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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1162 OF 2014**

The Commissioner of Income Tax-1

Versus

M/s. Green Infra Limited

..Appellant

..Respondent

Mr. P. C. Chhotaray for the Appellant.

Mr. P. F. Kaka, Senior Advocate, a/w Manish Kanth i/b. Atul Jasani for the Respondent.

**CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.**

DATE : 16th JANUARY, 2017

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 23rd August, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2011-12.

2. Mr. Chhotaray, the learned counsel urges only the following questions of law for our consideration :-

“(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that an amount of Rs.490/- per share received by the respondent-assessee constituted share premium of the assessee company?”

(ii) *Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in disagreeing with invocation of Section 68 of the Act to tax share premium?*

(iii) *Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in holding that because its subsidiary company has started manufacturing and therefore interest income from fixed deposit is to be charged as business income?*

3. Regarding question no.(ii):-

(a) Before the Tribunal, the Revenue raised a new plea viz. that the so called share premium has also to be judged on the touchstone of Section 68 of the Act which provides for cash credit being charged to tax. The impugned order of the Tribunal allowed the issue to be raised before it for the first time, overruling the objection of the respondent-assessee.

(b) The impugned order examined the applicability of Section 68 of the Act on the parameters of the identity of the subscriber to the share capital, genuineness of the transaction and the capacity of the subscriber to the share capital. It found that the identity of the subscribers was confirmed by virtue of the Assessing Officer issuing a notices under Section 133(6) of the Act to them. Further, it holds that the Revenue

itself makes no grievance of the identity of the subscribers. So far as the genuineness of the transaction of share subscriber is concerned, it concludes as the entire transaction is recorded in the Books of Accounts and reflected in the financial statements of the assessee since the subscription was done through the banking channels as evidenced by bank statements which were examined by the Tribunal. With regard to the capacity of the subscribers the impugned order records a finding that 98% of the shares is held by IDFC Private Equity Fund-II which is a Fund Manager of IDFC Ltd. Moreover, the contributions in IDFC Private Equity Fund-II are all by public sector undertakings.

(c) Mr.Chhotaray the learned counsel for the Revenue states that the impugned order itself holds that share premium of Rs.490/- per share defies all commercial prudence. Therefore it has to be considered to be cash credit. We find that the Tribunal has examined the case of the Revenue on the parameters of Section 68 of the Act and found on facts that it is not so hit. Therefore, Section 68 of the Act cannot be invoked. The Revenue has not been able to show in any manner the factual finding recorded by the Tribunal is perverse in any manner.

(d) Thus, question no.(ii) as formulated does not give rise to any substantial question of law and thus not entertained.

4. **Regarding question no.(iii):-**

(a) During the course of Assessment, the Assessing Officer noticed that the respondent had earned interest income on fixed deposits amounting to Rs.6.09 lakhs which was shown under the heading "Profits and Gains Business'. The Assessing Officer was of the view that the respondent had not commenced its business nor was it in the business of money lending therefore the interest on bank fixed deposit would be taxable as income from other sources and not as business income. Consequent reclassification of income was done in the Assessment Order dated 23rd December, 2011.

(b) In appeal the Commissioner of Income Tax (Appeals) upheld the view of the Assessing Officer. On further appeal the Tribunal in the impugned order records the fact that the three fixed deposit were for a period of 1 day, 28 days and 90 days respectively. Considering the nature of business of the respondent-assessee, the Tribunal, was of the view that the interest earned would be taxable under the head 'business income'. In support reliance was placed by the impugned order upon the decision of this Court in *CIT v/s. Indo Swiss Jewels Ltd. & another 284 ITR 389*.

(c) The grievance of the Revenue is that the respondent-assessee had not commenced its business. Therefore it is not entitled to claim that the

income earned on the fixed deposits even for a short period is no business income.

(d) We find that the claim for depreciation and expenditure in the subject assessment year, had been disallowed by the Assessing Officer and the disallowance was upheld by the Commissioner of Income Tax (Appeals). This disallowance was on account of non commencement of business. However the same has been reversed by the Tribunal in the impugned order. It has taken a view that the business of the respondent-assessee was of financing, investing, sourcing, operating, green or clean technological products and services had commenced. Therefore, consequently, allowed the claim made for depreciation and expenses to determine business profits. The above finding of the Tribunal that the business of the respondent had commenced is not challenged before us by the Revenue. It needs no emphasis that setting up a business or commencement of business cannot vary dependent upon the claim being made i.e. for expenses it has commenced and for income it has not commenced. Therefore it is not open to the Revenue to contend that the business was not set up/commenced for the purposes of holding that the income earned is not income from business.

(e) Further in the context of the respondent's business and the period

of fixed deposits, the impugned order holds the interest earned on them is taxable as business income. In fact this Court is almost similar circumstances in *Indo Swiss Jewels Ltd.* (supra) has held interest earned on short term deposits on the money kept apart for the purposes of business had to be treated as income earned from business and could not be treated as income from other sources. Considering the short duration in which the amounts were kept in fixed deposit awaiting use in its business operations would necessarily mean income earned on account of business following the ratio of this Court in *Indo Swiss Jewels Ltd.* (supra).

(f) In the above view, question (iii) as formulated does not give rise to any substantial question of law. Thus not entertained.

(g) The Appeal admitted on the substantial question of law at question no. (i).

5. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

(A. K. MENON, J.)

(M. S. SANKLECHA, J.)

Wadhwa