आयकर अपीलीय अधिकरण, हैदराबाद पीठ में

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI MANJUNATHA G., ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / **ITA No.226/Hyd/2021**
(निर्धारण वर्ष / Assessment Year: 2015-16)

Menzies Bobba Ground Handling Services Private Ltd (now merged with Menzies Aviation Bobba (Bangalore) Pvt.Ltd.)	Vs.	Dy.Commissioner of Income Tax, Circle-5(1) Hyderabad

[PAN : AAFCM0724P]

अपीलार्थी / Appellant प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri Sriram Seshadri, AR
राजस्व द्वारा/Revenue by: Shri Madan Mohan Meena, DR
appeared for Shri Kumar Pranav, CIT -DR

सुनवाई की तारीख/Date of hearing: 20/08/2024
घोषणा की तारीख/Pronouncement on: 09/10/2024

आदेश / ORDER

PER K. NARASIMHA CHARY, J.M:

Aggrieved by the order dated 30/03/2021 passed by the learned Principal Commissioner of Income Tax, Hyderabad in the case of Menzies

Bobba Ground Handling Services Private Limited ("the assessee") for the assessment year 2015-16, the assessee preferred this appeal.

2. Assessee is a private limited Company incorporated under the provisions of Companies Act, 1956 and is engaged in the business of providing ground handling services which includes ticketing, check-in, load control, messaging & standard communication, aircraft loading & unloading, cabin cleaning, aircraft ground support equipment, aircraft tow & pushback, special services, baggage services & cargo transfers. For the assessment year 2015-16, the assessee filed the return of income on 30/11/2015 admitting total income of Rs.2.99 crores after claiming deduction under section 80-IA of the Income Tax Act, 1961 (the Act) amounting to Rs.7.46 crores as per the normal provisions of the Act and declaring book profits amounting to Rs.9.05 crores under Section 115JB of the Act. According to the assessee, during the course of assessment proceedings, various details and information were called for, which were duly submitted by the assessee from time to time. Assessment was concluded by an order dated 12/12/2017 under section 143(3) of the Act with the adjustment of Rs.7.46 crores disallowing the claim of deduction under section 80-IA of the Act. Assessee had preferred an appeal before learned CIT(A) and it was decided in favor of the Assessee. Revenue preferred an appeal before the Tribunal and the same is pending.

3. Subsequently, on a perusal of the assessment record, learned Principal Commissioner of Income Tax found that during the year, as a part of restructuring of the existing capital structure and pursuant to the Scheme of Capital Reduction as approved by the Hon'ble Jurisdictional Andhra Pradesh High Court, the Assessee cancelled and extinguished 506 Class 1 Compulsory Convertible Cumulative Preference Share (CCCPS) having a face value of Rs.6,43,137/- by paying Rs. 1,54,410/- per share which is Fair value as per valuation report to the shareholders, namely, Rs.7.82 crores in total. Balance amount i.e., Rs.24.72 crores, namely, the difference between Rs.32.54 crores and Rs.7.82 crores was transferred to the capital reserves account. The scheme of capital reduction was approved by the Hon'ble Andhra Pradesh High Court on 03/12/2014.

4. According to the learned Principal Commissioner of Income Tax, learned Assessing Officer failed to examine the issue of capital reduction and therefore, after initiating proceedings under section 263 of the Act, set aside the original assessment order passed under section 143(3) of the Act

by passing an order under section 263 of the Act dated 30/03/2021 holding that the assessment order is erroneous and prejudicial to the interest of the revenue and directed the learned Assessing Officer to examine the said issue in detail and pass a consequential order as per law. Aggrieved by such an order, Assessee preferred this appeal.

5. Learned AR submitted that, during the course of proceedings, the Assessee was also asked to furnish details on the capital reduction scheme and appropriate details were duly submitted along with the explanation and supporting documents on the nature of scheme involved, namely, copy of the order of the Andhra Pradesh and Telangana High Court in connection with the reduction of share capital, Share Subscription Agreement and the copy of valuation report certifying the fair value of the preference shares vide submissions dated 19/10/2016 and 17/11/2017, and it is only on consideration of all such material, learned Assessing Officer completed the assessment. He, therefore, submitted that the allegation of non-examination of this fact by the learned Assessing Officer is factually incorrect. According to him the learned Assessing Officer conducted further inquiry more specifically in connection with the capital reduction during the year vide notice under Section 142(1) of the Act dated 19/07/2017 and thereafter upon consideration of the facts and materials submitted by the assessee vide letter dated 17/11/2017 and after applying his mind upon the relevant documents had completed the assessment vide order dated 12/12/2017.

6. He further submitted that a detailed enquiry and examination with respect to the issue under consideration was undertaken by the learned Assessing Officer in the course of assessment as well as reassessment proceedings, even if one were to say that such enquiry was inadequate, the same cannot be a ground for proceedings under Section 263 of the Act. By placing reliance on the decisions reported in CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Delhi HC), Spectra Shares and Scrips Pvt. Ltd vs. CIT (354 ITR 35) (AP HC) and Indu Fine Lands (P.) Ltd (45 taxmann.com 307) - ITAT, Hyderabad he submitted that there is a distinction between ‘lack of enquiry’ and ‘inadequate enquiry’. It is only in cases of 'lack of inquiry' that such a course of action under section 263 would be open.

7. On this score, he submitted that the assessment order cannot be held to be erroneous and prejudicial to the interests of the Revenue on this issue, because all the relevant enquiries in connection with the capital

reduction was done by the learned Assessing Officer during the course of assessment proceedings and assessment has been completed by the learned Assessing Officer only after being satisfied with the documents and explanation submitted by the assessee.

8. His next argument is that the learned Principal Commissioner of Income Tax had invoked the proceedings stating that the fair market value of the shares is different from the value mentioned in the valuation report submitted by the Assessee, but in this process, he did not refer the matter to the Departmental Valuation Officer for valuation of such shares or obtaining clarifications from the Assessee, and therefore, without establishing that the view of the learned Assessing Officer is unsustainable in law, learned Principal Commissioner of Income Tax ought not to have invoked revision under Section 263 of the Act.

9. While drawing our attention to the show cause notice dated 4/3/2020, wherein it was stated that if the DCF method is wrong and the FMV is equal to the par value, then the assessee stands to a gain of Rs.24,72,45,262/- under section 56(2)(viia) of the Act which the learned Assessing Officer failed to examine while passing the Assessment Order. Learned AR submitted that the learned Principal Commissioner of Income Tax failed to substantiate as to how there is failure of inquiry by learned Assessing Officer and come to a conclusion merely based on suspicion. He, therefore, submitted that the assessment order cannot be said to be erroneous and prejudicial to the interests of the Revenue without pointing out any legal or factual infirmity or without carrying out enquiry. Therefore, the proceedings under section 263 are invalid and are liable to be quashed. Lastly he submitted that after submitting all the material as required by the learned Assessing Officer, assessee does not have control over the proceedings and merely because the learned Assessing Officer does not deal with the taxability of the gain on capital reduction and have not passed a detailed speaking order in this connection, the same cannot be a ground for the learned Principal Commissioner of Income Tax to invoke jurisdiction under section 263. In this connection, the Assessee relied upon the decision of the Hon'ble Supreme Court in the case of Marico Ltd. 272 Taxman 179.

10. In so far as the merits of the case are concerned, Learned AR submitted that though the learned Principal Commissioner of Income Tax in the notice dated 04/03/2020 opined that the learned Assessing Officer failed to examine the gain of Rs.24,72,45,262/- under section 56(2)(viia) of

the Act, seems to have accepted the contention of the assessee that section 56(2)(viia)(ii) of the Act has no application to the case of the assessee, where the company reduced the share capital by way of reducing the face value of the shares, and proceeded to pass the impugned order stating that the capital gain should be brough to tax under section 56(i) of the Act. Learned AR submitted that a reading of section 56, shows that where the legislature intended to tax the capital transactions, the same have been specifically included under specific clauses of section 56(2) of the Act, lest the same cannot be brought to tax under the residuary head of section 56(1) of the Act, and therefore, unless a receipt is a revenue receipt, it cannot be in the nature of income and unless it is in nature of income, it cannot be considered for taxation under section 56(1) of the Act.

11. Per contra, it is the argument of the learned DR, that there is transfer of shares by reducing the share capital and paid off the value of shares to AEs by the assessee and it constitutes transfer under section 2(47) of the Act, and therefore, the difference amount which was credited to reserve is the gain of the assessee and liable to be brought to tax, but the learned Assessing Officer failed to examine this issue in the light of 56(2)(viia)(2) of the Act. According to the learned DR, the reason for reduction of share capital was in view of the excess funds available with the assessee and as per the orders of the Hon'ble High Court, the same was approved, but instead of paying the shareholders at the par market value of Rs.6,43,137/-, the assessee resorted to DCF method to arrive at a value of Rs.1,54,510/- and thereby paid a sum of Rs.7,81,82,060/- to the shareholders and diverted the balance of Rs.24,72,45,262/- to capital reserve of the balance sheet and this amount is nothing but the gain of the assessee in the share transfer transaction and therefore, it was properly directed to be brought to tax by the learned Principal Commissioner of Income Tax. According to the learned DR, the twin conditions of erroneous insofar as prejudicial to the interest of the Revenue are satisfied in this case, for non-examination of the issue by the learned Assessing Officer, and therefore, there are no merits in the case of the assessee.

12. We have gone through the record in the light of the submissions made on either side. In the notice dated 19/07/2017, issued under section 142(1) of the Act, the learned Assessing Officer sought information in respect of Capital Reduction during the year, namely, copies of Special Resolution passed in the extraordinary general meeting conducted on 08/09/2014, all applications / forms along with its enclosures filed before

the Tribunal / Registrar of Companies in respect of capital reduction, Valuation Report for arriving at fair value of Rs.1,54,510/- per each Class I CCPS share; and also the copy of Valuation Report for the purpose of examining the issue relating to the conversion of Class I CCPS shares into equity shares with face value of Rs.100/- per share with a premium of Rs.6,43,037/-. Apart from this, in the notice dated 30/08/2016, the learned Assessing Officer sought information relating to the large share premium received during the year under section 56(2)(viib) of the Act.

13. By way of reply dated 17/11/2017, the assessee furnished a detailed note on eligibility to claim deduction under section 80(A)(i)(b) of the Act and copy of valuation report for the valuation of preference shares issued by the assessee. So also, vide letter dated 19/10/2016, the assessee furnished Annual Report inclusive of P&L, Balance Sheet with Schedules, Tax Audit Reports including Forms 3CEB & 29B, Income Tax Return and Explanation to the items (a) to (g) of Point 6 along with copies of Form 15CA, High Court Order & Share Subscription Agreement, etc. It is only after obtaining all this material, the learned Assessing Officer completed the assessment by order dated 12/12/2017. There is sufficient material to reach a conclusion that the learned Assessing Officer applied his mind to the issue in question by seeking the assesses to furnish relevant material and only after obtaining the same, he completed the assessment. It is therefore, clear that merely because there is no elaborate discussion in the assessment order on this aspect cannot be a ground to conclude that the learned Assessing Officer concluded the assessment by omitting any particular aspect, when there was an enquiry on that aspect by seeking material, not once, but twice and obtaining the relevant requisite information. As has been held by the Hon'ble Supreme Court in the case of Cognizant Technology Solutions (SLP No.92/2003), the assessee has no role to play and is not the author of the assessment order and hence the manner and contents of the assessment order as framed is not determinative whether or not it is a case of change of opinion. Since we hold that there was adequate enquiry in this matter on the score of adequate enquiry, the assessment order does not suffer any infirmity.

14. Turning to the prejudicial nature of the assessment order to the interest of revenue is concerned, undisputed facts are that during the year under consideration, as a part of restructuring of the existing capital structure and pursuant to the Scheme of Capital Reduction, as approved by the Hon'ble Jurisdictional High Court, the assessee cancelled and

extinguished 506 Class 1 Compulsory Convertible Cumulative Preference Share (CCCPS) having a face value of Rs.6,43,137/- by paying Rs.1,54,410/- per share by determining the Fair value by adopting the DCF method, as per valuation report to the shareholders. Assessee, therefore, paid a sum of Rs.7.82 crores to the shareholders and the balance amount of Rs.24.72 crores being the difference between Rs.32.54 crores and Rs.7.82 crores was transferred to the capital reserves account as required by the Generally Accepted Accounting Principles.

15. Learned Principal Commissioner of Income Tax, in the notice issued under section 263 of the Act, initially stated that if the DCF method is wrong and the FMV is equal to the par value, then the assessee stands to a gain of Rs.24.72 crores under section 56(2)(viia) of the Act, which the learned Assessing Officer failed to examine. Assessee pleaded in the written submissions that section 56(2)(viia) of the Act is not applicable because the expression receive in the context of that section does not include the consideration for assessee's own shares and placed reliance on the decision of the Tribunal in Vora Financial Services Private Limited Vs. ACIT (2018) 96 Taxmann.com 88 (Mumb.Trib.).

16. Having considered the contentions raised by the assessee, the learned Principal Commissioner of Income Tax has given a go bye to the proposed application of section 56(2)(viia) of the Act and proceeded to observe that the alleged gain of Rs.24.72 crores resulted in the buy back of the class I CCCPS should have been brought to tax under section 56(1) of the Act. First objection of the assessee to this observation of the learned Principal Commissioner of Income Tax is that the learned Principal Commissioner of Income Tax did not bridge the gap between "if the DCF method is wrong…. …." and a clear finding that the "DCF method adopted by the assessee is wrong….." for any reasons. Merely labouring under hypothetical possibility of DCF method adopted by the assessee going on, learned Principal Commissioner of Income Tax concluded that the assessment order is erroneous and prejudicial to the interest of Revenue. On a careful reading of the impugned order, we find it to be so.

17. Learned Principal Commissioner of Income Tax seems to have accepted the contention of the assessee that in the cases of buyback of its own shares by a company, even if lesser price was paid to the shareholders, section 56(2)(viia) of the Act has no application. Learned Principal Commissioner of Income Tax however did not state in the impugned order

as to how in such situation, 56(1) of the Act will be applicable. In the case of CIT vs. M/s. Crescent Investment Co. (1995) 216 ITR 100 (SC) the Hon'ble Court held that buyback transactions would not typically be treated as a transfer for capital gains purposes.

18. From a reading of section 56, it can be understood that where the legislature has intended to tax the capital transactions, the same have been specifically enumerated under specific clauses of section 56(2) of the Act, and if any entry is not to be found in section 56, the same would be covered by section 56(1) of the Act. It, therefore, goes without saying that unless a receipt is in the nature of Revenue receipt, it does not fall in the ambit of section 56(1) of the Act to be taxed as income. Since the issuance of shares is in the realm of capital transaction, the receipt being a capital receipt, the cancellation of shares and transfer of any amount in relation to that transaction to the capital reserve account as required by the Generally Accepted Accounting Principles will also assume the character of capital receipt, and on that score does not fall in the ambit of section 56 of the Act. We, therefore, agree with the submissions of the Learned AR that the assessment order cannot be said to be bad, being prejudicial to the interest of Revenue.

19. Viewing from any angle, we find it difficult to agree with the learned Principal Commissioner of Income Tax that the assessment order is erroneous insofar as it is prejudicial to the interest of Revenue and therefore, the revisionary jurisdiction assumed by the learned Principal Commissioner of Income Tax cannot be sustained. We, accordingly, quash the impugned order.

20. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this the 9th October, 2024.

Sd/-	Sd/-
(MANJUNATHA G.)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 09/10/2024
L.Rama, SPS

Copy forwarded to:

1. M/s Menzies Bobba Ground Handling Services Private Limited (now merged with Menzies Aviation Bobba (Bangalore) Private Limited, Cargo Terminal 1, Kempegowda International Airport, Bangalore
2. The Deputy Commissioner of Income Tax, Circle-5(1), Hyderabad
3. The Pr.CIT
4. The Ld.DR, ITAT, Hyderabad
5. Guard File

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ITAT, HYDERABAD