आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'जी' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL " G" BENCH, MUMBAI

सर्वश्री, , नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य **एवं** अमित शुक्ला न्यायिक सदस्य के समक्ष

BEFORE SHRI N.K. BILLAIYA, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No.5784/Mum/2011

(**निर्धारण वर्ष** / Assessment Year :2008-09

The ACIT-1(1), Aayakar Bhavan, Mumbai-400 020	**बनाम**/ Vs.	M/s. Gagandeep Infrastructure Pvt. Ltd., 1-B, 1st Floor, 35, Court Chambers, Sir Vithaldas Thackersey Road, New Marine Drive, Mumbai-400 020

C.O. No. 126/Mum/2012

(Arising out of I.T.A. No.5784/Mum/2011

(**निर्धारण वर्ष** / Assessment Year :2008-09

M/s. Gagandeep Infrastructure Pvt. Ltd., 1-B, 1st Floor, 35, Court Chambers, Sir Vithaldas Thackersey Road, New Marine Drive, Mumbai-400 020	**बनाम**/ Vs.	The ACIT-1(1), Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCG 7272P		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by:**	Shri K.C.P. Patnaik
प्रत्यर्थी की ओर से/**Respondent by:**	Shri Vijay Mehta

सुनवाई की तारीख / **Date of Hearing : 07.04.2014**

घोषणा की तारीख /**Date of Pronouncement :23.04.2014**

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

This appeal by the Revenue and the Cross objection by the assessee are preferred against the very same order of the Ld. CIT(A)-1, Mumbai dt.24.5.2011 pertaining to A.Y. 2008-09. Since the appeal and the cross objection were heard together, they are disposed of by this common order for the sake of convenience and brevity.

2. The grievances of the Revenue read as under:

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 7,53,50,000/- u/s. 68 being share capital and share premium received during the year treating the same as unexplained cash credits?*
>
> *2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in restricting the disallowance to Rs. 1,24,191/- against Rs. 1,88,012/- u/s. 14A r.w. Rule 8D and in the light of the decision of Hon'ble High Court in Godrej & Boyce Ltd. Vs DCIT reported in 284 ITR 1(Bom) aas the decision of Hon'ble Bombay High Court is not accepted by the Department."*

3. The cross objections of the assessee read as under:

> *"1. On the facts, circumstances and in law, the Ld. CIT(A) erred in confirming the disallowance of Rs. 1,24,191/- by wrongly applying the provision of Sec. 14A r.w. Rule 8D of the I.T. Act, 1961. This amount represents the total amount debited by the appellant to profit and loss account for the year ended 31.3.2008.*

> *The appellant submits that it has not incurred any expenditure attributable to earning of exempt income and no expense is disallowable u/s. 14A r.w. Rule 8D of the I.T. Act."*

4. The return of income for the year under consideration was filed on 25.9.2008 declaring loss at Rs. 1,24,191/-. The return was processed u/s. 143(1) of the Act and thereafter it was selected for scrutiny assessment and statutory notices were issued and served upon the assessee.

4.1. During the course of the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has shown income from dividend only. The AO further noticed that the issued , subscribed and paid up capital of the assessee was increased from 2,50,000/- to Rs. 83,75,000/-. It was noticed that the assessee has collected share premium at Rs. 6,69,75,000/-. The AO further observed that the entire increase in the share capital was invested in shares of M/s. Omni Infrastructure Pvt. Ltd. The assessee was asked to furnish the details with supporting evidences of the subscribers to the share capital and also the premium received. The assessee was also asked to justify the charging of premium of Rs. 190/- per share. The assessee furnished list of shareholders, their share holding pattern as on first and last day of the balance sheet, copies of share certificates issued, copy of share application form, Form No. 2 filed with Registrar of Companies. As regards justification of charging premium, the assessee stated that the premium on shares has been charged on the basis of future prospects of the business/investments. It was also explained that the assessee had made investment in shares of M/s. Omni Infrastructure Pvt. Ltd at a premium of Rs. 12,490/- per share. The AO did not accept the submissions of the assessee. The AO was of the opinion that all the applicant companies are operating from the same address from where the assessee is also operating its business. Further, all the share application forms were signed by the same person . The AO further noticed that the shareholders from whom premium was charged are newly established companies and their sources of funds are from the share capital. The AO analyzed the investment patterns of all the companies which is as under:

S.No.	Name of the Company	Share Capital & Share premium	Investments made in companies	Amount of investment in shares.
1.	Money Matters (India) Pvt. Ltd.	21125000 54375000	Dynyaneshwar Trading & Investment P. Ltd.	24,00,000
			Gagandeep Infrastructure P. Ltd.	10,00,000
			Money Matters Advisory Services P. Ltd.	2,23,39,000
			Money Matters Properties Pvt. Ltd.	10,00,000
			Meghraj Properties P. Ltd.	10,00,000
			Money Matters Infrastructures P. Ltd.	10,00,000
2.	Money Matters Advisory Services Ltd.	172660000 180880000	Parshwanath Buildcon P. Ltd.	1,40,000
			Hindustan Insurance Broking Ltd.	3,20,000
			Future Venture India Ltd.	5,00,00,000
			S.K. Infrastructure Ltd.	5,00,00,000
3. (*)	Dnyaneshwar Trading & Investment P. Ltd.	39950000 328550000	Rolesoft Mercantile Pvt. Ltd.	30,00,000
			Contact India Communications P. Ltd.	55,00,000
			Meghraj Properties P. Ltd.	50,00,000
			Gagandeep Infrastructure P. Ltd.	3,50,00,000
			Money Matters Infrastructures P. Ltd.	1,70,00,000
			Parshwanath Buildcon P. Ltd.	3,30,00,000

4. (*)	Money Matters Properties Pvt. Ltd.	2,00,00,000 8,91,00,000	Gagandeep Infrastructure P. Ltd.	2,30,00,000
			Rolesoft Mercantile Pvt. Ltd.	30,00,000
			Money Matters Infrastructures P. Ltd.	2,25,00,000
			Meghraj Properties P. Ltd.	25,00,000
			Parshwanath Buildcon P. Ltd.	1,20,00,000
5 (*)	Sitillite Properties Pvt. Ltd.	1,83,50,000 2,82,50,000	Rolesoft Mercantitle Pvt. Ltd.	10,00,000
			Gagandeep Infrastructure P. Ltd.	20,00,000
			Meghraj Properties Ltd.	25,00,000
			Money Matters Infrastructure P. Ltd.	1,95,00,000
			Parshwanath Buildcon P. Ltd.	45,00,000
6 (*)	Terrain Properties Pvt. Ltd.	1,93,50,000 2,07,50,000	Gangdeep Infrastructure P. Ltd.	95,00,000
			Meghraj Properties P. Ltd.	25,00,000
			Money Matters Infrastucture P. Ltd.	75,00,000
			Parshwanath Buildcon P. Ltd.	1,40,00,000
7. (*)	Stroll Properties Pvt. Ltd.	1,78,30,000 3,55,70,000	Rolesoft Mercantile Pvt. Ltd.	10,00,000
			Gagandeep Infrastructure P. Ltd.	10,00,000
			Meghraj Properties P. Ltd.	5,00,000
			Money Matters Infrastructure P. Ltd.	15,00,000
			Parshwanath Builcon P. Ltd.	1,50,00,000

4.2. The AO further noticed that all the above- mentioned companies are having common/related Directors, common/related shareholders in one or the other company. On further verification of the deployment of funds by the assessee in purchase of the shares of M/s. Omni Infrastructure Pvt. Ltd., the AO called information from the said company. The AO observed that the said company has collected a huge premium of Rs. 61,46,22,200/-. The AO further noticed that M/s. Omni Infrastructure Pvt. Ltd is a loss making company which does not suggest in any manner for charging of higher premium of Rs. 12,490/- per share. After considering the facts and the submissions, the AO was of the firm belief that the assessee has failed to justify charging of share premium at Rs. 190/- per share. Before allotment of fresh shares, the company had a paid up capital of Rs. 2,00,000/- with no reserve and surplus for the year ending 31.3.2007 which means book value per share of the company was at Rs. 10/- per share. According to the AO, there was no basis for charging premium at Rs. 190/- per share. To justify his belief, the AO further observed that the assessee does not have any hidden assets in the form of pattern, copy rights, intellectual property rights based on which company would be likely to substantially enhance its profits, which would have a bearing on the premium to be charged on allotment on the fresh shares. The AO finally concluded as :

> No documentary evidence has been filed to justify the basis on which future high growth prospects and high profitability have been assumed.
>
> No weightage has been given nor any reason assigned for non consideration of past performance of the company for the valuation purposes.
>
> As already discussed the company does not possess any patent, copy right, intellectual property rights etc, which could be considered as hidden assets which could have enhanced the value of the shares of the company and therefore justified to some extent the charging of very high premium for allotment of shares.
>
> The only investment in shares of another company which is also new and with no track record or asset base. Hence the

> claim of assessee that, the company has future potential is totally disproved having regard to several incumbencies attached to its business as on date of call of share premium and is a subject matter of volatility and no valuation what so ever can been given to the subscriber to justify the premium on this basis.
>
> The companies which have invested in assessee's alleged share capital are all group concerns the sources of which are also through charge of premium on their own capital issue. Thus the documents furnished with regard to transactions between these closely held companies are not in line with the generally accepted lines for rising further capital and not authentic to be relied upon.

4.3. Thereafter, the AO went on to discuss the provisions of Sec. 68 of the Act and finally treated Rs. 7,53,00,000/- as unexplained cash credit within the meaning of Sec. 68 of the Act. The AO further noticed that the assessee has earned dividend income of Rs. 4,748/- and the same has been claimed as exempt u/s. 10(34) of the Act. The AO was of the opinion that Sec. 14A of the Act required the assessee to exclude all direct and indirect expenses attributable for the earning of this exempt income. The assessee was asked to show cause as to why the appropriate disallowance be not made out in respect of expenses incurred for earning the dividend income. In response to which the assessee stated that no expenditure had been incurred for earning exempt income. The AO discarded the statements of the assessee because according to the AO Rule 8D squarely apply for the year under consideration. Accordingly, the AO proceeded to calculate the disallowance u/s. 14A r.w. Rule 8D and computed the disallowance at Rs. 1,88,012/-.

5. Aggrieved by this, the assessee carried the matter before the Ld. CIT(A) in respect of the aforestated two additions made by the AO. Before the Ld. CIT(A), it was strongly contended that the AO is not

justified in adding the increase in share capital alongwith share premium as unexplained cash credit u/s. 68 of the Act. It was explained that the assessee has filed the details of increase in share capital alongwith share premium with documentary evidences like return of income, balance sheet of share holders, copies of share application form with bank account details. It was explained that the assessee is a Private Limited Company and is free to issue share at open price and with no limit on premium. However, the assessee has even complied the SEBI Regulation for issue of shares at premium. It was explained that when the shares are issued at a premium, the share premium is credited to Reserves & Surplus and it does not increase the equity. It was strongly submitted that the assessee has fully discharged the onus cast upon it by virtue of Sec. 68 of the Act.

6. After considering the facts and the submissions, the Ld. CIT(A) observed that the AO has not given any reason as to why the investment with a premium is not genuine when the assessee has produced all the details of investors in the form of share application form, bank account details, copies of the return of income alongwith balance sheet. The Ld. CIT(A) further observed that charging of premium is outlook of the investors. If an investor finds that the payment of premium is justified then only he would look to invest otherwise he may not invest in the shares of newly promoted company. The Ld. CIT(A) was of the belief that the department cannot question the charging of premium by the company. The Ld. CIT(A) further observed that the genuineness and the credit worthiness of the investors could have been examined by the AO which he has not made. Drawing support from the decision of the Hon'ble Supreme Court in the case of Loevely Exports Pvt. Ltd. 216 CTR 195, the Ld. CIT(A) deleted the addition holding that the AO has

not justified in adding the increase in share capital alongwith share premium as unexplained cash credit u/s. 68 of the Act.

7. In so far as disallowance u/s. 14A r.w. Rule 8D amounting to Rs. 1,88,012/-, the Ld. CIT(A) observed that the total expenditure claimed by the assessee in the Profit and Loss account was at Rs. 1,24,191/-. The Ld. CIT(A) directed the AO to restrict the disallowance to the extent of claim of expenditure of Rs. 1,24,191/- while upholding the decision of the AO that Rule 8D is applicable from the year under consideration.

8. Aggrieved by this, the Revenue is before us and the assessee is in cross objection in respect of the findings of the Ld. CIT(A) for disallowance u/s. 14A r.w. Rule 8D of the Act.

9. The Ld. Departmental Representative strongly relied upon the findings of the AO. It is the say of the Ld. DR that the onus was on the assessee to justify the premium charged on the issue of shares which the assessee has grossly failed and therefore the AO has rightly made additions u/s. 68 of the Act.

10. The Ld. Counsel for the assessee reiterated the facts as they were stated before the lower authorities.

11. We have carefully perused the orders of the lower authorities. In our considered view, the issue of shares at premium is always a commercial decision which does not require any justification. Further the premium is a capital receipt which has to be dealt with in accordance with Sec. 78 of the Companies Act, 1956. Further, the company is not required to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature in a capital receipts

and is not income for its ordinary sense. It is not in dispute that the assessee had filed all the requisite details/documents which are required to explain credits in the books of accounts by the provisions of Sec. 68 of the Act. The assessee has successfully established the identity of the companies who have purchased shares at a premium. The assessee has also filed bank details to explain the source of the share holders and the genuineness of the transaction was also established by filing copies of share application forms and Form No. 2 filed with the Registrar of Companies. The entire dispute revolves around the fact that the assessee has charged a premium of Rs. 190/- per share. No doubt a non-est company or a zero balance sheet company asking for Rs. 190/- 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 the 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 huge premium without any bar from any legislated law of the land. The amendment has been brought in the Income Tax Act under the head "Income from other sources" by inserting Clause (viib) to Sec. 56 of the Act wherein it has been provided that any consideration for issue of shares, that exceeds the fair value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be treated as the income of the assessee but the legislature in its wisdom has made this provision applicable w.e.f 1.4.2013 i.e. on and from A.Y. 2013-14. In so far as the year under consideration is concerned, the transaction has to be considered in the light of the provisions of Sec. 68 of the Act. There is no dispute that the assessee has given details of names and addresses of the share holders, their PAN Nos, the bank details and the confirmatory letters.

11.1. Considering all these undisputed facts, it can be safely concluded that the initial burden of proof as rested upon the assessee has been successfully discharged by the assessee . Even if it is held that excess premium has been charged, it does not become income as it is a capital receipt. The receipt is not in the revenue field. What is to be probed by the AO is whether the identity of the assessee is proved or not. In the case of share capital, if the identity is proved, no addition can be made u/s. 68 of the Act. We draw support from the decision of the Hon'ble Supreme Court in the case of Loevely Exports Pvt. Ltd. 317 ITR 218**.** We, therefore do not find any error or infirmity in the findings of the Ld. CIT(A). Ground No. 1 is accordingly dismissed.

12. Ground No. 2 in Revenue's appeal and cross objection by the assessee relate to the disallowance made u/s. 14A of the Act r.w. Rule 8D.

13. The assessee has earned dividend income of Rs. 4,748/- which it has claimed as exempt u/s. 10(34) of the Act. The AO has followed the decision of the Hon'ble Jurisdictional High Court in the case of Godrej & Boyce Mfg. Co. Ltd 328 ITR 81. The Ld. CIT(A) has very correctly upheld the findings of the AO that Rule 8D is applicable during the year under consideration. However, at the same time, the Ld. CIT(A) has restricted the disallowance of expenditure to the extent claimed by the assessee at Rs. 1,24,191/-. We, therefore, do not find any error or infirmity in the findings of the Ld. CIT(A) which we confirm. Accordingly the appeal filed by the Revenue is dismissed and so also the cross objection filed by the assessee is also dismissed.

14. In the result, the appeal filed by the Revenue and C.O. filed by the assessee are dismissed.

Order pronounced in the open court on 23rd April, 2014

आदेश की धोषणा खुले न्यायालय में दिनांकः 23.4.2014 को की गई ।

Sd/-	Sd/-
(AMIT SHUKLA)	(N.K. BILLAIYA)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 23.4.2014

व.नि.स./ *RJ* , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**