

**IN THE INCOME TAX APPELLATE TRIBUNAL “B”, BENCH KOLKATA**

**BEFORE SHRI A.T.VARKEY, JM &DR. A.L.SAINI, AM**

**आयकरअपीलसं./ITA No.1859/Kol/2017**

**(निर्धारणवर्ष / Assessment Year:2012-13)**

|                                                          |            |                                                                                                                                                                      |
|----------------------------------------------------------|------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>ITO, Ward-14(3), Kolkata</b>                          | <b>Vs.</b> | <b>M/s Pansu Commercial Pvt. Ltd.</b><br><br>The Principal Officer, M/s Pansu Commercial Pvt. Ltd., Sourav Ganguly, Avenue, P.O. Rajarhat, Gopalpur, Kolkata-700136. |
| <b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAGCP 2034 C</b> |            |                                                                                                                                                                      |
| <b>(Assessee)</b>                                        | <b>..</b>  | <b>(Revenue)</b>                                                                                                                                                     |

Assessee by : Shri Robin Chowdhury, Addl. CIT Sr. DR

Respondent by : Shri Subash Agarwal, Advocate

**सुनवाईकीतारीख/ Date of Hearing : 28/02/2019**

**घोषणाकीतारीख/Date of Pronouncement : 08/05/2019**

**आदेश / ORDER**

**Per Dr. A. L. Saini:**

The captioned appeal filed by the Revenue, pertaining to assessment year 2012-13, is directed against an order passed by the learned Commissioner of Income Tax (Appeals)-5, Kolkata (in short the ld. ‘CIT(A)’], which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 ( in short the ‘Act’), dated 21.03.2015.

2. The grievances raised by the Revenue are as follows:

*1. Whether on the basis of facts and circumstances of the case and in law the ld. CIT(A), Kolkata erred in deleting the addition made u/s 68 of the IT Act of Rs.2,17,00,000/- as subscription of shares along with premium*

*failing of appreciate the essence of the Act simply arguing that no 'sum' (cash) is credited in the books of the assessee company and only shares of assessee company issued in lieu of shares of some companies.*

*2. Whether on the basis facts and circumstances of the case and in law the ld. CIT(A), Kolkata erred in deleting the addition of Rs.2,17,00,000/- u/s 68 of the I.T. Act, holding the view of double taxation in the hands of assessee company as well as in the hands of five paper companies in the light of decision of the Hon'ble Calcutta High Court in case of Trinetra Commerce & Trade (P) Ltd., 75 taxmann. Com 70 (dt. of order 15.09.2016)*

*3. That the Department craves leave to add, modify or alter any of the grounds of appeal and /or adduce additional evidence at the time of hearing of the case.*

3. The brief facts qua the issue are that the assessee company, M/s Pansu Commercial Pvt. Ltd, filed the return of income under section 139(4) of the Act on 25.12.2012, declaring total loss to the tune of Rs.16,772/-. The assessee company was incorporated on 09.09.2011. During the year under consideration, as total of Rs. 2,17,00,000/- (Rs.1,43,200 + Rs.2,15,56,800) was credited in the books of accounts of the assessee company, consisting share capital at Rs.1,43,200/- and share premium at Rs. 2,15,56,800/-. The assessee was asked to produce all the directors of companies or persons from whom amount had been received during the financial year 2011-12. However, the assessee failed to produce anyone on the stipulated date and time before the assessing officer, however, the assessee furnished a reply to the show cause notice on 20.03.2015.

The assessee company has claimed to have received Rs. 1,43,200/- as share capital and Rs. 2,15,56,800/- as share premium during the financial year 2011-12 in lieu of which, shares have been allotted to the applicants. The assessee was required to furnish justifications for assigning the share premium value. In response, the assessee stated that there is no bar on share premium value, as per the instructions of Institute of Chartered Accountants or the Companies Act, 1956 or the Income Tax Act, 1961, the same is a capital receipt. Moreover, acceptance of the premium is the risk, decision and prerogative of the investor and there is no role of any third party or authority in the same. Share allotment has been done on the decision of management. The convention of share premium is long set and established by the department and corporate authorities for past several assessment years.

However, the assessing officer rejected the contention of the assessee and held that the assessee failed to discharge its onus therefore he made addition under section 68 of the Act to the tune of Rs.2,17,00,000/-.

4. Aggrieved by the addition made by the Assessing Officer, the assessee carried the matter in appeal before the Ld. CIT(A), who has deleted the addition made by the Assessing Officer. Aggrieved by the order of the Ld. CIT(A) the revenue is in appeal before us.

5. Before us, Id Counsel for the assessee, submitted in brief, that assessee company issued shares in lieu of shares of other companies, that is, barter transaction, exchange of assessee's shares with other shares, therefore the provisions of section 68 of the Act does not apply to the assessee, as there is no cash credit during the year.

6. On the other hand, Id DR for the Revenue submitted before us written submissions, which is reproduced below:

*“The assessee company was incorporated on 09.09.2011. There are three shareholder. Anital Agarwal & Suresh Agarwal are the initial shareholders of the company who were issued 5000 shares each having FV Rs.10, involving share capital of Rs.50,000 from each . In the same year assessee claimed to have issued 4320 shares to one M/s Gajvani Merchandise Pvt. Ltd on face value Rs.10 on a premium of Rs. 4,990. Thus, against share capital of Rs. 43,200 assessee claim to have received share premium of Rs.2,15,56,800/-. Assessee claimed that there was no monetary transaction with Gajvani Merchandise Pvt. Ltd. on the issue of share capital, as it is claimed that value is set-off against purchase value of shares of four unlisted company held by the share applicant as its investment.*

*In the appellate order Ld. CIT(A) has not gone into merit on the case and dealt with the legal issue of section 68 of the IT Act, whether any addition can be made u/s 68 where no sum of money has been transacted. Ld. CIT(A) in his order (in page no. 6 para 1.11) observed that:*

*“The A.O. has glossed over the fact that the assessee company did not receive any money by way of share capital from Gajvani Merchandise Pvt. Ltd. or others. The A.O. has made the addition u/s 68 of the I.T. Act, which applies only when any sum of money or cash is credited in the books of accounts and there is no satisfactory explanation from the assessee against the said credit about thenature and source. The A.O. has mechanically proceeded to make the addition without even appreciating, whether it was a fit case for application of section 68. Moreover, the shares in the said 4 companies*

taken in the books of the assessee in exchange for share allotted to Gajvani Merchandize Pvt. Ltd. do provide the nature and source of the amounts of share capital allotted to Gajvani Merchandise Pvt. Ltd. In the present case, the additions have been made at the ends of the Gajvani Merchandise Pvt. Ltd. and 4 other private companies in respect of the shares raised in the said 5 companies.

I differ with the observation of the Ld. CIT(A) on the issue of making addition u/s 68 in this case relying on the observation of the different judiciaries as reproduced hereunder:

A)[2013] 33 taxmann.com 64 (Karnataka) High Court of Karnataka in the case of Smt. Rekha Krishna Raj (March 13, 2013). Section 68 of the Income Tax Act, 1961- Cash Credits [scope of provision] – Assessment year 1997-98- Whether only a cash credit can be added to income under section 68, and not an unexplained credit representing value of supplies made by suppliers on credit cannot be added- Held, no [para 8] [in favour of revenue].”

7. We have heard both the parties and perused the material available on record. We note that the Id. AO had erroneously invoked the provisions of section 68 of the Act to the facts of the instant case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares of certain companies from certain shareholders without paying any cash consideration and instead the consideration was settled through issuance of shares to the respective parties. Hence, we hold that provision of section 68 of the Act are not applicable in the instant case. It is a case of swapping of shares. The shares were allotted for consideration other than cash. This is kind of a barter transaction, that is, shares were issued by the assessee company to share subscribing companies, and these share subscribing companies, paid the consideration by way of paying equity shares. The following journal entry will help us to understand the concept of barter transaction.

|                                 |            |
|---------------------------------|------------|
| Investment (Shares) Account Dr. | 5000 (say) |
| To Equity shares                | 1000       |
| To Premium on shares            | 4000       |

( Being Equity shares issued and consideration received from share subscribers by way of shares of other companies)

Having gone through the above journal entry, one can conclude that effect of this journal entry would be that investments in shares will be debited and the share capital and premium will be credited. The result of this journal entry clearly shows that there is no cash credit in the books of accounts i.e. there is no any sum crediting in the year under consideration and it is kind of a barter transaction, where one thing is being exchanged with other thing, hence the provisions of section 68 do not apply.

8.Now, coming to the assessee`s facts, we note that shares by the assessee to Gajvani Merchandise Pvt. Ltd. were allotted in exchange of shares of 4 (four) private companies being (i) M/s Aqua Vinimay P Ltd.,(ii) M/s Citron Commosale P Ltd.,(iii) M/s Ebony Dealtrade P Ltd, (iv) M/s Positive Merchants P Ltd.(vide pb-33). A copy of share purchase agreement is produced by the assessee which demonstrates that Gajvani Merchandise Pvt. Ltd. sold or handed over its shares in the said four private companies and in return for the said shares so acquired, the assessee allotted 4320 shares having face value of Rs. 10/- at a premium of Rs. 4,990/- per share. The assessee produced copies of financial statements of the said 4 private companies. As far as the addition in the hands of the assessee company is concerned one has to go by law as laid down in section 68 of the I. T. Act, the substance or the real impact of the transactions has to be kept in consideration to decide whether any addition of the share capital has to be made or not.

We note that addition made by the AO in respect of the share capital allotted to Gajvani Merchandize Pvt. Ltd. by the assessee is mechanically made by AO without considering the provisions of section 68. The A.O. has glossed over the fact that the assessee company did not receive any money by way of share capital from Gajvani Merchandise Pvt. Ltd. or others. The A.O. has made the addition u/s 68 of the I.T. Act, which applies only when any sum of money or cash is credited in the books of accounts and there is no satisfactory explanation from the assessee against the said credit about the nature and source. The A.O. has mechanically proceeded to make the addition without even appreciating whether it was a fit case for application of section 68. Moreover, the shares in the said 4 companies

taken in the books of the assessee in exchange for share allotted to Gajvani Merchandize Pvt. Ltd. do provide the nature and source of the amounts of share capital allotted to Gajvani Merchandise Pvt. Ltd. In the present case, the additions have been made at the ends of the Gajvani Merchandise Pvt. Ltd. and 4 other private companies in respect of the shares raised in the said 5 companies. If addition is required to be made that can be only in the hands of the said 5 companies as have been done u/s 68 in the said companies. As regards, the assessee company there is no case of application of section 68, once it has been demonstrated by the assessee that it did not receive money and that shares were received against the allotment of shares. As application of section 68 is not correct, hence the A.O.'s action, therefore cannot be sustained.

9. We note that Jurisdictional, Hon`ble High Court of Calcutta in the case of Jatia Investment Co. vs. CIT, reported in 206 ITR 718 wherein it was held where an assessee took over the liability of the non-financial companies to GB and Co. in exchange for the shares, in that situation section 68 cash credit does not attract. The detailed findings of the Hon`ble Court is given below:

*“We have perused the assessment order carefully. We find that cash did not pass at any stage though entries were made in the cash book showing payments and receipts; but since the entries made a complete round, no passing of cash was necessary for the purpose of making the entries. That there was no passing of cash is also admitted by the Income-tax Officer himself. We have already extracted the observation of the Income-tax Officer in paragraph 14 of his assessment order. The Income-tax Officer has clearly opined that all the respective parties did not receive cash nor did pay cash as none had any cash for the purpose. The only point in the assessment order is that the entries not involving the passing of cash should not have found a place in the cash book, but in the ledger account through journal entries. There is another self-contradiction in the Income-tax Officer's finding that, if there was no real cash entry on the credit side of the cash book, but merely a notional or fictitious cash entry, as admitted by him, there is no real credit of cash to its cash book ; the question of inclusion of the amount of the entry as unexplained cash credit cannot arise.*

*One of the grounds of the Tribunal for disbelieving the assessee's case is that the adjustment entries were made by notional cash entries with a view to bringing down the debt-and-capital ratio, i.e., that while being discharged of the debt the said companies also jettisoned their assets, i.e., the shares held by them of equivalent sum without achieving the avowed purpose. Here the Tribunal certainly misdirected itself. The ratio to be reduced is of the loan in relation to the share capital and the reserves. Jettisoning the shares had the desired effect of reducing the borrowed capital.*

*Again, as regards the Tribunal's refusal to take notice of the directions of the Reserve Bank, it is not correct for the Tribunal to hold that the said document was a new evidence in the true sense of the term. The assessee has been consistently pleading before the lower authorities that the entries had to be made in order to bring the companies in conformity with the said direction. Moreover, the direction of the Reserve Bank is a public document within the meaning of section 74 of the Evidence Act, 1872. Documents of a public nature and public authority are generally admissible in evidence subject to the mode of proving them as laid down in sections 76 and 78 of the Evidence Act.*

*In our view, the effect and import of the transactions is that the assessee took over the liability of the aforesaid non-financial companies to GB and Co. in exchange for the shares as aforesaid.*

*In the premises, we answer all the questions, in the affirmative and in favour of the assessee and against the Revenue."*

10. The Hon'ble Madras High Court in the case of V R Global Energy Pvt. Ltd. [2018] 96 Taxmann.com 647 (Mad), held that where assessee company allotted share to one VR in settlement of pre-existing liability of assessee to said company. It is only book adjustment entry and not actual receipts therefore conversion of these liabilities into share capital and share premium, should not be treated as unexplained cash credit under section 68 of the Act. That is, shares were allotted in exchange of liabilities hence no cash credit. The findings of Hon'ble Court is given below:

*The cash credits towards share capital were admittedly only by way of book adjustment and not actual receipts which could not be substantiated as receipts towards share subscription money. [Para 26]*

*The appeal is, thus, allowed and the judgment and order of the Tribunal is set aside, for the reasons discussed above. Additions under section 68 are also set aside. [Para 27]*

11. On similar facts, the Co-ordinate Bench of ITAT Kolkata in the case of ITO vs. Sunglow Telecom Pvt. Ltd. in I.T.A. No. 2178/Kol/2016, dated 16.11.2018, held as follows:

*"4. The undisputed fact in this case is that the allotment of shares were for consideration other than by way of cash. The four companies which applied for allotment of shares, have sold their investment to the assessee company and the assessee company, has as consideration for the purchase of those shares had allotted shares at a premium. **It is a case of swapping of shares. The shares were allotted for consideration other than cash.** The question is*

*whether under these facts and circumstances Section 68 of the Act, would be attracted.*

12.The undisputed fact, in the assessee`s case is that shares were issued at a premium, as consideration for the purchase of shares from the share applicant companies. This issue is squarely covered by the decision of the Coordinate Bench of Kolkata in the case of ITO vs. M/s. Anand Enterprises Ltd., ITA No. 1614/Kol/2016 & C.O. No.56/Kol/2016; dt. 26/09/2018, wherein under identical circumstances, at para 4.3. it was held as follows:-

*“4.3. In view of the aforesaid observations, in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents relied upon hereinabove, we hold that the Id. AO had erroneously invoked the provisions of section 68 of the Act to the facts of the instant case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares of certain companies from certain shareholders without paying any cash consideration and instead the consideration was settled through issuance of shares to the respective parties. Moreover, in the balance sheet of the assessee company in the schedule to share capital, it is very clearly mentioned by way of note that the fresh share capital was raised during the year for consideration other than cash. Hence we hold that provision of section 68 of the Act are not applicable in the instant case and accordingly the entire addition deserves to be deleted which has rightly been done by the Id. CIT(A) which does not require any interference. Accordingly, grounds raised by the revenue are dismissed.”*

13. In view of the aforesaid observations, and in the facts and circumstances of the case and respectfully following the aforesaid judicial precedents relied upon hereinabove, we hold that the Id. AO had erroneously invoked the provisions of section 68 of the Act, to the facts of the assessee`s case, which, in our considered opinion, are not at all applicable herein. This is a simple case of acquiring shares of certain companies from certain shareholders without paying any cash consideration and instead the consideration was settled through issuance of shares

to the respective parties. Hence, we hold that provision of section 68 of the Act are not applicable in the instant case and accordingly the entire addition deserves to be deleted, which has rightly been done by the Id. CIT(A), which does not require any interference. Accordingly, grounds raised by the revenue are dismissed.

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

**Order pronounced in the Court on 08.05.2019**

**Sd/-**  
**(A.T.VARKEY)**  
**न्यायिकसदस्य / JUDICIAL MEMBER**

**Sd/-**  
**(A.L.SAINI)**  
**लेखासदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;

दिनांक/ Date: 08/05/2019

(SB, Sr.PS)

Copy of the order forwarded to:

1. ITO, Ward-14(3), Kolkata
2. M/s Pansu Commercial Pvt. Ltd.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

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By Order

Assistant Registrar  
ITAT, Kolkata Benches