IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.331 OF 2016
ALONG WITH
WRIT PETITION NO.332 OF 2016

SLS Energy Pvt. Ltd.
having its office at Ground Floor,
D.B. House, Gen A.K. Vaidya Marg,
Goregaon (East), Mumbai-400 063. ... Petitioner

Versus

1. Income Tax Officer – 13(2)(2),
having his office at Room No.147,
1st Floor, Aayakar Bhavan,
Maharshi Karve Road,
Mumbai-400 020.

2. Pr. Commissioner of Income-tax-13,
having his office at Room No.416,
4th Floor, Aayakar Bhavan,
Maharshi Karve Road,
Mumbai-400 020

3. Union of India
through Ministry of Finance,
North Block,
New Delhi-110 001. ... Respondents

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Mr. V. Sridharan, Senior Advocate a/w Mr. B.V. Jhaveri, Mr. Sriram, Mr. Ravi Sawana, Mr. Dinesh Kukreja and Ms. Bhargavi Rawal for the Petitioner.

Mr. Akhileshwar Sharma a/w Ms. Shilpa Goel for the Respondents.

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CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.

PRONOUNCED ON : 27 JUNE 2023

J U D G E M E N T

(Per DHIRAJ SINGH THAKUR, J.)

. Common questions of law and facts arise in these two Petitions, and, therefore, we propose to dispose of the same by way of a common judgment and Order.

WRIT PETITION NO.331 OF 2016

2 The present Petition has been filed challenging the notice dated 23 March 2015 for the relevant assessment years-2010-11 issued under Section 148 of the Income Tax Act, 1961 ("the Act"), whereby the assessing officer proposed to reassess the income for the assessment year 2010-11 on the ground that the income had escaped assessment within the meaning of Section 147 of the Act.

3 The reasons for reopening as communicated to the Respondents are as under :-

> "In this case return of income for the assessment year 2010-11 was e-filed by assessee company on 1 September 2010 declaring NIL income. The return of income has been processed on 16 April 2011. It is found from the balance sheet of the e-return of income

that the assessee has issued paid up capital of Rs.77,00,000/- and Charged Security Premium at Rs.6,79,32,00,000/- during the year under consideration. An analysis of the details and information of the Balance Sheet shows that Share Premium and value of the shares can not be justified on the basis of 'intrinsic valuation of shares' and 'Net Asset Value Method' i.e. Share Premium charged is found excessive as the worth of the company is not found in that extent.

In view of the above facts and finding of the case, does not justify issue of Shares at such a huge premium, as such the nature of the transaction of so called Shares Premium is not established.

In view of the above facts, I have a reason to believe that the income to the tune of Rs.6,79,32,00,000/- chargeable to tax has escaped assessment for assessment year 2010-11 by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary in the return of income for his assessment, for that assessment year.

I am satisfied that this is the fit case to re-open u/s 147 of the Income Tax Act, 1961. Hence, a Notice u/s 148 of the I.T.Act is issued herewith for reassessment."

4 Objections were filed by the Petitioner against the reopening of the assessment, which came to be rejected by virtue of Order dated

20 January 2016.

5 The basis for reopening as is seen from the reasons furnished to the Petitioner are that during the year under consideration, the Petitioner had issued shares and charged premium thereupon at Rs.6,79,32,00,000/- and that based upon analysis of the details and information of the Balance Sheet, the share premium charged was not justified on the basis of 'intrinsic valuation of shares' and 'Net Asset Value Method'. It is stated that the worth of the company was not such as would justify the charging of such a huge premium and that the nature of the transaction of the so called share premium was not established.

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6 In this petition, the Petitioner primarily challenges the notice dated 23 March 2015 under Section 148 seeking to reopen the assessment for the Assessment Year 2011-12 on the basis of the reasons recorded as under :-

> "In this case return of income for the assessment year 2010-11 was e-filed by assessee company on 28 September 2011 declaring income Rs.18,17,780/-.

The return of income has been processed on 23 February 2013. It is found from Balance Sheet of the e-return of income that the assessee has issued paid up capital of Rs.1,45,00,000/- and Charge Security Premium at Rs.6,79,32,00,000/- during the year under consideration. An analysis of the details and information of the Balance Sheet shows that Share Premium and value of the shares can not be justified on the basis of 'intrinsic valuation of shares' and 'Net Asset Value Method' i.e. Share Premium charged is found excessive as the worth of the company is not found in that extent.

In view of the above facts and finding of the case, does not justify issue of Shares at such a huge premium, as such the nature of the transaction of so called Shares Premium is not established.

In view of the above facts, I have a reason to believe that the income to the tune of Rs.6,79,32,00,000/- chargeable to tax has escaped assessment for assessment year 2010-12 by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary in the return of income for his assessment, for that assessment year.

I am satisfied that this is the fit case to re-open u/s 147 of the Income Tax Act, 1961. Hence, a Notice u/s 148 of the I.T.Act is issued herewith for reassessment."

7 The case of the Petitioner is that in the year ending 31 March

2011, relevant to the Assessment Year 2011-12, the Petitioner had redeemed the said 68,00,000 preference shares of Re.1 issued to M/s Pony Infrastructure & Contractors Limited & thereafter issued the same preference shares of Re.1 each to M/s Mystical Infratech Pvt. Ltd. at the aggregate premium of Rs.679,32,00,000/- & further than the Petitioner had issued 6,80,000 equity shares of Rs.10/- each at par to the said company which was the holding company of the Petitioner.

8 The case set up by the Petitioner is that the Petitioner-company was incorporated under the Companies Act, 1956 for purposes of engaging in the business of generation and distribution of electricity and entered into a Memorandum of Understanding with Government of Madhya Pradesh for setting up a 1320 MW Thermal Power Project. The project being capital intensive funds were arranged by issuance of preference shares in favour of M/s Pony Infrastructure & Contractors Ltd (previously known as Dynamix Balwas Infrastructure Ltd.), which is stated to be a sister concern of the Petitioner herein. The Petitioner claims that during the relevant year Rs.680 crores were raised as capital by issuing 68 lakh Optionally Convertible Preference Shares with face value of Rs.1 at a premium of Rs.999. It thus claims to have collected Rs.68

lakh on account of share capital and Rs.679 crores and Rs.32 lakhs as share premium.

9 Objections to the reopening were filed, which were rejected by virtue of the Order dated 20 January 2016.

10 Mr. Sridharan, learned Senior Counsel appearing for the Petitioner urged that the vary basis for reopening was misconceived inasmuch as the receipt of premium on issuance of shares was not 'receipt of income', but was a 'capital receipt', and, therefore, could never become the basis for reopening on the ground that income had escaped assessment. Reliance in this regard was placed upon the case of **Vodafone India Services (P.) Ltd. Vs. Union of India**[1]. It was held :

> "25. But we have examined the issue afresh. The word income for the purpose of the Act has a well understood meaning as defined in Section 2(24) of the Act. This even when the definition in Section 2(24) of the Act is an inclusive definition. It cannot be disputed that income will not in its normal meaning include capital receipts unless it is so specified, as in Section 2(24)(vi) of the Act. In such a case, Capital Gains chargeable to the tax under Section 45 of the Act are, defined to be income. The amounts received on issue of share capital including the premium is undoubtedly

1 (2014) ITR 1 (Bombay)

on capital account....."

"42. It was contended by the Revenue that in any event the charge would be found in Section 56(1) of the Act. Section 56 of the Act does not provide that income of every kind which is not excluded from the total income is chargeable under the head income from other sources. However, before section 56 of the Act can be applied, there must be income which arises. As pointed out above, the issue of shares at a premium is on Capital Account and gives rise to no income....."

11 It was urged that The Finance Act, 2012 brought about two amendments in regard to premium received over and above Fair Market Value of shares. This was done by introduction of Section 56(2)(viib) and introduction of clause (xvi) in Section 2(24). Section 2(24) clause (xvi) and Section 56(2)(viib) read as under :

Section 2(24)(xvi) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of sub-section (2) of Section 56.

Section 56(2)(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares.

12 It was also urged that the amendments have prospective application and were to apply only from 1 April 2013, i.e. Assessment Year 2013-14.

13 Apart from the above, it was urged that Section 68 was also amended by The Finance Act, 2012 with effect from the Assessment Year 2013-14 when first proviso was added to Section 68 providing for the share application money to be taxed in the hands of investee company, if source of funds of the investors were not sufficiently established.

Section 68 and first proviso read as under :

> Section 68 Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :
>
> [***Provided*** *that*] where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless-
>
> (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

14 What was sought to be urged was that since the amendment of Section 68 by introduction of the first proviso was also prospective in nature and was to come into effect from 1 April 2013, the assessing officer could not have any basis to reopen the case to question the receipt of share premium as the said proviso was not applicable in the case of the Petitioner for the Assessment Years 2010-11 and 2011-12. Reliance was placed upon the case of **CIT Vs. Gagandeep Infrastructure (P.) Ltd**[2] to the extent it held that the Finance Act, 2012 is prospective and will not apply to a period prior to Assessment Year 2013-14 and further that Section 68 of the Act cannot be applied in the hands of the investee company when the details of the share holder investor are known.

15 It was urged that in the present case preference shares were allotted to M/s. Pony Infrastructure & Contractors Limited (formerly known as M/s Dynamix Balwas Infrastructure Pvt. Ltd.) filed its return of income for the assessment year 2010-11, reflecting the aforementioned transaction. In the additional affidavit filed by the Petitioner, it is stated that M/s Pony Infrastructure &

2 [2017] 394 ITR 680 (Bom)

Contractors Limited was assessed under Section 143(3) of the Act and as an assessment Order dated 22 February 2013 passed in that regard. Re-assessment proceeding was initiated in regard to the said assessment Order, however, the Tribunal allowed the appeal vide the Order dated 11 October 2018. It was thus urged that neither the identity of investors nor the transaction had been found to be suspect, and, therefore, there was no basis for the assessing officer to issue notice impugned under Section 148A.

16 Mr. Sridharan, learned Senior Counsel further contended that there was no tangible material with the assessing officer which would give him reasons to believe that income has escaped assessment and that the assessing officer was in fact trying to conduct a roving enquiry, which is therefore without jurisdiction. Reliance was also placed upon the case of **Sunrise Education Trust Vs. ITO**[3]. It was in the judgment (supra) held as under :

> "The assessee had from the outset been contending that the assessee's accounts are duly audited and/ such audited accounts are presented alongwith the return. This has been so asserted in the objections before the Assessing Officer as well as in the petition before us. Both times the response of the Assessing Officer in the order disposing of the objections and the affidavit-in-reply filed in this petition is that the assessee's cash deposits can only be verified through

3[2018] taxmann.com 74 (Guj.)

> assessment proceedings. In other words, the Assessing Officer does not even contended that the said cash deposits were not only reflected in the return filed, but that he wishes to verify the validity of such deposits and the assessee's claim of exemption, being a Trust. It is well settled through serious of judgments of this Court that re-assessment, even in a case where the return was not scrutinized before acceptance originally, cannot be resorted to unless the Assessing Officer had a reason to believe that the income chargeable to tax has escaped assessment. In other words, for mere verification or for a fishing inquiry, reopening of the assessment is not permissible."

17 Per contra, the stand taken by the Revenue as was urged by Mr. Akhileshwar Sharma, learned Counsel was that since the original Order of assessment in the case of the Petitioner was under Section 143(1) and that the assessment was re-opened within four years, there was no requirement to establish that the assessee had failed to disclose fully and truly material facts necessary for its assessment and that the assessment could be re-opened, if the assessing officer had tangible material for forming the basis for his reason to believe. It was urged that there was tangible material with the assessing officer, which would form the basis for his reason to believe that income of the Petitioner had escaped assessment.

18 A lot of emphasis was placed on the fact that the financials of the Petitioner showed that there was absolutely no business

conducted, for which the Petitioner got about Rs.680 crore and that in the subsequent year also, there was absolutely no business activity and that the company would be merely acting as a company for money lending purpose. The stand taken is that while share premium is a capital asset, yet the assessing officer was questioning the nature of the receipt of Rs.680 crore as share premium. It was urged that under Section 68, the assessing officer had jurisdiction to make enquiry with regard to nature and scope of sum credited in the books of accounts of the assessee it would be immaterial whether the amount so credited is given the colour of share application as capital.

19 It was contended that the revenue was justified in initiating the reassessment proceedings for the reason that there was tangible material available on record in the shape of analysis of the balance-sheet which clearly suggests that there was no justification for the assessee to have issued shares at such a huge premium of Rs.6,79,32,00,000/- during the year under consideration and further that the very nature of transaction of the so called share premium had not been established. Reliance is placed upon the judgment of the Apex Court in the case of **Commissioner Of Income-Tax Vs. Sophia Finance Ltd.**[4] to buttress the argument that merely

4 [1994] 205 ITR 98 (Delhi)

because a company chose to show the receipt as capital receipt would not preclude the Income Tax Officer from giving into the question whether the transaction was actually so, as Section 68 of the Act empowered him to do so and further that whenever an assessee represents that the receipt of shares on the receipt of share application money and an amount received is credited in the books of account of the company, the Income Tax Officer, who would be entitled to see whether the alleged shareholders do in fact exist or not.

20 We have heard learned Counsel for the parties.

21 It can be seen from the record that while disposing of the objections to the reopening, the A.O. has held as under:

> "7. As far as the argument that receipt of premium on the issue of shares cannot lead one to come to the conclusion that income has escaped assessment is concerned, it is premature, as the assessment proceedings are just initiated and only after the finalization of assessment and after considering the facts of the case whether the share premium received by the assessee was genuine or not and fully explained or not would be decided. If the cash credit shown in assessee's balance sheet is found unjustified, the AO can treat the same as unexplained cash credit u/s. 68 of the I.T.Act. Therefore, on this ground, the assessee's plea cannot be acceptable."

22 It is thus clear that the assessing officer was trying to invoke

Section 68 of the Act, which could not have been so invoked in view of the judgment of the Apex Court in **CIT V/s. Lovely Exports (P.) Ltd.**[5] which held as under:

> "2. Can the amount of share money be regarded as undisclosed income under section 68 of IT Act, 1961?. We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment."

23 Even otherwise reliance placed upon the judgment of the Delhi High Court in **Sophia Finance Ltd**. would be of little help to support the case of the revenue as in that case it was held:

> "Where, therefore, the assessee represents that it has issued shares on the receipt of share application money then the amount so received would be credited in the books of account of the company. The Income-tax Officer would be entitled to enquire, and it would indeed be his duty to do so, whether the alleged shareholders do in fact exist or not. If the shareholders exist then, possibly, no further enquiry need be made. But if the Income-tax Officer finds that the alleged shareholders do not exist then, in effect, it would mean that there is no valid issuance of share capital. Shares cannot be issued in the name of non-existing persons."

24 In the present case neither the reasons recorded nor the order disposing of the objections in any manner reflects that there was

5 [2008] 216 CTR 195 (SC)

any doubt with regard to existence of the entities in whose favour the allotment of shares had been made upon receipt of share money as also the amount of premium paid on the said shares.

25 By virtue of the impugned notice dated 23rd March 2015, the assessing officer seeks to reopen the assessment for the assessment year 2010-11, which is within a period of four years. Admittedly, no scrutiny assessment under Section 143(3) of the Act has taken place in the present case. Even in a case where no scrutiny assessment has taken place, reassessment can be ordered only if the assessing officer has reason to believe that income chargeable to tax had escaped assessment. The Apex Court in **Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers (P) Ltd.**[6] has clearly held that notice for reopening an assessment under Section 148 of the Act could only be justified if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment.

26 The reason for the assessing officer to reopen the assessment is his belief that the share premium charged by the Petitioner was excessive and further that the transaction of the so called share premium was not established. In other words, the assessing officer

6 291 ITR 500

apart from questioning the excessive share premium also is doubting the transaction, whereby the share premium had been received. Whether in the aforementioned facts the assessing officer could be said to have his reason to believe that income had escaped assessment and whether the material with the said assessing officer could be said to have any tangible material justifying the reopening is the issue that falls for our consideration.

27. There is no dispute that in **Vodafone India Services (P.) Ltd.** it stands concluded that receipt of share capital including the premium was on capital account and gave rise to no income. The amendments incorporated in the definition of income under Section 2(24)(xvi) and Section 56(2)(viib) of the Act were amendments which were to apply only from 01st April, 2013 i.e. assessment year 2013-14. The amendment to Section 68 by incorporation of the first proviso also came into effect by virtue of the Finance Act, 2012 w.e.f. 01st April, 2019 and was to apply for the assessment year 2013-14 and onwards, and, therefore, since the amendments were not applicable to the assessment year in question i.e. 2010-11, there would be no basis for the assessing officer's reason to believe that income had escaped assessment for the said assessment year. From the record it can also be seen that the preference shares allotted to

M/s Pony Infrastructure & Contractors Ltd. (formerly known as M/s. Dynamix Balwas Infrastructure Pvt. Ltd.) was assessed under Section 143(3) of the Act and an order of assessment dated 22nd February, 2013 was passed.

28 Reassessment proceedings were initiated against the said entity and the appeal allowed vide order dated 11th October 2018. We therefore agree with the contention of Mr. Shridharan, learned Counsel for the Petitioner that this was not a case where there could be any suspicion with regard to the factum of transaction having taken place between two companies. In any case the assessing officer appears to have not been in doubt regarding the transaction having taken place between the said two companies with regard to allotment of preference shares and receipt of the share premium amount inasmuch as what was sought to be questioned, was not in fact the transaction, but only the receipt of the share premium amount which was said to be excessive and much beyond the intrinsic value of the shares of the Petitioner company.

29 This can be guessed from the fact that the assessing officer had only flagged the share premium amount of Rs.6,79,32,00,000/-

which according to him was chargeable to tax that had escaped assessment and did not question the amount of Rs.68 lakhs received by the Petitioner company representing the value of Rs.68 lakhs shares of the face value of rupee 1 per share. Had the Assessing Officer any real doubts regarding the transaction itself, then there was no justification for him to question only the transaction with regard to the extent of the amount of premium charged for the said shares.

30 We therefore of the opinion that there was neither any basis for the assessing officer for his reason to believe that income had escaped assessment nor was there any tangible material which would have otherwise given jurisdiction to reopen the assessment even when the reopening was sought to be made within a period of four years.

31 For the reasons above, the Petitions are allowed and the notices impugned dated 23 March 2015 as also the Orders dated 20 January 2016 are quashed. No costs.

(KAMAL KHATA, J.) **(DHIRAJ SINGH THAKUR, J.)**