

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH
MUMBAI**

**BEFORE: HON'BLE JUSTICE P P BHATT, PRESIDENT
&
SHRI M.BALAGANESH, AM**

**ITA No.2170/Mum/2017
(Assessment Year :2011-12)**

Asst. CIT CIR 1 6 th Floor, Ashar IT Park R.No.22 nd No. 16Z Wagle Industrial Estate Thane (W) Mumbai- 400 604	Vs.	M/s.Covestro India Private Limited (formerly known as Bayer Sheets India Private Limited) Unit No.SB-801, 8 th Floor Empire Tower Cloud Campus, Thane-Belapur Road Airoli, Navi Mumbai-400708
PAN / GIR No.AAECB0040L		
(Appellant)	..	(Respondent)

Revenue by	Shri Tharian Oommen
Assessee by	Shri Nitesh Joshi
Date of Hearing	10/02/2021
Date of Pronouncement	27/04/2021

आदेश / ORDER

PER M. BALAGANESH (A.M.):

This appeal in ITA No.2170/Mum/2017 for A.Y.2011-12 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-55, Mumbai in appeal No. CIT(A)-55/DCIT(OSD)10(3)/IT-111/15-16 dated 30/11/2016 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act)

dated 03/01/2014 by the Id. Asst. CIT Cir-1, Mumbai (hereinafter referred to as Id. AO).

2. At the outset, the revenue had raised Ground No. 2 challenging the direction of the Id. CIT(A) to the Id. AO to include the customs duty while working out the arithmetic mean with regard to transfer pricing adjustment. This issue was conceded by the Id. AR before us at the time of hearing. The same is reckoned as a statement made from the Bar. Accordingly, the Ground No. 2 raised by the revenue is allowed.

3. Though the revenue had raised several grounds before us, the only effective issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the addition made in the sum of Rs 8,07,52,945/- on account of share premium received by the assessee u/s 56(1) of the Act, in the facts and circumstances of the case.

4. We have heard the rival submissions and perused the materials available on record. We find that the assessee is a private limited company engaged in the business of manufacturing and trading of polycarbonate sheets, articles and high impact polystyrene articles. and had filed its return of income for the Asst Year 2011-12 on 29/11/2011 declaring total loss of Rs 17,39,073/-. We find that the assessee company was incorporated in February 2010 and had commenced business operations in Asst Year 2011-12 i.e the year under consideration.

4.1. During A.Y.2011-12, Assessee had issued 7,00,000 shares at a price of Rs. 125.361351 having face value of Rs 10 and premium of Rs 115.361351. Accordingly, it accounted for share premium of Rs

8,07,52,945 in the books of account for the year under consideration. The break-up of the shares issued are as under:-

- 3,57,000 shares were issued to a foreign company namely Bayer Material science AO, for a monetary consideration and

- 3,08,000 shares were issued to Malibu Plastica Private Limited ("MPPL") and 35,000 shares were issued to Malibu Tech Private Limited ("MTPL") for non-monetary consideration i.e. consideration in the form of tangible assets, intangible assets and working capital acquired on purchase of Polycarbonate extrusion and thermoforming sheet business from the said Indian companies.

4.2. We find that the Id. AO had sought to treat the receipt of share premium in the sum of Rs.8,07,52,945/- (700000 shares x Rs.115.36 per share) as taxable u/s.56(1) of the Act under the head 'income from other sources' on the following grounds:-

- a) The face value of the shares is only Rs.10/-. The assessee has adopted discounted cash flow method (DCF) for justification of its share price at Rs.125.36 which includes premium of Rs.115.36 per share. The assessee did not furnish the business plan and projections to justify the issuance of shares at a premium of Rs.115.36. According to the Id. AO, the premium that is justified in the assessee's case was only Rs.80 per share.
- b) The year under consideration being the first year of business operations of the assessee company and hence, assessee is not justified in issuance of shares at a premium of Rs.115.36 per share.

- c) The share premium received by the assessee was without adequate consideration.
- d) The assessee company had utilised the share premium for purposes other than those specified u/s.78 of the Companies Act 1956 and hence, the receipt of share premium partakes the character of the revenue receipt taxable as income.

4.3. We find that the Id. DR vehemently relied upon the aforesaid observations of the Id. AO and also argued that the Id. CIT(A) instead of addressing the aforesaid issues had addressed the issue in dispute on the non-applicability of provisions of section 56(2)(viib) of the Act when the addition has been made by the Id. AO u/s.56(1) of the Act. Accordingly, the Id. DR argued that the entire conclusion reached by the Id. CIT(A) is totally misconceived. He also placed reliance on the decision of the co-ordinate Bench of Bangalore Tribunal in the case of Cornerstone Property Investment Pvt. Ltd., vs. Income Tax Officer, Ward 2(1)(3), Bangalore in ITA No.665/Bang/2017 dated 09/02/2018 in support of his contentions.

4.4. Per contra, the Id. AR argued that assessee bought business and allotted shares in kind with the same premium as was allotted to its holding company. He argued that the Id. CIT(A) had adjudicated the issue both u/s.56(1) of the Act by holding that the said receipt of share premium cannot be taxed u/s.56(1) of the Act and also by holding that the provisions of Section 56(2)(vii b) of the Act could not be invoked at all for the year under consideration as the same is applicable only from Asst Year 2013-14 onwards. He also argued that the receipt of share premium per se is capital receipt which has been held in favour of the assessee by the Id. CIT(A).

4.5. We find that there is absolutely no dispute with regard to the fact that addition has been made by the Id.AO towards receipt of share premium by treating the same as income u/s.56(1) of the Act. Hence, what is to be adjudicated by us is limited and confined to the fact as to whether receipt of share premium per se could be treated as the revenue receipt so as to make it taxable u/s.56(1) of the Act. We find from the financials of the assessee company for the year ended 31/03/2011 i.e the year under consideration, it had received total receipts of Rs.9,78,38,703/- and had incurred expenses including the impairment loss on fixed assets (Rs.1,44,73,424/-), Depreciation / amortization (Rs.65,54,508/-) to the extent of Rs.12,17,01,621/- and thereby incurring loss before tax to the extent of Rs.2,38,62,918/- for the year under consideration. This shows that the assessee company had started its business activities effectively during the year under consideration.

4.6. We hold that receipt of share premium per se cannot be treated as income or the revenue receipt. We hold that in order to bring a particular receipt to be taxable within the ambit of Section 56(1) of the Act, the receipt should be in the nature of income as defined in Section 2(24) of the Act. We find that the share premium received by the company admittedly forms part of share capital and shareholders funds of the assessee company. When receipt of share capital partakes the character of a capital receipt, the receipt of share premium also partakes the character of capital receipt only. Hence, at the threshold itself, the receipt in the form of share premium cannot be brought to tax as the revenue receipt and consequently treat the same as income u/s.56(1) of the Act. We find that the Co-ordinate Bench of this Tribunal in the case of

Credit Suisse Business Analysis (India) (P) Ltd., vs. Assistant Commissioner of Income -tax, Circle-15(1)(2), Mumbai reported in 72 taxmann.com 131 had addressed the very same issue in dispute. In that case also, the Id. AO had sought to treat the receipt of share premium as a trading receipt taxable u/s.56(1) of the Act for the very same reasons as pointed out by the Id. AO in the instant case. We find that this Tribunal had decided the issue in favour of the assessee by elaborately addressing all the points raised by the Id. AO which are exactly similar and identical to the issue raised by the Id. AO in the instant case. For the sake of convenience, the relevant portion of the said order of this Tribunal is reproduced hereunder:-

“5. We have heard the rival submissions and perused the material on record. We find that the FAA had upheld the disallowance because he was of the opinion that the assessee had not violated the provisions of CA. In other words, if the assessee had not contravened the section 78 or 100 of the CA, the amount in question would not have been liable to tax. In our opinion, the approach of the FAA is fundamentally wrong. The taxability of an amount has to be decided within the four corners of the Income Tax. Section 4 of the Act is the charging section and section 2 defines the word income. Even the inclusive definition of income does not stipulate that non-compliance of any provision of other Act would result in turning a capital receipt a revenue receipt. An infringement of a particular Act is dealt by that Act, unless and until it deals with other Act/(s). For example provisions of Prevention of Money Laundering Act (PMLA) provide that certain offences committed under other statutes would be considered scheduled offence under the PMLA. Without such a clear mandate nothing can be imported to be implemented to other Act/(s). While dealing with the assessment or appeals, under the provisions of the Income-tax Act, the basic principle every officer of the department has to remember that he is representing the Sovereign and his duty is to collect Due taxes only. For determining the Due taxes they should avoid bringing far-fetched fancies and ideas. In the case under consideration they have done the same. Without understanding the basic philosophy of income they have referred to the provisions of CA, so that the amount in question can be taxed at any cost. It is not a fair or judicious approach to deal with the Subjects of the State. Even if the assessee had violated the provisions of CA, it will be

penalised by the provisions of that Act. But, it would never turn a capital receipt into revenue receipt or vice versa.

Now, we would also like to discuss the provision of sections 78 and 100 of the CA also. But, before testing the applicability of the said sections, we would like to refer to the submissions made by the assessee in that regard. Neither the AO nor the FAA has proved that the share premium money was utilised by it for running its day-to-day business. The assessee had proved that the opening and the closing balance of the share premium money account was same for the year under consideration. We find that the factual position assailed by the assessee was not proved incorrect by both the authorities. If there was no difference in the balances how the conclusion was drawn that the share premium money was utilised for business purposes and not preserved for the purposes for which it was collected. Without any evidence both the authorities held that the assessee had used the money for purposes other than the purposes for which it was collected. Therefore, in our opinion there was no foundation of the building that was built by them. We are not in a position to validate such a classical factual blunder. Section 100 of the CA deals with reduction of share capital. In short, the stand taken by the FAA is not endorseable either legally nor factually. We would also like to mention that the facts of the case of T.V. Sundaram Iyengar & Sons Ltd.(supra), relied upon by the FAA, has not relevance to decide the issue before us. It does not deal with the issue of share premium money and its taxability. So, considering the facts and circumstances of the case, we are reversing the order of the FAA. Effective ground of appeal is decided in favour of the assessee.

As a result, appeal filed by the assessee stands allowed.

4.7. We also find that the similar view has been taken by this Tribunal in the case of Green Infra Ltd., vs. ITO reported in 38 Taxmann.com 253. The relevant operative portion of the said order is reproduced hereunder:-

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.

.....

12. We have considered the grievance of the Revenue from all possible angles and by applying the provisions of Sec. 56 of the Act and at our stage we have gone to the extent of testing the transaction within the parameters of Section 68 of the Act. We could not find a single evidence which could lead to the entire transaction as sham. Our view is also fortified by the share holding pattern as explained to us and as substantiated by the material evidence on record. We find that the share holders in all the related transaction under issue are directly or indirectly related to the Government of India. Therefore, considering the entire issue in the light of the material evidence brought on record, in our considerate view, the Revenue authorities have erred in treating the share premium as income of the assessee u/s. 56(1) of the Act. In our considerate view, for the reasons discussed hereinabove, we do not find it necessary to apply the provisions of Sec. 68 of the Act. We, therefore, direct the AO to delete the addition of Rs. 47,97,10,000/-. Ground No. 2 & 3 are accordingly allowed.

4.8. We also find that this order was subject matter of challenge by the revenue before the Hon'ble High Court and the question of law was not admitted by the Hon'ble Jurisdictional High Court on the addition made u/s.56(1) of the Act though the very same addition was challenged by the revenue u/s.68 of the Act which was admitted by the Hon'ble High Court. We find that the Hon'ble Jurisdictional High Court in the said case reported in 392 ITR 7 decided the addition made u/s.68 of the Act in favour of the assessee.

4.9. With regard to yet another observation made by the Id. AO in his order that receipt of premium was akin to gift and hence taxable

u/s.56(1) of the Act, we find that receipt of share capital and share premium is normal in case of a limited company and the same at any stretch of imagination cannot be equated with gift. Moreover, gift can be received only by individuals or HUFs and cannot be received by a company. Hence, this observation made by the Id. AO is dismissed in limine.

4.10. With regard to yet another observation made by the Id. AO that assessee had acquired certain intangible assets at the time of acquisition of business and those intangible assets were impaired in the same year and that this fact itself proves malafide intention of the assessee for allotment of shares at a premium. We are unable to persuade ourself to accept to this contention of the Id. AO in view of the fact that though the assessee had acquired certain intangible assets while acquiring business, and though the said intangible assets had been written off during the year due to impairment, we find that assessee company had not claimed the same as deduction. Hence, the relevant observation of the Id. AO in this regard is baseless and devoid of any merit.

4.11. With regard to reliance placed by the Id. DR on the decision of Bangalore Tribunal in the case of Cornerstone Property Investment Pvt. Ltd., vs. Income Tax Officer, Ward 2(1)(3), Bangalore in ITA No.665/Bang/2017 dated 09/02/2018, we find that the said decision is distinguishable on facts in as much as the Id. AO in that case had made addition u/s.68 of the Act by doubting the genuineness of the parties from whom share premium has been received. Further in that case, the Id. AO had examined the genuineness of the credits in the books of accounts by making relevant enquiries which established that assessee

was acting as a conduit and part of the layering process which enabled the flow of funds to move from one company to another company. In the instant case, we find the addition has been admittedly made by the Id. AO u/s.56(1) of the Act and no such enquiries doubting the genuineness of the transactions or the genuineness of the investors were doubted by the Id. AO in the instant case. Hence, the decision relied by the Id. DR, in our considered opinion, would not advance the case of the revenue. We find that all the necessary documents relating to the allotment of shares with premium together with relevant documentary evidences were indeed submitted by the assessee before the Id. AO which are not doubted at all.

4.12. In view of our aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the Id. CIT(A) had rightly deleted the addition made u/s.56(1) of the Act on account of receipt of share premium for the A.Y.2011-12. Accordingly, the ground No.1 to 1.5 raised by the Revenue are dismissed.

5. The ground Nos. 3 & 4 raised by the Revenue are general in nature and does not require any specific adjudication.

6. In the result, appeal of the Revenue is partly allowed.

Order pronounced on 27/04/2021 by way of proper mentioning in the notice board.

Sd/-
(JUSTICE P P BHATT)
PRESIDENT

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 27/04/2021

KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai