

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.1041/M/2023**

**Assessment Years: 2012-13**

The Deputy Commissioner of Income Tax, Central Circle -6(1), Room No. 1905, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai- 400 021	Vs.	M/s. Neepa Real Estates Pvt. Ltd., 12 <sup>th</sup> Floor, Hallmark Business Plaza, Sang Dnyaneshwar Marg, Near Gurunanak Hospital, Bandra (E), Mumbai- 400 051 <b>PAN: AAACN1884C</b>
(Appellant)		(Respondent)

**CO No.55/M/2023**

**(Arising out of ITA No.1041/M/2023)**

**Assessment Years: 2012-13**

M/s. Neepa Real Estates Pvt. Ltd., Vasant Oassis Site Office, Upper Basement, CTS No.345A/1 to 3, 345A 5, Makwana Road, Andheri East, Mumbai- 400 051 <b>PAN: AAACN1884C</b>	Vs.	The Deputy Commissioenr of Income Tax, Central Circle -6(1), Room No. 1905, 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai- 400 021
(Appellant)		(Respondent)

**Present for:**

Assessee by : Dr. K. Shivaram, Sr. A.R. &  
Shri Rahul K. Hakani, A.R.

Revenue by : Shri S. Srinivasu, D.R.

Date of Hearing : 10 . 08 . 2023

Date of Pronouncement : 12 . 09 . 2023

## O R D E R

**Per : Kuldip Singh, Judicial Member:**

For the sake of brevity aforesaid appeal and cross objections emanated from same impugned order passed by Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] are being taken up for disposal by way of composite order.

2. Appellant The Deputy Commissioner of Income Tax, Central Circle -6(1), Mumbai (hereinafter referred to as the Revenue) and the cross objector M/s. Neepa Real Estates Pvt. Ltd. (hereinafter referred to as the assessee) by filing the present appeal and cross objections respectively sought to set aside the impugned order dated 30.01.2023 passed by the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] on the grounds inter-alia that:

### **Grounds of Revenue's appeal (ITA No.1041/M/2023)**

*"i) Whether on the facts and circumstances of the case and in law, the Id. CIT(A) has erred in deleting the addition made on account of unexplained cash credit u/s.68 of the IT Act, 1961 of Rs.17,00,00,000/-.*

*ii) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the shares were issued at a much higher value than the value decided by the independent valuation report for which the assessee did not provide any plausible explanation.*

*iii) The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal if need be."*

### **Cross objections of assessee (CO No.55/M/2023)**

*1) The Learned Commissioner Appeals erred in confirming the reopening of the assessment without appreciating that reopening was beyond four years and the original assessment order was passed u/s 143(3) and there was no failure on the part of the Assessee to fully and truly disclose material facts and hence reopening is bad in law.*

*2) The Learned Commissioner Appeals erred in confirming the reopening of the assessment without appreciating that reopening was done without any new tangible material and reopening was nothing but a change of opinion which is impermissible in law and hence reopening is bad in law.*

*3) The Learned Commissioner Appeals erred in confirming the order of AO reducing work in progress by Rs.1,12,31,334/- being interest on delayed payment of TDS by invoking Section 40(a)(ii) r.w.s 37 without appreciating that Section 40(a)(ii) and 37 were not applicable to said interest payment and same was incurred wholly and exclusively for business and hence the reduction of work in progress may be deleted.*

*4) The Learned Commissioner Appeals erred in confirming the order of AO reducing work in progress by Rs.1,12,31,334/- being interest on delayed payment of TDS by invoking Section 40(a)(ii) r.w.s. 37 without appreciating that Section 40(a)(ii) and 37 cannot be invoked as no deduction of said interest is claimed during the year and hence the reduction of work in progress may be deleted.*

*5) The cross-objector craves leave to amend, alter, add or delete any cross objections.”*

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the original return of income filed by the assessee for the year under consideration was processed and assessment was framed under section 143(3) of the Income Tax Act, 1961 (for short ‘the Act’) at the loss of Rs.5,23,473/-. Thereafter assessment was reopened by initiating the proceedings under section 147/148 of the Act. The assessee opted to treat its return of income filed in response to notice issued under section 153A of the Act as a reply to the notice issued under section 148 of the Act. Reasons for reopening the assessment were supplied to the assessee and notice under section 143(3) of the Act was issued and served upon the assessee. During reopening proceedings the Assessing Officer (AO) noticed that the assessee company has issued 870 class-A shares and 1,99,130 class-C shares and (total 2,00,000 equity shares of value of Rs.10/- each) to M/s. MSREF

Indian Investment One Ltd. at a total premium of Rs.49,80,00,000/- as foreign direct investment (FDI). The assessee received an amount of Rs.50,00,00,000/- i.e. received an amount of Rs.2500/- per equity share of value of Rs.10/-, the premium of Rs.2490/- on each share during the year under consideration. The AO further noticed that the valuation of such shares was made at Rs.1,650/- per equity share as per valuation report by Chartered Accountant (CA) as per DCF method. The AO proceeded to hold that the assessee has received Rs.850/- premium on each share more than the assessed value of per share at Rs.1,650/-. No prudent businessman would invest in the assessee company at the higher rate of Rs.850/- per share more than the assessed value of Rs.650/- per share. Disagreeing with the explanation given by the assessee the AO proceeded to hold the share premium of Rs.17,00,00,000/- shown by the AO as unexplained cash credit in the books of the assessee under section 68 of the Act and thereby added the same to the total income of the assessee.

4. The AO also noticed that the assessee has claimed interest payment of Rs.1,12,31,443/- a delayed payment of TDS as business expenditure which is not allowable under section 37 read with section 40(a)(ii) of the Act. The assessee has not made suo-moto disallowance on this ground either. Declining the contentions raised by the assessee the AO proceeded to disallow an amount of Rs.1,12,31,443/- on account of interest on TDS debited to the work in progress by reducing the same from the work in progress for the year under consideration.

5. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue as well as the assessee have come up before the Tribunal by way of filing appeal as well as cross objection respectively.

6. 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.

**Ground Nos.1 & 2 of Revenue's appeal (ITA No.1041/M/2023)**

7. Undisputedly during the year under consideration the assessee company has received FDI of Rs.49,80,00,000/- by way of issuing 870 class-A equity shares and 199000 class-c equity shares at the face value of Rs.10/- with premium of Rs.2490/- each from MSREF Indian Investment One Ltd. a company incorporated in Mauritius. It is also not in dispute that the assessee company has issued 4300% secured redeemable non convertible debentures of Rs.1,00,00,000/- at a discount of Rs.1,20,93,000/- total amounting to Rs.378,00,00,000/- to MSREF VII Triangle B.V., Mauritius and the discount on debentures was adjusted against share premium. It is also not in dispute that both MSREF Indian Investment One Ltd. and MSREF VII Triangle B.V. belong to Morgan Stanley Group. It is also not in dispute that valuation of the shares in question were made by CA by applying DCF method @ Rs.1650/- per equity share meaning thereby the assessee has received Rs.850/- per share more than the valuation made by CA. It is also not in dispute that

the assessee company has issued shares at the negotiating price of Rs.2500/- per share being above the fair valuation of Rs.1650/- as per Reserve Bank of India (RBI) guidelines which allow issuance of the equity shares above the fair valuation. It is also not in dispute that the assessee company had issued the equity shares in D-Mat form with National Securities Depository Limited (NSDL) and issue was duly intimated to the RBI by making compliances with registrar of company in ROC form No.5.

8. In the backdrop of the aforesaid undisputed facts the AO proceeded to make the addition of Rs.17,00,000/- under section 68 of the Act on account of excess share premium as against the fair value of per equity share. However, the Ld. CIT(A) has deleted the addition which is under challenge before the Tribunal.

9. Now the sole question arises for determination before he Tribunal is :

*“As to whether the Ld. CIT(A) has erred in deleting the addition made by the AO on account of equity share issued at much higher value than the value assessed by the independent valuer?”*

10. We have perused the impugned findings returned by the Ld. CIT(A) on this issue the operative part of which is extracted for ready perusal as under:

*“5.5. As regards the merit of the issue on facts it is seen that the appellant has submitted various documents in support of its claim, before the AO. This include copies of security subscription agreement, shareholder agreement, KYC and certificate foreign inward dividends, FC-GPR form, banking documents, etc. Thus, it cannot be stated that no details were furnished by the appellant. Moreover, the AO has not taxed the entire receipt of Rs. 50 crores but only excess premium of Rs.17 crores. The appellant had stated that the funds in receipt belong to Morgan Stanley Real Estate Fund. I also find that apart from the difference in premium which the AO has doubted (based on valuation report), no other independent material or reasoning has been brought in, which would warrant such an addition. Although no specific*

*explanation has been given for the subscription by the foreign buyer at a higher price, this fact alone would not be sufficient to sustain the addition. It is a fact that first proviso to section 68 requiring to explain the source of source is not applicable to non-residents. As stated earlier, no independent evidence has been brought out by the AO in any manner to question the genuineness of the transaction apart from the fact that excess premium has been paid by the subscriber. The totality of the facts point towards genuineness of the transaction. In the absence of concrete material to doubt the genuineness of the transaction, the addition u/s 68 does not sustain. No addition can be made u/s 56(2)(viib) either as the said provision is applicable only in respect of consideration received from a resident.”*

11. The AO has primarily made the addition on the basis of the sole fact that no prudent businessman would pay the excess premium to the tune of Rs.850/- per share (total amounting to Rs.17,00,00,000/-) as against the fair value assessed as per DCM method @ Rs.1650/- per equity share. The AO has also invoked the principle of preponderance of probability.

12. The Ld. D.R. for the Revenue challenging the impugned order argued by making assessment order as basis. The Ld. D.R. for the assessee Revenue also contended that the assessee company has failed to submit the financials of the purchaser namely M/s. MSREF Indian Investment One Ltd. so as to establish the genuineness of the transactions.

13. However, on the other hand, the Ld. A.R. for the assessee by relying upon the findings returned by the Ld. CIT(A) contended inter-alia that identity and creditworthiness of the investor company namely MSREF Indian Investment One Ltd. being belonged to Morgan Stanley Group is not in question; that the assessee company has brought on record board resolution for increasing authorized share capital and reclassification of shares; that the equity shares were issued and allotted after making due

compliances with the ROC form No.5 and ROC form No.2; that the shares were issued in D-mat form with NSDL; that the issue was duly intimated to RBI; that the assessee has given documents to HDFC Bank for further submitting RBI, submission of FC-GPR form, requirement letter of RBI and reply filed thereto and as such the FDI was received by the assessee after complying with all the statutory requirements under intimation to the RBI. The Ld. A.R. for the assessee further contended that after perusing all the documents which proved the identity and genuineness of the transactions the AO has accepted the remaining amount of Rs.33,00,00,000/- but disallowed the excess amount of Rs.850/- per equity share as per valuation report given by the CA.

14. The Ld. A.R. for the assessee further contended that under section 68 of the Act the assessee is not required to prove the “source of source” as proviso to section 68 is applicable from A.Y. 2013-14 onwards and applicable to resident investor only and relied upon the decision rendered by the Tribunal in case of Green Infra Ltd. v. ITO (2013) 38 taxmann.com 253 (Mum)(Trib.), decision rendered by Hon’ble Bombay High Court in case of Pr. CIT vs. Aditya Birla Telecom Ltd. (2019) 263 Taxman 539 (Bom) (HC) [SLP of Revenue dismissed PCIT V. Aditya Birla Telecom Ltd. (2021) 125 taxmann.com 85 (SC)/(2021) 278 Taxman 8 (SC)] and Vodafone India Services P. Ltd. vs. UOI (2014) 50 taxmann.com 300/368 ITR 1 (Bom.)(HC).

15. When we examine the findings returned by the Ld. CIT(A) qua the impugned issues in the light of the arguments addressed by the Ld. A.R. for the assessee and the Ld. D.R. for the Revenue the

impugned order passed by the Ld. CIT(A) does not suffer from any illegality or perversity for the reasons as under:

i. that the AO after accepting the necessary documents required for getting FDI by the assessee company viz. FC-GPR forms, banking documents, security subscription agreement, shareholder agreement, KYC and certificate of foreign inward dividends, requirement letter of RBI, intimation regarding allotment of the share to ROC in ROC form No.2 and the fact that shares were issued in D-mat form with NSDL, accepted substantial amount of investment i.e. Rs.33,00,00,000/- and disputed an amount of Rs.17,00,00,000/- on the ground that as per valuation of the share at Rs.1650/- per equity share investor company had no reason to pay Rs.2500/- per equity share.

ii. that it is nowhere case of the AO that the assessee company has received share premium from a bogus company rather the AO has himself brought the fact on record that the investor company is a group company of Morgan Stanly whose credentials are well established in the global market. In these circumstances to attract maximum FDI and keeping in view the emerging market the investor company must have paid extra amount per equity share as against the valuation of the shares as per valuation report.

iii. that we are of the considered view that RBI guidelines to attract the FDI do not bar for receipt of more premium per equity share than the valuation of the shares as per valuation

report. However, if premium less than the valuation report is taken it is not accepted by the RBI.

iv. that any transaction qua such investment cannot be examined on piecemeal basis as in the present case. Because the AO has accepted the substantial amount and questioned the excess amount which was more than the valuation report without disputing the books of accounts maintained by the assessee. We are unable to comprehend as to how a single transaction of making investment by a foreign entity in the assessee company as to purchasing equity shares with premium can be segregated as genuine and ingenuine.

v. that it is also settled position of law that the proviso to section 68 requires the assessee to prove "source of source" is not applicable to the year under consideration A.Y. 2012-13. Moreover, this investment is applicable to the resident investor only. So when the entire amount has been received as per RBI guidelines and shares were issued and allotted in accordance with the company as per ROC form 2, the addition made by the AO is not sustainable.

vi. that amount received by the assessee company on issue of share at premium is not income and a capital receipt as per decision rendered by Hon'ble Bombay High Court in case of Vodafone India Services Pvt. Ltd. (supra), which has been accepted by the Revenue by issuing the circular No.F.No.500/15/2014/APA-1 dated 29.01.2015. So in these circumstances the addition made by the AO under section 68 is not sustainable. So the ratio of the judgment rendered by

Hon'ble Bombay High Court in case of Vodafone India Services Ltd. (supra) that the premium on share issue was not on account of capital account transaction and does not give rise to income as has been accepted by the CBDT vide its circular (supra). The Hon'ble Bombay High Court in case of PCIT vs. Aditya Birla Telecom Ltd. (2019) 105 taxmann.com 206 (Bombay) while deciding the identical issue held that when in the Indian Telecom Company, investment was made by US based global private investment group through P5AHIML, a specially constituted Mauritius based company and there was no suspicious movement of funds and all the necessary permissions and clearances were granted by Government of India and other Government authorities for such investment, merely because of the fact that the investor would not earn any dividend income immediately would not be sufficient to brand impugned transaction as a sham transaction. In the case at hand also the investment has been made, no doubt by paying more premium than the valuation of per equity share, by a well known group company of Morgan Stanley Group by complying with all the instructions issued by RBI and by getting necessary permissions and clearances and substantial part of the transaction has already been accepted by the AO the excess amount invested by investor company over and above the valuation report cannot be treated as unexplained cash credit in the books of the assessee, more particularly when the entire amount has been received in due course as per FC-GPR form.

vii. that even otherwise except valuation report, which has been made basis for making addition, the AO has not brought on record any evidence if the transaction as to making excess payment of premium as per valuation report was a bogus or sham transaction.

viii. that when there is not an iota of evidence on record that the payment of excess premium by the investor to the assessee company was a sham transaction the addition made by the AO is not sustainable being based upon suspicion.

ix. that it has been rightly observed by the Ld. CIT(A) that addition can only not be made under section 56(2)(viib), the said provision being applicable qua consideration received from a resident Indian, whereas in the instant case the investment has been received from non resident company.

16. So in view of what has been discussed above, we are of the considered view that there is no illegality or infirmity in the impugned deletion of addition made by the AO. Consequently findings returned by the Ld. CIT(A) are upheld. Ground Nos.1 & 2 raised by the Revenue are accordingly dismissed.

**CO No.55/M/2023**

**Ground No.1 & 2 of assessee's cross objection**

17. During the course of argument the Ld. A.R. for the assessee has not pressed the ground No.1 & 2 raised in its cross objections, hence the same are dismissed.

**Ground No.3 & 4 of assessee's cross objection**

18. The assessee has claimed interest payment of Rs.1,12,31,443/- on delayed payment of TDS as business expenditure without debiting the same to the P&L account. However, the assessee has debited the same to the work in progress under the head "project under constructions" in its balance sheet for the year under consideration. The AO disallowed the claim of the assessee being not allowable expenditure under section 37(1) of the Act.

19. The Ld. CIT(A) confirmed the disallowance made by the AO by returning following findings:

*"6.4. In recent Tribunal decisions in the cases of DNV GL AS (formerly known as DET Norske Veritas AS) (ITA No. 4687/Mum/2016), M/s. New Modern Bazaar Departmental Store (ITA No. 590/Del/2018), Refex Industries Ltd. [2022] 139 taxmann.com 213 (Chennai Trib.), Universal Energies Ltd. (ITA No. 2761/Del/2018), Expat Engineering India Ltd. (ITA No. 503/Bang/2022), Bharat Commerce & Industries Ltd. 230 ITR 733 (SC) [1998] and Madras High Court decision in the case of Chennal Properties & Investment Ltd w. (1999) 239 ITR 435, It has been held that interest on late deposit of TDS is not an allowable deduction. In the case of Expat Engineering India Ltd. (supra), it has been held by the Hon'ble ITAT, Bangalore that -*

*"7. ....Obtaining installments from the department and paying interest cannot be considered as equivalent to borrowing moneys from a third party for payment of tax and paying interest on such borrowed money. The assessee's argument, if taken to its logical conclusion, would amount to saying that the assessee, had, in effect, borrowed moneys from the Income Tax Department, to pay tax for which he was paying interest to the Income Tax Department. Such is clearly, not the case, as it cannot be"*

*6.5. The issue can also be looked at from another angle. The Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs. CIT [2022] 143 taxmann.com 178 (SC) dated 12.10.2022, in para 53 and 54 of the order held that the amounts held in Trust by the employer stand on a different footing. In the instant case also, TDS dues are actually dues of the Government and it is held by the deductor in a fiduciary capacity as a Trustee. Thus, the interest paid for default on timely deposit of the same cannot be allowed as a business deduction.*

6.6. *As a logical corollary to the above, the appellant cannot be allowed the benefit of back door entry to making such a claim by shifting such payments to Work in Progress and claiming such expenses in future. Hence, the AO's action is upheld.*

6.7 *In view of the discussion, this ground stands DISMISSED.”*

20. We are of the considered view that the Ld. CIT(A) has rightly decided the issue in question by relying upon the order passed by the Tribunal and judgment rendered by Hon'ble Madras High Court in case of Chennai Properties Ltd. w. (1999) 239 ITR 435 that interest on late deposit of TDS is not an allowable deduction. So the contention raised by the Ld. A.R. for the assessee that interest on delayed payment of TDS is compensatory in nature and not penal is not sustainable, hence rightly disallowed by the AO as well as the Ld. CIT(A). So in view of the matter ground Nos.3 &4 raised by the assessee in its cross objections are dismissed.

21. In view of what has been discussed above, the appeal filed by the Revenue as well as cross objections filed by the assessee are hereby dismissed.

**Order pronounced in the open court on 12.09.2023.**

**Sd/-**  
**(GAGAN GOYAL)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

Mumbai, Dated: 12.09.2023.

\* 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.