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

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.1720/M/2022
Assessment Year: 2014-15

Income Tax Officer-6(1)(1), Room No.503, 5th Floor, Aayakar Bhavan, M.K. Marg, Mumbai - 400020	Vs.	M/s. Arm Infra & Utilities Pvt. Ltd., 18th Floor, A-Wing, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai – 400 013 **PAN: AALCA8247K**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Jay Bhansali, A.R.
Revenue by : Shri Manoj Singa, D.R.

Date of Hearing : 08 . 09 . 2022
Date of Pronouncement : 29 . 09 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Income Tax Officer-6(1)(1), Mumbai (hereinafter referred to as 'the Revenue) by filing the present appeal, sought to set aside the impugned order dated 04.05.2022 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)] qua the assessment year 2014-15 on the grounds inter alia that :-

"1. On the facts and circumstances of the case and in law, the Ld.CIT(NFAC) has erred in ignoring the fact that while completing the original assessment under section 143(3), the A.O. had not examined the applicability of section 56(2)(viib) of the Act.

2. On the facts and circumstances of the case and in law, the Ld.CIT(NFAC) has erred in not appreciating the fact that section 56(2)(viib) of the Act is applicable on hybrid instrument.

3. The Appellant prays that the order of the CIT(Appeals) on the above ground be set aside and that of the AO be restored.

4. The appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary."

2. Briefly stated facts necessary for adjudication of the controversy at hand are : Assessee filed its return of income for the year under consideration at the total loss of Rs.3,84,344/- and the assessment was framed at the loss of Rs.3,84,344/- under section 143(3) of the Income Tax Act, 1961 (for short 'the Act').

3. However, the Ld. Principal Commissioner of Income Tax (PCIT) by invoking the revisionary jurisdiction under section 263 of the Act flagged the issue of taxation of premium received under section 56(2)(viib) of the Act being not examined by the Assessing Officer (AO) and found the assessment order passed, to be erroneous in so far as prejudicial to the interest of the revenue and directed the AO to make fresh assessment in the light of the observations made in the order passed under section 263 of the Act. The AO consequently passed the fresh assessment order at the assessed income of Rs.6,05,66,15,656/- under section 143(3) read with section 263 of the Act.

4. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has quashed the order passed by the AO under

section 143(3) read with section 263 of the Act having been become infructuous by allowing the appeal. Feeling aggrieved the Revenue has come up before the Tribunal by way of filing present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. We have perused the order passed by the Ld. CIT(A), the operative part of which is extracted hereinunder for ready perusal:

> ***"7.3 Finding on Grounds of Appeal***
> ***a) It was noted that in the 263 proceedings that in the order passed u/s 143(3) dated 15.12.2016 the issue of taxation of premium received u/s 56(2)(viib) was not examined by the AO. The Pr.CIT-6, Mumbai passed order u/s 263 of the Act on 27.03.2019. It was held that the assessment order passed by the AO is found to be erroneous in so far it is prejudicial to the interest of revenue. It was held that AO passed the assessment order without making enquiries and verification and AO did not examine the provisions of Section 56(2)(viib) in respect of share premium received by Appellant on issue of CCD's. The Pr.CIT-6, Mumbai directed the AO to make the assessment afresh in light of observation made in the order passed u/s 263 of the Act.***
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> ***b) The Appellant filed an appeal against the order passed u/s 263 by Pr.CIT-6, Mumbai before Hon'ble IT AT, Mumbai challenging the jurisdiction of Pr.CIT-6, Mumbai in invoking the provisions of Section 263 of the Act. The Hon'ble ITAT, Mumbai in ITA No. 2212/Mum/2019 vide order dated 12.11.2021 quashed the order u/s 263 passed by Pr.CIT-6, Mumbai holding it invalid for want of jurisdiction. The relevant portion of order Hon'ble ITAT, Mumbai is reproduced as under:-***
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> > ***"14. After considering the submissions, we noticed that the Ld. Pr. C/T treated the transactions entered by the assessee as subscription of shares instead of subscription of debentures. We observed that the corporate arranges funds for its requirement through various instruments like equity shares, preference shares with various combinations of conversion***

and percentage of dividend, debentures with various combinations of conversion as well as percentage of interest and other similar bonds for its financial requirements. In the present case, the funds were arranged from internal sources within the group concerns. The assessee company through its Board passed a resolution to arrange funds by issue of compulsory convertible debentures with zero percent interest payout with premium. It is a/so important to notice that these debentures were issued at private placement and subscribed by Edison Utility Works Pvt. Ltd. which is a group concern and the monies borrowed by Edison Utility from Jayneer Capital Pvt. Ltd. and Essel Corporate Resources Pvt. Ltd., again these are group companies. These CCDs were issued with the promise of compulsory conversion after end of 7th year with equal redeemable preference shares and these redeemable preference shares will be redeemed at the end of 8th year. The Ld. Pr. C/T termed the above transactions as deemed subscription of shares instead of debentures. We are aware that corporate generate funds by adopting hybrid instruments which suits their requirements, in the given case, the board selected the instrument so that up to seven years, the funds arranged will have no burden on the company and will remain instrument of debt. From 8th year onwards, it will be converted into preference shares with no commitment on dividends and at the end of the 15th year, converted CCDs will be redeemed at a premium of * 750 per share. This hybrid instrument will have no burden on the company until the 15th year and at the end of the 15th year, the company will repay to the subscribers of the debt instrument at a premium. The burden of premium will be a liability on the company. We observed that the Ld. Pr. CIT considered the premium received at the issue of debt instrument as free money available to the company considering the fact that the assessee has declared the same under the head reserves and surplus as security premium. We do not agree with them above observation of the Ld. Pr. CIT and even though the assessee discloses the above premium under the head reserves and surplus but as per the promise given in Board resolution clearly indicate that it is in fact a liability on the company until the 15th year and at the end of 15th year, these hybrid instrument has to be redeemed at the premium of F 150 per CCD. That means the subscribers of the debt instrument will redeem R 150 per CCD against the payment of premium * 90 per CCD at the time of investment. Further, we noticed that the Ld. Pr. CIT invoked the provisions of section 56(2) (viib) of the Act in second notice issued under section 263 of the Act and directed the Assessing Officer to complete assessment as per the above section. He considered the hybrid instrument as issue of shares i.e., issue of equity rather than debt. The basic presumption made by the Ld. Pr. CIT is flaw that he treated

the hybrid instrument as issue of equity shares in order to invoke the provisions of section 56(2) of the Act. The tax authorities, in order to invoke the provisions of section 56(2) of the Act, they have to bring on record that consideration was received for issue of shares exceeds the face value of such shares and the aggregate consideration received for such shares exceeds the fair market value. In the given case, in our view, is not an issue of equity shares rather it is issue of debt instrument with the condition of conversion to redeemable preference shares. We noticed that the Ld. Pr. CIT equated the preference shares with equity shares with reference in distribution of dividends. We do not agree with the observation that preference shares are nothing but equity shares. The preference shares do not carry any right to equity participation business. It is only a type of capital without participation and having a preferential right over distribution of prescribed dividend and distribution of capital. Therefore, the preference shares can never be considered as equity shares unless it is converted and issued with promise to convert as equity. Till the preference shares are converted, it can never have the right of equity in the company. In our considered view, the provisions of section 56(2) (vib) of the Act has no application to the hybrid instrument issued by the assessee company, the hybrid instrument are in the nature of debt cum preference shares (which is not equity shares) is outside the definition of equity shares. We notice that the Ld. Pr. CIT observed in his order that the assessee has received the premium, which it does not need to pay and it has to be treated as income. We observe that provisions of section 52(2) of Companies Act, 2013, allows the companies to utilize the securities premium only in the below manner-

> ***"a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares; :***
> ***(b) in writing off the preliminary expenses of the company;***
> ***(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of then company;***
> ***(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or***
> ***(e) for the purchase of its own shares or other securities under section 68."***

15. The above manner of utilization clearly indicates that it is capital reserve and liability for the company to apply the reserve only in the specified manner. These reserve even

though part of reserves and surplus, but can never be applied for any other purpose. In the given case, the assessee has issued promise to the CCD holders to redeem the preference shares after 15 years with premium of # 150 per CCD. Therefore, technically, company can utilize the premium only for the above purpose. Merely because the assessee issued the CCD, which is hybrid instrument to arrange corporate funding thru group concerns, it does not mean that it has indulged in generation of unaccounted money. In this case, there is no finding by any authorities that the assessee has indulged in such activities except that they received premium in issue of CCDs and recorded the same under the head Reserves and Surplus. As discussed above, the assessee cannot utilize the premium other than the manner specified in section 52 of Companies Act, 2013. There is proper safety and binding specified in the Companies Act to monitor the funds generated by the companies. The tax authorities should apply the provisions selectively rather than on general terms without analyzing the real impact on management of funds and taxability,

16. As discussed above, in our view, the assessment was selected under CASS, main object of verification of issue of debentures on premium and low income in comparison to high investment in unlisted equities. In relation to above selection of the case, the Assessing Officer has issued several notices and the assessee has submitted relevant information as called for. The Ld. Pr. CIT considered the above verification and the information submitted by the assessee as improper and non-verification of share premium by the Assessing Officer to assume jurisdiction under section 263 of the Act. The Explanation-2 to section 263 of the Act was invoked by the Ld. Pr. CIT to come to the conclusion that the assessment order is passed without making enquiries or verification. After considering the above facts, in our considered view, the Assessing Officer has made enquiries and carried on with the verification even though passed non-speaking order. The Explanation-2 to section 263 of the Act can be invoked only when no enquiries or verification is carried on otherwise it cannot be invoked. In the given case, the Assessing Officer has carried on the enquiries and verification to his satisfaction which may not be to the satisfaction to the Ld. Pr. CIT. Therefore, assumption of jurisdiction fails. We take force in the decision of the Hon'ble Delhi High Court in CIT v/s Brahma Centre Developments Pvt. Ltd., ITA no.116 of 2021 & ITA no.118 of 2021 (Del.), judgment dated 05.07.2021. Consequently, we set aside the impugned order passed by the learned PCIT by allowing the grounds of appeal raised by the assessee."

c) On the other hand, the AO completed the assessment under section 143 (3) r.w.s 263 on 29.12.2019 with reference to the directions of Pr. CIT vide order u/s 263 dated 27.03.2019. The AO made addition of Rs. 605,70,00,000/- u/s 56(2) (viib) of the Act in the order passed u/s 143(3) r.w.s 263 of the Act. Aggrieved by the said order, the present appeal has been filed by the Appellant.

d) The basis of the order passed by the AO u/s 143(3) r.w.s 263 of the Act dated 29.12.2019 is the order passed by Pr. CIT-6 Mumbai u/s 263 of the Act dated 27.03.2019. The Pr. CIT-6, Mumbai directed the AO to make the assessment afresh in light of the observation made in the order passed u/s 263 of the Act. The Hon'ble ITAT vide order dated 12.11.2021 has quashed the order passed by Pr. CIT-6, Mumbai u/s 263 of the Act holding that "the assumption of jurisdiction by Pr. CIT-6, Mumbai fails". Since the order passed by Pr. CIT-6, Mumbai u/s 263 has been quashed by Hon'ble ITAT, Mumbai holding it invalid for want of jurisdiction, therefore, the consequent order passed by the AO u/s 143(3) r.w.s 263 has no legs to stand on and deserves to be quashed.

In view of the above facts, the order passed by the AO u/s 143(3) r.w.s. 263 becomes infructuous and deserves to be quashed. Thus, the Ground of Appeal No. 5 is allowed and assessment order passed u/s 143(3) r.w.s 263 stands quashed being infructuous and bad in law.

e) As Ground of Appeal No. 5 has been allowed, the remaining Grounds of Appeal become academic in nature and do not require separate adjudication.

8. As a result, appeal is allowed."

7. When it is undisputed fact on record that co-ordinate Bench of the Tribunal in assessee's own case in ITA No.2212/M/2019 for A.Y. 2014-15 order dated 12.11.2021 has quashed the order dated 27.03.2019 passed by the Ld. PCIT under section 263 of the Act, the subsequent assessment order passed by the AO dated 29.12.2019 under section 143(3) read with section 263 of the Act is not sustainable in the eyes of law having been become infructuous. So the Ld. CIT(A) by passing the impugned order has legally and validly allowed the appeal of the assessee by quashing the impugned order passed by the AO under section 143(3) read with

section 263 of the Act. So finding no illegality or perversity in the impugned order passed, present appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 29.09.2022.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 29.09.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.