

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3238/Del/2018
(Assessment Year: 2013-14)

RS India Infrapower Pvt Ltd, GL Business Centre, Dundahera, Old Delhi, Gurgaon Road, Gurgaon PAN: AAEC9526H	Vs.	ITO, Ward-3(4), Gurgaon
(Appellant)		(Respondent)

Assessee by :	Shri Salil Agarwal;. Adv Shri Ravi Pratap Mall, Adv
Revenue by:	Shri Surender Pal, Sr. DR
Date of Hearing	17/07/2019
Date of pronouncement	09/10/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id CIT (A)-1, Gurgaon dated 17.11.2017 for the Assessment Year 2013-14 wherein the learned CIT – A has confirmed the addition of INR 33,000,000/- and further enhanced it by a sum of INR 13960/- on account of share application money along with premium received by the assessee u/s 68 of The Income Tax Act.
2. The assessee has raised the following grounds of appeal:-
 - “1.0 *Prayer for condonation of delay in filing of appeal*
 - 1.1 *That on the facts and in the circumstances of the case and in law, the Company requests your goodself to condone the delay in the filing of the subject appeal as per the period of limitation provided under the Act for filing an appeal against an order of the CIT(A) passed under section 250.*
 - 1.2 *That there was a delay in filing of the appeal before your goodself due to the ill health of the Managing Director of the Company who is primarily responsible for the decision making of the Company and was thus incapable of arranging for the filing of the said appeal.*
 - 1.3 *That there was a delay in filing of the appeal due to the unexpected resignation and disassociation of all the key employees and Chartered*

Accountant responsible for handling the accounts and other documentation of the Company.

- 1.4 *That there was a delay in filing of the appeal due to the change in the registered office of the Company due to which there was a delay in the receipt of the order of the Hon'ble CIT(A) and also lead to the misplacement and mismanagement of the relevant documents required for the filing of the appeal.*
 - 2.0 *Addition of share application money pending allotment*
 - 2.1 *That on the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in confirming the addition made by the Learned Assessing Officer ("Learned AO") vide his order passed under section 143(3) of the Act on account of share application money pending allotment amounting to Rs. 3,30,00,000.*
 - 2.2 *That on the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in ignoring the fact that the shares were allotted by the Company in the subsequent year at the value which was evidenced by a valuation report.*
 - 2.3 *That on the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in holding that the share application money received did not represent a bona fide business transaction and was merely a book entry to justify unaccounted cash.*
 - 3.0 *On explanation of source of funds with Navaya Infrapower Private Limited ("the Shareholder")*
 - 3.1 *That on the facts and in the circumstances of the case and in law, the Learned CIT(A) failed to appreciate the genuineness of the share application money given by the Shareholder due to certain delays on the part of the Authorized Representative of the Company during the appeal proceedings before the CIT(A).*
 - 3.2 *That the Learned CIT(A) failed to appreciate that the Shareholder was incorporated for carrying on infrastructure business, inter alia including investing in other companies engaged in the same line of business for strategic purposes.*
 - 3.3 *That the Learned CIT(A) failed to appreciate that the Shareholder's business sector was on a downward trajectory due to which the planned activities could not be undertaken and thus the revenue from operations and corresponding expenses remained low."*
3. The brief facts of the case show that Assessee Company filed its return of income on 28/9/2013 declaring nil income. Assessee is engaged in the business related to renewable energy. On perusal of the audit report and audited accounts filed by the assessee, the learned assessing officer noted that assessee has received share application money amounting to Rs. 33313960/-. The assessee was asked to prove the creditworthiness and genuineness of the above large share application money received by the assessee. The learned assessing officer asked the assessee to provide

complete details of allotted shares along with genuineness and creditworthiness of the same. Assessing officer also asked to file the complete details of the copy of the income tax return, bank account details and mode of receipt of the above money. The learned assessing officer noted that the above sum was received from Navya Infrapower Private Limited. Despite repeated opportunities given to the assessee, it could produce only on 30/03/2016 the balance sheet and bank account statement of Navya Infrapower Ltd. AO noted that the authorized representative has shown his inability to provide the copy of the income tax return in respect of above company. Therefore the learned assessing officer noted that the assessee company has failed to provide the desired information even after availing numerous and sufficient opportunities. Thereafter the learned assessing officer noted that it is the settled principle of law that the burden of providing the source of credit is on the assessee. Thus, the AO noted that Assessee Company has received share application money in the garb of accommodation entry from Messer Navya Infrapower Ltd. Further details of profit and loss account of the above company reveals that company has shown income from other sources to the extent of only INR 5100 for the year ended on 31st of March 2013. Thus, he held that the assessee has received share application money of Rs. 33300000/- of which creditworthiness and genuineness of the depositor could not be proved during the course of assessment proceedings. Therefore, he made the above addition. Accordingly assessment order u/s 143 (3) of the income tax act was passed on 31/3/2016 determining total taxable income of the assessee at Rs. 33300000/-.

4. Assessee aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT – A – 1, Gurgaon. Before the learned CIT – A , assessee submitted the details of share application money received during financial year 2012 – 13, copies of the audited balance sheet and profit and loss account of shareholders, copies of bank statement of the shareholders, details of allotment of shares. As per the details filed before learned CIT – A that appellant had received the amount of share application money during the financial year 2012 – 13 from 2 companies amounting to Rs. 33313960/- Rs. 33300000/- was received from Navya Infrapower

Private Limited and INR 1 3960/- was received from the Anandrao Infrastructure Private Limited. The learned CIT – A also noted that assessee has received share application money in earlier years from Panchamrit Real Estate Private Limited. However, as per the balance sheet of that company filed by the appellant, it was noted that under non-current investment it has shown the entry of Rs. 877527 shares of INR 10 each fully paid in the appellant company. The CIT – A further noted that there is a discrepancy in the list of shareholder and the figure shown in the balance sheet of shareholders. Accordingly, he asked the assessee to produce the information about the shareholder and noted that as on 31st of March 2013 Panchamrit Real Estate Private Limited has shown holding 1359657 shares amounting to INR 13596570 along with other members. The assessee submitted reply on 20/2/2017 stating that appellant has issued 1359657 shares to that company for a total consideration of INR 9 19249900/- introducing premium of INR 905653330/-. Therefore in the books of the company the share capital of only INR 13596570/- excluding premium of INR 905653330/- is shown. It was also stated that assessee has received share application money of Rs. 33300000 from Navya Infrapower Private Limited and INR 1 3960 from Anandrao Infrastructure Private Limited to issue shares at INR 173 including share premium of INR 163/-. It was further stated that the company has received share application money of INR 1 3690/- from Ananad Rao Infrastructure Private Ltd in financial year 2013 and Rs. 116068436/- before financial year 2013. Therefore total share application money received from Navya Infrastructure Private Limited of Rs. 116082396/- to issue 670996 shares at INR 173/- including share premium of INR 163/-. On the explanation of the assessee, the learned CIT – A sought information under section 133 (6) from the investor through speed post which was not received back. Further, no reply was also received from those parties. The CIT appeal also sent reminders to both the companies through speed post, which were also not received back, and no response was received. The learned CIT – A brought the fact of the notice issued by him to the assessee and assessee was requested to obtain the information from these two companies, as these companies were shareholders of the appellant. However, no reply was filed

by the assessee. Thereafter in Para number 3.10 of the order the learned CIT – A analyzed the statement of account of PUNCHAMRIT Real Estate Private Limited and other shareholders. In Para number, 3.1 to he also noted the discrepancy in the balance sheet of those companies and the details submitted by the assessee in its reply dated 20/2/2017. He noted that on the perusal of the balance sheet the reserve and surpluses were at Rs. 883097597/- whereas as per the reply of the assessee the premium of only INR 905653330/- was received. The assessee was also asked to reconcile the above difference. The learned CIT – A also noted that though assessee has received the share application money of Rs. 33313690/- however the learned assessing officer has only made the addition of Rs. 33300000/-. Therefore notice of enhancement was issued on 25/5/2017 for enhancement of the income by INR 13690/-. In spite of repeated opportunities the assessee did not submit any reply to the learned CIT – A and therefore once again he asked the assessee to furnish certain information as per letter dated 6/9/2017 as per Para number 3.14 of his order. No reply was submitted by the assessee of this communication. Therefore, the learned CIT – A considered the whole issue as per Para number 3.16 of his order. In Para number 3.19, he also verified the balance sheet of Navya Infrapower Private Limited and the profit and loss account of that company. He noted that this company has shown loss of INR 3515/- during the year under consideration. He further noted that the above company has prior to issue of cheque in favour of the appellant company as share application money has received funds from others, it does not have any source of funds of its own. He reached this conclusive finding at Para number 3.21 of his order and noted that the appellant has failed to prove the genuineness of the transaction pertaining to share premium received from Navya infrapower Ltd and creditworthiness of that company. In Para number 3.24 he further noted that assessee has filed certain documents pertaining to various companies who subscribed for shares of the appellant company and on perusal of the documents reveal that in each of these companies there is a very small amount of share capital in the form of shareholders fund and share application money. In each of these companies are huge amount of share premium received. On perusal of the

profit and loss, account reveals that none of these companies had any taxable income and as per the return filed for assessment year 2010 – 11; all the companies had shown loss. Further, in these companies there are no salary expenses, electricity expenses, rental expenses and office maintenance expenses. Therefore, he held that it is clear from the fact that these companies in fact never existed and were only paper companies. He noted that it is evident that the transactions of the share capital were accommodation entries and the genuineness of the transaction and creditworthiness of the said applicants has not been proved. He further noted that from the details it is apparent that the amounts introduced by the various companies as share capital in the appellant company were received by these various companies in their bank accounts on the very same day or a couple of days prior to the date on which the share capital was introduced. These amounts were routed to various bank accounts in order to give them effect of genuineness. He further referred to the annual accounts of those companies, found that there is a very small amount of share capital in the form of shareholders fund, and share application money. In each of these companies, there is a huge amount of share premium. The perusal of the profit and loss account of these companies had no substantial taxable income and all the companies shown losses. These companies also do not have any expenditure and therefore they were merely the paper companies. He further noted that it is apparent that appellant is a private limited company and therefore the subscribers to the shares of private company can be only private persons, such private persons must invariably be persons of confidence of the directors of the private limited company and there should be normally no difficulty in producing them before the assessing officer. In the present case, they were not produced and therefore the natural corollary is that that the real position is not the same as emerges from papers and documents furnished in this behalf. Therefore, he held that appellant has failed to file the details with regard to this company in spite of specific opportunity allowed to it and thus assessee has failed to prove the identity of the subscriber, creditworthiness of those companies and the genuineness of the payment of share application money to the appellant. The learned CIT – A also followed

the decision of the honourable Delhi High Court in the case of CIT vs Nova castles private limited (2014) 50 taxmann.com 110, CIT vs Nipun builders and developers 350 ITR 407 (del), Commissioner Of Income Tax vs. nova promoters and finlease private limited 342 ITR 169 and other decisions of the honourable jurisdictional High Court. Thus, he confirmed the addition made by the learned assessing officer and enhanced the income of the assessee by INR 13960. Thus, the addition was confirmed under section 68 of the income tax act. Assessee is aggrieved with that order and has preferred this appeal before us.

5. This appeal is delayed by 71 days. Ground number 1 of the appeal of the assessee is a prayer for condonation of delay in filing of the appeal. The assessee submits that there was a delay in filing of the appeal due to the ill health of the managing director of the company, who is primarily responsible for the decision making of the company and was thus incapable of arranging for the filing of the said appeal. There was also a reason stated that delay was due to the unexpected resignation and disassociation of all the key employees and the chartered accountant responsible for handling the accounts and other documentation of the company. There was also a change in the registered office of the company because of that there was a delay in receipt of the order of the learned CIT appeal which lead to the misplacement of the relevant documents required for the filing of the appeal. He therefore submitted that cause of delay in filing the above appeal is beyond the control of the assessee, not deliberate and may be condoned.
6. The learned departmental representative submitted that the order of the learned CIT – A was communicated to the assessee on 21/12/2017 as per the column number 6 of form number 36 whereas the assessee has filed appeal on fourth may 2018. Therefore, there is a considerable delay of more than 3 months in filing of the appeal. He further stated that the explanation given by the assessee does not show that there is a sufficient reason in filing of the appeal belatedly.
7. We have carefully considered the rival contention and found that the order of the learned CIT – appeal was communicated to the assessee on 21/12/2017; however, the assessee could file the appeal only on fourth may 2018. The assessee has submitted that the main person Shri Girdharilal

who is the director of the company was seriously ill in the year 2016 and after a prolonged illness; he passed away in October 2018. He was also aged about 75 years. There was nobody else who could have attended to the filing of the appeal. Further, by filing appeal belatedly, no benefit has accrued to the assessee. In fact, non-filing of the appeal would act as detrimental to the interest of the assessee. Therefore, delay in filing of the appeal cannot be construed as an intentional error/omission on the part of the assessee. In view of this, delay in filing of the appeal from 21/2/2018 to third may 2018 is condoned and appeal is admitted.

8. On the ground number 2, the learned authorized representative submitted that the applicant company has filed the return of income declaring Rs. nil as its income and during the year the assessee has received a sum of Rs. 33313960/- as share application from two companies through banking channel. The above sum was added by the lower authorities as income of the assessee as the appellant has not provided the income tax return of the aforesaid companies. He further submitted that the appellant was unable to present its case before the lower authorities with complete facts nor it was able to furnish the documentary evidences which goes to the root of the matter and if such facts are examined and it would seen that the addition made are untenable either on the facts or in law. It was stated that Shri Girdharilal at the relevant time was one of the directors of the appellant company became seriously ill in the year 2016 and after a prolonged illness he passed away in October 2018 at the age of 75 years. He submitted that above person was the director in the company and there were no other persons who could provide the details as because of dispute between PTC and RS India group. He further submitted that the assessee was also facing certain financial difficulty and it did not have requisite staff that could provide the requisite details before the learned assessing officer or the learned CIT – A which resulted into the confirmation of the above addition. Therefore he submitted that under rule 29 of the Income Tax Appellate Tribunal Rules, additional information of the above share capital receipt by the appellant are required to be looked in to as the genuine investment received by the appellant through banking channels and therefore the

addition made is totally untenable. Therefore, he submitted that application of admission of additional evidences may be admitted.

9. He further submitted that the appellant is a private limited company owning 25.98% shares of RS India energy Ltd and 43.66% shares of RS India global energy limited. It also owns 63% shares of R K wind limited. This company also engaged in the business of production collection and distribution of electricity. The power trading Corp India Ltd the leading provider of power trading solution in India was established in the year 1999 is a government of India initiated public-private partnership whose primary focus is to develop commercially vibrant power market in the country. PTC India financial services Ltd has been promoted by PTC India Ltd as a company Incorporated under the companies act and registered with Reserve bank of India as a nonbanking financial company. In February 2009, a Memorandum of Understanding was signed among PTC energy Ltd, RS India global energy Ltd and RS India wind Energy private limited to setup 1000 MW wind energy project in different parts of India with the specific roles and responsibilities for each of the participating partner in the memorandum of understanding. He submitted the copy of the Memorandum of Understanding as additional evidence. He further stated that PTC financial services Ltd made equity contribution of INR 610,000,000 in the shares of RS India energy private limited and holds 37% holding of the aforesaid company. Similarly, PTC energy Ltd also made an equity contribution of INR 230,000,000 in Rs India Global Energy Limited. Thus, aforesaid company holds 48% holding in RS India global energy Ltd. Since for setting up the aforesaid wind power project huge land at the rate of 5 acres per megawatt was required as such, Navya Infrapower Private Limited was the land aggregator and given the strength and experience in real estate field was supposed to secure the requisite land for a portion of the above-mentioned 1000 MW proposed wind power plant. Messer Rs India global energy Ltd entered into an agreement on 18/6/2010 with the Navya infrapower Ltd for a total consideration of INR 12,800,000. The aforesaid sum was given to the aforesaid company by account payee cheques. RS India Wind energy private limited also entered into an agreement on 12/11/2011 with Navya Infrapower Ltd for operation and

maintenance and electrical line work. Towards the aforesaid work, a sum of INR 19,600,000 was paid to Navya infrapower private limited by account payee cheques. He further referred to the agreement entered with Navya Infrapower Private Limited by RS India global energy Ltd and RS India wind energy private limited. He further submitted that due to the bright outlook of the powers sector, Navya infrapower private limited also made investment in the equity share capital of the appellant company as the appellant company was holding the shares of RS India wind energy private limited, RS India global energy Ltd Rs India wind energy limited. The aforesaid company made an investment of Rs. 3,33,00,000 in the shares of the appellant company through banking channels in shares were also allotted to such company. At present aforesaid company holds 192486 shares of the appellant company. He further gave a pictorial representation of the aforesaid transaction. He also placed on record the evidences related to the genuineness of the above payment in the form of copy of the details of the directors as per the MCA website, copy of the permanent account number of the directors, copy of the audited financials and bank statement. He further placed on record the confirmation of the shareholders. In view of this, he submitted that the appellant has furnished the due evidences, which may kindly be admitted, and the instant appeal may kindly be set aside to the file of the learned assessing officer to examine the contention of the appellant in the light of the aforesaid factual position. He therefore submitted that there is no reason to hold that in such a transaction shareholder to be a non-genuine. He submitted that all these memorandum of understanding as well as the agreements could not be produced before the ld Lower authorities due to the situation prevailing on part of the assessee. These agreements needs to be analyzed to understand that the shareholders are genuine entities, the sources of funds is also explained and due to these agreements, there cannot be any doubt in the genuineness of the transactions. He referred to clause-by-clause conditions and understanding between those parties to show that there is complete clarity and business sense in those transactions.

10. The learned departmental representative vehemently supported the order of the lower authorities and submitted that despite being given a specific

opportunity to the assessee at many point of times before the lower authorities no evidences were produced before them. Now the assessee is producing these evidences in form of several agreements, Memorandum of Understandings and other details. He submitted that there is no reason that these evidences must be admitted by the ITAT as the assessee has not justified that why this explanation was not given before the lower authorities. He further submitted that despite this merely producing the copy of the details of the directors, PAN of the directors, audited financial statements, bank statement and the confirmation of shareholders does not provide any iota of truth about the identity, creditworthiness and the genuineness of the transaction. He submitted that despite this information the transaction is not genuine, as assessee has not proved creditworthiness and genuineness of the transaction. The learned departmental representative vehemently supported the order of the learned CIT – A and referred to decisions cited in the order of the learned CIT – A to hold that where the assessee has failed to prove the initial onus cast upon him then the addition has been correctly made u/s 68 of the income tax act by the learned assessing officer. He further referred to the latest decision of the honourable Delhi High Court in case of NDR promoters Pvt Ltd [2019] 102 taxmann.com 182 (Delhi)/[2019] 261 Taxman 270 (Delhi)/[2019] 410 ITR 379 (Delhi) and decision of the honourable Supreme Court in NRA Iron and steel Co Ltd [2019] 103 taxmann.com 48 (SC)/[2019] 262 Taxman 74 (SC)/[2019] 412 ITR 161 (SC) which has laid down that in such circumstances the addition is required to be made u/s 68 of the income tax act. He also submitted that impact of the agreements produced before ITAT must also be proved by assessee that they have any impact on the taxability of share capital in the hands of the assessee. Agreements unless acted up on in true spirit are merely a paper work to justify a nonexistent fact.

11. We have carefully considered the rival contention and perused the orders of the lower authorities.
12. We first address the issue of admission of additional evidences. The assessee has now produced before us the several memorandums of understanding between PTC energy Ltd, RS India global energy private limited and RS India wind energy Ltd where they have agreed to setup a

1000 MW wind energy project in different parts of India. The assessee has also produced before us the copy of the agreement entered with Navya Infrapower Ltd, one of the shareholders, held to be nongenuine and RS India global energy Ltd and RS India wind energy private limited. According to this agreement, there are certain arrangements between the parties for setting up of the power plant. Further as per annexure -4, assessee has shown that Mr Manoj, Sanjit Roy, Suman Devi and Shushil Kumar are the directors of the shareholder company and they also hold the permanent account number. Further the assessee has also tried to explain before us the source of the funds available with Navya Infrapower Private Limited in the form of share application and allotment money available of INR 1 6700000/- . Further, the bank statement of state bank of India of the shareholder is also produced wherein the transactions have been shown through banking channel. There are also amount credited because of premature closure of the fixed deposits receipts showing source of the funds invested in the appellant company. The confirmation has also been submitted of the depositor. As these details have been submitted by the assessee before us by invoking the provisions of rule 29 of The Income Tax Appellate Tribunal Rules, 1963 as additional evidences showing cause that these documents could not be submitted before the lower authorities for the reason that one of the main directors of the company passed away in October 2018 and was seriously ill since the year 2016 and aged around 75 years. It was also submitted that there was no other person who could provide the details of the transaction and disputes between the power trading Corp and RS India group. The assessee has also tabulated complex structure of the transaction in the group by which the money has been deposited in the company as share capital. Based on the structure it is prima facie apparent that shareholders are mere pass through entities but it needs to be demonstrated with the complete facts. There is also a reason that main director of the company who was very old and severely ill and ultimately passed away, is according to us the sufficient cause to admit those evidences. In view of above facts, we admit the additional evidences submitted by the assessee, as there is a sufficient and reasonable cause for nonproduction of them before the lower authorities.

13. We are also aware about the manner in which the addition has been made by the learned assessing officer and confirmed by the learned CIT – A for nonproduction of certain details by the assessee despite being given repeated opportunities before them. The learned AO has repeatedly requested the assessee to produce the income tax return of the depositors, which the assessee has not produced before any of the lower authorities. Even before us, the assessee has not produced the same. The learned CIT – A has also made huge efforts by issuing notices to the shareholders u/s 133 (6) of the act which was not complied with. Appellant is also required to meet the argument of the learned departmental representative with respect to the judicial precedents of the honourable Delhi High Court and honourable Supreme Court. Ld AR has tried to prove all these facts, which are held against him, based on the agreements, memorandum of Understanding by reading clauses contained therein, explaining the financial structure of the w whole transactions, to show the identity, creditworthiness and genuineness of the transactions and shareholders. As those agreements were, MOUs were not available with lower authorities along with other details produced before us, in the interest of justice, we set aside the whole issue back to the file of the ld AO with direction to the assessee to prove Identity, creditworthiness of the shareholders and genuineness of the transactions meeting the findings of the lower authorities. The learned assessing officer may examine the additional evidences produced before us as well as all other evidences that assessee may like to produce before the lower authorities and then decide the whole issue afresh. Accordingly, ground number 2 of the appeal of the assessee is set aside to the file of the learned assessing officer as directed above to the parties.
14. Ground number 3 of the appeal is with respect to the explanation of the source of funds of the Navya Infrapower Ltd. The contention of the appellant is that it is a strategic investment by the company, which is engaged in the same line of business. As we have already dealt with the taxability of share capital and share premium received by the appellant in ground number 2 of the appeal of the assessee setting aside the whole issue back to the file of the learned assessing officer with a direction to the

assessee, we do not find any reason to adjudicate ground number 3 of the appeal. Accordingly, it is dismissed.

15. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 09/10/2019.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:09/10/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi