

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “A” DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.4895/DEL/2019
Assessment Year 2014-15

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| M/s. BLP Vayu (Project-1) Pvt. Ltd. 14 th Floor, Tower B Vatika Towers DLF Golf Course Road, Suncity Sector-54 Gurgaon Haryana | Vs. | PCIT Gurgaon. |
| TAN/PAN: AAFCB0591B | | |
| (Appellant) | | (Respondent) |

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|------------------------|-----------------------|----|------|
| Appellant by: | Shri Rajiv Jain, CA | | |
| Respondent by: | Shri Kanv Bali, Sr.DR | | |
| Date of hearing: | 16 | 03 | 2023 |
| Date of pronouncement: | 31 | 05 | 2023 |

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed at the instance of the assessee against the revisional order of the Id. Pr.CIT, Gurgaon (‘Pr.CIT’ in short) dated 05.03.2019 wherein order passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) dated 15.12.2016 concerning AY 2014-15 was held to be erroneous in so far as prejudicial to the interest of the revenue within the meaning of Section 263 of the Act.

2. The grounds of appeal raised by the assessee read as under:

“That on the facts and circumstances of the case Id Pr.CIT, Gurgaon in his order dated 05.03.2019 passed u/s.263 of the Act, erred in setting aside the order dated 15.12.2016 for AY 2014-15 passed by the Id AO,

Ward-1(3), Gurgaon u/s 143(3) of the Act, by holding that in respect of issue of 513978 shares @ Rs 1284.10 per share, failure of the ld AO to examine the genuineness of the transactions, creditworthiness of the persons from which share premium was received and identity, rendered the assessment erroneous and prejudicial to the interest of revenue and further erred in exercising the powers u/s. 263 of the Act:

(i) Because the entire share application money was received during the F.Y. 2012-13 corresponding to A.Y. 2013-14 and the entire issue including share premium was examined by the ld AO twice, first during the course of proceedings for A.Y. 2013-14 concluded by order dated 16.03.2016 passed u/s 143(3) of the Act and then again during the course of assessment proceedings for AY 2014-2015.

(ii) Because provisions of section 68 of the Income Tax Act, 1961 can be applied only in the year in which share application money or share premium is received and not in any subsequent year."

3. As per the grounds of appeal, the assessee has sought to challenge the jurisdiction assumed by the Pr.CIT under Section 263 of the Act and as a corollary sought to impugn the revisional order passed by the Pr.CIT under Section 263 of the Act.

4. Briefly stated, the assessee-company is engaged in the business of generating and dealing in electricity and all forms of energy and power generated by wind and other conventional and non conventional methods. The return filed by the assessee for the Assessment Year 2014-15 was subjected to scrutiny assessment. An assessment order was framed under Section 143(3) of the Act wherein the income of the assessee returned at Rs. Nil was accepted by the Assessing Officer without any modifications. Thereafter, the Pr.CIT in exercise of his revisionary powers issued show cause notice dated 29.11.2018 under Section 263 of the Act requiring the assessee to show cause notice as to why the assessment so framed under Section 143(3) was not modified/set aside on the ground that such order is erroneous in so far as it is prejudicial to the interest of the Revenue. The show cause notice issued in this regard is extracted herein for ready reference.

“In this case, the assessee company had furnished its return of income for the A.Y. 2014-15 on 30.11.2014 declaring an income/loss of Rs. Nil. Assessment was completed accepting returned income under section 143(3) of the I.T. Act, 1961 vide order dated 15.12.2016.

2. The assessment records of the aforesaid assessee company for the A.Y. 2014-15 were examined. On perusal of the assessment records, it was noticed that the case was selected under scrutiny through CASS with the reasons "Large Share premium received during the year". During the year under consideration, the assessee company has issued total 513978 share @ Rs. 1284.10/- per share to various parties against the face value of Rs. 10/- each and received share premium to the tune of Rs. 65,18,59,370/-. During the course of assessment proceedings, the AO was required to examine the justification of share premium with regard to the FMV and the creditworthiness of the subscriber to whom the said shares have been allotted at a huge premium. It is observed that the AO failed to examine the same but completed the assessment, accepting the FMV of shares as submitted by the assessee. The FMV adopted by the assessee at huge premium of Rs. 1274.10/- is apparently on a higher side in view of the financial statement of the assessee.

3. Failure of the AO to examine the genuineness of the transactions, creditworthiness of the persons from which share premium has allegedly received and their identity rendered the assessment erroneous and prejudicial to the interest of the revenue.

4. You are, therefore, provided an opportunity to show cause as to why the assessment order passed by the ITO, Ward 1(3)Gurgaon, dated 15.12.2016 for the A.Y.2014-15 in your case should not be revised u/s. 263 of the Act. You are requested to attend my office on 18.12.2018 at 10:30 AM either in person or by representative duly authorized in writing on your behalf or produce or cause to be produced at the said time, any documents or any other evidence on which you rely in your support.

In case of no reply/non-attendance as per above, it shall be assumed that you do not wish to say anything in the matter and the matter would be decided as per material available on record without any further notice/intimation to you.

Yours faithfully,

*Pr. Commissioner of Income Tax
Gurugram*

5. As per the show cause notice, on the basis of perusal of case records the Pr.CIT observed that the assessee has issued 513978 shares @ Rs.1284.10 per share against the face value of Rs.10/- each and received a premium to the tune of Rs.65.48 crore. The

case was selected for scrutiny for verification of large share premium received during the year. The Assessing Officer however in the course of the assessment has completed the assessment and accepted the Fair Market Value (FMV) of shares submitted by the assessee without carrying out examination on justification of the share premium and also the creditworthiness of the subscriber to whom shares have been allotted on such a huge premium. As per show cause notice, the Pr.CIT thus alleged that the failure of the Assessing Officer to examine the genuineness of the transaction, creditworthiness of the persons from whom share premium have been received has rendered, the assessment erroneous and prejudicial to the interest of the Revenue.

6. The Pr.CIT did not find the reply of the assessee in response to the show cause notice to be satisfactory and concluded that the assessment order so passed is erroneous and prejudicial to the interest of the Revenue on the ground that the Assessing Officer has not pursued the inquiries to their logical end resulting in the assessment order erroneous and prejudicial to the interest of the Revenue. The Pr.CIT accordingly set aside the assessment order and directed the Assessing Officer to pass fresh assessment order after making thorough and detailed inquiries on the particular issue of issuance of shares at huge premium.

7. Aggrieved by the aforesaid action of the Pr.CIT, the assessee is in appeal before the Tribunal agitating the assumption of supervisory jurisdiction usurped by the Pr.CIT as well consequential order passed under Section 263 of the Act.

8. The Id. counsel for the assessee broadly reiterated its submissions made before the Pr.CIT and submitted that all

relevant facts and evidences concerning the issue and allotment of shares and premium were placed before the Assessing Officer in pursuance of inquiries carried out under Section 142(1) of the Act in the course of assessment. The ld. counsel pointed out that the assessee company had issued 513978 shares only one entity and that too to 'M/s. BLP Energy Pvt. Ltd.' at a premium of Rs.1284.10 per shares having regard to the audited financial statement for F.Y. 2013-14. The aforesaid subscriber M/s. BLP Energy Pvt. Ltd. is 100% holding company and the shares have not been allotted to any third party investor. Delineating further, the ld. counsel referred to its reply dated 01.02.2019 placed before the Pr.CIT and submitted that the said amount of investment aggregating to Rs.66 crore was received by the assessee company in the preceeding Financial Year, i.e., F.Y. 2012-13 (A.Y. 2013-14) in the form of share application money and the shares have been issued against such receipts in the subsequent year to the holding company resulting in securities premium amount of Rs.65,48,60,220/- being accounted for its books of account. The ld. counsel next submitted that while the share application money was received in preceding Assessment Year 2013-14 which was also subjected to scrutiny assessment under Section 143(3) of the Act, the compliance of Section 56(2)(viib) of the Act was also verified in the Assessment Year 2014-15 in question. Specific queries have been raised with regard to the aspects of the share premium and the concern expressed in the show cause notice of the Pr.CIT is thus totally unfounded. The ld. counsel thus submitted that the share application money was received in the preceding Assessment Year 2013-14 for which the allotment was carried out in the Assessment Year 2014-15 in question and most

importantly, the shares were allotted to its 100% holding company and none else and therefore, there was no warrant to invoke the deeming fiction of Section 56(2)(viib) in the context of the case. It was thereafter submitted that the allotment have been carried out in tune with the valuation report towards calculation of fair market value of shares as per Rule 11UA(2)(b) of the Income Tax Rules. A copy of valuation report obtained in this regard was referred to and relied upon in respect of the case so made out. The ld. counsel thus submitted that requisite inquiries were diligently carried out by the Assessing Officer as warranted in the facts of the case and the Pr.CIT, on the other hand, has omitted to take note of the glaring facts of allotment of shares to its holding company carrying out substantial business in energy sector. It was thus alleged that the action of the Pr.CIT is perfunctory. The ld. counsel thus urged for cancellation of the revisional order and restoration of the stands of the Assessing Officer.

9. The ld. DR for the Revenue, on the other hand, referred to and relied upon the revisional order and submitted in furtherance that the Assessing Officer has failed to discharge its quasi judicial functions obligated under the statute and has perfunctorily accepted the position taken by the assessee without any meaningful inquiry. The ld. DR thus supported the action of the Pr.CIT and submitted that such blatant lack of inquiry has resulted in an erroneous order causing grave prejudice to the Revenue. It was submitted that the action of the Pr.CIT is covered by the wide amplitude of the revisional powers.

10. We have carefully and dispassionately considered the rival submissions and perused the revisional order and the assessment

order together with other documents and material placed before us and adverted to. The Pr.CIT, in the instant case, has sought to cancel the assessment order on the pretext that large share premium received against allotment of shares have not been enquired into.

11. The Pr.CIT has controverted the propriety of assessment order on the ground that requisite inquiries have not been carried out with reference to the receipt of huge share premium on allotment of shares on the touchstone of Section 56(2)(viib) of the Act. The Pr.CIT also observed that the Assessing Officer has failed to examine the genuineness of the transaction of allotment of shares on the touchstone of Section 68 of the Act.

11.1 As per case records, it is an undisputed fact that the shares have been allotted at a premium to its 100% holding company. Thus, applicability of Section on 56(2)(viib) has to be seen in this perspective. The Co-ordinate Bench of Tribunal in *DCIT vs. Ozone India Ltd. in ITA No.2081/Ahd/2018 order dated 13.04.2021* in the context of Section 56(2)(viib) has analyzed the deeming provisions of Section 56(2)(viib) of the Act threadbare and *inter alia* observed that the deeming clause requires to be given a schematic interpretation. The transaction of allotment of shares at a premium in the instant case is between holding company and it is subsidiary company and thus when seen holistically, there is no benefit derived by the assessee by issue of shares at certain premium notwithstanding that the share premium exceeds a fair market value in a given case. Instinctively, it is a transaction between the self, if so to say. The true purport of Section 56(2)(viib) was analyzed in *Ozone case* and it was

observed that the objective behind the provisions of Section 56(2)(viib) is to prevent unlawful gains by issuing company in the garb of capital receipts. In the instant case, not only that the fair market value is supported by independent valuer report, the allotment has been made to the existing shareholder holding 100% equity and therefore, there is no change in the interest or control over the money by such issuance of shares. The object of deeming an unjustified premium charged on issue of share as taxable income under Section 56(2)(viib) is wholly inapplicable for transactions between holding and its subsidiary company where no income can be said to accrue to the ultimate beneficiary, i.e., holding company. The chargeability of deemed income arising from transactions between holding and subsidiary or vice versa militates against the solemn object of Section 56(2)(viib) of the Act. In this backdrop, the extent of inquiry on the purported credibility of premium charged does not really matter as no prejudice can possibly result from the outcome of such inquiry. Thus, the condition for applicability of Section 263 for inquiry into the transactions between to interwoven holding and subsidiary company is of no consequence. We also affirmatively note the decision of SMC Bench in the case of *KBC India Pvt. Ltd. vs. ITO in ITA No.9710/Del/2019 order dated 02.11.2022 (SMC)* where it was observed that Section 56(2)(viib) could not be applied in the case of transaction between holding company and wholly owned subsidiary in the absence of any benefit occurring to any outsider.

12. Preliminary enquiry, if undertaken, by Pr.CIT would have thus possibly changed the discourse in the present case.

13. As regards inquiry on the parameters of Section 68 is concerned, it is the case of the assessee that the money/credit has been entered in the books of the assessee in preceeding Assessment Year 2013-14 and therefore, Section 68 itself is not applicable qua AY 2014-15 in question. This notwithstanding, money has been received from holding company carrying substantial business activities and getting assessed year after year. On an enquiry from the Bench, the ld. counsel placed the assessment order dated 30.12.2019 passed by the Assessing Officer in pursuance of the impugned revisional order and submitted that the additions of Rs.65,48,60,220/- has been carried out under Section 56(2)(viib) of the Act by re-determining the Fair Market Value. The assessee thus contends that the Assessing Officer was thus also satisfied with the parameters of Section 68 of the Act towards such nature and source of such credits in the post revisional proceedings.

14. A revisional action of the Pr.CIT in the context of the facts of the case thus appears to be wholly unjustified and without meeting the jurisdictional requirement of Section 263 of the Act. We thus find wholesome merit in the plea of the assessee for cancellation of the revisional order and restoration of the order of the Assessing Officer. We do so accordingly.

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

Order pronounced in the open Court on 31/05/2023

Sd/-

**[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER**

DATED: /05/2023
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Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**