IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ravish Sood (JM)

I.T.A. No. 6991/Mum/2016 (Assessment Year 2012-13)

DCIT 1(3)(2) R.No. 540, 5th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Varsity Education Management Pvt. Ltd. 6A/1, Court Chambers New Marine Lines Mumbai-400 020. PAN : AADV6100E
(Appellant)		(Respondent)

Assessee by	Shri K. Gopal & Ms. Neha Paranjpe
Department by	Shri S. Padmaja
Date of Hearing	14.8.2018
Date of Pronouncement	24.10.2018

ORDER

Per B.R. Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 29-09-2016 passed by Ld CIT(A)-3, Mumbai and it relates to the assessment year 2012-13. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition of Rs.60.24 crores relating to excess share premium made by AO u/s 68 of the Act. The grounds of appeal urged by the revenue read as under:-

(i) *On the facts and in the circumstances of the case and in law, the Id.CIT(A) erred in deleting addition made to total income of Rs. 60,24,03,736/- on account of share premium when receipts of premium over and above the DCF valuation report submitted by the assessee was devoid of justification of its nature as required by the provisions of section 68 of the Act.*

(ii) *On the facts and in the circumstances of the case and in law, the Id.CIT(A) erred in deleting the addition made to total income amounting to Rs.60,24,03,734/-*

(iii) *On the facts and in the circumstances of the case and in law, without prejudice to ground No.1and 2 above, the Id.CIT(A) ought to have held that share premium is a revenue receipt taxable under the Act being accretion to assets without corresponding increase in liability and the*

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corresponding reserves generated can be distributed as dividend in the form of bonus/shares".

2. The facts as narrated by AO are extracted below:-

"Facts of the case:- The assessee company was incorporated on 28.12.2010 the name Anumati Properties Private Limited. The assessee company was acquired by current Management on 14.3.2011 and its name was changed to Varsity Education Management Pvt Ltd w.e.f. 27.3.2011. The assessee is engaged in the business of providing services like content development, facilities management, transportation management, text books and uniforms, mess and canteen services of students of K-10 schools (Kinder garden to Class 10) and Junior Colleges situated in Karnataka and Andhra Pradesh. The assessee company had two subsidiary companies, the details of which are as under:-

(i) Junior Varsity Education Management Pvt Ltd (Formerly known as Diamond Dreamz IT Solutions Pvt Ltd) which was incorporated on 7.4.2010. The company is engaged in the business of providing products & services like curricular, co-curricular or extra-curricular activities in relation to technology, education, content, training, consulting, transport facilities, facility management, brand building and marketing, provision of assets and other services to various educational institutions across the state of Andhra Pradesh.

(ii) K-12 Education Management Pvt Ltd: The company was incorporated on 16.9.2009 and engaged in the business of providing services like curriculum development, teacher recruitment, training, facilities management, transportation, accounting and information Technology, marketing testing services , text books, uniforms, mews and canteen etc to students up to 10th class in the trust schools situated in Karnataka & Andhra Pradesh."

3. The assessee company was acquired by current management on 14.3.2011. The share holders of the company as on 31.3.2012 are following persons, who were allotted shares at Par value on 24.03.2011:-

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(a) Trilochan Properties Pvt Ltd (now known as Coeus Education Management Pvt Ltd)	29,41,150 shares
(b) Ms Sushama B	29,425 shares
(c) Ms Seema B	29425 shares

4. The AO noticed that a Mauritius based company named M/s NSR PR Mauritius LLC had invested in the assessee company on 21.3.2011 (relevant to AY 2011-12) in 12,01,923 Compulsory Convertible Preference Shares(CCPS) of Rs.10/- each at premium of ₹ 1030/- per share. During the year under consideration, i.e., in the financial year relevant to the AY 2012-13, the assessee company has again issued to the very same investor, viz., NSR PE Mauritius LLC 16,82,692 Compulsory Convertible preference shares (CCPS) of Rs 10/- each at a premium of Rs 1030/- per share. Thus, during the year under consideration, the assessee has received share premium of Rs 173.31 crores during the year under consideration and the same was credited to Securities premium account in the Balance Sheet. The AO noticed that the assessee company has allotted the shares to management entities/people at par on 24.3.2011, whereas, it has allotted the Compulsory Convertible Preference shares to NSR PR at a premium at Rs 1,030/- per share on 21.3.2011 & 5.12.2011. The AO noticed that the book value of the shares of the company on the above dates was Nil, as evidenced by the Balance Sheet of the assessee company. Hence the AO asked the assessee to give justification for premium received.

5. The explanations furnished by the assessee are extracted by the AO in the assessment order and for the sake of convenience, we also extract the same below:-

> *"M/s NSR PR Mauritius LLC is (known as New silk route growth capital) is a Mauritius based private equity fund registered with the SEBI as a venture capital fund vide registration no ln/FVCI/08-09/119 dated 16.1.2009 (Herein after referred to as 'NSR') The registration details can*

be viewed on the SEBI website also. The url address is www. sebi. gov. in/investor/forventure. html. During the Previous year relevant to the AY 2012-13, the company has received Foreign Direct Investment (FDI) from NSR PE Mauritius LLC against allotment of 16.82.692/- Compulsory Convertible Preference shares (CCPS) of Rs.10/- each at a premium of Rs 1030/- per share. The share premium of Rs 173,31,72,760/- credited to Securities Premium account. Further we submit that USD 349,99,993 received from NSR PE Mauritius LLC on 5.12.2011 and exchange rate as on that date is Rs 51.90/USD. The total amount credited is Rs 179.16 crores. The balance of Rs 4.16 cr, after allotting CCPS of 16,82,6927- of Rs 10 each at a premium of Rs 1030/-per share, has been refunded to M/s NSR PE Mauritius LLC. This allotment is done as per the terms and conditions of the investment agreement dt 16.3.2011, particularly as per clause 2.1(i). As per this clause, it is agreed that the assessee is required to allot CCPS of ` 10 each at a premium of Rs 1030/-. Therefore, the nature of money received from NSR is towards the allotment of CCPS at a premium. The entire procedure has been followed to infuse capital into the assessee company. It is exclusive commercial decision of the investing company. The copy of the agreement with NSR is already available in the department records in the file of AY 2011-12. In support of the above, we are herewith enclosing Foreign Exchange Inward Remittance certificate (FIRC) from Axis Bank and Bank statement at Page no 1 & 2. Return in form FC-GPR filed with Reserve Bank of India, evidencing the proof of amount received towards allotment of CCPS is enclosed.

The assesse has further stated that its submissions for the earlier year may be considered. The same are reproduced below:-

2. For the purpose of FDI investment into the assessee company the valuation report has been prepared and has been submitted to you for your perusal. The Receipts and Profits projected in the valuation report are purely on estimated basis. However, your honours may note that the actual profits earned by each company mentioned in the valuation report, are equal or more than the projections made in the valuation report. This can be verified by your Honours from the Profit & Loss a/c file before you for the future subsequent years of the assessee, i.e. Varsity and also Junior Varsity Education Management Pvt i.e (Jr Varsity). Therefore the assessments/projections made in the valuation are more or less near to the real valuation.

The below table demonstrate the comparison:

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Name of the Company	*Assessment year*	*Profit as per the valuation report*	*Profit as per actual profit & loss a/c*
Varsity education Management Pvt ltd	*2012-13*	*18,60,00,000*	*17,96,98,259*
-do-	*2013-14*	*34,00,00,000*	*44,63,07,687*
Diamond dreams IT Solutions Pvt ltd(presently known as Jr Varsity Education Management Pvt ltd	*2012-13*	*43,60,00,000*	*78,05,15,719*
-do-	*2013-14*	*46,60,00,000*	*85,42,58,692*

3. It is to submit that as per the valuation report, the value of Varsity Education Management Pvt ltd i.e. assessee works out to Rs 2,31,36,85,924/- whereas the valuation of junior Varsity Education Management Pvt ltd works out to Rs 2,13,01,85,5247-. Thus the total valuation of both the companies works out to Rs 4,44,38,71,449/-.

(i) However the valuer at the time of valuation has discounted the above said valuation and accordingly arrived at a value of Rs 682/- per equity share. This valuation has been done based on the discounted cash flow method as per RBI guidelines. The guidelines have been already filed with you. Under the RBI guidelines any FDI coming into Indian company has to be valued as per DCF method. Further, investment in Indian company should not be less than the valuation arrived as per the DCF method. After the valuation as per DCF method, the assessee and the NSR have negotiated the price and arrived at share premium of 1030/-. This premium has worked out making a discount of 30% to the total value of 4,44,38,71,449/-. The discounted value works out to 3,11,07,10,014/- and the no of equity shares are 30,00,000. Thus the value per share works to Rs 1037/-. Base on this valuation CCPS has been allotted to the NSR at 1030/- premium as far as the assessee is concerned.

(ii) As per the agreement the assessee is required to make investment in K-12 Education Management Pvt ltd as well as Akash Multimedia. The first tranche of investment made by NSR is used for acquisition of shares in K-12 and also Akash Multimedia which has been reflected in the Balance Sheet of the assessee.

(iii) Being a startup company the assessee is not in a situation to demand a certain premium. The NSR being a venture capital fund, it is their prerogative to invest or not and normally venture capital

funds invest as per their own valuations. It is to submit that there is no relationship between the assessee company and NSR.

(iv) NSR has not only invested in assessee company and also in various companies in India and in other countries. Some of the investments they made are Vector Life sciences Ltd. Cafe Coffee day, VRL logistics, 9X Media Pvt Ltd, KS oils etc. you may visit their website to know their total investments http://nsrpartners. Com/portfiolio.

(v) After the investment by the NSR in assessee, the assessee has created huge employment opportunity in group companies and has paid substantial tax to the government.

(vi) The valuation report pertains to equity value whereas the assessee has allotted the CCPSs. The CCPS allotted to NSR will be converted after a certain date i.e. after completion of second tranche of investment. While valuing the shares the assessee has also considered benefits that are going to be derived from the acquisition of K-12 and also Akash Multimedia. Whereas the valuer has not considered same at the time of valuation report.

(vii) Your Honours may also observe that K-12 has become 100% subsidiary of the assessee over a period of time. In view of the above, it is not justified to for any addition under section 68 of the Act.

6. The assessee further submitted that the assessee has discharged the onus placed upon it u/s 68 of the Act by providing all the documents. It also submitted that the provisions of sec.68 will not be applicable to this receipt as the investment has been made by Foreign Venture Capital Fund. The AO had referred to the decision rendered by Hon'ble Bombay High Court in the case of Major Metals Limited vs. Union of India (207 Taxman 185) in the query raised by him. The assessee submitted that the above said decision is not applicable to the facts of the present case. It was submitted that the Hon'ble Bombay High Court, in the above said case, refrained from interfering with the decision reached by the Settlement Commission as the petitioner has failed to demonstrate before the Court that the order passed by the Settlement Commission was perverse. The assessee placed reliance on the decision

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rendered by Delhi bench of ITAT in the case of Russian Technology Centre P Ltd vs. DCIT (25 ITR (Trib) 521) to contend that no addition is warranted u/s 68 of the Act if the identity of the non-resident remitter is established and the money has come in through banking channels.

7. The assessing officer noticed that the assessee has furnished a valuation report to the Reserve Bank of India (RBI), wherein the value per share was estimated at Rs.682/- (Face value of Rs.10/- plus premium of Rs.672/-) only by following "Discounted Cash Flow" (DCF) method. Accordingly the AO took the view that the assessee should have collected premium of Rs.672/- only per share and accordingly held that there is no justification for collecting premium at Rs.1030/- per share, meaning thereby, the difference amount of Rs.358/- per share was considered by AO as unjustified premium. Accordingly the AO took the view that the unjustified premium amount of Rs.358/- cannot be considered as "Share premium amount" as claimed by the assessee. The AO held that the assessee is required to explain the "nature" and "Source" of the cash credits in order to discharge the burden placed upon him u/s 68 of the Act. The AO took the view that the assessee has only proved the "source" and not the "nature of receipts" in respect of unjustified premium amount of Rs.358/- per share. Accordingly, the AO took the view that the decision rendered by Hon'ble Bombay High Court in the case of Major Metals Ltd (supra) is applicable to the facts of the present case, as the question of reasonableness of premium was also examined in the above said case. The AO further took support of the following decisions to contend that the unjustified share premium can be added u/s 68 of the Act:-

(a) ZARS Trading P Ltd (ITA No.3284/Del/90) (2010 TIOL 308)

(b) Kushara Real Estate P Ltd (ITA No.4247/Del/2009).

The AO also observed that the assessee has not received funds from Venture Capital Funds & Venture Capital Company and hence exemption provided in sec. 68 of the Act is not applicable to the assessee. Further the AO held that the assessee has allotted shares at par to the management people, but

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collected premium from M/s NSR PR Mauritious LLC, which is against all rationale and logics.

8. Accordingly the AO took the view that the assessee has failed to justify excess premium of Rs.358/- per share, which amounted to Rs.60.24 crores. The AO noticed that unjustified excess premium amounting to Rs.43.02 crores was assessed as income of the assessee in AY 2011-12 also. Further, the AO also took the view that the phrase "nature" occurring in section 68 takes care of situation where premium received is beyond justification. Accordingly, the AO assessed the above stated excess premium amount of Rs.60.24 crores as income of the assessee u/s 68 of the Act.

9. We have earlier noticed that the assessee had received funds in the immediately preceding year, i.e., in AY 2011-12 by issuing CCPS at a premium of Rs.1030/- per share. In that year also, the AO had considered the excess premium of Rs.358/- per share as unjustified premium and accordingly added Rs.43.02 crores as income of the assessee u/s 68 of the Act. In the appellate proceedings pertaining to AY 2011-12, the Ld CIT(A) had deleted the addition by holding that the assessee has proved the identity and creditworthiness of investor/shareholder as well as genuineness of transactions in terms of sec.68 of the Act. The assessee had also contended before Ld CIT(A) that the amounts received on account of issue of equity shares are in the nature of capital receipts as held by Hon'ble Bombay High Court in the case of Vodafone India Services P Ltd.

10. In the instant year, the ld CIT(A) followed the decision rendered by him in AY 2011-12 and deleted the addition made by the AO by observing that there is no logic in making addition of alleged excess premium of Rs.358/- per share, when the identity and source of the same have been proved. Aggrieved, the revenue has filed this appeal.

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11. The Ld CIT-DR submitted that the addition made in the year under consideration is identical in nature to the addition made in AY 2011-12, i.e., both relate to the assessment of excess premium as income of the assessee u/s 68 of the Act. The Ld D.R submitted that the Ld CIT(A) has deleted the addition in AY 2011-12 and during the year under consideration, the Ld CIT(A) has granted relief to the assessee by following his order passed for AY 2011-12. The Ld D.R submitted that the order passed by Ld CIT(A) in AY 2011-12 has since been reversed by the co-ordinate bench of ITAT in ITA No.486/Mum/2015 dated 11.01.2017. Accordingly the Ld D.R submitted that the order passed by the Tribunal for AY 2011-12 should be followed in this year also and accordingly the addition should be confirmed by reversing the order of Ld CIT(A) passed for this year. The Ld D.R submitted that the judicial discipline demands that the order passed in an earlier year on identical set of facts on the very same issue by one bench of Tribunal should be followed by another bench. In support of this proposition, the Ld D.R placed her reliance on the following case law:-

(a) Blue Star Ltd (217 ITR 514)(Bom)
(b) Societe Generale (ITA No.1314 of 2013)
(c) HDFC Bank Ltd (ITA No.1753 of 2016)
(d) Hinduja Global Solutions Ltd (W.P No.1451 of 2015)
(e) Hatkesh Co-op Hsg Society Ltd

12. The Ld D.R submitted that the book value of shares on the date of investment was NIL and hence the basis for receiving premium of Rs.1030/- per share is not borne out of record except the financial projections made by the assessee. As per the valuation report submitted by the assessee, the premium on shares was arrived at Rs.672/- per share only. Hence the assessee has failed to prove the genuineness of the excess premium of Rs.358/- per share. She submitted that the assessee is required to prove the "nature" as well as "source" of the cash credit to the satisfaction of the AO as per the provisions of sec.68 of the Act. She submitted that the assessee has failed to explain the "nature" in respect of receipt of Rs.358/- per share and hence the assessee cannot be said to have discharged the onus placed upon its

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shoulders under sec. 68 of the Act. By placing reliance on the decision rendered by Mumbai bench of ITAT in the case of M/s Angel Pipes and Tubes (P) Ltd (2014)(50 taxmann.com 128), the Ld D.R contended that the burden of proof would shift back to the shoulders of the Assessee, when the AO was not satisfied with the explanations furnished by the assessee. In the instant case, the assessee has failed to prove the genuineness of excess premium of Rs.358/- per share and hence the burden has shifted back to the assessee and the assessee has failed to discharge the same.

13. The Ld D.R further submitted that the decision rendered by Hon'ble Bombay High Court in the case of M/s Major Metals Ltd (2012)(19 taxmann.com 176) would squarely apply to the facts of the present case. In the above said case, the assessee collected huge premium of Rs.990/- per share. The Settlement Commission found that neither the subscribers had financial standing for giving such huge amount nor the past performance of assessee would justify payment. Hence the addition was made u/s 68 of the Act. The Hon'ble Bombay High Court has refused to interfere with the decision taken by the Settlement Commission. The Ld D.R submitted that, in the present case also, the assessee has failed to justify the excess premium of Rs.358/- per share, as the valuation report justifies premium to the extent of Rs.672/- per share only.

14. The Ld D.R submitted that the assessee has placed its reliance on the decision rendered by Hon'ble Bombay High Court in the case of Vodafone India Service P Ltd (supra) to contend that the share premium is capital receipt. She submitted that the decision was rendered by the Hon'ble Bombay High Court in the context of Transfer pricing provisions and not u/s 68 of the Act. Hence the assessee cannot take support of the above said decision.

15. The Learned AR, on the contrary, submitted that the assessee has entered into an agreement with M/s. NSR PR Mauritius LLC on 16.3.2011, as per which the above said Mauritius company has invested funds in the

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assessee company in three tranches. The first tranche of funds was received in the financial year relevant to AY 2011-12; the second trench of funds was received during the year under consideration and the third trench of funds was received during F.Y. 2013-14 relevant to AY 2014-15. The Learned AR submitted that the assessee has received funds by issuing CCPS in all the three years. He submitted that the assessee has issued CCPS by complying with the all formalities prescribed by Reserve Bank of India (RBI). As per the requirement of RBI, the assessee is required to furnish Valuation certificate estimating the Share premium amount. As per the RBI rules, the assessee could not issue shares/CCPS less than the value so determined through valuation certificate. However, there is no restriction in issuing shares at a price higher than that arrived at through Valuation Certificate. In support of this submission, the Ld A.R referred to the Notification No.FEMA 205/2010-RB dated April 7, 2010 issued by the Reserve Bank of India. This notification is placed at pages 207-208 of paper book and Clause 5 of the notification states that the price of shares issued to persons resident outside India under this Schedule "shall not be less than" .... As per the valuation certificate the value of equity share was arrived at Rs.682/-, i.e. par value of Rs.10/- plus premium of Rs.672/-. However, the Assessing Officer has taken the view that the assessee should not have collected money more than the share value determined through Valuation Certificate. Accordingly he did not accept the alleged excess premium in AY 2011-12 and 2012-13. Accordingly he has assessed the excess premium amount as unexplained cash credit u/s 68 in AY 2011-12 & 2012-13. The Ld A.R submitted the assessee has received third tranche of funds in AY 2014-15 at the same premium amount of ₹ 1030/- per share. The AO has accepted the same in AY 2014-15 and accordingly, he did not make any addition towards alleged excess premium in AY 2014-15. The Ld A.R, accordingly contended that the addition made by the AO in this year should be deleted.

16. The Learned AR submitted that M/s NSR PR Mauritius LLC (also known as New Silk route growth capital) is a venture capital fund registered with SEBI, vide registration No.IN/FVCI/08-09/119 dated 16.1.2009. He submitted that the above said investor company is not related to the assessee in any manner. The Learned AR further submitted that the above said investor company has given a letter dated 3.3.2014 to the assessee, copy of which is placed at page No. 200 of the paper book, wherein the above said investor company has explained that it has taken commercial decision to invest in the assessee company looking at the bright future it had. The Learned AR submitted that above said investor-company has invested funds in other concerns in India as well as in other Countries also. In this regard, he invited our attention to the material placed at page No. 198-199 of the paper book, wherein newspaper report about the investments made by the above said company with the assessee firm and other concerns is given. The Learned AR further submitted that the assessee and the investor company has entered into an agreement on 16-03-2011 and it has invested funds in the assessee as per the terms and conditions agreed between the parties. He submitted that the agreement so entered between the parties is a detailed one containing various terms and conditions on the issue of preference shares, exit policy, conversion policy, rate of return, if the CCPS is returned back etc. The learned AR, in particular, invited our attention to page No. 61 of the paper book, wherein the condition relating to "Benchmark price" is stated. The above said clause states that in the event that the investor exercised buy back option and/or the put option pursuant to clause 4.6(i), a price per investor shares at which investor receives IRR of 18% is the bench mark price. If it is under clause 4.6(ii), then the IRR shall be 12% etc. The Learned AR submitted that this clause would indicate that investor has taken a conscious decision to make investment in the assessee expecting a particular rate of return, duly considering the earning potentials of the assessee. The same has been confirmed by the investor by its letter dated 3.3.2014.

17. The Learned AR submitted that the assessee has issued CCPS at a premium of Rs.1030/- as per agreement reached between the parties. He submitted that it was a commercial decision reached by the investor company and the assessee. He submitted that the was not right in law in questioning the commercial decision reached by both the parties, as he is not entitled to sit in the arm chair of the assessee and dictate the manner in which the business should be conducted. Accordingly, he submitted that the Assessing Officer was not justified in accepting share premium only to the extent of ₹ 672/- per share and further not justified in holding difference amount of ₹ 358/- per share does not represent share premium. The Learned AR submitted that the assessee as well as the investor company has accepted share premium amount as Rs.1030/- per share and the said amount was collected as Share premium only. It is the AO, who has bifurcated the share premium as justified amount of Rs.672/- and unjustified amount of ₹ 358/- per share. Accordingly he submitted that "nature" of amount of Rs.358/- per share cannot be considered to be something else other than "Share premium".

18. The Learned AR submitted that the Tribunal has passed the order for A.Y. 2011-12 on 11.1.2017 upholding the view of the Assessing Officer in assessing alleged excess premium as income of the assessee. He submitted that Hon'ble Bombay High Court has considered the issue of excess share premium in the case of CIT Vs. Green Infra Limited (2017) 392 ITR 7 (order dated 16.1.2017). He submitted that Revenue itself has accepted before the Hon'ble High Court that Share premium should also be judged on touch stone of section 68 of the Act. Accordingly, it was held that once the assessee has discharged burden placed upon him u/s. 68 of the Act, no addition could be made on account of share premium collection. The Learned AR submitted that identical view was expressed by Hon'ble Bombay High Court in the case of Gagandeep Infrastructure P. Ltd. (2017) 394 ITR 680. The ld AR submitted that the Coordinate Bench of the Tribunal, while disposing of the appeal of the assessee for A.Y. 2011-12, did not have benefit of decisions rendered by

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Hon'ble Bombay High Court in the case of Green Infra Ltd. (supra) as well as in the case of Gagandeep Infrastructure P. Ltd. (supra). He submitted that the decision rendered by Hon'ble jurisdictional Bombay High Court is binding upon the Tribunal and hence the Tribunal need not follow the decision rendered by it in the assessee's own case in AY 2011-12, when it is required to follow the decision rendered by jurisdictional Bombay High Court. The Ld A.R took support of the following observations made by Hon'blle Bombay High Court in the case of Hatkesh Co-op Housing Society Ltd (2016)(243 Taxmann 2013):-

> *"….. We are of the view that when an identical issue, which had earlier arisen before the Co-ordinate Bench of the Tribunal on identical facts and a view has been taken on the issue then judicial discipline would demand that a subsequent bench of the Tribunal hearing the same issue should follow the view taken by its earlier Co-ordinate bench. No doubt this discipline is subject to well settled exceptions of the earlier order being passed per in curium or sub silentio or in the meantime, there has been any change in law either statutory or by virtue of judicial pronouncement……"*

Accordingly the Ld A.R submitted that, in view of the binding decisions rendered by Hon'ble Bombay High Court, subsequent to the decision rendered by the Tribunal in AY 2011-12, the decision so rendered by the Tribunal is not required to be followed in this year.

19. With regard to the reliance placed by Ld D.R on the decision rendered by Hon'ble Bombay High Court in the case of Major Metals Ltd (supra), the Ld A.R submitted that the order was passed in the above said case on the writ filed by the assessee against the order passed by Settlement Commission u/s 245D(4) of the Act. The Hon'ble Court, after considering the arguments of both the sides as well as the facts, refrained to interfere with the order passed by the Settlement Commission as it found the view expressed by the Settlement Commission was one of the possible view. The Ld A.R that the Hon'ble Bombay High Court has made following observations in the case of Pr. CIT vs.

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Apeak Infotech (2017)(397 ITR 148) with regard to its decision rendered in the case of Major Metals (supra):-

> *"(d) We may also point out that decision of this court in Major Metals Ltd vs. Union of India (2013)(359 ITR 450)(Bom) 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 shareholders/share applicants were unidentifiable or bogus."*

Accordingly the Ld A.R submitted that the decision rendered by Hon'ble Bombay High Court was on the point whether there was any perversity in the order passed by the Settlement Commission or not, i.e., the Hon'ble Bombay High Court did not adjudicate the issue on merits. Hence it cannot be said that the said decision shall have any binding effect.

20. The Ld A.R submitted that the share premium amount has to be examined under sec.68 of the Act only. The assessing officer has satisfied with the identity, credit worthiness and genuineness of funds invested by NSR PE Mauritius LLC in the preference shares issued by the assessee company, meaning thereby, the assessee has discharged the burden placed upon its shoulders u/s 68 of the Act. The AO has accepted the investment in part, i.e., par value of shares plus share premium to the extent of Rs.672/- per share. When the AO was satisfied with the three main ingredients relating to share application/share premium, there is no reason to disbelieve the remaining amount of share premium of Rs.358/- per share. He submitted that the AO has made addition u/s 68 of the Act stating that the amount of Rs.358/- per share represents unjustified premium. He submitted that there is no scope under sec.68 of the Act to assess the alleged unjustified premium. He

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submitted that the AO himself has accepted the premium amount of Rs.1030/- in AY 2014-15 and hence there is no reason to take a different view in this year, viz., that the share premium amount is unjustified. He submitted that the Share Premium amount represents capital receipts and hence there is no scope for assessing the same as income of the assessee, when the AO was satisfied with the test of three main ingredients u/s 68 of the Act.

21. He further submitted that the definition of the term "income" has been expanded by Finance Act 2012 with effect from 1.4.2013 by including following clause in sec.2(24) of the Act:-

> *"(xvi) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of sub-section (2) of section 56."*

The AR submitted that the AO is entitled to assess the excess premium, if any, only from AY 2013-14, that too after proving that the value of shares has exceeded fair market value. The above said clause is held to be applicable only from AY 2013-14 by Hon'ble Bombay High Court in the case of Gagandeep Infrastructure P Ltd (supra) and also in the case of Apeak Infotech (supra). Accordingly the A.R submitted that there is no scope for assessing the alleged excess share premium during the year under consideration, as the same represents capital receipt and further the AO was satisfied with the identity and creditworthiness of the investor and the genuineness of transactions. The Ld. A.R submitted that the AO has accepted the fair market value of CCPS in AY 2014-15, when the above said provisions of sec.2(24)(xvi) read with sec.56(2)(viib) was very much applicable. Accordingly he submitted that there is no reason to suspect the share premium during the year under consideration also. Accordingly he submitted that the order passed by Ld CIT(A) should be upheld.

22. The Ld D.R, in the rejoinder, submitted that the co-ordinate bench has held that the assessee has failed to explain the basis of share premium collected by it over and above the valuation as per RBI guideline and

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accordingly held that the assessee has failed to satisfactorily explain genuineness of transactions to the satisfaction of the assessing officer. The ld DR further submitted that the decision rendered by Hon'ble Bombay High Court in the case of Major Metals Ltd (supra) was not referred to in the decisions rendered by the Bombay High Court in the case of M/s Green Infra Ltd (supra) and Gagandeep Infrastructure Ltd (supra). Accordingly, the Ld D.R submitted that the decision rendered by the Tribunal in AY 2011-12 should be followed.

23. We have heard rival contentions and perused the record. The assessee has issued CCPS to M/s NSR PR Mauritius LLC, a SEBI registered Venture Capital Fund at a premium of Rs.1030/- per share. In the valuation certificate submitted to Reserve bank of India, the price of share was worked out at Rs.682/- per share, consisting of Rs.10/- par value plus premium of Rs.672/- per share. We notice that the assessing officer has taken the view that the premium collected by the assessee over and above the premium worked out in the Valuation Certificate is unjustified premium and accordingly assessed the same as income of the assessee u/s 68 of the Act. There is no dispute with regard to the fact that the AO is otherwise satisfied with the identity and creditworthiness of the investor and that the transactions were carried out through banking channels.

24. The first question that arises is whether the Share premium can be considered as income taxable under the Act. This question was considered by the co-ordinate bench of Tribunal in the case of Green Infra Ltd (2013)(145 ITD 240). In the above said case, the assessee had collected share premium of Rs.490/- per share on allotment of shares of face value of Rs.10/- per share. The AO considered the share premium as unscientific and unjustified. Accordingly, he assessed the amount collected as Share Premium as income of the assessee u/s 56 of the Act. When this issue came before the Tribunal, the Tribunal deleted the addition with the following observations:-

"10. *We have considered the rival submissions and carefully perused the orders of the lower authorities and the material evidences brought on record in the form of Paper book. The entire dispute revolves around the charging of share premium of Rs. 490/- per share on a book value of Rs. 10/- each. This dispute is more so because of the fact that the assessee company was incorporated during the year under consideration. Therefore, according to the revenue authorities, it is beyond any logical reasoning that a company with zero balance sheet could garner Rs. 490/- per share premium from its subscribers. Such transaction may raise eyebrows but considering the subscribers to the assessee company, the test for the genuineness of the transaction goes into oblivion. It is an undisputed fact admitted by the Revenue authorities that 10,19,000 equity shares has been subscribed and allotted to IDFC PE Fund-II which company is a Front Manager of IDFC Ltd., in which company Government of India is holding 18% of shares. The contributors to the IDFC PE Fund-II who is a subscriber to the assessee's share capital, are LIC, Union of India, Oriental Bank of Commerce, Indian Overseas Bank and Canara Bank which are all public sector undertakings. Therefore, to raise eyebrows to a transaction where there is so much of involvement of the Government directly or indirectly does not make any sense.*

10.1 *No doubt a non-est company or a zero balance company asking for a share premium of Rs. 490/- per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the share holders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. Details of subscribers were before the Revenue authorities. The AO has also confirmed the transaction from the subscribers by issuing notice u/s. 133(6) of the Act. The Board of Directors contains persons who are associated with IDFC group of companies, therefore their integrity and credibility cannot be doubted. The entire grievance of the Revenue revolves around the charging of such of huge premium so much so that the Revenue authorities did not even blink their eyes in invoking provisions of Sec. 56(1) of the Act.*

10.2 *Let us consider the provisions of Sec. 56(1) of the Act:*

> *'56. Income from other Sources.— (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.'*

10.3 *A simple reading of this section show that income of every kind which is not to be excluded from the total income shall be chargeable to income tax. The emphasis is on that 'income of every kind', therefore, to*

tax any amount under this section, it must have some character of "income". It is a settled proposition of law that capital receipts, unless specifically taxed under any provisions of the Act, are excluded from income. The Hon'ble Supreme Court has laid down the ratio that share premium realized from the issue of shares is of capital in nature and forms part of the share capital of the company and therefore cannot be taxed as a Revenue receipt. It is also a settled proposition of law that any expenditure incurred for the expansion of the capital base of a company is to be treated as a capital expenditure as has been held by the Hon'ble Supreme Court in the case of Punjab State Industrial Development Corpn. Ltd. v. CIT [1997] 225 ITR 792/93 Taxman 5 and in the case of Brooke Bond India Ltd. v. CIT [1983] 140 ITR 272/[1982] 10 Taxman 18 (Cal.). Thus the expenditure and the receipts directly relating to the share capital of a company are of capital in nature and therefore cannot be taxed u/s. 56(1) of the Act. The assessee succeeds and Revenue fails on this account."

25. The revenue has challenged the order passed by the ITAT by filing appeal before Hon'ble Bombay High Court, which has since disposed of the appeal, vide its order dated 16-01-2017 reported in CIT vs. Green Infra Ltd (2017)(392 ITR 7). Before Hon'ble High Court, the revenue has acccepted that the Share Premium collected by the assessee has to be considered as cash credit and examined on the parameters of sec. 68. Hence, there should not be any dispute now that the share premium amount collected by the assessee should be examined within the parameters of sec. 68 of the Act. In the instant case, the assessing officer has assessed the alleged excess premium u/s 68 of the Act only.

26. The above said legal position was reiterated by Hon'ble Bombay High Court again in the case of CIT vs Gagandeep Infrastructure Pvt Ltd (2017)(394 ITR 680). In the above said case, the assessee therein issued shares at a premium of Rs.190/- per share and collected a sum of Rs.7.53 crores including share premium amount of Rs.6.98 crores. The AO questioned the justification for charging Share Premium and it was explained that the same was on the basis of the future prospects of the business of the respondent assessee. The AO did not accept the same and invoked sec.68 of the Act to

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treat the amount of Rs.7.53 crores as unexplained cash credit. The Ld CIT(A) deleted the addition cited above. The Ld CIT(A) observed that the AO has not given any reason to conclude that the investment made (inclusive of premium) was not genuine in spite of furnishing of evidences to prove genuineness. The Ld CIT(A) also held that the appropriate valuation of shares is for the subscriber/investor to decide and not a subject of enquiry by the Revenue. The Tribunal noticed that the assessee has proved the three main ingredients that were required to be proved u/s 68 of the Act, viz., the identity of the subscribers, the creditworthiness of the subscribers and genuineness of transactions. The Tribunal also held that the share premium received by the assessee would be on capital receipt and not in the revenue field.

27. Before the Hon'ble Bombay High Court, the revenue took support of the proviso inserted to sec.68 of the Act with effect from 1.4.2013 and contended that the same would apply to AY 2008-09 also. The proviso inserted to sec.68 of the Act states that when the assessee collected by way of share application/share capital/share premium or any such amount by whatever name called, then an additional burden is placed upon the assessee to prove the nature and source of the investor, i.e., the person in whose name such credit is recorded should also offer explanation about the nature and source of such sum collected. The Hon'ble Bombay High Court rejected the same and held that the proviso would be effective only from AY 2013-14 onwards. With regard to the decision rendered by the Tribunal, the Hon'ble Bombay High Court held as under:-

> *"….In any view of the matter the three essential tests while confirming the pre-proviso section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders, i.e., they are bogus. The apex court in Lovely exports P Ltd (supra) in the context to the preamended section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus*

> *shareholders then it is for the Income tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit."*

28. The decision rendered by the Tribunal in the case of Green Infra Ltd (supra), which has been confirmed by Hon'ble Bombay High Court (supra) as well as the decision rendered by Hon'ble jurisdictional High Court in the case of Gagandeep Infrastructure Pvt Ltd (supra) makes it clear that no addition could be made u/s 68 of the Act in respect of Share premium, if the assessee discharges its burden by proving the three essential ingredients, viz., identity of the subscriber, the capacity of the subscriber and the genuineness of the transaction.

29. We notice that the decision rendered by the co-ordinate bench in AY 2011-12 in the assessee' own case in ITA No.486/Mum/2015 did not consider the decision rendered by another Co-ordinate bench in the case of Green Infra Ltd (supra), wherein it was held that the share premium cannot be assessed u/s 56 of the Act, but to be examined within the parameters of sec.68 of the Act. It is a fact that the assessee has failed to quote the same before the Tribunal at the time of hearing of appeal. It is so mentioned in the M.A order dated 23-06-2017 passed in M.A.No.153/Mum/2017. In any case the decisions rendered by Hon'ble Bombay High Court in the cases of Green Infra Ltd (supra) and the Gagandeep Infrastructure P Ltd (supra) have been rendered subsequent to the decision of the Tribunal in AY 2011-12 and hence the co-ordinate bench did not have the benefit of the same. In the above said cases, it has been held that the addition u/s 68 of the Act of share premium is not warranted, if the three essential ingredients viz., identity of the subscriber, capacity of the subscriber and genuineness of transactions are proved, meaning thereby, if the share subscriber proves all the three ingredients, then there is no scope for partially accepting the share premium and partially assessing the same by holding that the share premium is unjustified. The Hon'ble Bombay High Court has held in the case of Hatkesh Co-op Housing

Society Ltd (supra) that the decision rendered by the Tribunal need not be followed if, inter alia, there has been change in law either statutory or by virtue of judicial pronouncement. We have noticed that there is change in law by virtue of decision rendered in the case of Green Infra Ltd (supra) and Gagandeep Infrastructure P Ltd (supra) after the decision rendered by co-ordinate bench in AY 2011-12 and hence the is not required to be followed in preference to the binding decisions rendered by Hon'ble Bombay High Court.

30. The Ld D.R contended that the decision rendered by the Hon'ble Bombay High Court in the case of Major Metals Ltd (supra) supports the view taken by the assessing officer and further the above said decision was not considered in the case of Green Infra Ltd (supra) and Gagandeep Infrastructure P Ltd (supra). On the contrary, the Ld A.R submitted that the decision has been rendered in the case of Major Metals Ltd (supra) against the orders passed by Settlement Commission. We notice that the Power of Hon'ble High Court against the orders passed by Settlement Commission is not appellate power, but restricted to

(i) grave procedural defects such as violation of mandatory procedural requirement of provisions in Chapter XIX-A and or violation of rules of natural justice;

(ii) absence of nexus between reasons given and decision taken by Settlement Commission.

It was so held by Hon'ble Karnanata High Court in the case of N.Krishnan vs. Settlement Commission (1989)(180 ITR 585)(Kar). The Hon'ble Karnataka High Court further held that an error of fact or of law alleged to have been committed by Settlement Commission cannot be looked into by High Court. The following observations made by Hon'ble Bombay High Court in the case of Major Metals Ltd (supra) also support the above said view:-

> ***"19.*** *The next aspect of the order of the Settlement Commission which needs to be looked into relates to the computation of the additional income of Rs.6.18 crores in the hands of the assessee. Before we deal with the merits of the challenge, it must be noted at the outset that the extent of judicial review in a determination made by the Settlement Commission*

must fall with the parameters settled by decided cases. In Jyotendrasinhji v. S.I. Tripathi [1993] 201 ITR 611/68 Taxman 59 (SC) the Supreme Court emphasised that the only ground upon which an order passed by the Settlement Commission can be interfered with is that the order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. This would be apart from grounds of bias, fraud or malice which would constitute a separate category. The Supreme Court held as follows:

> *"16. ...The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same - whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant. Apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in Sri Ram Durga Prasad v. Settlement Commission, 176 ITR 169 : (AIR 1989 SC 1038), which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji, J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is "concerned with the legality of procedure followed and not with the validity of the order." The learned Judge added "judicial review is concerned not with the decision but with the decision-making process." Reliance was placed upon the decision of the House of Lords in Chief Constable of the N.W. Police v. Evans [1982] 1 WLR 1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant..."*

***20.** The same principle has since been reiterated in a more recent judgment rendered in relation to the powers of the Settlement Commission constituted under the Central Excise Act in Union of Indiav. Ind-Swift Laboratories Ltd. [2011] 4 SCC 635 by the Supreme Court:*

> *"22. An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act. So far as the findings of fact recorded by the Commission or question of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court..."*

> ***21.*** *In an earlier judgment of a Division Bench of the Karnataka High Court in N. Krishnan v. Settlement Commission [1989] 47 Taxman 294/(Kar.) it was held that a decision of the Settlement Commission may be interfered with only, (i) if there is a grave procedural defect such as a violation of the mandatory procedural requirements of the provisions of Chapter XIX-A and/or violation of the principle of natural justice; and (ii) there is no nexus between the reasons given and the decision taken by the Settlement Commission. In other words, the Court under Article 226 would not interfere with an error of fact alleged to have been committed by the Settlement Commission."*

Against the background of above said legal position, the Hon'ble Bombay High Court examined the decision rendered by the Settlement Commission in the case of Major Metals Ltd (supra). The Hon'ble Bombay High Court noticed that the Settlement Commission has given atleast 14 reasons for taking the view that the genuineness of the transactions was not proved by the assessee. In this regard, the Hon'ble Bombay High Court observed as under:-

> *"23. Now, it is in this background that the Settlement Commission has arrived at a considered finding of fact that the* ***transactions of the two companies were not genuine transactions; that the two companies lacked a credit standing which would have enabled them to pay*** *large amounts towards share premium of Rs.990/- on a face value of Rs.10/- per share and that* ***neither the past performance or the financials of the petitioner itself would justify the payment of such a large premium.*** *The Settlement Commission has relied upon the law laid down by the Supreme Court inSumati Dayal vs. CIT in applying the test of human probabilities."*

Since the Settlement Commission has given its decision on finding of facts, the Hon'ble Bombay High Court did not interfere with the decision rendered by the Settlement Commission. The Hon'ble Bombay High Court itself has explained this legal position in the case of Apeak Infotech (2017)(397 ITR 148) as under:-

> *(d) We may also point out that decision of this Court in Major Metals ltd vs. Union of India (2013)(359 ITR 450)(Bom) proceeded on its own facts to uphold 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 inasmuch as they did not have financial standing which*

would enable them to make an investment of Rs.6,00,00,000 at premium of 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."

In the above said case also, the AO assessed the amount received by the assessee as share capital/share premium as income of the assessee under sec.28(iv) of the Act, which was inserted with effect from 1.4.2013. The revenue relied upon the decision rendered by Hon'ble Bombay High Court in the case of Major Metals Ltd (supra), which was rejected by the Hon'ble High Court.

31. From the foregoing discussions, we can notice that the decision rendered by Hon'ble Bombay High Court in the case of Major Metals Ltd (supra) cannot be taken as a binding precedence, since the scope of judicial review of the order passed by the Settlement Commission is different from normal appeal jurisdiction. Further the Hon'ble Bombay High Court has noticed that the Settlement Commission has arrived its decision on the basis of facts prevailing therein, viz., the genuineness of transactions and the capacity of the investors were not proved. Even though the Settlement Commission has also observed that the past performance of the company did not justify payment of large premium, the said observations were made only to support the main observations. In any case, it has now been held that the share application/share capital/share premium collections have to be examined under the parameters of sec.68 of the Act.

32. The Ld D.R also argued that the assessee has not explained "nature" of excess premium amount of Rs.358/- per share, i.e., according to Ld D.R/AO, the share premium was justified only to the extent of Rs.672/- only. Accordingly she contended the excess amount of Rs.358/- collected by the

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assessee cannot be considered as share premium. Since the "nature" of this excess collection is not explained by the assessee to the satisfaction of the AO, the Ld D.R contended that the same was rightly assessed u/s 68 of the Act.

33. Section 68 of the Act is a deeming fiction to assess cash credits, if the same was not declared by the assessee as his income and further, if the assessee offers no explanation or the explanation offered by the assessee is not satisfactory to the AO. The provisions of sec.68 read as under:-

> *68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the **"nature and source"** thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year."*

It is the contention of the Ld D.R that the excess premium of Rs.358/- per share cannot be considered as "share premium" and further the assessee has failed to explain the "nature" of amount of Rs.358/- per share. Accordingly it was contended that the same was rightly assessed as income of the assessee.

34. There is no dispute with regard to the fact that the assessee has received the impugned funds by way of "Share Premium" on issue of preference shares. In the books of accounts also, the assessee has credited "share premium account" only with the amount received. The investor has also given the funds only towards share premium. Hence, according to the assessee as well as investor company, the nature of receipt/payment is "Share premium" on the preference shares.

35. Since the revenue is contending that the "nature" of excess amount of premium is not proved, we shall examine the meaning or context in which the word "nature" is used in sec.68 of the Act. The courts have time and again held that if an assessee proves three essential ingredients with regard to cash credits, viz., the identity of the creditor, credit worthiness of the creditor and genuineness of transactions, then the "nature and source" of cash credit

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stands proved. In that case, the said cash credit cannot be assessed as income of the assessee. As observed earlier, if any cash credit is offered as income by the assessee himself, the question of applying sec.68 does not arise. The requirement of applying provisions of sec.68 shall arise only if any cash credit is not offered as income by the assessee.

36. We notice that the Hon'ble Bombay High Court, in the case of Major metals Ltd (supra) has also discussed about the scope of provisions of sec.68 of the Act as under:-

> *'Section 68 of the Income Tax Act provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. The Supreme Court held as follows:*
>
> > *"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and* ***if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee.*** *[See : Parimisetti Seetharamamma [1965] 57 ITR 532 at page 536). But,* ***in view of Section 68 of the Act, where any sum is found credited in the books*** *of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut it, the said evidence being unrebutted, can be used against him* ***by holding that it was a receipt of an income nature****. While considering the explanation of the assessee the Department cannot, however, act unreasonably."*

A careful reading of the above observations would show that the term "nature" is used in sec.68 of the Act in the context of whether the cash credit is of "income nature" or is "not of income nature". As per the deeming provisions of sec.68 of the Act, all cash credits may be considered to be of "income

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nature", if the assessee offers no explanation or the explanations offered by the assessee is not to the satisfaction of the AO. While considering the explanation of the assessee, the department cannot, however, act unreasonably. Hence the meaning of the term "nature" is whether the cash credit bears the nature of income or not? Identical views have been expressed in the following cases also:-

(a) Mahindranath Das vs. CIT (27 ITR 522)(pat), wherein it was held as under:-

> *In our opinion the argument of Mr. Gupta must be rejected as unsound. The principle is well established that if the assessee receives a certain amount in the course of the accounting year, the burden of proof is upon the assessee to show that the **item of receipt is not of an income nature;** and if the assessee fails to prove positively the source and nature of the amount of the receipt, the revenue authorities are entitled to draw an inference that the receipt is of an income nature. The burden of proof in such a case is not upon the department but the burden of proof is upon the assessee to show by sufficient material that the item of receipt was not of an income character.*

(b) Sreelekha Bannerjee and Ors vs. CIT (49 ITR 112)(SC):-

> *If there is an entry in the account books of the assessee which shows the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money is and **to prove that it does not bear the nature of income.** The department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the **receipt was not of an income nature,** the department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The department does not then proceed on no evidence, because the fact that there was receipt of money is itself evidence against the assessee. There is thus, prima facie, evidence against the assessee which he fails to rebut, and being*

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unrebutted, that evidence against him by holding that it was a receipt of an income nature.

(c) Smt. Panna Devi Chowdhary vs. CIT (208 ITR 849, 858)(Bom):-

.....The Income tax Act imposes a liability to tax upon income. It does not provide that whatever is received by a person can be regarded as his income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within taxing provision. ***It is only in a case where the receipt is in the nature of income****, the burden of proving that it is not taxable lies upon the assessee.*

37. In the instant case, there is no dispute to the fact that the assessee has received the sum of Rs.1030/- per share as Share Premium. It is the case of the assessing officer is that he will accept the share premium only to the extent of Rs.672/- per share worked out as per Valuation certificate. Accordingly the AO has considered the amount of Rs.358/- per share as unjustified premium and assessed the same as income of the assessee u/s 68 of the Act. The question that requires to be considered is whether the alleged excess premium of Rs.358/- per share is in the "nature of income or not", within the meaning of sec.68 of the Act.

38. There is no dispute with regard to the fact that the assessing officer was satisfied with the identity of the investor M/s NSR PR Mauritius LLC, its credit worthiness. With regard to the genuineness of transactions also, the assessee has proved the same by proving that the funds have been received through banking channels and there is no dispute on this fact. However, the AO has taken the view that the genuineness of the Share premium amount has been proved to the extent of Rs.672/- only and the AO has so taken the view, only for the reason that the share premium is determined only to the above said extent as per the valuation certificate, i.e., the AO has based his decision on the valuation certificate. The Ld A.R brought our attention to the Notification No.FEMA 205/2010-RB dated 07-04-2010, wherein it is stated the price of

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shares issued to persons resident outside India under this Schedule **shall not be less than**:-

(a)…….

(b) the fair valuation of shares done by SEBI registered Category-I Merchant banker or a Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognised stock exchange in India; and…..

Hence there is merit in the contention of the Ld A.R that the share premium amount worked out in the Valuation Certificate is the minimum amount that can be collected by the assessee and hence there is no bar on collecting higher amount as share premium. The Ld CIT(A) has rightly observed that there are several factors that are taken into consideration while issuing the equity shares to shareholders/investors, such as Venture capital funds and Private Equity funds. The Ld CIT(A) has also noticed that the actual financial results achieved by the assessee has exceeded the financial projections. Accordingly he has held that the premium of Rs.1030/- was determined between the parties on the basis of commercial considerations and agreed to by them, which cannot be questioned by the tax authorities. It is well settled proposition of law that the AO was not entitled to sit on the arm chair of a businessman and regulate the manner of conducting business. Hence, in our view, the AO was not justified in holding that he will accept the share premium amount only to the extent of Rs,672/- only. Hence the AO was not justified in partially not accepting the share premium and accordingly he could not have doubted the genuineness of transactions on this reason.

39. We have noticed that the AO has assessed the alleged excess premium u/s 68 of the Act. The Hon'ble Bombay High Court has held in the cases of Green Infra Ltd (supra) and Gagandeep Infrastructure P Ltd (supra) has held that the amount received on issuing of Shares should be examined by the AO within the parameters of sec.68 of the Act. Accordingly, once the AO was satisfied with the identity and credit worthiness of the investor and genuineness of transactions, the assessee can be said to have proved the

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"nature and source" of the cash credits. The amounts received as Share premium are in the nature of capital receipts as per the decision rendered by Hon'ble Bombay High Court in the case of Vodafone India Services P Ltd (supra) and the assessee has also discharged the onus placed upon it u/s 68 of the Act. In fact, the AO himself accepted the share premium to the extent of Rs.672/- per share as Capital receipt. Hence the "nature" of alleged excess share premium amount cannot be considered as receipt of income nature.

40. The amendment brought in sec.68 of the Act w.e.f. 1.4.2013 has been held to be applicable from AY 2013-14 onwards by Hon'ble Bombay High Court in the case of Gagandeep infrastructure P Ltd (supra). Even otherwise, the amendment will not apply to the assessee herein as the investor is a SEBI registered Venture Capital Fund. The amendment brought in sec. 2(24) and sec.56(2)(vii) of the Act relating to assessing of excess share premium as income, has been held to be applicable from AY 2013-14 onwards as held by Hon'ble Bombay High Court in the case of Apeak Infotech (supra). We have seen that the AO himself has accepted the quantum of share premium in AY 2014-15 and further the actual financial results have far exceeded the financial projections.

41. We also notice from the agreement entered between the parties, the investor is entitled to a particular rate of return in case the call option/put option is exercised. It also provides for the manner of conversion of preference shares into equity shares etc. In any case, the question of present book value shall apply only to equity shares and not to preference shares.

42. In view of the foregoing discussions, we are of considered view that the decision reached by Ld CIT(A) does not call for any interference. Accordingly we uphold the order passed by Ld CIT(A) on the reasons discussed above.

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

Order has been pronounced in the Court on 24.10.2018.

Sd/-	Sd/-
(RAVISH SOOD)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 24/10/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Senior Private Secretary)
ITAT, Mumbai

PS

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