

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ)
and Shri Satbeer Singh Godara, Judicial Member**

**I.T.A. No. 686/KOL/2017
Assessment Year: 2012-2013**

***Income Tax Officer,.....Appellant
Ward-10(4), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, 3rd Floor,
Kolkata-700 069***

-Vs.-

***M/s. BSNL Commercial Pvt. Limited,.....Respondent
Behind Jhawtalla Kali Temple,
Teghoria, Kolkata-700 059
[PAN:AAECB 6746 K]***

Appearances by:

Shri Sankar Halder, JCIT, Sr. D.R., for the Appellant

Shri S.L. Kochar, A.R. & Shri Anil Kochar, Advocate, for the Respondent

Date of concluding the hearing : October 31, 2018

Date of pronouncing the order : November 22, 2018

O R D E R

Per Shri P.M. Jagtap, Vice-President (KZ):-

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-4, Kolkata dated 03.02.2017 and the solitary issue involved therein relates to the deletion by the Id. CIT(Appeals) of the addition of Rs.1,00,80,000/- made by the Assessing Officer on account of share premium.

2. The assessee in the present case is a Company, which filed its return of income for the year under consideration on 21.09.2012 declaring total income of Rs.13,429/-. As noticed by the Assessing Officer, the assessee-company during the year under consideration had raised

share capital at a huge share premium of Rs.1,00,80,000/-. Keeping in view that there was no substantial business activity carried on by the assessee-company during the year under consideration except making some investment in land and Bank, the Assessing Officer proceeded to examine the claim of the assessee for huge share premium. In this regard, he issued notices directly to the concerned shareholders and in reply to the said notices, the concerned shareholder companies furnished the details and documents required by the Assessing Officer. The Assessing Officer, however, found that the replies received from the shareholder companies were almost identical in style and some of their Directors and addresses of the Registered Office were common. He, therefore, issued summons under section 131 to the assessee-company requiring it to produce the Directors of the shareholder companies for examination. The assessee-company, however, failed to produce the Directors of the shareholder companies for verification before the Assessing Officer. Keeping in view this failure of the assessee-company, the Assessing Officer held that the creditworthiness of the concerned creditors could not be corroborated by the assessee-company and even the high value of share premium could not be justified by it. He accordingly treated the share premium amount of Rs.1,00,80,000/- received by the assessee-company as unexplained cash credit and made an addition to that extent to the total income of the assessee in the assessment completed under section 143(3) vide an order dated 16.03.2015.

3. Against the order passed by the Assessing Officer under section 147/143(3) of the Act, an appeal was preferred by the assessee before the Id. CIT(Appeals) and the following submissions were made on behalf of the assessee-company in writing before the Id. CIT(Appeals) in support of its case that the addition made by the Assessing Officer on account of share premium by treating the same was not sustainable:-

"We would like to inform you that the company BSNL Commercial Private Limited was incorporated on 05/09/2011 with the paid up capital of Rs.1,00,000/-. This amount of

Rs.100000/- was subscribed by the directors of the company as promoters. In the financial year 2011-12, It was engaged in the business of Job work/Commission/Interest Income/trading in consumables commercial goods. The company was willing to deal in Real Estate Business as Real Estate Agent/Builders/Property Developer. It is evident from its Balance Sheet and Profit & Loss Account of the financial year 2011-12 that it had already started dealing in properties from the financial year 2011-12 as it had purchased Land amounting to Rs.2202490/- during the year 2011-12 which is also showing in its Inventories as on 31/03/2012. It wanted to expand its business of dealing in properties and for this fund was required. So, the directors (Debasis Sanyal & Santwana Bagchi) of the Company convinced the investors about its planning and expected return (10% to 15%) from investment in the company and had issued 42000 shares @ Rs.250/Share (Face value - Rs. 10/Share & Share Premium - Rs.240/Share) to 4 investors and thereby raised Rs.1,05,00,000/- from the issue of shares. Out of the above fund raised, Rs.55,00,000/- was received from M/s. Devsant Commercial Private Limited, one of the group companies of M/s. BSNL Commercial Pvt Ltd. So, it can be said that more than 50% of the fund raised is the management's own fund being raised from the group company.

Moreover, all the required compliances for raising money through issue of shares were made by the company. The company had received all the money raised through issue of shares in its bank account. All the transactions had made through bank. It had also filed Form-2 for allotment of shares during the year and had also given allotment advice & share certificates to the investors. It had also submitted all the details & documents as per notices u/s. 143(2) & 142(1).

Surplus Fund out of money raised through share issue was kept in Company's bank account till finalization of other property related business transactions. The turnover of the company for the financial year 2011-12 is Rs.348815/- which is from Job Work/Commission and profit before tax of the company is Rs.13429/- during that year. The company is a fast moving company. It is having good reputation and goodwill in the market.

The investors had also complied with all the notices sent by the department and submitted all the relevant details & documents as per the notices sent to them u/s 133(6).

The appellant had also clarified all the grounds on which the Ld. Assessing Officer had added to the total income for the Assessment Year, the Share Premium amounting to Rs.1,00,80,000/- received during the year treating it as cash credit. The Appellant pleaded that the Net Asset Value of the

assessee's share was Rs.203/- per share as on 31.03.2012. and the Company has issued the Shares @ Rs.250/- shares, which is very much near to its NAV. Looking into the boom phase of Construction Industry at that time, the pricing of shares were not too high to be categorised as huge and unjustified share premium.

Details & documents submitted by the appellant and the investors and clarification & justification given by them had proved genuineness of transactions of share premium including face values, identities and creditworthiness of the shareholders of the company for justification of investment in the company.

The Assessee had furnished all the details as required to establish the genuineness of the issue of shares at premium of Rs.240/ share such as copy of Bank Statements of BSNL Commercial Private Limited, Copy of ITR Acknowledgement for the Assessment Year 2012-13, copy of Certificate of Allotment Advise, Copy of Allotment letter, Copy of Annual Report including copy of Bank Statements and copy of PAN Card of Investors Companies such as Devsant Commercial Private Limited, Sanmati Synfab Private Limited & Shlok Fashions Private Limited and copy of PAN of Directors of Investor Companies.

So, issue of shares at premium of Rs.240/- share is justified and all the details & documents mentioned above also prove the genuineness of transactions of share premium including face values, identities and creditworthiness of the shareholders of the company for justification of investment in the company.

There are a number of decisions of Hon'ble Courts on the issue, which are favourable to the assessee. Some of these are summarized as under:

a) In the case of Commissioner of Income-tax v. Gangeshwari Metal (P.) Ltd., [2013] 30 taxmann.com 328 (Delhi), it has been held that where the assessee in support of transaction of receipt of share application money, brought on record various documents such as names and addresses of share applicants, their confirmatory letters, copies of bank statements etc., said transaction was to be regarded as genuine and, consequently, no addition could be made in respect of same under section 68.

b) In CIT, Meerut vs. Nav Bharat Duplex Ltd. [2013] 35 taxmann.com 289 (Allahabad), it has been held that where Assessing Officer made addition in

income of assessee-company under section 68 on plea that it could not prove that share applicants had enough money on date of purchase of its shares, since share applicants were identified and they had submitted their bank statements, cash extracts and returns filing receipts, impugned addition was not justified.

c) In CIT, Udaipur vs. Bhaval Synthetics [2013] 35 taxmann.com 83 (Rajasthan), the Assessing Officer made addition to assessee's income on account of unexplained share capital on ground that assessee did not furnish confirmation from shareholders. However, Commissioner (Appeals) noticed that transactions were made through banking channel and existence of persons in whose names shares had been issued was proved and deleted said addition. The Hon'ble Court has held that the Commissioner (Appeals) did not commit error of law in deleting said addition.

d) Recently, the Mumbai Bench of the Income Tax Appellate Tribunal (the Tribunal) in the case of Green Infra Ltd. had an occasion to deal with taxability of premium received on issue of shares. The Tribunal held that share premium realized from the issue of shares is capitalized in nature and forms part of the share capital of the company and therefore cannot be taxed as revenue receipt. The Tribunal also held that it is a prerogative of the Board of Directors of the Company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to shares at premium.

In spite of what has been stated hereinbefore, the Assessing Officer wrongly added the amount of Share Premium of Rs.100,80,000/- to the total income of the assessee.

We are also enclosing the following details & documents that we have already submitted to Assessing Officer for your reference:-

- 1. Letter submitted to Assessing Officer regarding Justification of issue of shares at premium.*
- 2. Copy of PAN of Company "BSNI Commercial Private Limited" with copy of PAN of Director "Debasis Sanyal".*
- 3. Copy of Certificate of Allotment Advice or Letter of Allotment.*
- 4. Copy of Details of Source of fund.*

5. *Copy of Bank Statements of the Company "BSNI Commercial Private Limited".*

6. *Copy of Financial Statements of the Company "BSNL Commercial Private Limited" for the year ended 31.03.2012.*

7. *Copy of Acknowledgement of ITR for the Assessment Year 2012-13.*

8. *Copy of PAN of Investor Companies with Copy of PAN of Director of Investor Companies.*

9. *Copy of Financial Statements of the Investor Companies for the year ended 31.03.2012.*

10. *Copy of Acknowledgement of ITR for the Assessment Year 2012-13.*

We hope that the above details & documents and clarification is sufficient to serve your purpose and also justify the issue of shares at premium by the company".

4. The Id. CIT(Appeals) found merit in the submissions made on behalf of the assessee-company and deleted the addition made by the Assessing Officer by treating the share premium amount as unexplained cash credit under section 68 for the following reasons given in paragraph no. 4.8 & 4.9 of his impugned order:-

"4.8. I find that the appellant had explained before the AO that the Net Asset Value of the assessee's share was Rs.203/- per share as on 31.03.2012 and that it has issued the equity shares @ Rs.250/ shares, which is very much near to its NAV. It was also explained by the AR that considering the boom phase of Construction Industry at that time, the pricing of shares were not too high to be categorised as huge and unjustified share premium. The appellant had furnished details & documents for justification of share premium. The AO has not pointed out any anomaly or defect backed by cogent material to negate the arguments and justification filed by the appellant in course of assessment proceedings with regard to the issue of share premium. I find that the appellant had furnished all the details as required to establish the genuineness of the issue of shares at premium of Rs.240/- per share such as copy of Bank Statements of BSNL Commercial Private Limited, Copy of ITR Acknowledgement for the assessment Year 2012-13, copy of Certificate of Allotment Advise. Copy of Allotment letter. Copy of Annual Report including copy of Bank statements and copy of PAN

Card of Investor Companies such as Devsant Commercial Private Limited, Sanmati Synfab Private Limited & Shlok Fashions Private Limited and copy of PAN of Directors of Investor Companies. In such event, I find that the issue of shares at a premium of Rs.240/- per share seems to be justifiable when all the details & documents as mentioned above filed before the AO only go to show the genuineness of transactions of share premium including face values, identities and creditworthiness of the shareholders of the company for justification of investments in the appellent company.

4.9. Therefore, considering the totality of the facts and circumstances of the case, I find substance in the argument of the AR that the appellent has made out its case that the identity of the share applicants are established beyond doubt and on enquiries made by the AO there is no adverse finding reached on this aspect. Admittedly, all the share applicants are existing assesseees under the Act which establishes the identity and authenticity of the share applicants. About the genuineness of the transactions, there is no any adverse finding in the assessment order which is distinct to the facts brought on record by the appellent during the course of assessment proceeding. The creditworthiness of the share applicants as regards their subscription to the share capital is proved by submission of their return, audited annual accounts, their bank statement and replies to notices u/s 133(6) of the Act as depicted hereinabove. The net worth of such subscribers is in excess of the amount invested by each of them as explained hereinabove. The addition made by AO is based on extraneous parameters not germane for deciding the issue. The AO had not dealt with the issue judiciously and consistently with the evidence adduced during the course of the assessment proceedings by the appellent and the replies of the share applicants in respect of the share capital do not warrant the inference that such share application monies received is unaccounted cash credit. Hence, I am inclined to accept the arguments tendered by the AR of the appellent in this respect. In view of the above, I have no hesitation to hold that the impugned addition made by invoking the provisions of s. 68 by the AO is not justified in the circumstances. In view of the foregoing, the addition of Rs.1,00,80,000/- made on this account by the AO is, therefore, directed to be deleted. Thus, this ground is allowed".

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

5. The Id. D.R. strongly relied on the order of the Assessing Officer in support of the Revenue's case on the issue involved in this case. He contended that the creditworthiness of the concerned shareholders was not established by the assessee-company by producing them for examination before the Assessing Officer inspite of sufficient opportunity afforded in this regard. He contended that money trail of the share premium amount claimed to be received by the assessee-company from the concerned shareholders was required to be seen to ascertain the genuineness of the huge share premium amount claimed to be received by the assessee, but the Id. CIT(Appeals) completely overlooked this vital aspect while deleting the addition made by the Assessing Officer on account of share premium amount by treating the same as unexplained cash credit.

6. The Id. Counsel for the assessee, on the other hand, contended that all the relevant aspects of the issue have been duly considered by the Id. CIT(Appeals) and after taking into consideration the relevant documentary evidence placed on record by the assessee-company, creditworthiness of the concerned shareholders has been accepted by the Id. CIT(Appeals). He contended that even the share premium charged by the assessee-company was duly justified by it by furnishing the relevant facts and figures. He contended that the share capital amount received from the shareholders was accepted by the Assessing Officer and only the share premium amount received from them was treated by him as unexplained, which was not justified. He contended that in the similar facts and circumstances of the case, the addition made by the Assessing Officer on account of share premium amount was held to be not sustainable by the Tribunal in the case of ITO -vs.- M/s. Trend Infra Developers Pvt. Limited decided vide its order dated 26.10.2018 passed in ITA No. 2270/KOL/2016.

7. We have considered the rival submissions and also perused the relevant material available on record. It is observed that the relevant documentary evidence in the form of Annual Reports, Bank statements, copies of PAN Card, etc. of the shareholder companies was produced before the Assessing Officer in order to establish the identity as well as creditworthiness of the said shareholder companies. The notices issued by the Assessing Officer were also duly responded by the said shareholder companies by filing their replies. It is observed that the Assessing Officer, however, doubted their creditworthiness as well as the genuineness of the share premium amount mainly on the ground that the assessee-company failed to produce the Directors of the shareholder companies for examination. He, however, accepted the share capital amount received from the concerned shareholder companies and treated mainly the share premium amount paid by them as unexplained. As pointed out by the Id. Counsel for the assessee, the share premium charged by the assessee-company was duly justified before the Id. CIT(Appeals) by furnishing the relevant facts and figures. It is observed that in the similar facts and circumstances involved in the case of M/s. Trend Infra Developers Pvt. Limited (supra), similar addition made by the Assessing Officer only on account of share premium by treating the same as unexplained was deleted by the Id. CIT(Appeals) and the Tribunal upheld the order of the Id. CIT(Appeals) for the following reasons given in paragraph no. 3.3 of its order:-

"3.3. We have heard the rival submissions. The fact stated hereinabove remain undisputed before us by either of the parties and hence the same are not reiterated for the sake of brevity. At the outset, we find that the assessee had received share capital of Rs. 57,900/- from six shareholders and Rs. 2,88,92,100/- from the very same shareholders towards share premium. The share capital received by the assessee has been duly accepted by the Id. AO within the ken of section 68 of the Act. However, share premium component has been doubted by the Id. AO. We find that the assessee in the instant case had duly complied with by furnishing the complete details of share subscribers to prove their identity, genuineness of the transaction and creditworthiness of share subscribers beyond doubt. These are duly supported by the documentary evidences which are enclosed in the paper book. The Id. AO had not found any falsity or any adverse inference of the said documents. We find that the Ld. CIT(A) had placed heavy reliance on these documents and had granted relief to the assessee. All the share subscribers

are duly assessed to income tax and the transaction with the assessee company are duly routed through banking channels and are duly reflected in their respective audited balance sheets which are also placed on record before us. In any case, once the receipt of share capital has been accepted as genuine within the ken of section 68 of the Act, there is no reason for the Id. AO to doubt the share premium component received from the very same shareholders as bogus. We held that all the three necessary ingredients of section 68 had been duly complied with by the assessee with proper documentary evidences. We find that notices issued u/s 133(6) have been duly complied with. The only grievance of the Id. AO was that the assessee could not produce the directors of the share subscribing companies. In our considered opinion, for this reason alone, there cannot be any addition u/s 68 of the Act as held by the Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation Pvt. Ltd. reported in 159 ITR 78 (SC). We find that the decision of Hon'ble Delhi High Court in the case of Novo Promoters and Finelease Pvt. Ltd. reported in 342 ITR 169 (Del) vehemently relied upon by the Id. DR before us, is not applicable in the instant case, as in the facts before the Hon'ble Delhi High Court, the notices u/s 133(6) have not been duly complied with. Hence the decision rendered by the Hon'ble Delhi High Court in the case referred to supra is not applicable to the facts of the instant case and is factually distinguishable".

8. As the issue involved in the present case as well as all the material facts relevant thereto are similar to the case of M/s. Trend Infra Developers Pvt. Limited (supra) decided by the Tribunal, we respectfully follow the said decision and uphold the impugned order of the Id. CIT(Appeals) deleting the addition made by the Assessing Officer on account of share premium.

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

Order pronounced in the open Court on November 22, 2018.

Sd/-
(Satbeer Singh Godara)
Judicial Member

Sd/-
(P.M. Jagtap)
Vice-President (KZ)

Kolkata, the 22nd day of November, 2018

Copies to : (1) **Income Tax Officer,**
Ward-10(4), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, 3rd Floor,
Kolkata-700 069

(2) **M/s. BSNI Commercial Pvt. Limited,**

***Behind Jhawtalla Kali Temple,
Teghoria, Kolkata-700 059***

- (3) Commissioner of Income Tax (Appeals)-4, Kolkata,*
- (4) Commissioner of Income Tax- ,*
- (5) The Departmental Representative*
- (6) Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.