

**आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI**

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

**आयकर अपील सं/ ITA No. 3205/Mum/2019**

(निर्धारण वर्ष / Assessment Year 2011-12)

**आयकर अपील सं/ ITA No. 5584/Mum/2017**

(निर्धारण वर्ष / Assessment Year 2011-12)

The Dy. Commissioner of Income Tax,  
Central Circle 2(2), Room No. 806, 8<sup>th</sup> Floor,  
Old CGO Annex Bldg, M.K. Road,  
Mumbai-400 020

..... Appellant  
/ अपीलाथी

v/s

M/s Empower India Ltd.  
25/25A, 327, Nawab Building, 2<sup>nd</sup> Floor,  
Mumbai-400 001

.....Respondent  
/ प्रत्यर्था

स्थायी लेखा सं /PAN – AAACH3967N

**आयकर अपील सं/ ITA No. 5207/Mum/2017**

(निर्धारण वर्ष / Assessment Year 2011-12)

M/s Empower India Ltd.  
25/25A, 327, Nawab Building, 2<sup>nd</sup> Floor,  
Mumbai-400 001

..... Appellant  
/ अपीलाथी

स्थायी लेखा सं /PAN – AAACH3967N

v/s

The Dy. Commissioner of Income Tax,  
Central Circle 2(2), Room No. 806, 8<sup>th</sup> Floor,  
Old CGO Annex Bldg, M.K. Road,  
Mumbai-400 020

.....Respondent  
/ प्रत्यर्था



Revenue by	:	Shri R. Manjunatha Swamy, DR
Assessee by	:	Shri Neeraj Mangla, AR

सुनवाई की तारीख / Date of hearing:	05.09.2019
घोषणा की तारीख / Date of pronouncement :	23.10.2019

## आदेश / ORDER

**महावीर सिंह, न्यायिक सदस्य/**  
**PER MAHAVIR SINGH, JM:**

These two appeals by Revenue and one by assessee are arising out of the common order of Commissioner of Income Tax (Appeals)-48, Mumbai in Appeal Nos. CIT(A)-48/I.T-177/DC C-2(1), CIT(A)-48/I.T-107/DCCC-2)2/2-16-17 dated 30.06.2017. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle 2(1) Mumbai (in short JCIT/ITO/ AO) for AY 2011-12 vide dated 30.03.2014 under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first common issue of Revenue in these two appeals in ITA Nos. 5584/Mum/2017 & 3205/Mum/2019, which is only one of the same issue and actual deletion of addition by CIT(A) is on account of commission income of ₹ 3,09,50,705/- against the order passed by AO under section 143(3) read with section 153C of the Act. Actually, in ITA No. 5584/Mum/2017, the addition under challenge is amounting to ₹ 4,07,48,957/- as

against the order passed by AO under section 143(3) of the Act.

Following are the grounds in respective appeals:-

In ITA No. 5584/Mum/2017

*"(i) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of ₹1 4,07,48,976 on account of commission income stating that the said commission income has already been included in assessee's income as miscellaneous income?"*

In ITA No. 3205/Mum/2019

*"(i) On the facts and in the circumstances of the case and in law, the Id CIT(A) was justified in deleting the addition of ₹ 3,09,50,705/- on account of commission income stating that the said commission income has already been included in assessee's income as miscellaneous income."*

3. Briefly stated facts are that the AO while completing the assessment under section 143(3) of the Act completed the assessment under section 143(3) of the Act and computed



commission of bogus purchases contending that the assessee has earned commission of ₹ 97,98,271/- on these transactions, which is not reported in the book of accounts. Therefore, this commission of ₹ 97,98,271/- being aggregate of 0.30% of total sale and purchase (Bogus) was added. Again, while completing the assessment under section 153C read with section 143(3) of the Act, the commission income was reassessed at ₹ 4,07,48,976/- being 1% of the aggregate new investment made and total sale made by the assessee company during the year under consideration. Thus, a further addition of ₹ 3,09,50,705/- was made to the income of the assessee company. The assessee before CIT(A) claimed that out of the total turnover of ₹ 153,90,13,631/-, the turnover of ₹ 97,42,41,410/- was with group entities which were also operated and control by Shri Shirish C Shah and the said fact was evident from assessment order framed under section 153C read with section 143(3) of the Act. The learned Counsel for the assessee referred to page 55 of the CIT(A)'s order, he also referred to page 15 of the assessment order passed under section 153C read with section 143(3) of the Act. For this proposition, it was claimed that no commission have been earned by the assessee within the group companies. In view of this, the learned Counsel stated that only balance turnover of ₹ 50,47,72,218/-, which is turnover from outside parties commission could have been calculated and the CIT(A) has directed accordingly at Para 6.4 as under: -

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*"6.4 In the assessment order dated 30.03.2014, made under section 143(3) of the Act, the AO has relied on the statement given by Shri Devang Master, in the course of statement given under section 131 on 12.03.2013, that M/s Empower Industries India Ld. receives a commission of 0.3% of the total transaction amount and has made an addition of ₹ 97,98,271(1)(c)/- on total purchase and sale transactions. In the assessment order under section 153C dated 22.03.2016, the AO has computed the commission income @ 1% of total sales and new investments made, by considering these as accommodation entries provided by the appellant at ₹ 407,48,97,690/-.*

*6.4.1 I find that there is no specific evidence regarding receipt of commission income on accommodation entries provided by the appellant during the search and or survey proceedings except for the statement given by Shri Devang Master on 12.03.2013 and subsequently*

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*on 09.04.2013, where in it was stated that Shri Shah charges commission in this regard, the rate being 0.30% and that he promised to give him half share in the commission but never kept his promise. The AO has estimated the commission income @1% since the appellant company was found to be involved in providing accommodation entries by way of bogus sales and purchase and by way of giving entries of investment and advances.*

*6.4.2 I find that the rate of 1% adopted by the AO is reasonable, considering that the commission made as reflected in the seized documents in the case of Shri Shrish Shah is in the rate of 2%. I am also inclined to agree with the AO that the commission income should be considered in respect of the sales and the new investment during the year, as done in the order under section 153C of the Act and not in respect of the purchase. I find that merit in the submission of the appellant that so far as the sale is concerned, the rate 1% should be*

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*considered in respect of the sales of ₹ 56,47,72,218/- made to outside parties, since no such commission would be received on making sales to group/related concern like, mobile Telecommunication. Further, I find that the appellant has shown miscellaneous income of ₹ 40,718,363/- which include foreign exchange gains of ₹ 4,086,360/-. If the foreign exchange gains is excluded, the miscellaneous income by way of interest received, write off of sundry balances, sale of shares, etc. would be ₹ 366,32,003/-. These incomes have been received or booked in relation to the business of giving by way of interest received, write off of sundry balances, sale of shares, etc. would be ₹ 366,32,003/-. These incomes have been received or booked in relation to the business of giving accommodation entries and appear to be a way to bring in commission income arising on such entries in the books of accounts. I find that such income, amounting to ₹ 366,32,003/- is more than the*

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*commission income estimated@1% on new investment of ₹ 253,58,840/- and on sales to outside parties of ₹ 56,47,722/-, aggregating to ₹ 310,06,562/-. In view of the above, I am of the considered opinion that further addition, computed at ₹ 407,48,976/- in the assessment order under section 153C of the Act and of Rs. 97,98,271(1)(c)/- in the assessment order under section 143(3) is not justified. Accordingly, the addition of ₹ 97,98,271/- in the assessment order under section 143(3) dated 30.03.2014 is deleted. Further, the balance addition of Rs. 309,50,705/- made in the order under section 153C dated 22.03.2016 is also deleted. The grounds taken in this regard are allowed."*

4. In view of the above, it was contended that the addition to the extent of ₹ 97,42,415/- deleted by the CIT(A), but AO has not challenged the said addition and hence, the same has become final.

5. As regards to the addition deleted by CIT(A), he contended that he has restricted the additions made only to outside parties and directed accordingly. When these facts were



confronted to the learned CIT Departmental Representative, Shri Manjunatha Swamy, he only relied on the assessment order.

6. After hearing both the sides and going through the facts of the case, we noted that the CIT(A) has given a categorically finding in Para 6.4.2 that the sale/ purchase/ investment/ loans made from bogus parties i.e. outside parties is to the extent of ₹ 97,42,41,410/- and addition on balance turnover of ₹ 56,47,72,218/- which is made from outside parties is already estimated at the rate of 1%. We also noted that foreign exchange fluctuation, interest income, sundry debtors written off and profit on sale of unquoted shares, the assessee company had credited miscellaneous income of ₹ 4,07,18,363 to its profit and loss account and since all loans and advances given and share held by the assessee company are not genuine, the income derived there from is also not genuine and represented the commission income accrued to the assessee. We also noted that apart from foreign exchange fluctuation other components of other income aggregating to ₹ 3,66,32,003/- credited to profit and loss account represented commission income and CIT(A) computed the assessable commission income at ₹ 3,10,06,562/- being 1% of the aggregate of new investments and sales to outside parties and held that since the assessee company has already offered income of ₹ 3,66,32,003/-, which is more than the commission income, no further addition can be

made in the hands of the company. Hence, we find no infirmity in the order of the CIT(A). Both the appeals of Revenue are dismissed on this issue.

7. Coming to the assessee's appeal in ITA No. 5207/Mum/2017, the learned Counsel for the assessee stated that he is not interested in prosecuting the following ground No. 1 to 4: -

*"1. Under the facts and circumstances of the case, the appellate order passed by the Id. CIT (A) is unreasonable being against the principles of natural justice and against the provisions of IT Act, 1961.*

*2. The Ld. CIT(A) has grossly erred on facts as well as in law in holding the transactions of purchase and sales to bogus and confirming disallowing of loss of Rs. 77,56,687/- incurred by the appellant company in trading activities.*

*3. The Ld. CIT(A) has grossly erred in law as well as on facts of the case in disallowing bad debts of Rs. 1,01,620/- on the presumption that the same is not a business expenditure.*

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4. *The Ld. CIT(A) has grossly erred in law as well as on facts of the case in disallowing expenses of Rs. 2,11,550/-by invoking the provisions of Explanation I to Sec. 37 of the Act only on surmises, conjectures and presumptions."*

8. As the learned Counsel for the assessee stated that he has instructions from the assessee not to press the ground No 1 to 4. The learned CIT DR has not objected to the same. Hence, these grounds are dismissed as not pressed.

9. The next issue in this appeal of assessee is as regards to the adhoc disallowance of salary expenses estimated by the AO and confirmed by CIT(A), the assessee has raised the following ground No. 5: -

*"5. The Id. CIT(A) grossly erred in law in making adhoc disallowance of Rs. 26,23,800/- being 10% of salary expenses of Rs. 2,62,38,008/- incurred by the appellant company on the pretext that the profit of 0.375% on HR Services rendered by the appellant company is very low."*

10. Briefly stated facts are that the assessee company incurred salary expenses amounting to ₹ 2,62,38,008/- during

the year under consideration. The AO while completing the assessment under section 143(3) of the Act disallowed 30% of expenses amounting to ₹ 78,71,402/- on adhoc basis by observing that the stated expenses are not incurred by the assessee company for its business purposes. Aggrieved, assessee preferred the appeal before CIT(A).

11. The CIT(A) after considering the submissions of the assessee restricted disallowance at 10% just on the basis of conjuncture and surmises by observing as under: -

*"8.3 (ii) The AO has made disallowance of ₹ 78,71,402/- out of the personal expenses @ 30%. The appellant has submitted that the HR services have been provided on which salary and wages and staff welfare expenses of ₹ 262,38,008.- have been incurred and receipt of ₹ 263,36,743/- has been shown against this head. I find that the appellant has shown profit of 0.375% which is very low and points of inflation of expenses. Therefore, some disallowance out of such expenses is found to be justified. However, I find that the disallowance @30% is very high and the same is restricted to 10% of such expenses, i.e. to ₹ 26,23,800/-.*

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*Accordingly, the balance addition of Rs. 42,57,602/- is deleted."*

Aggrieved, against the restriction at 10% assessee came in appeal before Tribunal.

12. We have also heard rival contentions and gone through the facts and circumstances of the case. We noted that AO as well as CIT(A) has just on the basis of presumption made disallowance just on adhoc basis. No reason whatsoever is cited, hence, we are of the view that this disallowance confirmed by CIT(A) on adhoc basis of ₹ 26,23,800/- is without basis. Hence, we delete the disallowance and allow the appeal of the assessee.

13. The next issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in disallowing expenses being ROC fee paid on further public issue of bogus shares. For this assessee has raised the following ground No. 6:

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*"6. The 14. CIT(A) grossly erred in law as well as facts of the case in disallowing expenses of Rs. 86,80.163/- being ROC fees paid by the appellant company on Further Public offer.*

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*The appellant craves leave to add/ alter/ modify any ground of appeal before or during **this** appellate proceedings."*

14. Brief facts relating to the above issue are that the AO during the course of assessment proceedings made addition of expenses claimed under the head 'rates and contracts' amounting to ₹ 94,30,037/-. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) required the assessee to file the details of these expenses and from the details he noted that the expenditure includes a sum of ₹ 72,60,163/- towards increase in authorized share capital, ₹ 15,20,000/- towards stamp duty fees. The CIT(A) has asked the assessee to show cause as to why the income to the extent of ₹ 86,80,163/- should not be enhanced vide order sheet entry dated 22.05.2017 because these expenses are capital in nature and hence, cannot be allowed under section 37(1) of the Act. The assessee replied to the CIT(A) but the CIT(A) following the decisions of Hon'ble Supreme Court in the case of Punjab State Industrial Development Corpn. Ltd vs. CIT (1997) 93 Taxman 5 (SC) dated 04.12.1996 and Brooke Bond India Ltd vs. CIT 91 Taxman 26 (SC) dated 27.02.1997 vide Para 8.4.2 enhanced the income by observing as under: -

*"8.4.2 I have considered the details filed and submissions made by the appellant. I find that the above said*

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*expenses aggregating to ₹ 86,80,163/- have been incurred as fees and stamp duty paid to Ministry of Corporate Affairs for the purpose of increasing the authorized capital of the appellant company. Thus, the above said expenditure is found to be for the expansion of the capital base of the company and is capital in nature which cannot be allowed under section 37(1) of the Act. In this regard, reliance is placed on the decision in the cases of Punjab State Industrial Development Corpn. Ltd vs. CIT (1997) 93 Taxmann 5 (SC) dated 4.12.1996 and Brooke Bond India Ltd vs. CIT 91 Taxman 26 (SC) dated 27.02.1997. In case of Punjab State Industrial Development Corpn. Ltd Vs. CIT, the Hon'ble Apex court has held as under:*

*We do not consider it necessary to examine all the decisions in extenso because we are of the opinion that the fee paid to the Registrar for expansion of the capital*

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*base of the company was directly related to the capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit-making, it still retains the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company. We are, therefore, of the opinion that the view taken by the different High Courts in favour of the revenue in this behalf is the preferable view as compared to the view based on the decision of the Madras High Court in Kisenchand Chellaram (India) (P.) Ltd.'s case (supra) . We, therefore, answer the question raised for our determination in the affirmative, i.e., in favour of the revenue and against the assessee.*

*The above said decision has been followed in the case of Brooke Bond India Ltd. vs.*

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*CIT 91 Taxmann 26 (SC) and it has been held that, the expenditure incurred of issuing share to increases its share capital by a company would not be allowed as Revenue expenditure under section 37(1) of the Act.*

*8.4.3 In view of the above discussion, it is clear that the issue regarding allowability of expenditure incurred by the company as filing fee to ROC/ Ministry of Corporate Affairs, for enhancement of capital base of the company, is well settled in view of the above said decisions of Hon'ble Supreme Court. The decisions cited by the appellant, have been considered and disapproved in the above said decisions of the Apex court. Accordingly, the expenditure of ₹ 86,80,163/- is disallowed, being capital in nature. The income assessed under section 143(3) vide order dated 30.03.2014 is enhanced by the amount of ₹ 86,80,163/-. Since the appellant has not added the above said sum of its total income in the return*

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*of income filed on 27.09.2011, I am satisfied that the appellant has furnished inaccurate particulars of its income and penalty proceedings under section 271(1)(c) is initiated separately in respect of the above said addition of ₹ 86,80,163/-."*

Aggrieved, assessee came in appeal before Tribunal.

15. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted the fact that the assessee company has increased its authorized share capital being ROC fee and stamp duty paid of ₹ 71,60,163/- and ₹ 15.20 lakhs respectively. It was claimed by assessee company that it was incorporated on 20.02.1981 with an object to carry out the business of reselling in IT products and providing service of manpower supply. The assessee company with a view to undertake business activity and expand itself was in need of funds. Accordingly, the assessee filed application to the ROC for increase of authorized share capital from ₹ 25 crores to ₹ 125 crores. This was done on the advice of financial advisers who suggested that various product like convertible equitable warrants or preferential issue of equity shares can be issued against the traditional fund raising options like debt. Before us, it was claimed that the AO while passing rectification order

under section 154 of the Act dated 30.09.2016 has noted the amounts as under: -

*On going through the records, it is seen that the addition on account of share capital made was as under: -*

<i>Closing share capital</i>	<i>1070123875</i>
<i>Opening share capital</i>	<i>-124142875</i>
<i>Share premium</i>	<i>1560000000</i>
<i>Share premium</i>	<i>1273876500</i>
<i>Total</i>	<i>3778857500</i>

*On going the details of closing share capital, it is seen that the share capital includes bonus shares of ₹ 69,00,00,000/- . The share capital on account of bonus share cannot be treated as unexplained credit under section 68 as the same is out of reserve and surplus. Therefore, the addition of ₹ 69,00,00,000/- under section 68 of the Income-tax Act 1961 is mistake apparent from the records and rectified under section 154 of the Income-tax Act 1961 as under: -*

<i>Total income as per order u/s 143(3) r.w.s 153C dated 22nd March 2016</i>	<i>351,47,83,330</i>
<i>Less addition on account of bonus shares</i>	<i>-69,00,00,000</i>
<i>Revised total income</i>	<i>282,47,83,330</i>



16. In view of the above, it was contended that the issued share capital of the assessee company was increased from ₹ 99,31,430/- to ₹ 107,01,23,875/- in the corresponding period the increase in issued share capital of ₹ 94,59,81,000/- consisted of issue of bonus share capital of ₹ 80,42,11,445/-. The details of issue of bonus share capital is as under: -

<i>Date of issue of bonus shares</i>	<i>Amount</i>
26-03-2010	11,42,11,445
13.07.2010	69,00,00,000
<i>Total</i>	<i>80,42,11,445</i>

We noted that out of the total expenses of ₹ 86,80,163/- incurred for increase in authorized share capital, the following is attributable to the issue of bonus shares:-

<i>Date of payment of expenses</i>	<i>Fee for increase in authorized share capital</i>	<i>Stamp duty</i>
12.05.2010	5,83,584	2,28,423
13.07.2010	34,60,573	13,80,000
<i>Total</i>	<i>40,44,157</i>	<i>16,08,423</i>

It means that the total expenses for issue of bonus share capital is amounting to ₹ 56,52,580/- out of the total expenses incurred for increase in authorized share capital at ₹ 86,80,163/-. It means that this amount of ₹ 56,52,580/- cannot be allowed being expenses incurred for issue of bonus share capital being capitalization of reserve merely by reallocation of companies funds and there was no inflow of fresh funds or increase in capital employed. Therefore, we are of the view it could not be said that the assessee company has acquired a



benefit or advantage of enduring nature and the total funds available with the company would remain the same and issue of bonus share would not result in expansion of capital base of the assessee company. Therefore, we are of the view that the expenditure incurred on issue of bonus share would be revenue expenditure allowable. For balance sum of ₹ 30,27,583/-, we are of the view that this is increase in share capital and will not be allowed. This issue of the assessee's appeal is partly allowed.

**17. In the result, both the appeals of the Revenue are dismissed and that of the assessee is partly allowed.**

Order pronounced in the open court on 23.10.2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 23.10.2019

मुदीप सरकार, व. निजी सचिव / *Sudip Sarkar, Sr.PS*

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

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 (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai