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

**BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER**
**AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA Nos. 696 & 697/Hyd/2014**
**Assessment Year: 2009-10 & 2010-11**

| | | |
|---|---|---|
| Bharathi Cement Corporation Pvt. Ltd., Hyderabad.<br><br>PAN – AADCR 3079 G | vs. | Asst. Commissioner of Income-tax, Circle – 2(3), Hyderabad. |
| (Appellant) | | (Respondent) |

Assessee by : Shri Nageswar Rao
Revenue by : Smt. M. Kiranmayee

Date of hearing 08/06/2018
Date of pronouncement 10/08/2018

**O R D E R**

**PER S. RIFAUR RAHMAN, A.M.:**

Both these appeals filed by the assessee are directed against the orders, both, dated 25/02/2014 of CIT(A) – III, Hyderabad for AYs 2009-10 & 2010-11.

2. Briefly the facts as taken from AY 2009-10 are, assessee is a company engaged in the business of manufacture and sale of cement under the name Bharathi Cement. It filed its return of income for the AY 2009-10 on 30/09/2009 declaring total income of Rs.2,91,01,250/-.

2.1 During this AY, assessee has offered income of Rs. 2,91,01,250/- as 'income from other sources' on account of interest earned on fixed deposits and it did not commence its business during this AY, hence, there is no income form the head 'income from business or profession'.

2.2 During the assessment proceedings, AO noted that assessee was incorporated in the year 1999 as the company with limited liability and initially it is registered as Raghuram Cements. The name of the company was changed to the present name in August'2008. The assessee has its manufacturing unit established at Nallalingayapalli Village, Kamalapuram Mandal, Kadapa District, A.P. with a licensed capacity of 5 million tonnes per annum. The details of shareholders and directors of the company are as under:

Sri YS Jagan Mohan Reddy 66.43% equity
M/s Silicon Builders (P) Ltd. 33.15% equity
(company owned and controlled by Shri YS Jagan Mohan Reddy)

Directors

S/Shri YS Jagan Mohan Reddy
Harish C Kamarthy
J Jagan Mohan Reddy
Ravinder Reddy
V.R. Vasudevan

2.3 During the current AY, the assessee issued 0% convertible preferential shares with a face value of Rs. 10/- per share and a premium of Rs. 1,440/- per share in a private placement to the following investors as detailed below:

| Name and postal address of the shareholder | No. of shares allotted | Rate at which allotted | Amount of share capital allotted (Rs.) | Share premium | Share allotted on money | Total investment (Rs.) |
|---|---|---|---|---|---|---|
| Dalmia cements Ltd., New Delhi | 1,37,930 | 1,450 | 13,79,300 | 19,86,10,200 | | 20,00,00,000 |
| India Cements Ltd., Chennai | 2,09,147 | 1,450 | 20,91,470 | 30,11,71,680 | 705 | 30,32,63,855 |
| Suguni Constructions Pvt. Ltd., Hyd (company belonging to Sri Nimmgadda Prasad | 1,37,931 | 1,450 | 13,79,310 | 19,86,20,640 | 50 | 20,00,00,000 |
| Total | 4,85,008 | 4,350 | 48,50,080 | 69,84,02,520 | 755 | 70,32,63,855 |

2.4 AO observed that the above investment made by the investors are not technical investments rather in an arrangement between the investors and directors of the assessee company in order to pass on the funds through the assessee, this is a method adopted by the directors to pass on the contracts and other facilities to the beneficiaries i.e. investors as directors were influential persons in the, then, State Govt of A.P. To investigate the above investments, AO issued summons u/s 133(1) to the above investors and the senior officers of the company appeared before the AO and recorded the statement. However, none of them agreed that they have invested under any sort of influence. AO brought on record various incidences in which the above investors have benefitted from the State Govt. policies and treated the above receipt of share premium by the assessee as income of the assessee u/s 28(iv) of the Act.

3. Aggrieved by the above order of AO, the assessee preferred an appeal before the CIT(A).

4. During the course of appeal proceedings, the assessee filed additional evidence and the CIT(A) sent the same to the AO for a remand report. AO along with remand report, also submitted additional information which was collected by him subsequent to passing of the assessment order, which is related to subsequent findings in search operation in the case of Dalmia Bharat Enterprises on 21/01/2012. Assessee was given a copy of such information and also assessee was asked to submit its argument on all the issues before the AO, so that a comprehensive remand report can be submitted by the AO. Accordingly, AO submitted remand report.

5. Ld. CIT(A) issued a notice of enhancement to the assessee on 31/01/2014 to show cause as to why the entire receipt from the three investors amounting Rs. 70.32 crores not to be assessed under the head ‘income from other sources’. Assessee filed its objections before

the CIT(A) and first objection of the assessee was that information submitted by the AO during the appeal proceedings was nothing but additional evidence and as per Rule 46A, only assessee can file additional evidence and not the AO. On this issue, ld. CIT(A) relying on the decision in the case of Goel Die Cast Ltd., [2008] 297 ITR 72 (P&H) observed that the CIT(A) is bestowed with powers which are co-terminus with that of the AO and during the course of appeal proceedings, CIT can call for information or take cognizance of any information presented before him even if it is from the AO. He observed that information supplied by the AO was collected during the search proceedings in the case of Dalmia Bharat Enterprises and information was also collected by AO during other assessments and penalty proceedings in the case of group companies belong to the assessee and accordingly, dismissed the argument of the assessee on this count and justified the information submitted by the AO to be used against assessee.

5.1 On the main issue, i.e. addition on account of share premium collected by the assessee, assessee has filed the following arguments before the CIT(A):

> *"• The appellant has received money in the form of investments in preference shares from reputed companies. Their sources are not in doubt and they have fully confirmed all the investments. Therefore, section 68 cannot be invoked.*
>
> *• With regard to section 28 of the income tax act, the appellant argued that the amount of share premium cannot be treated as a perquisite under the aforementioned section.*
>
> *• There is also no applicability of section 56 of the Income Tax Act in the current year as the section is applicable from the assessment year 2013-14.*
>
> *• With regard to the amount of premium, the appellant states that it is the prerogative of the investor as to what he deems to be the amount he would like to pay for certain investments. The appellant has also relied upon the ruling of the honourable ITAT Mumbai in the case of Green Infra Ltd ITA 7762/2012/Mum.*

*• Further, it was stated that it is an un-controverted fact that all the investors have confirmed the investment including the price at which it was made. It's also argued that just because an investor has purchased a controlling stake in another company and not done so in the case of the appellant, it does not lead to any conclusion that it was not logical to do so.*

*• Even if the Nimmagadda group may have been involved in routing unaccounted money, that can merely lead to taxation of such money in their hands.*

*• Further if any investments are considered to be irretrievable payments, then it is for the assessing officer to apply section 41 or any other applicable provision to that investor and not to the appellant.*

** The assessee also argued that there was no doubt about the fact that the investment in shares inclusive of share premium was a capital investment and accordingly it could not be brought to tax as a revenue receipt.*

5.2 After considering the submissions of the assessee and the information available before him, the CIT(A) confirmed the additions made by the AO by appraising further evidence before him. He brought on record, certain schemes and benefits allotted by the Govt. of AP to the investors like permission for industrial water supply to the India Cements Ltd., environmental clearances and clearance of change of land use to subsidiary companies of Dalmia Cements Ltd. and issue of licence for land for ports and giving clearance for various plots of land owned by Nimmagadda Group and their relatives.

5.3 By relying on the above incidences of benefits passed on to the investors in the assessee company, the CIT(A) opined that the investors received huge benefits and largesse from the Govt. of AP during the period of making investment. He further opined that there is unmistakable connection between huge concessions received by the three investors from the Govt. of AP and the investments in preferential share capital in the assessee company and, therefore, it is clear from the substantial evidence and documentary evidence

uncovered during the search proceedings, referred to that concessions and so-called investments are not co-incidental, but, they are definitely part and parcel of one integrated plan for quid-pro-quo. Further, he made comparison with the investments made in the assessee company and the shares available in the market of the same cement industry and brought out following points before adjudicating the issue and the same are as under:

> *• The three companies i.e. M/s Dalmia Cements Ltd, MIs India Cement Ltd and M/s Suguni Constructions Private limited together invested Rs. 70,32,63,855/- were allotted 0% convertible preference shares at a total price of Rs. 1,450/- per share i.e. at a premium of Rs. 1,440/- per share.*
>
> *• In other words, by spending far more than the existing capital of the appellant company, the so-called investors obtained only 4,85,008 shares i.e. 0.43% of shareholding in the assessee company.*
>
> *• They also obtained 0% voting power because preference shares do not carry any voting power.*
>
> *• The so-called investors also ensured that they would never get any return on their investment because the shares were 0% preference shares.*
>
> *• Not only that, if and when the appellant company became profitable, these three investor companies would not gain any return because dividend would be given only to the equity shareholders.*
>
> *• Further, the investor companies had provided 99.4% of their money to the appellant as premium i.e. this amount would never be counted whenever any return was to be given and the amount would never be returned back to' these investors.*
>
> *. Normally, investments are made at a premium when it is understood after due diligence that the future returns would be such that in spite of the premium the return would add wealth in real terms to the investor.*
>
> *• There is no evidence of any due diligence having been conducted by the three investing companies.*

• *In the current case, the investments were abinitio dead because there was never any hope of any return on them and neither there was any possibility of the original investment being returned back.*

• *In the report sent by the assessing officer dated 14/06/2013, the details of the average share price of the top seven cement company in the country is compared. This chart is reproduced* below:-

| S.No. | Name of the company | Share prices of the Cement companies during the relevant period of investment | | | | Sales turnover during 2008-09 in Crores. |
|---|---|---|---|---|---|---|
| | | May/June 2008 | July 2008 | August 2008 | November 2008 | |
| 1 | ACC | 628.00 | 533.60 | 626.00 | 405.00 | 7474.15 |
| 2 | UltraTech Cement | 627.00 | 535.00 | 635.00 | 318.00 | 6436.96 |
| 3 | Ambuja Cements | 81.90 | 82.00 | 81.00 | 56.50 | 7100.00 |
| 4 | Birla Cements | 180.00 | 161.00 | 187.00 | 94.00 | 2057.89 |
| 5 | JK Cements | 139.00 | 125.00 | 131.00 | 50.00 | 1502.46 |
| 6 | KCP Cements | 32.80 | 26.00 | 30.18 | 13.25 | 405.26 |
| 7 | Madras Cements | 121.25 | 125.00 | 133.20 | 69.25 | 2538.50 |
| 8 | India Cements Ltd. | 121.25 | 125.00 | 133.20 | 69.25 | 2538.50 |

5.4 The CIT(A) adjudicated the issue by observing as under:

*"6.15 In the present circumstances, the situation and conditions warrant that the test of human probability be applied and the real should be unearthed from the cloak of the apparent. As discussed in detail supra, the entire set of transactions smacks of non-genuineness and is absolutely contrary to normal human behaviour, especially in case of three companies.*

*6.16 From above it is clear that the entire amounts received in the form of preference share payments as well as the "premium" are in the nature of income. They are not exempt under any section of the Income Tax Act. Thereafter, it is seen that the fact that these transactions have been classified as "Preference Shares" and "Premium" does not mean that these receipts are in the form of a Capital receipt. The entire classification is done with a motive for tax evasion. As has already been discussed in detail, the entire amount has been paid as a quid pro quo for the favours which the assessee has has obtained for these persons from the Andhra 'Pradesh Government. No equity of the assessee company has been given to these people and they have not received any rights on the income or assets and have 0% voting rights. The entire money has been given and forgotten. By no stretch of imagination can such transactions be classified as genuine investment in equity as the equity structure of the appellant remains unchanged. Therefore the amounts received by the appellant are in the nature of a*

*Revenue Receipt, to be classified as Income of the year. Since the income is not in the nature of a business or salary or capital gains, it has to be classified in the resultant category of "Income from other sources".*

*6.17 The assessee has also argued during appeal proceedings that if at all the additions are to be made, they should be in the hands of Mr. Jagan Mohan Reddy, in his personal capacity and not in the hands of the assessee company. This argument is not valid because the entire payments are received in the hands of the assessee.*

*6.18 Given the above facts and circumstances and applying the test of human probabilities, I hold that the entire amount of 70,32,63,855/- received by the assessee from the three companies referred to supra was in the nature of "Income from Other Sources" to be assessed as such u/s 56 of the Income Tax Act. The addition made by the assessing officer on account of only the share premium is enhanced as such."*

6. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds of appeal:

*"1. The Learned Commissioner of Income-tax (Appeals)-III, Hyderabad ("Ld. CIT-A") has erred in law as well as on facts while:*

*a. Confirming addition of Rs.69,84,11,520/- towards share premium on shares allotted in Assessment Year ("AY") 2009-10 u/s 56 of the Income Tax Act, 1961 ("the Act");*

*b. Enhancing income by Rs.48,52,335/- u/s 56 of the Act towards face value of the shares allotted in that year.*

*2. The order of the Ld. CIT-A is based on surmises, conjectures and presumptions and does not take into consideration extensive evidence and material*

*3. The impugned order selectively relies on incomplete investigations which have not reached finality and reaches incorrect, unsubstantiated and unlawful conclusions.*

*4. The impugned order is completely erroneous on facts and in law including pages 31 to 34 of the same., is a bundle of contradictions and several inconsistent, contradictory and unsubstantiated reasons are cited and the entire decision in making process is completely vitiated . The conclusions reached are incorrect and deserve to be set aside/ quashed*

*5. The Ld. CIT-A has neither properly appreciated nor set out any reason as to why the judgments cited by the assessee were not applicable to the matter under appeal and has further placed reliance on judgments whose facts are clearly distinguishable from those of the Appellant. Further the conclusions reached are contrary to decisions of Hon'ble Court(s) and law.*

*6. The Ld. CIT-A has wrongly applied section 56 to a transaction that is capital in nature.*

*7. The impugned order ignores the findings of the AO, approbates and reprobates while enhancing the income without citing any valid reasons.*

*The above grounds are independent and without prejudice to each other. The Appellant craves leave to add to, alter, supplement, amend, vary, withdraw or otherwise modify the grounds mentioned hereinabove at or before the time of hearing."*

7. Ld. AR of the assessee submitted written submissions, which are as under:

"*Company is not business of providing any type of services and is engaged in manufacturing and sale of cement. Assessee company has a distinct legal entity from its shareholders/promoters.*

*Representatives from investor companies were examined on oath and have confirmed making the investment at premium. Complete details and confirmation of transaction available and are not contradicted in any why that shares were acquired at a premium as continues to be reflected in books of accounts of Appellant Company.*

*Quantity of Share premium on shares of private company are not regulated by law and is based on commercial negotiations. Reference to facts noted at para 40 in recent decision in Flipkart India ITA 202 /Bang/2018 shows that premium is based on perception and business expectations of investors and in present case the investors were admittedly experienced and knowledgeable managements of listed/ reputed companies.*

*Share premium money received is fully accounted and continues to remain in the company to date fully compliant with section 78 of companies Act. Allegations that the same could be towards services by promoters are totally baseless and not supported by any material. Amount of share premium is*

*permitted to be negotiated between investor and company and there are no restrictions on the quantum. Subsequent investment in April 2010 made by PARFICM (overseas third party investor) which has brought in huge premium amount Rs. 1440 CRORES out of Rs. 1780 crores appearing as on date in the share premium account, was also negotiated and clearly and undoubtedly much more than share premium determined as per prescribed methods.*

*Bharati Cement Corporation Limited as legal entity is distinct and separate from promoters or shareholders, presumptions made in impugned order to the contrary are contrary to settled principles of law, unlawful, factually baseless and invalid. As no amount of share premium is alleged or even shown to have been allowed as pass through by the company there is no basis for suspicions and wild allegations. Without prejudice, even if lifting of corporate veil is permissible, the consequence would not lead to taxation of share premium in the hands of Appellant Company.*

*Presumptions of some service/benefits being allowed by government of state of Andhra Pradesh to investor companies, even if presumed to be true for argument sake cannot justify taxation of any amount in the hands of Appellant company, as being a legal entity Appellant Company was neither in business of providing such services or was actually involved in any way.*

*As directed during the course of hearing, we have already filed bank accounts into which the entire share investment including share premium was received, and how the same was subsequently invested into fixed assets owned by company ( cash flow statements), details of profits made by investors from such investment in Appellant Company. Details provided also establish that the entire sum and even subsequent share premium amount received from PARFICM remains invested in Appellant's business as on date of this hearing.*

*Ld. AO brought impugned share premium to tax under Section 28 (iv) and section 68 but the Ld. CIT (A) has confirmed that the same is taxable under section 56. Department is not in appeal against Ld. CIT (A) order. The subsequent amendment by way of section 56 2(viib) effective 1.4.2013 i.e., Ay 1314 cannot be applied for impugned transactions completed during Ay 9-10 and 10-11. Facts on record confirm that section 68 and section 28 (iv) have no application at all.*

*Hon'ble Tribunal's pointed query to Ld. DR ( at earlier hearings of these appeals) on limb of sections 56, 28 and 2(24) under which share premium of the nature involved in present appeal*

*would be taxable did not result in any response, much less reasonable response.*

*Appellant referred to and relied upon decisions of courts in Larsco entertainment (ITA 249/HYD/2014), Subhlakshmi Vanijya Pvt. Ltd., (ITA 1l04/KOL/2014), Green infra (ITA 7762/MUM/2012), Vodafone decision 3411TR l(at paras 71 and 619) ,26 ITR 736 Dhirajlal Giridharilal and 66 ITR 725 Ramakrishna pillai (SC)" .*

7.1 Referring to the above, the ld. AR submitted that share premium amount received during AY 2009-10 and 2010-11 by the assessee is capital receipt and cannot be taxed as revenue receipt under the provisions of the Act as applicable to extant period. He, therefore, prayed that the additions made to returned income on this count be deleted in toto. He relied on the following cases:

1. Vodafone India Services Pvt. Ltd., [2014] 368 ITR 1 (Bom.)
2. Credit Suisse Business Analysis (India) Pvt. Ltd. Vs. ACIT, ITA No. 993/Mum/2015, order dated 05/08/2016.

8. The ld. DR also filed synopsis of arguments, which are as under:

"*1.NON-GENUINENESS OF THE TRANSACTION:*

*1. The promoter of the assessee company was having huge political clout during the period relevant for the assessment year, having regard to the fact that his father was the chief minister of the State of Andhra Pradesh.*

*2 .. The investing Companies viz., MIs. Dalmia cements, MIs. Gilchrist Investments Pvt Ltd., MIs. Alpha Villas Pvt Ltd. & MIs. Alpha Avenue Pvt Ltd, have obtained huge benefits from the Government of Andhra Pradesh in various forms. As a gratuitous measure, they have remitted huge amounts into the assessee company in which Mr. Y.S. Jagan Mohnan Reddy is the major shareholder. The said remittance was termed as" investment" and were allotted 0% convertible preference shares.*

*3. All the investors by spending more than the existing capital of the assessee obtained only 0.3% of shareholding in the company. The investors never had any say in the management*

*of the affairs of the Company. They did not have voting power and were not entitled to any profits of the assessee.*

*4. The subject investment was not done upon obtaining any due diligence.*

*5. The investments made by Nimmagadda group were always in huge profit fetching areas like medical, media & entertainment, hospitality etc., but for the first time invested at a huge rate in a Cement Company as stated above, that too in an inexperienced Company which did not commence its production and also without expecting any earning/profit out of the subject investment.*

*6. The said investment is unscientific and not based on any due diligence. There was no guarantee assured by the assessee that the investors would get any gain out of their investment.*

*7. The directors in fact stated before the AO that they had no say in fixation of the price for shares. When the investors never had any say in fixation of price of the share or in the affairs of the company, it is inconceivable that such a giant business group, have invested in the assessee company with no track record. The so-called investment is an arm-twisted investment.*

*8. Everybody is entitled to arrange their financial transactions in such manner to avoid tax liability or lessen the burden, but the arrangement should be real and genuine and cannot be sham or make belief arrangement.*

*9. In the facts of the facts of the present case the entire transaction is a bogus transaction smacks of non-genuineness.*

*5 2. LIFTING OF CORPORATE VEIL:*

*What is apparent is not real. The AO as well as the CIT(A) gave a categorical finding that what is shown is not real. The amounts have been paid as a quid pro quo for the benefits received by the four investors. The payments are kickbacks. The net worth of the assessee was RS.185 Cr. By investing more than the promoters of the assessee, the investors could get only .03% of shareholding in the assessee company. There is direct nexus between the investments made by the so-called investors and the benefits that they derived from the Government of A.P. The sale of shares of the Company were never offered to general public thus what is apparent is not real. The AO, who is entitled to lift the corporate veil to examine the realities behind the legal facade, did so in the instant case. The entire transaction was pushed as genuine.*

*3.WHETHER THE RECEIPT IS CAPITAL RECEIPT OR REVENUE RECEIPT:*

*The definition of income as defined under Sec.2(24) of the Act is an inclusive definition. Any receipt which can be described as income is taxable unless it is exempted under the provisions of the Act.*

*The finding of the AO as well as the CIT(A) is that the subject investment did not go into capital expansion of the company. The investment did not result in any change in capital or equity structure of the company.*

*The three investors have come and given their money without expectation of any return out of the said investment and left the scene. They never wanted to derive any benefit out of the said investment. There was never any obligation on the part of the assessee to part any of its profits in favour of the investors. The entire receipt is cloaked as "Capital receipt".*

8.1. Referring to the above submissions, the ld. DR submitted that the appeal filed by the assessee is devoid of any merit and liable to be dismissed. He relied on the following cases:

1. CIT Vs. L.N. Dalmia, [1994] 207 ITR 89 (Cal.)
2. Sunil Siddharthbai Vs. CIT, 156 ITR 509 (SC)
3. Workmen of Associated Rubber Industry ltd., 157 ITR 77 (SC)
4. Juggilal Kamlapat Vs. CIT, 73 ITR 702 (SC)
5. CIT Vs. Durga Prasad More, 82 ITR 540 (SC)

9. Considered the rival submissions and perused the material on record as well as the decisions cited. We noticed that assessee has issued and allotted shares of 0% convertible preferential shares in private placement to three investors. They are well known companies in the industry. These shares were issued with huge share premium and share premiums were determined without any basis. But all the issue and allotment of shares are within the four corners of law. The AO/CIT(A) has not brought on record any issues with the issue and allotment of shares since these are issued and allotted as per the companies Act and rules that existed at the time of issue and allotment of shares. The determination of share premium may not be

as per industries norms or investor norms but these were fixed and accepted by the investing parties.

9.1 We further notice that AO/CIT(A) has noted the timing of issue and allotment of shares with such huge share premium which aroused suspicion. Accordingly, AO issued summons to the investors and none of the investors had agreed that these were invested under any influence by the shareholder/directors. AO and CIT(A) has brought on record the incidences and circumstantial events to infer that these are quid-pro-quo arrangements between the investors and director of the company. The arrangement and circumstances leading to issue and allotment of shares may draw some doubts that certain benefits may have passed on to the directors. But the question is whether the directors/shareholders have really benefited with this arrangement and the assessee company was used as arrangement to pass on the benefit. The revenue has to prove that the investors have passed on the benefit to the shareholders/directors through this arrangement by bringing cogent material. But the AO/CIT(A) has brought on record so many incidences and alleged benefits which were enjoyed by the investors from the Govt. of AP. But, what is important is that the funds were invested in the company and the company has demonstrated that it has treated the investment as part of share capital fund and also the share premium as part of capital reserve within the company as per the provisions of Companies Act. Since the assessee is artificial person created by the Statute, we cannot trespass the legal entity. It cannot be trespassed provided the authority has evidence to prove that this legal person was used to pass on the benefit to interested shareholders by lifting the corporate veil. In this case, no such evidence was brought on record rather circumstantial evidence and test of human probabilities were applied to convert the capital transaction as per Companies Act into revenue transaction under Income-tax Act.

9.2 We notice that AO has invoked section 28(iv) to convert the capital receipt as revenue. This section refers to any benefit/perquisite arising from business or exercise of a profession. This capital receipt is not generated in the business whereas ld. CIT(A) confirmed the capital receipt as income from other sources without establishing that this is income of the assessee when the assessee has not even commenced the business. The alleged receipt is the benefit intended to pass on to the director/shareholdes of the company. We noticed that this capital investment was received by the assessee as 0% convertible preferential shares. No doubt there is no immediate outflow to the company in terms of dividend but it is convertible in the near future as equity share capital. There are certain aspects of this investment which certainly raises eyebrows as they are not the best of investment decision like:-

i) no participation in the management considering only 0.43% shares were allotted to outsiders ( no controlling interest is compromised)

ii) without yielding the controlling interest, investment of such huge share premium

iii) no basis for issuing shares at such huge premium

Apart from this aspect, the investment is legal and within the provisions of Companies Act, 1952. We are not in a position to accept the contention of the ld. AR that the investors have actually earned the profit by investing in the assessee company. We noticed that the shares were allotted with share premium of Rs. 1,440/- and the same shares were sold at Rs. 671.20. We have to compare the same shares which were sold and not compared with the portfolio of investment. We also noticed that in the subsequent submission, AO found that these shares were sold without having any say by the investors. All the negotiations were made by the directors and the proceeds were also reinvested in the assessee company as loans etc.

9.3 Again, we also cannot presume or apply test of human probabilities, we are dealing with the business transaction, it has to

be based on cogent material. Considering the whole situation, in our considered view, the AO/CIT(A) have restricted themselves by stopping the investigation based on circumstantial evidence and applying test of human probabilities. In order to lift the corporate veil for the purpose of determining whether any benefit is passed on to the shareholders/directors, they have to bring on record proper evidence/cogent material. We direct the AO to redo the assessment keeping in mind that no doubt the assessee has received this capital receipt and what circumstances which lead to investment is not important but whether the assessee company was used as a vehicle to pass on the benefit to shareholders/directors. In this regard, we direct the AO to make the assessment as below:

a) We noticed that assessee has declared loss in AY 2010-11 as per Income-tax Act, Rs. 189.76 crores and in cash flow, they are declaring decrease in cash from operating activities to the extent of Rs. 71.94 crores. On careful analysis, it can be seen that assessee received through share capital Rs. 181.99 crores and secured borrowings Rs. 334.47 cores but made investment in fixed assets to the extent of Rs. 370.75 crores. The investment in fixed assets are already covered in secured borrowings, the decrease in cash from operation has to be verified properly.

b) He has to verify whether any benefit is passed on to shareholders/directors through other means as the assessee is declaring huge loss in the initial years of operation itself.

Therefore, this issue is remitted back to the AO for re-verification as per above direction and in simple terms, verify all the funds and cash flow management of the company for both AYs 2009-10 & 2010-11. AO should not resort to rely on circumstantial evidence or on test of human probabilities but on factual evidence of passing of benefit to the shareholders/directors. Hence, grounds of appeal raised by the assessee are allowed for statistical purposes.

10. As the facts and grounds raised in AY 2010-11 are materially identical to AY 2009-10, following the conclusions drawn therein, the grounds raised in this appeal are also treated as allowed for statistical purposes.

11. In the result, both the appeals of the assessee are allowed for statistical purposes.

Pronounced in the open Court on 10th August, 2018.

| | |
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| **Sd/-** | **Sd/-** |
| **(P. MADHAVI DEVI)** | **(S. RIFAUR RAHMAN)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Hyderabad, Dated: 10th August, 2018

*kv*

Copy to:-

*1) Bharathi Cement Corporation Pvt. Ltd., 8-2-696 Carmel Point, Road No. 12, Banjara Hills, Hyd – 34.*
*2) ACIT, Circle – 2(3), IT Towers, Opp. Mahaveer Hospital, AC Guards, Hyderabad.*
*3) CIT(A) – III, Hyderabad.*
*4) CIT - II, Hyd.*
*5) The Departmental Representative, I.T.A.T., Hyderabad.*
*6) Guard File*