

आयकर अपीलिय अधीकरण, न्यायपीठ –“B” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA**  
[Before Shri P. M. Jagtap, Vice-President and Shri A. T. Varkey, JM]

**I.T.A. No. 2096/Kol/2017**  
**Assessment Year: 2008-09**

ITO, Ward-1(4), Kolkata	Vs.	M/s Josan Deposits & Advances Pvt. Ltd. (PAN: AAACJ 3357 J)
Appellant		Respondent

Date of Hearing (Virtual)	03.11.2020
Date of Pronouncement	03.12.2020
For the Appellant	Shri Imokaba Jamir, CIT
For the Respondent	Shri S. M. Surana, Advocate

**ORDER**

**Per Shri A.T. Varkey, JM:**

This is an appeal preferred by the revenue against the order of Ld. CIT(A)-14, Kolkata dated 30.06.2017 for 2008-09.

2. First of all we note that Revenue's appeal is delayed by 5 days and the Revenue has filed the condonation application. After going through the reasons given in the condonation application, we are inclined to condone the delay and proceed to hear the appeal of the Revenue. The sole ground of the revenue is against the action of the Id. CIT(A) in deleting the addition of share capital including premium amounting to Rs. 92.50 crores made by Assessing Officer u/s 68 of the Income Tax Act, 1961 (hereinafter referred to the "Act").

3. The facts in brief are that the assessee filed its return of income showing total income of Rs. 15,542/-. The return was processed u/s 143(1) of the Act. However, later the assessment was reopened u/s 147 of the Act and the A.O noted the assessee had raised the share capital of Rs. 92.50 crores during the year. After calling for the details of share capital raised by the assessee along with copies of agreement of

purchase of shares by the share applicants and issue of their own shares against such purchase of shares and the A.O after having issued notice u/s 133(6) to all the shareholders and after receiving confirmation, after the Assessing Officer being satisfied accepted the explanation filed by the assessee vide his assessment order passed u/s 147 / 143(3) dated 17.06.2010. Later the case of the assessee was set aside by the Ld. CIT-1, Kolkata vide his order u/s 263 of the Act dated 08.03.2013 for fresh enquiries and to pass a speaking order. Thereafter, the A.O passed the order dated 26.03.2014 u/s 143(3) / 263 of the Act herein he added Rs. 92.50 crores u/s 68 of the Act on the plea that the directors of the share applicants did not appear before him.

4. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the appeal of the assessee vide his impugned order by holding as under:

“I have considered the submissions. I find that the agreement for purchase of shares from the share applicants company were filed before the Income tax Officer. The Income Tax Officer has not adversely commented on the genuinity of the agreement. In the written submissions filed by the appellant the said fact was again reiterated by the appellant. However, still the Income Tax Officer has not adversely commented on the same. The fact therefore remains, that the shares of appellant company were allotted against the shares held by share applicants which were sold by them to the appellant who in turn, by adjustment allotted its own shares. The Income Tax Officer has also note adversely commented on the shares held by the share applicant companies either in the assessment order or in the remand report. When the fact is accepted that the shares were held by share applicant companies and the appellant allotted its own shares against purchase of such shares, the provisions of section 68 are not applicable. The principles laid down by the jurisdictional High Court with regard to the issue of share capital by adjustment may be quoted which was as under:

*“We have perused the assessment order carefully. We find that cash did not 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 to 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 & 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.....”*

Not only that the judgments of Jaipur Bench in the case of Komal Kumar Bader cited by the appellant as quoted above has extensively dealt with the issue of interpretation of the term “sum” and have taken support from a number of judgments which have been cited in the said judgment. The Hon'ble Bench has also taken support from various section of the Income Tax Act, 1961 wherein term “sum” have been used. The judgments cited by the appellants includes judgment u/s 68, Section 56, Section 80G, Section 88 and various other section which were relevant for the purpose of interpretation of the word “sum” and cash credit. Same has been reiterated and underlined by the Hon'ble Andhra Pradesh High Court in the case of Amonbolu Rajaiyah in 102 ITR 423; The Allahabad High Court in the case of Saru Smelting and Refining Co. 116 ITR 766; CIT vs. Gopal Krishna Singhania 193 ITR 274; Hon'ble Calcutta High Court in the case of Jatia Investments co. reported in 206 ITR 718 and a host of other judgments already discussed earlier. All the judgments support the proposition that the word sum means money introduced in cash or by cheque. Moreover by purchasing the shares of allottee companies and issuing its own shares against such purchase, the assessee is not enriched by any fresh introduction of any cash or sum to be utilized for its business purposes or for any other purpose. The purchase and issue of shares was only an adjustment entry and was negated by each other. In view of the above and in view of peculiar facts of the case as stated above, I have no alternative but to delete the addition made by the Assessing Officer.

Though I have decided the issue (a) in favour of the appellant but it will be relevant to discuss issue (b) for proper adjudication of this matter. There is no dispute that the appellant issues its own shares against purchase of shares of the share allottee companies. In that situation, question arises with regard to the share transferred by the share allottee companies with regard to their genuineness. Such shares held by the share allottee companies were either genuine or perhaps were not genuine. If, for the sake of arguments, it is held that those shares were genuine then the contribution made by those companies by transferring their shares to appellant were also genuine and as such no addition can be made by treating the contribution of such shares as unexplained in exchange to which the appellant company issued its own shares. Alternatively, there may also be another presumption that the shares held by those share allottee companies were not genuine. In that case the allotment of its own shares of appellant company have been allotted by adjustment with the purchase price of those shares held by allottee companies. In that case the shares issued by the appellant company also becomes not genuine and there is no question of any cash credit in the hands of the appellant since what was contributed and what was issued both were not genuine and no addition can be made. Hence on that score also no addition can be made.

In respect of issue (c) the appellant raised several issues as stated in the written submissions and rejoinder to remand report . The appellant submitted that the A.O did not carry out any enquiry in accordance with the directions of the Id. Commissioner of Income Tax as contained in the order passed by him u/s 263. The appellant also submitted that all the details and evidences were filed in the original proceedings u/s 147 as well as in the course of fresh proceedings but the income tax officer failed to made any enquiry as per the directions mentioned in the order u/s 263. The appellant also submitted that the only ground on which the addition was made was that the directors of share allottee companies were not produced. It was submitted by the assessee that the production of appearance directors was not material while deciding the credits u/s 68 and in particular on the facts and circumstances of this case wherein the existing shares held by the share allottee company were sold and against which the appellant issued its own shares. It was also submitted that notices u/s 133(6) were issued in course of original assessment proceedings. The same were duly served and complied with by the shareholders for furnishing the details, documents and evidences as required by the A.O in support of their identities and creditworthiness and genuineness of the transactions. It was also submitted that all those details were duly filed before the Income Tax Officer. It was further submitted that in course of reassessment proceedings giving effect to the order of Ld. Commissioner of Income Tax, the appellant in order to discharge the initial onus lying upon it filed evidences in support of the identities and creditworthiness of the shareholders and genuineness of the transactions. It was submitted that no defect whatsoever was brought on record by the Income Tax Officer to prove that such evidences were not reliable. It was submitted that the allegation of the Income Tax Officer that the shareholders have introduced their unaccounted cash in the garb of share capital is also against the facts on record since no money or sum was received as share capital. It is on record that the shares of assessee company have been allotted against purchase of shares by adjustment, therefore, the allegation of the A.O that there was introduction of unaccounted cash is contrary to the facts of the case as no sum has been received by the appellant. I find force in the submissions of the

appellant that since no sum of money has been received by the appellant, no addition can be made u/s 68 as unexplained cash credit. The contention of the appellant is supported by a number of judgments cited above. In view of the above addition on account of share capital u/s 68 is deleted.

Since I have decided the issue in favour of the appellant on issue no (a) and issue no. (b), I refrain from dealing with the other contentions raised by the appellant.”

5. Aggrieved by the action of Ld. CIT(A) giving relief to the assessee, the revenue is before us.

6. The learned CIT DR Shri Imokaba Jamir assailing the action of Ld. CIT(A) contended 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 because directors of the share applicant companies did not bother to appear before the A.O, so the 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 in that case decided by the Hon'ble High Court only notional entries were found recorded and there was no real transactions involved attracting the provision of section 68 of the Act. However, according to him, 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, so section 68 of the Act 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. The learned CIT 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 urged us to reverse the decision of Ld. CIT(A) and uphold the A.O's action and confirm the addition.

7. Per contra, the learned counsel for the assessee Shri S. M. Surana supporting the impugned action of Ld. CIT(A) 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 of the Act 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.(supra). According to him, 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 CIT DR is incorrect. He also drew our attention to the case law Paper Book where he has compiled sixteen (16) case laws of Hon'ble Supreme Court, Hon'ble High Courts and Tribunals for supporting the action of Ld. CIT(A) and coming to the merits he also drew our attention to the Paper Book and submitted that the same were 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 and the A.O could not point out any defects in the papers filed before him. The Ld. A.R contended that the AO completely overlooked the relevant documentary evidences 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 and therefore on merits also the addition made by the AO u/s 68 was not sustainable. He, therefore, does not want us to interfere with the reasoned order passed by the Ld. CIT(A).

8. We have considered the rival submissions and also perused the relevant material available on record. First of all we note that the assessee company had issued its shares during the year under consideration at premium to certain companies in lieu of the shares held by the said companies and *thus there was no inflow of cash involved in these transactions. And this 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 account.* The learned CIT DR at the time of hearing has not brought anything on record to rebut or controvert this finding of fact. 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) 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 case 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, so this case law does not help the Revenue.

9. We note that the Ld.CIT(A) has relied upon the decision of Hon'ble Calcutta High Court in the case of Jatia Investment Co. (supra) to give relief to the assessee. In the said case [Jatia Investment Co.], 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 of the Act. And subsequently when the matter reached the Hon'ble Calcutta High Court, it was held by their Lordship that when the cash did not pass at any stage and since neither the respective parties received any cash nor paid 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 considered 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 relying on this decision for deleting the addition made by the AO u/s 68 by holding that the said provision was not applicable. We fully concur with the view of the Ld. CIT(A) and the case laws relied on by the Ld. CIT(A) to give relief to the assessee. Therefore, we are inclined not to interfere with the order of Ld. CIT(A) and confirm the order of Ld. CIT(A).

10. In the result, appeal of the revenue is dismissed.

Order is pronounced in the open court on 03.12.2020.

Sd/-

(P. M. Jagtap)  
Vice President

Sd/-

(A. T. Varkey)  
Judicial Member

Dated: 03.12.2020

*SB, Sr. PS*

Copy of the order forwarded to:

1. Appellant- ITO, Ward-1(4), Kolkata
2. Respondent- M/s Josan Deposits & Advances Pvt. Ltd., 85/83, N. S. Road,  
Room No. 42A, 4<sup>th</sup> Floor, Kolkata-700001
3. The CIT(A)- 14, Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata