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

INCOME TAX APPEAL NO.128 OF 2020

The Principal Commissioner of
Income Tax-6, Mumbai .. Appellant

Versus

Essar Agrotech Ltd. .. Respondent

Mr. Akhileshwar Sharma, Advocate for the Appellant.

Mr. Sameer G. Dalal, Advocate for the Respondent.

CORAM : B. P. COLABAWALLA &
FIRDOSH P. POONIWALLA, JJ.
DATE : JULY 29, 2026

P. C.

1. The above Appeal is filed by the Revenue challenging the order dated 1st March 2019 passed by the Income Tax Appellate Tribunal (**ITAT**). The Assessment Year in question is A.Y.2012-13. According to the Revenue, the above Appeal gives rise to the following 2 questions of law:-

(i) Whether, on the fact and in circumstances of the case and in law, the Hon'ble ITAT was right in upholding the decision of Ld. CIT(A) deleting the addition made on account of share premium ignoring the fact that the AO has brought on record that though the assessee has consistent negative EPS and there was no valuation report, the shares of the assessee have been purchased at premium and the credit worthiness of the investor is not established in view of the negative Reserve and Surplus and only interest bearing funds available with them and the use of share premium for business purposes in the form of making short term advances?

(ii) Whether, on the facts and in circumstances of the case and in law, the Hon'ble ITAT was right in upholding the decision of Ld. CIT(A) deleting the addition made on account share premium ignoring the fact that the very decision of Hon'ble Jurisdictional High Court in the case of Gagandeep Infrastructure Pvt. Ltd. vs. CIT 394 ITR 680 (Bom) on which the CIT(A) relied has been challenged by the Department by filing an SLP vide No.5759/2018?

2. The brief facts of the present case are that the Assessee Company is engaged in the business of agricultural activity and cultivation of flowers, vegetables etc. and rendering services for maintenance of mango orchards. The Assessee Company filed its Return of Income for A.Y.2012-13 on 30th September 2012 declaring its total income at Rs.11,07,178/-. The case of the Assessee was selected for scrutiny and the assessment was completed under Section 143(3) on 30th March 2015 determining the total income of the Assessee at

Rs.11,90,82,890/- by making various additions towards share capital and share premium under Section 68 of the Income Tax Act, 1961 (**the IT Act**), as well as disallowance of expenditure incurred in relation to exempt income under Section 14A read with Rule 8D(2)(ii) and 8D(2)(iii) of the Income Tax Rules, 1962 (**the Rules**).

3. Aggrieved by the Assessment Order, the Assessee preferred an Appeal before the CIT(Appeals). Before the CIT(Appeals) the Assessee argued that the Assessing Officer had erred in making a disallowance towards expenditure income in relation to exempt income without appreciating the fact that the Assessee had not incurred any expenditure in relation to exempt income. Over and above this, the Assessee also challenged the addition made by the Assessing Officer towards share capital and share premium under Section 68 of the IT Act, and on the basis of that submitted that premium is a capital receipt and that the Assessee being a Company, is not required to prove the purpose or justification for charging premium on shares, and what is relevant is whether the identity, genuineness and creditworthiness of the parties investing has been proved or not. According to the Assessee it had filed all details in order to prove all the ingredients, and hence the

Assessing Officer erred in making any addition towards share capital and share premium under Section 68 of the IT Act.

4. The CIT (Appeals), after considering the submissions of the Assessee, deleted the addition made by the Assessing Officer towards disallowance of expenses incurred in relation to exempt income by following various judicial precedents. Further the CIT (Appeals) also deleted the addition made towards share capital and share premium by following the decision of this Court in ***Gagandeep Infrastructure Pvt Ltd V/S CIT [(394) ITR 680 (Bom)]***. The CIT (Appeals) held that when identity, genuineness of transactions, and creditworthiness of the parties, have been proved by filing necessary details, there was no reason for the Assessing Officer to make the addition only for the reason that shares had been issued at a higher premium. With these observations he deleted the said addition made by the Assessing Officer.

5. Aggrieved by the order of the CIT (Appeals), the Revenue preferred an Appeal before the ITAT. In paragraphs 5 to 7 of the impugned order the ITAT dealt with the issue regarding disallowance of expenditure incurred in relation to exempt income. For the reasons stated in the said paragraphs, the ITAT upheld the findings of the CIT

(Appeals) and rejected the ground taken by the Revenue. This part of the impugned order is not challenged in the present Appeal.

6. As far as the issue regarding the addition towards share capital and share premium is concerned, the ITAT dealt with the aforesaid issue from paragraphs 8 to 12 of the impugned order and came to the conclusion that the CIT (Appeals) rightly deleted the addition made by the Assessing Officer on this count. To put it in a nutshell, the ITAT, after perusing the facts and circumstances of the present case, came to the conclusion that the Assessee had filed complete details including identity of the subscriber to the share capital, as per which the Assessee has issued Rs.22,50,000/- equity shares at Rs.50/- per share having a face value of Rs.10/- per share with a premium of Rs.40/- per share. The ITAT noted that the Assessee had also filed complete details of the financial statement of the subscriber of the shares and their bank statements. Further the share capital issued by the Assessee had also been disclosed by the subscriber in its financial statements. The ITAT noted that the matter did not stop here. It noted that the subscriber's assessment was subjected to scrutiny and an order was passed under Section 143(3) where the Assessing Officer made no adverse comments in respect of the amount invested in the Assessee

Company's shares. Over and above this, the Assessee had also filed complete details of the money trail to explain source of investment made in Assessee Company's shares. The ITAT further noted that the subscriber to the share capital had received the amount from various other group companies to make the aforesaid investment. Looking at these facts and considering that it was not the case of the Assessing Officer that the share capital had been issued to a unknown subscriber, nor was it issuing shares to an accommodation entry provider, held that the CIT (Appeals) correctly deleted the aforesaid addition. The ITAT held that once the identity of the subscriber had been proved with the necessary details and also the genuineness of the transaction and creditworthiness of the parties had been established, then merely for the reason that the shares had been issued at a high premium, addition could not be made under Section 68 of the IT Act. The ITAT held that the issue of shares at premium and subscription to such shares is a decision between two parties, namely, the Company issuing the shares, and the party subscribing to those shares, and the Assessing Officer did not have any role to play, as long as ingredients provided under Section 68 of the IT Act were proved or established.

7. Having gone through the order of the ITAT as well as the order of the CIT (Appeals), we find that no substantial question of law arises in the present case. In the present case, both authorities below, on facts, were fully satisfied about the genuineness of the transaction, the identity of the subscriber, the creditworthiness of the subscriber as well as the source from which the monies were invested. Once this is the case, we are of the view that the order of the ITAT does not give rise to any substantial question of law.

8. To get over this hurdle, Mr. Sharma, the learned counsel appearing on behalf of the Revenue, brought to our attention the second proviso to Section 68. He submitted that the aforesaid proviso stipulates 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 other 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 has been found to be satisfactory. According to

Mr. Sharma, the stipulation in the second proviso to Section 68 has not been fulfilled in the present case and therefore a substantial question of law arises from the impugned order.

9. On the other hand, the learned advocate appearing on behalf of the Respondent Assessee firstly submitted that the second proviso to Section 68 was inserted by Finance Act, 2012 with effect from 1st April 2013. In other words, the same came into operation from A.Y.2013-14. In the facts of the present case we are concerned with A.Y.2012-13 and the said proviso can have no retrospective application, especially considering that the said proviso was not introduced with retrospective effect and nor does it contain the words “for removal of doubts” or that it is “declaratory”. He, therefore, submitted that the proviso cannot have retrospective operation and would apply only prospectively from A.Y.2013-14. This apart the learned counsel submitted that even assuming for the sake of argument that the said proviso were to apply, in the facts of the present case, there was clearly an explanation about the nature and source of funds that were invested by the subscriber, namely the investor. He, therefore, submitted that the reliance placed on the second proviso to Section 68 is wholly misconceived.

10. Having heard both counsels on this aspect, we are clearly of the view that in the facts of the present case, there is no requirement for us to determine whether the second proviso to Section 68 operates prospectively or has any retrospective effect. We say this because in the facts of the present case the ITAT has given a factual finding that subscriber had subscribed to the share to the Assessee Company by receiving amount from various other group companies. This factual finding, in our view, in the facts of the present case, clearly satisfies the condition laid down in the second proviso to Section 68. Once this is our view, we find that even this argument of the Revenue does not, in the facts of the present case, raise any substantial question of law.

11. In view of the aforesaid discussion, we find no merit in the above Appeal. It is accordingly dismissed. However, there shall be no order as to costs.

12. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.] **[B. P. COLABAWALLA, J.]**