

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 3834/MUM/2017
(Assessment Year: 2009-10)**

**Deputy Commissioner of Income Tax,
Circle 6(1)(1), Mumbai**

Room No. 504, 5th Floor, Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai – 400020

..... **Appellant**

M/s EPC Offshore Subsea Projects Ltd.,

Vs

(formerly Essar Offshore Subsea Ltd.)

Through Official Liquidator

Ministry of Corporate Affairs,

Bank of India Building, 5th Floor,

M.G. Road, Mumbai – 400001.

[PAN: AABCE9585G]

..... **Respondent**

Appearance

For the Appellant/Department : None

For the Respondent/Assessee : Shri Biswanath Das

Date

Conclusion of hearing : 16.05.2023

Pronouncement of order : 26.05.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Revenue has challenged the order, dated 21/03/2017, passed by the Ld. Commissioner of Income Tax (Appeals) 12, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2009-10, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 31/03/2015, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the

Act’).

2. The Revenue has raised the following grounds of appeal:

- "1 On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in quashing the notice issued u/s 148 on the ground that notice u/s 148 is nothing but change of opinion without appreciating the fact that the assessee has not objected to proceedings initiated vide notice u/s 148 of the Income Tax Act.*
- 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of INR 27,97,50,000/- ignoring the facts narrated in para 3.2 to 3.6 of the assessment order.*
- 3. The Appellant prays that the order of the CIT(Appeals) on the above grounds be set aside and that of the Assessing Officer be restored."*

3. The relevant facts in brief are that the Assessee filed original return of income for the Assessment Year 2009-10. The case of the Assessee was selected for scrutiny and assessment under Section 143(3) of the Act was framed on the Assessee vide order, dated 28/12/2011 accepting the return of income at INR 1,01,83,940/-. Subsequently, reassessment proceedings were initiated as notice, dated 28/03/2014, was issued to the Assessee and order, dated 31/03/2015, was passed under Section 143(3) of the Act. The income of Assessee was assessed at INR 28,99,33,940/- after making addition of INR 27,97,50,000/- under Section 68 of the Act on account of share premium received by the Assessee during the relevant previous year in respect of shares issued by the Assessee to its holding company having face value of INR 10/- at a premium of INR 30/-.

4. The Assessee preferred appeal before CIT(A) challenging the validity of the reassessment proceedings as well as addition made by the Assessing Officer under Section 68 of the Act on merits. The

CIT(A) quashed the notice issued under Section 148 of the Act holding that reassessment proceedings has been initiated on account of change of opinion as the issue of share premium was duly considered by the Assessing Officer during the course of original assessment proceedings. The CIT(A) held that no addition should be made under Section 68 of the Act even on merits as the identity of the investor was disclosed by the Assessee and accepted by the Assessing Officer. In this regard, reliance was placed by the CIT(A) on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Lovely Export Private Limited (2008) 216 CTR 195.

5. Being aggrieved, the Revenue has preferred the present appeal.
6. When the appeal was taken up for hearing, none was present for the Appellant. We have heard the Ld. Departmental Representative and perused the material on record. Admittedly the shares were issued by the Assessee to its holding company at a premium. The financial statements of the Assessee for the relevant period were on record. During the assessment proceedings, specific query was raised by the Assessing Officer regarding share premium received by the Assessee. During the assessment proceedings the Assessee, vide letter dated 25/03/2015, submitted a note on justification of premium along with document and details. In relation to the same, the CTI(A) had, in Paragraph 6 and 6.1 of the order impugned, recorded as under:

"6. Appellant, vide letter dated 25.03.2015, during re-assessment proceeding submitted the following information.

'Note on justification on premium: (submitted on 27.03.2015)

During the 2009-10, EOSSL (Appellant) has been awarded a prestigious INR 1066 crore by ONGC for the construction of

NHRC platform. This is the first contract and value being the best for any new contractors. ONGC contract normally does not carry any Mobilisation Advance clause. In order to fund the project initially and to mobilise the resources, the company has decided to raise the fund through its holding company. Hence it was decided to issue the shares of Rs 10 each at a premium of Rs 30 per share. This is the offer price decided by EOSSL which in return has accepted by EPIL'

6.1 Further, appellant has submitted following documents before Assessing officer along with above letter and duly received by assessing officer by his stamp of receipt in ward No. 6(2)(2) by Assistant Commissioner of Income Tax Mumbai

- 1) Memorandum and Articles of the company Annexure-1*
- 2) Certificate of Incorporation*
- 3) Annual Return filled with ROC - Annexure-2*
- 4) Bank statements - Annexure-3*
- 5) All shares are held by Essar Project India Ltd and its nominees. Essar Projects (India) Limited is a registered company having PAN AAACE 2358 J. It has registered office at Essar house, 11, KK Marg, Mahalaxmi, Mumbai-400034.*
- 6) No change in share holding since it is acquired by ESSAR Project India Limited*
- 7) Copy of share holder register is attached in Annexure-4*
- 8) Total Share premium was received from Essar Project India Limited.*
- 9) Details of share premium was received Annexure -5*
- 10) No amount has returned on account of share premium.*
- 11) Copies of balance sheet, Profit loss account, and tax audit report for FY 2008-09 and 2009-10 is attached Annx-6*
- 12) Copy of the board resolution attached in Annex-7.*

7. Taking note of the above, the CIT(A) concluded that that the reassessment proceedings were initiated merely on account of change of opinion. The relevant extract of the order passed by the

CIT(A) read as under:

"6.5 I have gone through the submission of the appellant and carefully perused the material on record. The material available on record clearly demonstrates that the issue of share premium was duly considered by the assessing officer during the course of the original assessment and thus the notice issued u/s 148 is nothing but change of opinion. So, based on the various judicial pronouncements relied upon by the appellant I direct that the notice issued u/s 148 be quashed based on the principle of judicial discipline. This ground no. 1 is allowed.

Further, during the original assessment proceedings u/s 143(3), the appellant had, vide its submission Dt. 17.10.2011 (in reply to Ques. 18 of the questionnaire) duly submitted the reasons for share premium to the then A.O. It is only after considering all these details that the then A.O. passed the Order u/s 143(3) without effecting any addition on account of receipt of Share Premium."
(Emphasis Supplied)

8. We concur with the findings given by CIT(A) that during the original assessment proceedings reply/submission/justification was furnished by the Assessee in relation to issue of shares at premium. The contention of the Ld. Departmental Representative is that the same were not sufficient to justify issuance of shares at a premium of INR 30/-. However, the facts remains that based upon the material on record, the Assessing Officer has formed in opinion that no addition was to be made on account of share premium. A perusal of the reasons recorded shows that reassessment proceedings have been initiated on the basis of the assessment record only without there being any fresh tangible material. The relevant extract of reasons recorded read as under:

"The return of income for the AY 2009-10 was filed on 30.09.2009. The return was processed u/s 143) on 18.03.2011 Subsequently,

the case was selected for scrutiny and the assessment was completed.

2. *In this case the assessee issued share capital at premium and is in receipt of share premium during the FY 2008-09 relevant to the AY. 2009-10 amounting to Rs 27,97,50,000/- The shares valued at par of Rs 10 per share have been issued at a premium of Rs 30 per share. The assessee is an unlisted company and the nature of the share application received (the intrinsic value of the share in comparison to the excess premium received) is not substantiated. Apart from the issue of identity and creditworthiness of the subscribers, the genuineness of the transaction is also an important aspect in case where the transactions of this nature pertain to a Private Limited Company. The issue of basis of valuation of shares and charging of premium is also required to be examined. It needs to be appreciated that the issue of share premium cannot be decided without being supported by any facts and financial data. It is noteworthy that the fixation of premium be made having regard to the net asset value of the company, or the past record of earnings. It cannot be based on hypothetical presumptions as to the potential growth of earnings that may be achieved on some unspecified date in the future. It is also relevant to state that the past history of the case is extremely relevant in order to determine the genuineness or otherwise of current transactions.*

4. There is no justification for charging share premium of Rs 30/- per share totaling to Rs.27.98 Moreover, this issue has not been verified by the Assessing officer at the time of assessment.

5. There was failure on the part of the assessee to disclose true and correct particular of its income for AY 2009-10 which were necessary to frame correct assessment.

6 In view of the above facts, I have reason to believe that the assessee's income of more than Rs. 1 lakh has escaped assessment for the AY. 2009-10 within the meaning of section 147 of the Act.

7. Further, in this case assessment was previously completed u/s 143(3) of the Act and four years have no elapsed since the end of the relevant A.Y. ie. AY. 2009-10. Hence, in accordance with the provisions of section 151(1) of the LT. Act, 1961, a notice u/s. 148 of the Act can be issued if the Assessing Officer (not below the rank of Assistant Commissioner of Deputy Commissioner) is satisfied that it is a fit case for issue of such notice. Notice u/s. 148 of the Act is therefore issued to the assessee."

9. It is admitted position that the assessment was framed under Section 143(3) of the Act. Though the Learned Departmental

Representative vehemently contended that there was no formation of opinion during the original assessment proceedings since the assessment order was silent on the issue of share premium, we are not inclined to accept the same in view of the fact that specific query was raised by the Assessing Officer during the assessment proceedings in response to which the Assessee had furnished information/details. Further, the reasons recorded do not make reference to any tangible material. The Hon'ble Supreme Court has, in the case of CIT Vs. Kelvinator India Limited:320 ITR 561, *[on which reliance was placed on behalf of the Assessee before the CIT(A)]*, held that after 01/04/1989 , Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment and that the reasons must have a live link with the formation of the belief. On perusal of the reasons recorded, it can be seen that the reassessment proceedings have been initiated only on reappraisal of the material already on record and on account of mere 'change in opinion' which cannot be reason for reopening of assessment. Therefore, in our view, in absence of any fresh tangible material the Assessing Officer was not justified initiating reassessment proceedings as the Assessment under Section 143(3) of the Act was framed on the Assessee, vide order dated 28.12.2011, after making inquiry into the issuance of shares at premium. Accordingly, we do not find any infirmity in the order passed by the CIT(A) quashing the notice dated 28.03.2014 issued under Section 148 of the Act. Since we have confirmed the order of CIT(A) on the jurisdictional issue as aforesaid, the issue relating to the merits have become academic. Accordingly, Ground No. 1 raised by the Revenue is dismissed while Ground No. 2 raised by

the Revenue is disposed off as being infructuous.

10. In result, the present appeal preferred by the Revenue is dismissed.

Order pronounced on 26.05.2023.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 26.05.2023
Alindra, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai