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### Supreme Court upholds the addition made under section 68 of unexplained share capital/premium received by the company

Unexplained share capital and share premium is taxable as cash credit under section 68 of the Act

#### Facts of the case:

NRA Iron & Steel Pvt. Limited (the Assessee) received a sum of Rs. 17.60 crores from various investors towards issue of shares at a premium during the financial year relevant to AY 2009-10. The face value of the share was Rs. 10 per share, which were subscribed to at a premium of Rs. 190 per share. The Assessee submitted that the entire share capital had been received through normal banking channels by account payee cheques/demand drafts. The Assessee also produced income tax return acknowledgments of the investor companies to establish the identity and genuineness of the transactions.

On the basis, of independent enquiries conducted, the Assessing Officer (AO) found as under:

- None of the investor companies which had invested amounts ranging between Rs. 90,00,000 and Rs. 95,00,000, could justify making investment at such a high premium of Rs. 190 for each share (face value Rs. 10 per share);
- Some of the investor companies were found to be non-existent;
- Almost none of the companies produced the bank statements to establish the source of funds for making such a huge investment in the shares;
- None of the investor companies appeared before the AO, but merely sent a written response through post.

Accordingly, the AO held that the Assessee failed to discharge the onus to prove the identity and creditworthiness of the investor companies and the genuineness of the transaction. Accordingly, an amount of Rs. 17.60 crores was added to the total income of the Assessee as unexplained cash credit under section 68 of the Income-tax Act, 1961 (the Act).

#### Decisions of CIT(A), Tribunal and the High Court:

The CIT(A) deleted the addition as the Assessee had submitted confirmations from the investor companies along with Income Tax returns and held that the Assessee had discharged the initial onus under Section 68 of the Act, for establishing the credibility and identity of the shareholders. The Tribunal and High Court upheld the order of CIT(A).

#### Supreme Court:

The Assessee did not appear before the Supreme Court and the matter was proceeded ex-parte.

#### Issue under consideration:

Whether the Assessee had discharged the primary onus to establish the genuineness of the transaction as required under section 68 of the Act?

## Decision of the Supreme Court:

The Hon'ble Supreme Court (SC) noted that the words "any sum found credited in the books" in section 68 of the Act indicates that the section is widely worded and includes investments made by introduction of share capital and share premium.

The SC referred to the decisions of the SC in the case of Kale Khan Mohammad Hanif V CIT<sup>1</sup>, Sumati Dayal Vs. CIT<sup>2</sup>, CIT Vs. P. Mohankala<sup>3</sup>, Guwahati High Court in the case of Nemi Chand Kothari Vs. CIT<sup>4</sup>, Delhi High Court in the case of CIT Vs. N. R. Portfolio (P.) Ltd<sup>5</sup>. and others and has summarised the following principles to be applied to verify whether the Assessee has discharged the primary onus contemplated by section 68 of the Act:

- The Assessee is under a legal obligation to prove, to the satisfaction of the AO, so as to discharge the primary onus, the genuineness of the transaction, since the facts are exclusively within the Assessee's knowledge, the identity of the creditors, and creditworthiness of the investors, who should have the financial capacity to make the investment in question;
- Thereafter, the AO is duty bound to investigate the creditworthiness of the creditor/ subscriber, verify the identity of the subscriber, and ascertain whether the transaction is genuine, or these are bogus entries of name lenders.;
- If the enquiries and investigations reveal that the identity of the creditors appears to be dubious or doubtful, or lack creditworthiness, then the genuineness of the transaction could not be said to be established.

The SC observed that lower appellate authorities failed to appreciate the results of the detailed enquiry conducted by the AO which showed that the investors had meagre or nil income and failed to explain how they had invested huge money in the Assessee.

The SC remarked that the practice of conversion of unaccounted money through the cloak of share capital/premium must be subjected to careful scrutiny, particularly so in the case of private placement of shares.

The SC held that the Assessee had failed to discharge the onus required under section 68 of the Act and the action of AO in adding the amount of share capital / share premium was upheld.

## Conclusion:

The SC decision seems to apply impliedly the amended section 68 of the Act (amended by the Finance Act 2012 w.e.f. AY 2013-14) to AY 2009-10 which, while dealing with share application money / premium, provides that the Assessee's explanation shall be deemed to be unsatisfactory unless the person, in whose name the share application money/ premium is credited, also offers a satisfactory explanation. The Finance (No. 2) Act, 2019, has amended the provisions of section 56(2)(viib) of the Act, wherein it has been provided that if start-up, as defined, fails to comply with conditions provided *vide* Notification issued under clause (ii) of the proviso to section 56(2)(viib) of the Act, then the consideration received for issue of shares which exceeds the face value of such shares shall be deemed to be the income of the company chargeable to income-tax for the previous year in which the failure to comply with any of the said conditions has taken place. Both Section 68 and 56(2)(viib) of Act should not apply to specified venture capital funds.

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<sup>1</sup> 50 ITR 1

<sup>2</sup> 80 Taxman 89

<sup>3</sup> 161 Taxman 169

<sup>4</sup> 136 Taxman 213

<sup>5</sup> 222 Taxman 157 (Mag)



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