

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'A', KOLKATA  
[BEFORE SHRI P.M. JAGTAP, VP (KZ) AND SHRI S.S. VISWANETHRA RAVI, JM]

I.T.A. No. 2236/Kol/2017

Assessment Year: 2012-13

*ITO, Ward - 5(3) Kolkata.....Appellant*  
*Aayakar Bhawan,*  
*P-7, Chowringhee Square,*  
*Kolkata - 700 069.*

*M/s. Bhagwat Marcom Pvt. Ltd.....Respondent*  
*23B, N.S. Road,*  
*Kolkata - 700 001.*  
*[PAN: AAECB 9502 D]*

**Appearances by:**

*Shri A.K. Nayak, CIT (DR) appearing on behalf of the Revenue.*

*Shri V.K. Jain, FCA appearing on behalf of the Assessee.*

Date of concluding the hearing : June 19, 2019

Date of pronouncing the order : July 31, 2019

## **ORDER**

**PER P.M. JAGTAP, VICE-PRESIDENT (KZ)**

This appeal is preferred by the Revenue against the order of Ld. CIT(A) - 2, Kolkata dated 03.08.2017 and the solitary issue involved therein relates to the deletion by the Ld. CIT(A) of the addition of Rs. 9,85,00,000/- made by the AO on account of share capital and share premium by treating the same as unexplained cash credit u/s 68 of the Income Tax Act, 1961.

2. The assessee in the present case is a company which is engaged in the business of investment and trading of shares and securities. The return of income for the year under consideration was filed by it on 23.08.2012 declaring a total income of Rs. 446/-. During the year under consideration, the assessee company had received share application money of Rs. 9,85,00,000/- against the issue of 98500 shares of the face value of Rs. 1/- with premium of Rs. 999/- per share. During the course of assessment proceedings, notices u/s 131

were issued by the AO to the directors of the share applicant companies requiring them to appear personally along with the relevant details and documents to justify the investment made in the assessee company. As stated by the AO in the assessment order, none however appeared before him in response to the notices issued u/s 131. The AO, therefore, required the assessee company to produce the directors of the share applicant companies along with the relevant details and documents for verification. As noted by the AO in the assessment order, the assessee however failed to comply with the said requirement. The AO, therefore, treated the share application money received by the assessee during the year under consideration as unexplained cash credit and addition of Rs. 9,85,00,000/- made by him to the total income of the assessee in the assessment completed u/s 143(3) vide an order dated 04.03.2015.

3. Against the order passed by the AO u/s 143(3), an appeal was preferred by the assessee before the Ld. CIT(A) challenging the addition made by the AO u/s 68 and after considering the submissions made by the assessee as well as the material available on record, the Ld. CIT(A) deleted the addition made by the AO u/s 68 for the following reasons given in his impugned order:

*"I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the assessing officer during the assessment proceedings. The issue under consideration is that whether the issue of shares against the shares disclosed by the appellant invite the mischief of the provisions of the s. 68 of the Act or not and as to whether the AO is justified in making the addition towards share capital raised in the facts and circumstances of the case.*

*The AR of the appellate has submitted that there was NO receipt of money in this case, thus the prime condition of section 68 was missing. The AO*

*had not doubted the transaction of allotment of shares against the purchase of investment; rather he had imposed the provisions of section 14A to disallow expenditures relating to such investments. The appellant had allotted its equity shares to the companies, who have sold their investments to the appellant. There were mere journal entries in books, no cash or proceeds were received and recorded in books. The transactions were explained and the documentary evidences filed with AO. The assessee furnished the particulars mode of consideration and details of the persons who have been allotted shares during the year.*

*The AR further has submitted that summons u/s. 131 were issued but no one appeared is rather distortion of facts. The summons were served on 3 (THREE) share applicants. The share applicants comply with statutory requirement, submitted their response by registered post to AO. The AO had issued notices for verification u/s 133(6) of the Act by registered post. In response, the share subscribers filed their replies with evidences and confirmations of transactions. The details are as mentioned in the submission of the appellate as above. The subscribers filed their respective audited annual accounts. Income tax records, particulars of, directors, nature of business, PAN Card, share allotment letter, list of shareholders and declaration and nature of transaction. Please refer page no 20 to 267 of paper book for the copies of replies by all the shareholders to AO. The AO had deliberately ignored the replies and confirmations filed by the share applicants against his own notices only. The AO, for the reasons known to him, did not mention these vital facts in his order. The logic of the AO to deny the existence of such replies is beyond comprehension.*

*There is no adverse finding by AO about the investment made by subscribers. Even the source of the source of investment made to Assessee Company is aptly explained. The AO did not assert that the explanation given by the assessee is false. The appellant state that the explanation was supported by the documents, authenticity thereof was also not in doubt. Thirdly, the explanation provided by the assessee was not unsatisfactory as the AO had not rebutted the same. Mere stating in the order that the explanation is not satisfactory without any logic or reasoning is bad in law. The AO during the course of proceeding also verified the source of sources too and detail of which is available in the paper book having page no 268 to 287. The AO issued notice u/s 133(6) to the source of source companies and verified the transaction. The detail of such notices issued and replied filed are as mentioned in the submission of the appellate. The shareholders are all tax assessee and have been assessed at some point of time by the Income tax department. The detail of which are as mentioned in the submission of the appellate.*

*I fully endorse the view of the AR that the AO's action in making addition u/s 68 by relying upon the decision in the case of Bisakha Sales [P] Ltd, vs. CIT, Kolkata – II is totally misplaced. The AO has drawn adverse inference on the ground that director of the appellant company and Shareholders Company did not appear in person in response to summons. The failure on the part of the directors to appear in person does not suggest that identity, proof and genuineness of transactions furnish by the appellant Company stands disproved.*

*The AO also placed his reliance on the cases of Govindarajuhu Mudaliar vs CIT [1958] 34 ITR 807, CIT vs Devi Prasad Viswanath Prasad (1969) 72 ITR 194 (SC) and Commissioner of Income Tax vs Independent Media (P) Ltd. (2012) 25 taxman.com 276 (Delhi). The Reliance is also being placed on the decision of jurisdictional ITAT in the case of M/s. Star Griha Pvt. Ltd. vs CIT and M/s. Bisakha Sales Pvt. Ltd. vs CIT but the facts are not relevant to the case. The facts on said cases are totally different. In those cases, the assessee had received monies by cheques/drafts and allotted shares and in this case, no money was received by the appellant. The AO has stated that in the light of the facts of the case and aforesaid exposition of the legal position, with regard to the identity and creditworthiness of the subscriber companies and the genuineness of the transaction, it can be said that assessee has introduced its own unaccounted fund in the form of share application money to legalize its own black money,*

*The AR of the appellant submitted that the application of section 6B in this case is bad in law on facts as no cash or money was received and recorded as cash credit by the assessee and also placed his reliance upon the judgment of Jatia Investment given by Jurisdictional High Court. The AR of the appellate also placed his reliance on various judgements as mentioned in the submission.*

*The AR of the appellate has further submitted assessment of share subscribers were completed by the department u/s 143 (3) by the various assessing officer. The relevant portion of the respective assessment order passed u/s 143(3) of the Act, wherein the respective AO adjudicated/referred the amount raised by the respective Assessee towards share subscription are as mentioned in the submission of the appellate. It was plead by the appellant that the sum so raised by the respective assessee (share subscriber) of the appellant, has been utilized to acquire the investments by them. The Share subscribers after holding the investments over a period sold and transferred the some of the investment to the appellant. The appellant in turn, allotted its own equity*

*shares in consideration thereof. The transaction was recorded in books by journal entries only. All the share applicants are assessed to income tax and had regularly filed their income tax and ROC returns. The AR has also brought to notice with copy of assessment order where the assessment of these shareholder companies were completed u/s 143 (3) of the act by the different assessing officers in different years. Hence, the identity of the share applicants was duly proved. These companies are being assessed u/s 143(3) of IT Act by respective AOs.*

*The AR further argued that the transaction will not come under the preview of cash credit, as there is no cash receipt or receipt of any money or credit of any money. The assessee did not receive any share application money too. The assessee allotted its shares to the companies to whom it had debts to pay, The allotment of shares is against the documents to AO during the course of hearing. The AR in this regards placed his reliance in Hon'ble jurisdictional High Court in the case of Jatia Investment Co. vs CIT (1994) 206 ITR 718 (Cal) wherein it had been accepted the contention of the assessee and stated that in Case there is no cash receipts, the question of cash credit does not arises.*

*The AO has placed his reliance in the case of Star Griha Pvt. Ltd. and Bishakha Sales Pvt. Ltd, etc but the facts of these cases are not similar to the case the appellate. The basic difference is that in the case of appellate there is no cash involved on issue of share capital. Furthermore, the facts on said cases are totally different. In those cases, the assessee had received monies by cheques/drafts and allotted shares. Whereas in the case under consideration, no money was received by the appellant. Furthermore, the facts on said cases are totally different. In those cases, the assessee had received monies by cheques/ drafts and allotted shares. Whereas in the case under consideration, no money was received by the appellant.*

*Further, I find that there has been no cash transaction in this case, the mode of consideration was shares and there was no money involved in these transactions. The appellant did not have any intention to rotate his money without paying any taxes as alleged by the AO in his order. I find that there is no real cash entry on the credit side of the cash book. The shares were issued against the share. It is merely a notional entry and there is no real credit in the cash book and bank account. The question of inclusion of the amount of entry unexplained cash credit cannot arise. Therefore, the question of cash credit does not come in, there being no actual passing or receipt of cash. In other words, the transactions are*

*mere book entries. The transactions showing the amount as received in cash and paid away were not actual but only notional. As far as the question of section 68 is concerned, the nature of the transactions and the entries clearly show that no cash, in fact, flowed.*

It is pertinent to discuss the provision of section 68 of the act. The section 68 Says:-

**Cash credits**

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

*The observation of the Hon'ble Jurisdictional High Court decision in the case of Jatia Investment Co vs CIT (1994) 206 ITR 718 (CAL.) dated 06.08.1992 in the similar matter are as under:-*

*"there is no real cash entry on the credit side of the cash book, but merely a notional or fictitious cash entry there is no real credit of cash any its cash book, the question of inclusion of the amount of the entry unexplained cash credit cannot arise"*

*The facts of the case are similar to the facts of the cases of the Hon'ble Jurisdictional High Court in the of Jatia Investment Co, [1994] 206 ITR 718 (CAL.).*

*The AO placed his reliance on the various judgments as mentioned in the assessment order. However AO's action in making addition u/s 68 by relying upon the decisions are totally misplaced. The facts of the cases, as cited by the AO in his order are totally different with the facts of the appellant. In those cases, as referred by the AO, the assessee had received monies by cheque /draft and allotted shares. Whereas in the case under consideration, no money was received through banking channel by the appellant. There is no cash transaction in the case of the appellant as the shares were issued against the shares of another companies. On the basis of submissions with document, it can safely concluded that the information that the shares were issued against the shares was very much available with the AO during the assessment proceeding.*

*The AR of the appellate vide his letter dated 25.07 .2017 has further submitted that on the ground of appeal, that the grounds of deletion on*

*the share capital amount, together with shares premium added u/s"68 is supported by the appellate order passed by the CIT[23], Kolkata in the case of DSR Impex Pvt. Ltd. appeal No 265/CIT(A)-23/TECH-2/2016-17/Kol for assessment year 2012-13, Dhankamla Commosales Pvt Ltd appeal No 230/CIT(A)-23/W-6(1)2016-17 /Kol for assessment year 2012-13 and Coolhut Marketing Pvt. Ltd. appeal No 181/CIT(A)-23/TRO-2/2016/Kol for assessment year 2012-13. In all such cases the grounds granted are relating to on applicability of section 68 where in no sum was credited or received during the year. The facts of the cases [supra] are similar to the above appeal.*

*The AO failed to appreciate the fact that there was no sum credited in the books of Account of the appellate and no money was received. The assessee had allotted its shares Against the discharge of debts by journal entries in books. The AO failed to verify the facts of the case. The shares were allotted against the acquisition of investments under the agreements. The copies of these documents were also filed during the appellate proceedings, I find that there is no real cash entry on the credit side of the cash book. The shares were issued against the share. It is merely a notional entry and there is no real credit in the cash book and bank account. The question of inclusion of the amount of the entry unexplained cash credit cannot arise. Therefore, the question of cash credit does not come in, there being no actual passing or receipt of cash, In other Words, the transaction are mere book entries. The transactions showing the amount as received in cash or in kind and discharged were not actual case but only notional by journal entries As far as the question of section 68 is concerned, the nature of the transactions and the entries clearly show that no cash, in fact, flowed.*

*Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the AR that there is no cash involved in the issue of share capital in the appellate case, In view of the aforesaid findings and respectfully following the decisions of Hon'ble jurisdictional High Court decision in the case of Jatia Investment Co, I have come to the conclusion that the issue is squarely covered by the decision of Jurisdictional High Court as mentioned and discussed above, I have no option but to accept the arguments tendered by the AR of the appellant in this respect that there is no sum was credited in the book of account as per the provision of u/s 68 of the Act. Accordingly, the case of appellate does not come under the preview of the section 68 of the Act, Further, I have no hesitation to hold that the impugned addition made by*

*invoking the provisions of section 68 by the AO is not justified in the circumstances. Accordingly, the AO is directed to delete the addition made on this account. These grounds of appeal are allowed."*

Aggrieved by the order of the Ld. CIT(A), the Revenue has preferred this appeal before the Tribunal.

4. The learned DR submitted that the share capital and share premium amount credited in the books of account of the assessee company represented cash credit u/s 68 and since the primary onus to establish the identity and the capacity of the concerned share applicants as well as to prove the genuineness of the relevant transactions was not satisfactorily discharged by the assessee, addition u/s 68 was rightly made by the AO by treating the same as unexplained cash credit. He contended that the Ld. CIT(A) however did not appreciate the facts and circumstances involved in the assessee's case and deleted the addition made by the AO u/s 68 inter alia on the ground that there being no inflow of cash, section 68 was not applicable. He contended that the reliance of the Ld. CIT(A) on the decision of Hon'ble Calcutta High Court in the case of Jatia Investment Co. (supra) to come to this conclusion is clearly misplaced in as much as the facts involved in the said case before the Hon'ble Calcutta High Court were entirely different. He submitted that only notional entries were found recorded in the said case and there was no real transactions involved attracting the provision of section 68. He contended that the facts involved in the present case however are different, in as much as there were real transactions involving issue of share capital in lieu of investment in shares and these transactions having been reflected in the books of account of the assessee with



credit made to the share capital and share premium amount section 68 was clearly attracted. In support of this contention, he relied on the decision of Hon'ble Madhya Pradesh High Court in the case of V.I.S.P. (P) Ltd. vs CIT 265 ITR 202 and the decision of Mumbai Bench of this Tribunal in the case of Panna S. Khatau vs ITO rendered vide its order dated 03.07.2015 passed in ITA No. 3596/Mum/2012. The learned DR contended that the relief given by the Ld. CIT(A) to the assessee on the issue under consideration by holding that section 68 is not applicable thus is not justified and the matter should go back to the Assessing Officer for deciding the same afresh on merit in the light of relevant details and documents furnished by the assessee before the Ld. CIT(A) which were not available to the AO.

5. The learned counsel for the assessee, on the other hand, submitted that the shares at premium were issued by the assessee company during the year under consideration to other companies in lieu of the shares held by the said companies and since no cash was involved in these transactions, section 68 was not applicable as rightly held by the Ld. CIT(A) by relying on the decision of Hon'ble Calcutta High Court in the case of Jatia Investment Co. He contended that the ratio of the said decision of the Hon'ble jurisdictional High Court is squarely applicable to the facts of the present case and distinction sought to be made by the learned DR is not correct. He also invited our attention to the voluminous papers placed in the Paper Book and submitted that the same filed before the AO as well as before the Ld. CIT(A) were sufficient to establish the identity and capacity of the concerned share applicants as well as the genuineness of the relevant transactions. He contended that the AO completely

overlooked this vital and relevant documentary evidence filed by the assessee while the Ld. CIT(A) considered and appreciated the same in the right perspective to arrive at the conclusion that the primary onus to establish the identity and capacity of the concerned share applicants as well as genuineness of the relevant transactions having been established by the assessee on evidence, addition made by the AO u/s 68 was not sustainable on merit also. He, therefore, strongly supported the impugned order passed by the Ld. CIT(A) giving relief to the assessee on this issue and urged that the same deserves to be upheld.

6. We have considered the rival submissions and also perused the relevant material available on record. It is observed that its shares were issued by the assessee company during the year under consideration at premium to certain companies in lieu of the shares held by the said companies and there was thus no inflow of cash involved in these transactions. The said transactions were entered into in the books of account of the assessee company by way of journal entries and it did not involve any credit to the cash amount. The learned DR at the time of hearing has not brought anything on record to rebut or controvert this position. He however has contended by relying on the decision of Hon'ble Madhya Pradesh High Court in the case of V.I.S.P. (P) Ltd. (supra) as well as the decision of Mumbai Bench of this Tribunal in the case of Panna S. Khatau (supra) that section 68 was still applicable in the present case involving credit to the share capital and share premium amount. It is however observed that the facts involved in the case of V.I.S.P. (P) Ltd. were different in as much as the liability in question in the said casev

represented trading liability of the assessee accruing as a result of purchases made by the assessee during the relevant year and since the said liability was found to be a bogus liability, addition made by the AO was held to be sustainable by the Hon'ble Madhya Pradesh High Court.

7. In the case of Panna S. Khatau (supra) cited by the learned DR, both section 68 and 56 (2)(vi) were held to be applicable by the Tribunal but no concrete or cogent reasons were given to justify the applicability of section 68 to the credits not involving any receipt or inflow of cash in the relevant year. Moreover, the view taken by the Tribunal in the said case is contrary to the decision of Hon'ble Calcutta High Court in the case of Jatia Investment Co. (supra) relied upon by the Ld. CIT(A) to give relief to the assessee on issue under consideration in the present case. In the said case, the three NBFCs had taken loans from proprietary concern belonging to the same group. Since the said loans were required to be liquidated as per the RBI guidelines and there was no cash available with the NBFCs to repay the loans, the shares held by the three NBFCs were transferred to a partnership firm namely Jatia Investment Co., and the amount receivable against the said sale of shares was adjusted by the NBFCs against the loan amount payable to proprietary concern. The partnership firm of M/s. Jatia Investment Co. thus received shares from the three NBFCs and also took over the loans payable by the said NBFCs to the proprietary concern. These transactions were entered into in its books of account by the partnership firm through cash book by debiting the investment in shares and crediting the loan amount of the proprietary concern. This credit appearing in the books of account

of the partnership firm, M/s. Jatia Investment Co. was treated by the AO as unexplained cash credit u/s 68 and on confirmation of the same, when the matter reached to the Hon'ble Calcutta High Court, it was held by their lordship that when the cash did not pass at any stage and since the respective parties did not receive cash nor did pay any cash, there was no real credit of cash in the cash book and the question of inclusion of the amount of the entry as unexplained cash credit could not arise. In our opinion, the ratio of this decision of the Hon'ble Jurisdictional High Court in the case of Jatia Investment Co. (supra) is squarely applicable in the facts of the present case and the Ld. CIT(A) was fully justified in deleting the addition made by the AO u/s 68 by holding that the said provision was not applicable.

**8. In the result, the appeal of the Revenue is dismissed.**

Order Pronounced in the Open Court on 31<sup>st</sup> July, 2019.

Sd/-

(S.S. Viswanethra Ravi)  
 JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)  
 VICE PRESIDENT

**Dated: 31/07/2019**

Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Bhagwat Marcom Pvt. Ltd., 23B, N.S. Road, Kolkata – 700 001.
2. ITO, Ward – 5(3), Kolkata.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar/H.O.O.  
 ITAT, Kolkata