JM:

This appeal filed by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-13, Mumbai [in short CIT(A)], in appeal No. CIT(A)-13/DCIT-7(3)(2)/651/2015-16, order dated 03.01.2017. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle-7(3)(2), Mumbai (in short 'DCIT/ AO') for the A.Y. 2012-13 vide

order dated 30.03.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by AO in respect of share premium charged by assessee as unexplained credit under section 68 of the Act. For this Revenue has raised the following ground No. 1 to 3: -

> *"1. On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) is right in deleting addition of Rs.598,44,01,500/- u/s 68 of the Act made on account of charging share premium of nearly Rs. one lakh each on 59,850 cumulative compulsory convertible preference shares of face value of Rs. 10/ - each allotted to M/s. Piramal Estates Put Lid without appreciating that the assessee company was not worth such a huge premium and nature and genuineness of the share transaction is not satisfactory.*
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> *2. On the facts and in the circumstances of the case and in law, whether charging share premium of nearly Rs. One lakh each the share with face value of Rs. 10/- is just justified in view of the financial results of the assessee company for the financial year ending on 31.3.2011 and 31.3.2012 and other relevant factors.*
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> *3. On the facts and in the circumstances of the case and n law, whether the Ld. CIT(A) erred in holding that proviso to section 68 of the Act is prospective in stature Inspite of the fact that the*

proviso is clarifactory in nature and thus, retrospective."

3. Briefly stated facts are that the assessee company is engaged in the business of real estate and real estate development and incidental services. The AO during the course of assessment proceedings notice from the balance sheet of the assessee for the year under consideration as on 31.03.2012 that the authorized share capital has group up from ₹ 1 lacs to 150 lacs. He also observed that the paid up share capital has gone up from ₹ 1 lacs to 150 lacs. He noticed from the balance sheet that during the year under consideration the assessee has issued 59,850 cumulative compulsory convertible preferential shares (CCPS) of ₹ 10 each to Piramal Estates Private Ltd. (PEPL) for consideration of ₹ 5,98,500 and also charged share premium for the same at ₹ 99,990/- i.e. ₹ 598,44,01,500/-. The AO noted that the assessee company is incorporated only on 14.12.2010 with a share capital of ₹ 1 lacs and it has incurred loss of ₹ 7,59,747/- during the assessment year 2011-12. He also noted that during the year under consideration, the assessee suffered a loss of ₹ 29,11,50,443/- and as a result of the same earning per share is negative. Accordingly, the AO required the assessee to justify such a huge premium of ₹ 99,990/-. According to AO, the assessee is unable to prove the nature and sources of credit as per in the books of account in term of section 68 of the Act and hence, he treated the share premium as unexplained under section 68 of the Act. Accordingly, he added the share premium to the return income of the assessee. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) deleted the addition by observing in Para 3.3 as under: -

"3.3 Decision - I have carefully considered the AO's order as well as the ARs submissions. Let me

first summarize the AO's case. According to the AO, the fact that the appellant had received share premium of Rs. 99,990/- per share for shares with a face value of t 10/- each, itself would be a good and sufficient reason to charge the said premium to tax under section 68 of the Act. On the other hand, the ARs sought to demonstrate that they had more than adequately discharged the onus of proving the identity and creditworthiness of the share applicant as also the genuineness of the transaction. Further, the ARs' have argued that there was no provision in the Act under which the said share premium could be charged to tax. There was hence no scope for making any addition under section 68 as made by the AO.

3.3.1 Let me now examine the factual issues of this case. Though the AO's order is completely silent with regard to the notice issued under section 133(6) of the Act, the ARs' have demonstrated that they had filed considerable documentation in response thereto. As there was only one share-applicant viz. PEPL and that entity too was a group company, the appellant had filed complete details of the name and address of the applicant, its PAN, its return in form no. 2 filed with the RoC & its return of income. These documents have been re-filed before me as part of the compilation. In any case, as pointed out by the ARs, the sole share-applicant was assessed to tax in the very same Circle with the very same AO as the appellant. Not just that, the AO had very much scrutinized the return of PEPL for

this very same assessment year there being no addition made in its hands on account of the share application money paid to the appellant. In these circumstances. I find myself in complete agreement with the ARs' averment that the identity of the investor had been proven beyond any doubt. Further, the return of income of PEPL of the assessment year under consideration too had been filed before me along with its audited financial statements, they having already been filed before the AO. The AO was free to summon PEPL in case he had any doubts or queries in that regard. He had not done so. On this backdrop. I am of the considered view that the creditworthiness of PEPL too had been established beyond any doubt by the appellant. Coming to the genuineness of the transaction, the appellant had filed a copy of form no. 2 in which the return - as required under the Companies Act, 1956 - had been filed by the appellant before the RoC. This return spells out the details of the investments made by PEPL in the appellant-company. A copy of the same has also been filed before me. After taking into account this documentation. I find that the genuineness of the transaction between the appellant and PEPL too has been established more than adequately. To conclude, having establish the identity and creditworthiness of the investor as also the genuineness of the transaction, I -find that there was no scope for invoking the provisions of section 68 of the Act. Having examined the factual aspects of this

case, let me now turned to the legislative aspects thereof.

3.3.2 Here it would also be important to briefly discuss the recent amendment in section 68 of the Act. A proviso to section 68 of the Act has been inserted with effect from 1st April 2013. It lays down certain conditions for treatment of share premium as unexplained cash credit under section 68 of the Act. However, as has been made clear in the Explanatory Notes to the Finance Act 2012, the said amendment shall be prospectively applicable from AY 2013-14 onwards. In these circumstances, it would be clearly inapplicable to the case at hand, it being an appeal for AY 2012-13. The said amendment is accordingly not discussed any further, it being inapplicable to the case at hand. Suffice to say that there exists no explicit legislative sanction to bring to tax any share premium insofar as the assessment year under consideration is concerned. Having dealt with the legislative aspect, let me now examine the various judicial pronouncements on this issue.

3.3.3 The Hon'ble Supreme Court has had occasion to go into this very matter. In the case of CIT v. Allahabad Bank Ltd. (73 ITR 745), it had been held that the share premium account had to be included in the paid up capital account, thus leading to share premium being treated on a par with the paid up capital. Further, in the case of CIT v. Standard Vacuum Oil Co. (59 ITR 865), it had been

held that premium realized on issue of shares is not in the nature of a revenue receipt and is hence not chargeable to tax. It would hence become dear that as held by the Hon'ble Supreme Court, not just the paid up capital but also the share premium is not chargeable to tax, both being not in the nature of revenue receipts. The Hon'ble High Court too of Bombay had occasion to go into this matter in its decisions rendered in the cases of Vodafone India Services (P) Ltd. v. Uol (supra) and Shell India Markets P. Ltd. v. ACIT (supra). It had then unequivocally held that the amounts received on issue of share capital - including the premium - are undoubtedly on the capital account. The Mumbai Bench of the Hon'ble Tribunal too had occasion to examine this very issue in the case of Green Infra Ltd. v. ITO (38 Taxmann 253). It had cited the judgments of the Hon'ble Supreme Court discussed earlier in this sub-paragraph. It had then examined the facts of that case and stated that a non-est and a zero balance company asking for premium of 490/- per share with a face value of it 10/- defied commercial prudence. Nevertheless, it had concluded that it was the prerogative of the Board of the assessee-company to decide the quantum of the premium and it was the wisdom of the share-holders to invest on those terms. Thus, the Revenue was barred from charging the said premium to tax in the absence of any explicit legislative sanction. As seen from its balance sheet, the appellant's investments in its subsidiaries totalled ₹ 667.36 crores. It is

hence quite clear that it is far from being a non-est company or a zero balance one. In these circumstances, there would be all the more reason for not charging to tax the share premium collected by the appellant. It would hence become clear that there is a substantial body of crystalized judicial opinion at various levels which has held that share application money as also share premium charged and collected by a company is a receipt on the capital account and not one on the revenue account, thus rendering it incapable of being charged to tax.

3.3.4 The factual, the legislative and the judicial aspects of the addition has made by the AO have been discussed in detail in the preceding three subparagraphs. It would now become clear that none of these aspects support the addition as made by the Assessing Officer. In view of the detailed discussion in the preceding three sub-paragraphs and after respectfully following the aforecited superior judicial authorities, the addition of Z 598,44,01,500/- as made by the AO is hereby set aside. The AO is so directed."

Aggrieved, Revenue came in second appeal before Tribunal.

4. Before us, the learned CIT Departmental Representative heavily relied on the assessment order and stated that when there is negative net worth of the assessee company in view of huge loss suffered by it regularly during these two assessment years i.e. AY 2011-12 and 2012-13. He stated that the charging of premium on CCPS amounting to ₹ 99,990/- is without any basis and nature and source of credit is not

proved. On the other hand, the learned Counsel for the assessee Shri Yogesh Thar made detailed submissions and heavily relied on the order of CIT(A).

5. We have heard rival contentions and gone through the facts and circumstances of the case. The facts of the case are that the assessee company issued 59,850 1% NCCPs having face value of 10/- at a premium of ₹ 99,990/- to PCPL. These shares were issued in two tranches of 20,000 and 39,850/- shares respectively. In respect of first tranche of issue of shares was applied by PCPL and money for the same was received in earlier year i.e. year ended 31st March 2011, which was disclosed as application money received pending allotment under the current liabilities in the FY ended 31.03.2011. The second tranche was received in the previous year 2011-12 relevant to AY 2012-13. The assessee company filed statutory forms with ROC in form No. 2 for each tranche separately disclosing the number of shares, face value and premium per share and also the name of the allottee. The assessee also filed its annual return of with ROC in form No. 20B disclosing the details of accounts of number of shares, face value and premium of share, name and address of shareholders. The AO during the course of assessment proceedings issued notice under section 133(6) of the act dated 28.03.2014 requiring the assessee to furnish details in respect of shares issued at premium. The assessee replied and filed following details: -

> *"Annexure1- details of share allotment*
>
> *Annexure 2- form 2 filed for each tranche of allotment filed with RoC*
>
> *Annexure 3- Annual return filed in Form 20B filed with RoC*

Annexure 4- Details of applicant (including PAN and address) shares allotted, consideration, etc."

6. The AO required the assessee to explain as to why the share premium is not added to the returned income of the assessee. The assessee filed its reply dated 16.03.2015, wherein it is submitted that the return of income filed by PCPL and also audited financial statement for the AY 2012-13. The AO invoked the provisions of section 68 of the act and added share premium of ₹ 598,44,01,500/-, without disputing the face value of shares to the total income of the assessee on the ground that the assessee has failed to establish the nature and source of the credit on the account of the share premium. The CIT(A) deleted the addition after considering the submissions of the assessee as noted above.

7. We have noted that during the course of hearing of this appeal, the Ld CIT-DR in all fairness admitted that the identity, source and creditworthiness of the transaction is not in doubt but only dispute of the Department is as regards the nature of the transaction in light of the huge premium charged by the Assessee. The Ld CIT-DR placed heavy reliance on the decision of Co-ordinate bench of Mumbai Tribunal in the case of Pratik Syntex (P.) Ltd. Vs. ITO (2018)94 taxmann.com 12. The Ld Counsel for the assessee Sh Thar explained that the said decision cannot be applied in the present case on facts of the case. He explained that the said decision is rendered on different set of facts as compared to the present case. He stated that the valuation of the share premium is to be looked into for the purpose of section 68 of the Act. The facts in that case were that equity shares were issued in the year under consideration to the promoters as well as three new parties. Both these classes of shareholders were issued equity shares. Promoters were issued shares

at par whereas premium of Rs. 4901- per share was charged from the new parties and for this the Tribunal has made specific note of the following:

> *Despite making such huge investment in the company, the company did not know the whereabouts of those shareholders (para 6, page 10 of the order).*

Ld counsel stated that no justification for such different issue price even within this relevant year under consideration is brought on record. The Tribunal noted that no doubt the price can be different in genuine transactions as well however the case got aggravated since the shareholders to whom premium was charged could not be traced (para 6, page 10 of the order). The AO deputed an inspector to make field inquiries with respect to the shareholders. The inspector reported that these three new shareholders are not available at the given addresses and their whereabouts are not known. The assesse in that case was confronted with the adverse inspector report but the assessee could not produce current addresses of these three new shareholders (para 6. page 10 of the order). The creditworthiness of the shareholders was also not proved since the shareholders did not have their own money as every payments made by them towards share money in the favour of the assessee is preceded by deposit in the hank account and the balance maintained regularly by them was miniscule (para 6, page 14 of the order). The confirmations received from three parties were signed by the same person. The assessee in that case could not justify the chargeability of such a huge share premium received from three new shareholder vis-a-vis issuing shares at par to the original promoters within the same relevant year under consideration. To contend that Section 56(2)(viib) r.w.s. 2(24Xxvi) of the Act are placed in statute by

Finance Act, 2012 w.e.f. 01-04-2013 and no question can he raised as to the valuation of shares at an huge share premium is not correct as in the instant case, the genuineness of the transaction of raising of share capital inclusive of share premium to the tune of Rs. 300 lacs from these three new shareholders is itself not proved.

8. We have gone through the case laws relied by the Assessee have been distinguished by the Tribunal while rendering the aforesaid decision. We seek to specifically address how the Tribunal dealt with the decision of Hon'ble Jurisdictional High Court in case of CIT Vs. Gagandeep Infrastructure (P.) Ltd. (2017) 394 ITR 680. The Hon'ble Tribunal has held that in the case of Gagandeep (supra) the Hon'ble Bombay High Court considered the factual matrix of the case wherein it was observed that the taxpayer satisfied the three ingredients of Section 68 of the Act which stood proved namely identity and creditworthiness of shareholders and genuineness of the transaction and on that factual matrix decision of the tribunal was accepted wherein tribunal ruled in favour of the assessee by holding that the taxpayer did satisfied all the three ingredients of Section 68 of the Act.

9. Now let us go through the decision relied on by the assessee of Hon'ble Bombay High Court in case of Gagandeep (supra) which reads as under:-

"(c) Being aggrieved, the Revenue carried the issue in the appeal to the Tribunal. The impugned order of the Tribunal holds that the respondent assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares. The identity was established by the very fact that the detailed names, addresses of the shareholders, PAN numbers, bank details and confirmatory letters were filed. The genuineness of the transaction was established by filing a copy of share application form, the form filed with the Registrar of Companies and as also bank details of the shareholders and their confirmations which would indicate both the genuineness as also the capacity of the shareholders to subscribe to the shares. Further the Tribunal while upholding the finding of CIT(A) also that the amount received on issue of share capital alongwith the premium received thereon, would be

on capital receipt and not in the revenue field. Further reliance was also placed upon the decision of Apex Court in Lovely Exports (P) Ltd. (supra) to uphold the finding of the CIT(A) and dismissing the Revenue's appeal".

10. Now, in the present case of the assessee, the main crux of the facts that the assessee filed sufficient evidences viz, return of income, share allotment, annual return, details including name, address and PAN of the shareholder which are not negated by the AO. The AO in the present case has himself assessed the preference shareholder for the assessment year under consideration and after scrutiny has passed the order u/s 143(3) of the Act around the same date and has neither made any addition nor made any adverse remarks. The AO has not questioned the preference share capital to the extent of the face value but has only questioned the share premium. By this action of the AO himself, the 'nature' of transaction as that of 'preference share allotment' is proved beyond doubt and merely because he feels that the share premium is high the genuineness of the transaction cannot be doubted for the purpose of section 68 of the Act.

11. We find that in the given facts of the case the decision of Hon'ble Jurisdictional High Court in case of Gagandeep (supra) squarely applies to the assessee's case. The decision of Hon'ble Jurisdictional High Court in case of CIT vs Green Infra Ltd 78 taxmann.com 340 is squarely applicable to the case of the assessee. Despite being the specific argument of the CIT-DR that the share premium defies commercial prudence, Hon'ble Jurisdictional High Court has held that genuineness of the transaction is proved since the entire transaction is recorded in the books of the assessee and the transaction has taken place through banking channels. The decision of the Hon'ble High Court has specifically held 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 shareholders

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. The Tribunal after examining the ingredients of section 68 of the Act held that the addition of share premium under section 68 of the Act cannot be sustained. We hereunder reproduce the relevant paragraph of the decision of Hon'ble Jurisdictional High Court in ease of Green Infra (supra) for ready reference:

3.Regarding question no.(ii):

> *(a)Before the Tribunal, the Revenue raised a new plea viz. that the so called share premium has also to be judged on the touchstone of Section 68 of the Act which provides for cash credit being charged to tax. The impugned order of the Tribunal allowed the issue to be raised before it for the first time, overruling the objection of the respondentassessee.*
>
> *(b)The impugned order examined the applicability of Section 68 of the Act on the parameters of the identity of the subscriber to the share capital, genuineness of the transaction and the capacity of the subscriberto the share capital. It found that the identity of the subscribers was confirmed by virtue of the Assessing Officer issuing a notices under Section 133(6) of the Act to them. Further, it holds that the Revenue itself makes no grievance of the identity of the subscribers. So far as the genuineness of the transaction of share subscriber is concerned, it concludes as the entire transaction is recorded in the Books of Accounts and reflected in the financial statements of the assessee since the subscription was done through the banking channels as evidenced by bank statements which were examined by the Tribunal. With regard to the capacity of the subscribers the impugned order records a finding that 98% of the shares is held by*

IDFC Private Equity Fund which is a Fund Manager of IDFC Ltd. Moreover, the contributions in IDFC Private Equity FundII are all by public sector undertakings.

(c) Mr.Chhotaray the learned counsel for the Revenue states that the impugned order itself holds that share premium of Rs.490/ per share defies all commercial prudence. Therefore it has to be considered to be cash credit. We find that the Tribunal has examined the case of the Revenue on the parameters of Section 68 of the Act and found on facts that it is not so hit. Therefore, Section 68 of the Act cannot be invoked. The Revenue has not been able to show in any manner the factual finding recorded by the Tribunal is perverse in any manner.

(d) Thus, question no.(ii) as formulated does not give rise to any substantial question of law and thus not entertained".

12. In view of the aforesaid, we are of the view that valuation is not relevant for determining genuineness of the transaction for the purpose of section 68 of the Act. We are of the view that CIT(A) has rightly deleted the addition on account of the share premium relying on the decision of Hon'ble Jurisdictional tribunal in case of Green Infra Ltd. Vs. ITO (2013) 145 ITR 240. It is a settled position that what is apparent is real unless proved otherwise. It is a settled legal position that "apparent is real" and the onus to prove that the apparent is not the real is on the party who claims it to be so as held by Hon'ble Supreme Court in case of CIT Vs. Daulat Ram Rawatmull (1973) 87 ITR 349.

13. In the present case, the overwhelming evidence proves that the 'nature' of receipt is share premium. The audited accounts of both parties, the statutory since it was the department which claimed that the share premium is not in fact so, despite the statutory forms viz. Form 2 for

return of allotment and Form 20B for annual return filed with the ROC all show the 'nature' as share premium. If the Department wants to contend that what is apparent is not real, it is the onus of the department to prove that it was Assessee's own money which was routed through a third party. Only then can the provisions of section 68 of the Act be invoked. This aspect is considered in the decision of Mumbai Tribunal in case of Green Infra Ltd. Vs. ITO (2013) 145 ITD 240, wherein Tribunal has held 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 shareholders 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. The said decision has been affirmed by Hon'ble Jurisdictional high Court in case of Green Infra Ltd (Supra).

14. The Ld. Counsel for the assessee made another argument that the power of carrying valuation is not envisaged by the Legislature for the purpose of Section 68 of the Act. He argued that, wherever the Legislature intended to give the power to determine the value to the AO, it either prescribes Rule for valuation of a particular thing or vested upon the AO the power to refer to the Valuation officer. The power of AO to make a reference to the Valuation Officer is contained in section 142A of the Act. Section 142A of the Act as it stood for the year under consideration reads as under:

"142. (1) For the purposes of making an assessment or reassessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 6911 or the value of any bullion, jewellery or oilier valuable article referred to in section 69A or section 6911 or fair market value of any property referred to in sub-section (2) of section 56 is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him".

15. We have considered the issue and find that this section does not cover section 68 of the Act. Thus, the Legislature does not envisage any sort of valuation for the purpose of section 68 of the Act. Indeed, valuation of preference shares is a completely different exercise as compared to valuation of equity shares. The AO makes the mention of the reserves and loss while challenging the charge of share premium on preference shares. "Reserves" could be relevant for valuing equity shares. They are not relevant for valuing preference shares. Preference shareholders get priority over the equity shareholders in terms of payment of dividend and during winding up. They get only a fixed rate of dividend. The redemption amount depends on the terms of issue. The conversion depends on the terms of issue. The terms of issue are relevant for valuing preference shares. Even the present Rule 11UA of the Income Tax Rules 1962 are applicable only to section 56(2) of the Act, requires valuation of preference shares by the merchant bankers. The AO has not even attempted to do any sort of valuation of preference shares. His addition is based entirely on conjectures and surmises. It is a settled law that the assessment cannot he made on mere suspicion, conjectures and surmises.

16. Even amendment to section 68 brought by Finance Act, 2012 does not refer to valuation. The insertion of the proviso to section 68 of the Act by Finance Act, 2012 casts an additional onus on the closely held companies to prove source in the shareholders subscribing to the shares of companies. During the course of the hearing, the Ld Counsel explained that the explanatory memorandum to the Finance Bill 2012 makes it clear that the additional onus is only with respect to source of funds in the hands of the shareholders before the transaction can be accepted as a genuine one. Even the amended section does not

envisage the valuation of share premium. This is further evident from a parallel amendment in section 56(2) of the Act which brings in its ambit so much of the share premium as charged by a company, not being a company in which the public are substantially interested, as it exceeds the fair market value of the shares. If one accepts the Ld CIT-DR's contentions that section 68 of the Act can he applied where the transaction is proved to be that of a share allotment that here the valuation for charging premium is not justified, it will make the provisions of section 56(2)(viib) of the Act redundant and nugatory. This cannot be the intention of the Legislature especially when the amendments in the two sections are brought in at the same time.

In view of the matter, the Ld Counsel explained that it is a settled law that where two views are possible, the view favorable to the assesse should be adopted as held by Hon'ble Supreme Court in case of CIT Vs. Vegetable Products Ltd. (1973) 88 ITR 192. In view of the above facts and circumstances, we are of the view that the assessee has discharged its onus by adequately disclosing the transaction in its books of accounts, filing statutory forms as regards allotment of shares, providing name, address and PAN of the shareholders, etc. the assessee has sufficiently discharged the onus cast upon it for the purpose of section 68 of the Act and no addition can be made on this account. Hence, we are of the view that the CIT(A) has rightly deleted the addition and we confirm the same. This issue of Revenue's appeal is dismissed.

17. The next issue in this appeal of revenue is against the order of CIT(A) deleting the disallowance of expenses relatable to exempt income made by the AO by invoking the provisions of section 14A of the Act read with Rule 8D of the Income Tax Rules,1962 (hereinafter the Rules). For this Revenue has raised the following ground No. 4,5 and 6: -

"4. On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) erred in deleting the disallowance of Rs.33,22,52,153/- made by the Assessing Officer u/s. 14A of the Income Tax Act, 1961 read with Rule rad with rule 8D of the Income Tax Rules, 1962, without appreciating the facts brought out by ml e Assessing Officer and considering the fact that Section 14A was intended to cover those situation where there is a possibility of exempt income being earned in future and it is not necessary for exempt income to have been included in the income of a particular year for the disallowance to be triggered.

5. On the facts and in the circumstances of the case and in law, whether the ld. CIT(A) erred in deleting the disallowance of Rs. 33,22,52,153/ - u/s. 14A of the Act read with Rule 8D of the Rules without considering CBDT Circular No.5/2014 dated 11.2.2014 on the issue involved.

6. On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) erred in deleting the disallowance of ₹ 33,22,52,153/- determined as per computation envisaged Rule 8D after invoking provisions of Section 14A of the Act."

18. We have heard rival contentions and gone through the facts and circumstances of the case. The assessee before the AO as well as before CIT(A) contended that no exempt income is earned by assessee but still the AO disallowed the interest by invoking the Rule 8D(2)(ii) and administrative expenses by invoking the Rule 8D(2)(iii) i.e. average value

of investments at ₹ 31,44,59,929/- and ₹ 1,77,92,224/- respectively. The CIT(A) deleted the disallowance only on the premises that the assessee has not earned any exempt income and hence following the Delhi High court decision in the case of Cheminvest Limited vs. CIT (2015) 378 ITR 33 (Delhi), deleted the disallowance only on the premises that the assessee has not earned any exempt income and the only grievances of the department is that the provisions of section 14A of the Act read with Rule 8D of the Rules are to be applied even where the investment has not yield in exempt income. We find that this legal position is now settled that the provisions of section of 14A of the Act cannot be applied in the absence of any exempt income earned in a particular year by the assessee. This position has been settled by the decision of Hon'ble Bombay High Court, Nagpur Bench in the case of Pr. CIT vs. Ballarpur Industries Limited in Income Tax Appeal No. 51 of 2016, wherein this issue has been considered and finally following the judgment of Hon'ble Delhi High Court in the case of Cheminvest Limited (supra) held as under: -

> *"On hearing the learned Counsel for the Department and on a perusal of the impugned orders, it appears that both the Authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the Authorities relied on the judgment of the Delhi High Court in Income Tax Appeal No. 749/2014, which holds that the expression "does not form part of the total income" in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual receipt of the income, which is not includible in the total income, during the relevant previous year for*

the purpose of disallowing any expenditure incurred in relation to the said income. The Income Tax Appellate Tribunal held that the provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the relevant previous year. It is not the case of the Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. In the facts of the case, the Authorities held that since the investments made by the assessee in the sister concerns were not the actual income received by the assessee, they could not have been included in the total income."

19. In view of the above settled position, the CIT(A) has rightly deleted the addition and we confirm the same.

20. The next issue in this appeal of the Revenue is against the order of CIT(A) deleting the disallowance of expenses being interest under section 36(1)(iii) of the Act on account of diversion of interest bearing funds as interest free advances to Nariman Infrastructure LLP wherein the assessee company has 50% of stake through its 100% subsidiary of Piramal Commercial Estates LLP and there is commercial expediency in the transaction for advancing this interest free loan. But the AO applying the rate of borrowing at the rate of 11% of amount advanced, disallowed interest of ₹ 9,13,000/- on borrowed funds claimed by assessee under section 36(1)(iii) of the Act. Aggrieved, assessee preferred the appeal before CIT(A), the CIT(A) allowed the claim of the assessee by observing in para 5.3 as under: -

"7. On the facts and in the circumstances of the case and in law, whether the ld. CIT(A) is right in deleting disallowance of ₹ 9,13,000/- made under section 36(1)(iii) of the Act on account of diversion of interest bearing funds as interest free advances to M/s Nariman Infrastructure LLP wherein the assessee company has 50% stake through its 100% subsidiary M/s Piramal Commercial Estates LLP without considering the fact that the Hon'ble Supreme Court in the decision in the case of Addl. CIT vs. Tulip Star Hotels Ltd. (2012) 21 Taxmann.com 97 (SC) held that the decision in the case of SA Builders vs. CIT (2012) (208 ITR 1) (SC), which was relied by the Ld. CIT(A), needs consideration.

8. On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) is right in deleting disallowance of ₹ 9,13,000/- made under section 36(1)(iii) of the Act without appreciating that the assessee company and recipient of the interest free advance M/s Nariman Infrastructure LLP are two different persons for income tax purposes."

21. We find that the CIT(A) has considered the submissions of the assessee that the advance of interest free loan have been made only for the purposes of assessee's business and according to its corporate strategy. We find that the assessee is engaged in the business of real estate and its development. For this purpose it has this amount of ₹ 0.83 crores to Nariman Infrastructure LLP as it has a stake of 50% in Nariman Infrastructure LLP through its 100% subsidiary Piramal Commercial Estates LLP. We find that the CIT(A) has clearly observed that this

transaction is on account of principle of commercial expediency, which was never contested by Revenue. Hence, we confirm the order of CIT(A) and dismiss this issue of Revenue's appeal.

22. In the result, the appeal of Revenue is dismissed.

Order pronounced in the open court on 16-11-2018.

Sd/-	Sd/-
(एन. के. प्रधान / NK PRADHAN)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 16-11-2018

सुदीप सरकार, **व.निजी सचिव** */ Sudip Sarkar, Sr.PS*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**