

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Income Tax Appeal No. 26/2017

(The Pr. Commissioner of Income Tax-3, Civil Lines, Nagpur vs. M/s.Apeak Info
tech Nagpur.)

with

Income Tax Appeal No. 27/2017

(The Pr. Commissioner of Income Tax-3, Civil Lines, Nagpur vs. M/s. Yogesh
Infotech, Nagpur.)

with

Income Tax Appeal No. 28/2017

(The Pr. Commissioner of Income Tax-3, Civil Lines, Nagpur vs. M/s. Amply
Infotech, Nagpur.)

with

Income Tax Appeal No. 29/2017

(The Pr. Commissioner of Income Tax-3, Civil Lines, Nagpur vs. M/s. Westline
Trading Company, Nagpur.)

with

Income Tax Appeal No. 30/2017

(The Pr. Commissioner of Income Tax-3, Civil Lines, Nagpur vs. M/s. Jasper
Commerce, Nagpur.)

with

Income Tax Appeal No. 31/2017

(The Pr. Commissioner of Income Tax-3, Civil Lines, Nagpur vs. M/s. Inex
Infotech, Nagpur)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Shri A.J. Bhoot, Advocate for Appellant.

**CORAM : M.S. SANKLECHA &
MANISH PITALE, JJ.**

DATE : 08.06.2017.

P. C.:-

1. All these six appeals by the Revenue under Section 260A of the Income Tax Act, 1961 (the Act) take exception to the common order dated 25th November, 2016 passed by the Income Tax Appellate Tribunal (Tribunal). The common impugned order of the Tribunal

dismissed the Revenue's appeals in respect of the six Respondent-Assesses all relating to the assessment year 2012-2013. The issue arising in all these appeals are identical viz. Whether the amount received as share premium on issue of share by the Respondent-Assesses Companies could be taxed as profit and gains of business in the hands of Assessees under Section 28(iv) of the Act.

2. Mr. A. J. Bhoot the learned counsel of the Revenue states that the relevant facts and questions arising for our consideration in all these six appeals are identical and be heard together. Therefore they are heard together.

3. Although numerous questions of law has been raised in the six appeals, Mr. A. J. Bhoot learned counsel for appellant urges only the following questions of law for our consideration in all these appeals.

“A. Whether on the facts and in circumstances of the case and in law, the Tribunal was correct to uphold the decision on CIT(A) that the share premium received by the Assessee Company cannot be taxed under Section 68 of the Act ignoring the ratio laid down by this Court in its decision in

reported 359 ITR (Bom) Pg. 450 (M/s. Major Metals vs. UOI)?

B. Whether on the facts and in circumstances of the case and in law, the Tribunal as well as Commissioner of Income Tax (Appeals) was right in deleting addition made by the Assessing Officer, by holding that the share premium receipt is capital in nature?."

4. During the previous year relevant to the subject assessment year 2012-2013, all the Respondent - Assessee had increased its Share Capital by issuing its shares at a premium. During the course of assessment, the Assessing Officer negated the Respondent-Assessee's contention that the share premium received by it on issue of shares is was a capital receipt and hence could not be taxed as income. The Assessing officer held that the Respondent - Assessee did not have any significant business at the time of issue of share capital to warrant receipt of share premium. Thus, the Assessing officer while passing the assessment order under Section 143(3) of the Act in five of the six proceedings, on 18th March, 2015 and in one proceeding on 20th March, 2015 added the share premium received to its income as profits and gains of business under Section 28(iv) of the Act.

5. Being aggrieved by the above Assessment orders, the Respondent - Assessee in all the six appeals carried the above issue in appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). By six distinct orders all dated 15th March, 2016 (one in respect of each Respondent - Assessee) held that Section 28 (iv) of the Act would have no application, as it dealt with the benefit other than cash or money arising out of business as held by this Court in Mahindra and Mahindra Ltd. vs. CIT reported in 261 ITR 501. It is also to be noted that the CIT(A) also held that Section 68 of the Act will not apply as during the course of Assessment proceedings, complete details of the investor i.e. the PAN, Balance Sheet of IT Return, copies of Bank statements, resolution of the Board authorizing the and also the parties who made the investment have confirmed the transaction in Assessment proceedings. In his remand report also the assessing officer did not dispute the above position. Thus, the six appeals of the Respondent - Assessee were allowed by six orders dated 15th March, 2016 of the CIT(A).

6. Being aggrieved the Revenue carried the above issue in appeal to the Tribunal. Admittedly, the only issue which was urged before the Tribunal is the addition of share capital premium received by the Respondents - Assessee to its income under the head of Profit and Gains of Business under Section 28(iv) of the Act. On the only issue

urged before it, the impugned order of the Tribunal holds that Section 28(iv) of the Act will have application only on the amounts received as income and not on capital Account. The impugned order placed reliance upon the decision of this Court in the case of **Vodafone India Services Pvt. Ltd. vs. Addl. CIT 368 ITR 01** wherein, it has been held that the amount received on share capital including premium are undoubtedly on capital account in absence of express legislation. Further reliance was placed upon the decision of the Hon'ble Apex Court in **M/s G.S. Homes & Hotels P.Ltd. vs. Dy. Commissioner of Income Tax (Civil Appeal No. (S) 7379-7380 of 2016 rendered on 9th August, 2016)** wherein, the decision of the Karnataka High Court holding that the amount received on account of shares from various share holders be treated as business income was reversed. The impugned order also made reference to the unreported decision of this Court in **Idea Cellur Limited vs. The Union of Indian and others (Writ Petition (Lodg) No. 1462 of 2013 decided on 12th September, 2013)** wherein, this Court while dealing with issue of non granting of stay of demand in its writ-jurisdiction has observed that any benefit which is received on capital account cannot be subject matter of Income Tax under Section 28(iv) of the Act. Thus, the appeals of the Revenue were dismissed by following the decision of this Court and of Apex Court that the receipt of share premium is on capital account and cannot be brought to tax as income.

7. In the back-drop of the above facts, we shall now decide the above two questions which arise for our consideration.

8. **Regarding Question A:-**

(a) The issue raised by the Revenue in this question is to bring to tax the share premium received under Section 68 of the Act. We find that the issue of bringing the share premium to tax under Section 68 of the Act was not an issue which was urged by the Appellant - Revenue before the Tribunal. The only issue which was urged before the Tribunal as recorded in Para 11 of the impugned order is the addition of share capital and share application money in the hands of the Assessee as income under Section 28(iv) of the Act. We find that the CIT(A) did consider the issue of applicability of Section 68 of the Act and concluded that it does not apply. The Revenue seems to have accepted the same and did not urge this issue before the Tribunal. Mr. Bhoot, learned counsel appearing for the Revenue also fairly states that the issue of applicability of Section 68 of the Act was not urged by the Revenue before the Tribunal.

(b). It is a settled position in law as held by this Court in **CIT vs. Tata Chemicals Ltd., 256 ITR 395** that in an appeal under Section 260A of the Act, the High Court can only decide a question if it had

been raised before the Tribunal even if not determined by the Tribunal. Therefore, no occasion to consider the question as prayed for arises.

(c) In any case, we may point out that the amendment to Section 68 of the Act by the addition of proviso thereto took place with effect from 1st April, 2013. Therefore, it is not applicable for the subject Assessment year 2012-13. So far as the pre-amended Section 68 of the Act is concerned, the same cannot be invoked in this case, as evidence was led by the Respondents- Assessee before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment. Therefore, admittedly, the Assessing Officer did not invoke Section 68 of the Act to bring the share premium to tax. Similarly, the CIT(A) on consideration of facts, found that Section 68 of the Act cannot be invoked. In view of the above, it is likely that the Revenue may have taken an informed decision not to urge the issue of Section 68 of the Act before the Tribunal.

(d). We may also point out that decision of this Court in **Major Metals Ltd. vs. Union of India, 359 ITR 450** proceeded on its own facts to uphold the invocation of Section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers to shares of the Assessee - Company were not creditworthy in as much as they did

not have financial standing which would enable them to make an investment of Rs. 6,00,00,000/- at premium at Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by this Court in its writ-jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. No finding in this case has been given by the Authorities that shareholder/share applicants were unidentifiable or bogus.

(e). In the above view Question No. A is not being entertained in view of the decision in Tata chemical Ltd., (supra). Accordingly, the question (A) is not entertained.

9. **Regarding Question B.:-**

(a) We find that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income. This conclusion was reached by the impugned order following the decision of this Court in Vodafone India Services Pvt. Ltd. (supra) and of the Apex Court in M/s G.S. Homes and Hotel P. Ltd. (supra). In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be

income.

(b) It is further pertinent to note that the definition of income as provided under Section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assessee in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that this Court in **Commissioner of Income Tax vs. M/s. Gangadeep Infrastructure (P) Ltd (Income Tax Appeal No.1613 of 2014 decided in 20 March 2017)** has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1 April 2013 will not have retrospective effect and would be effective only from Assessment year 2013-14.

(c) In view of the above, Question No.B as proposed also does not give rise any substantial question of law as it is an issue concluded by the decision of this Court in M/s Vodafone India Services Pvt. Ltd.

(Supra) and in the Apex Court in M/s G.S. Homes & Hotels P.Ltd. (supra). Thus not entertained.

10. Therefore, all the six appeals are dismissed. No order as to costs.

(MANISH PITALE, J).

(M.S.SANKLECHA, J.)

Gohane

