IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH MUMBAI

BEFORE: SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

ITA No. 78/MUM/2018
(**Assessment Year : 2012–13**)

Assistant Commissioner of Income Tax CIR.6(2)(1) Room no. 504, 5th Floor, Aaykar Bhavan, M.K.Road, Mumbai–400020.	Vs.	M/S. Doshion Veolia Water Solution P. Ltd. 347, Warehouse Complex, Acme Compound Road, Wadala East, Mumbai–400037. (Corporate debtor-through Shri Vikash Gautamchand Jain-official liquidator)
PAN/GIR No. AACCD8958M		
(Appellant)	..	**(Respondent)**

&
ITA No. 1503/MUM/2018
(**Assessment Year : 2009–10**)

A.C.I.T.CIR.6(2)(2) Room no. 504, 5th Floor, Aaykar Bhavan, M.K.Road, Mumbai–400020.	Vs.	Doshion Water Solution P. Ltd. Office no. 3, 2nd Floor, "A" Wing Godrej Colliseum, Eastern Express Highway, Behind Everard Nagar, Sion, Mumbai-400022
PAN/GIR No. AACCD8958M		
(Appellant)	..	**(Respondent)**

Assessee by	None
Revenue by	Smt. Sanyogita Nagpal (CIT DR)
Date of Hearing	**28/05/2024**
Date of Pronouncement	**18/07/2024**

आदेश / O R D E R

PER SUNIL KUMAR SINGH (J.M):

The facts and the law applicable in both the aforesaid revenue appeals i.e in ITA no. 78/MUM/2018 for the A.Y. 2012-13 and ITA no. 1503/MUM/2018 for A.Y.2009–10, are common. Hence, both the appeals are being disposed off by this common order for the sake of convenience. We shall first deal with ITA no. 78/MUM/2018 for A.Y.2012–13.

ITA no. 78/MUM/2018 (A.Y. 2012-13)

1. This appeal is directed against the impugned order dated 24.10.2017 passed in Appeal no. CIT(A)–12/ACIT–6(2)(2)/435/15–16 by the Ld. Commissioner of Income–tax(Appeals) [hereinafter referred to as the "CIT(A)"] u/s. 250 of the Income-tax Act, 1961 [hereinafter referred to as "Act"] for the Assessment year [A.Y.] 2012-13, wherein learned CIT(A) has partly allowed assessee's appeal by deleting additions of Rs. 47,44,00,000/- u/s. 68 of the Act and Rs. 78,12,014/- u/s. 14A of the Act r/w rule 8D(2)(ii) of the Income Tax rules 1962 [hereinafter referred to as "Rules"], which were made vide assessment order dated 31.03.2015.

2. The brief facts state that the assessee company is engaged in the business of manufacturing of water treatment plant and Ion exchange resins and dealers in water treatment components-spares. The assessee has filed return of income electronically on 30.11.2012, declaring total income at Rs. 16,07,76,886/-. The assessee has shown income from book profit u/s. 115JB at Rs. 20,60,30,773/-. The return was processed u/s. 143(1) of the Act. The case was selected under scrutiny under CASS. Statutory notices u/s. 143(2) and 142(1) of the Act were issued and served upon the assessee. Assessee's representative Shri S V Parikh filed details in response there to. Assessing officer noticed that despite dividend of Rs. 2,00,89,500/- received as exempt income u/s. 10(34) of the Act and holding investments of Rs. 48,70,85,000/- (P.Y.1,13,19,000/- at the end of the year under scrutiny), assessee did not make disallowance of expenditure u/s. 14A of the Act r/w rule 8D of the rules. The assessing officer determined the expenditure attributable to the activity of investments that generates income which is not includible in the total income of the assessee company and worked out under rule 8D of the Rules as disallowance at Rs. 90,58,024/-. Assessing officer further added cash credit of Rs. 47,44,00,000/- on account of share capital (inclusive of share premium of Rs. 37,95,20,000/- for want of acceptable explanation from the assessee. Assessing officer also computed book profit u/s. 115JB of the Act for MAT liability. The total income was thus worked out as the income computed by assessee under normal provisions at

Rs. 16,07,76,886 + disallowance of Rs. 90,58,024/– u/s. 14A of the Act + cash credit of Rs. 47,44,00,000 u/s. 68 of the Act = Total Rs. 64,42,34,910/-. Penalty proceedings u/s. 271(1)(C) were also initiated for concealment of correct particulars of income. Aggrieved by the assessment order, assessee filed an appeal before learned CIT(A). Learned CIT(A) has partly allowed assessee's appeal to the extent of deleting aforesaid additions.

3. Aggrieved by the impugned order dated 24.10.2017, the appellant revenue has preferred this appeal firstly on the ground that learned CIT(A) has erringly deleted the addition of Rs. 47,44,00,000/- received by the assessee on account of share application money/share capital and share premium, not being substantiated with any evidence. Secondly, on the ground that the addition of Rs. 78,12,014/- was also erringly deleted on account of interest expenditure.

4. It is worth noting that these appeals were earlier heard on 02.02.2023 by the then co-ordinate bench and the common order dated 03.02.2023 was passed in aforesaid both the appeals. It was noticed by the Tribunal that the corporate debtor was made respondent despite commencement of liquidation proceedings in the case of company. It was further observed that if the revenue wants to pursue these appeals, then 'official liquidator' be impleaded as respondent. With these observations, both the appeals were dismissed with the liberty to the revenue that if in the future they prefer to pursue these appeals, the correct form No. 36 was required to be filed with

appropriate prayers. The appellant revenue, accordingly filed miscellaneous applications no. 553/MUM/2023 and 557/MUM/2023 respectively. The then co-ordinate bench, again passed common order dated 11.03.2024 on the basis of revised form no. 36 indicating Shri Vikash Gautamchand Jain as appointed official liquidator for the respondent/corporate debtor. The Tribunal, accordingly recalled (set aside) its earlier common order dated 03.02.2023 and these appeals were directed to be listed before the regular bench, hence these appeals.

5. After restoration of both these appeals, learned DR participated in the hearing for the appellant revenue, however none participated for the official liquidator of the respondent/corporate debtor. Keeping the pendency of the appeals pertaining to the year 2018 and the fact in view that the respondent corporate debtor is under liquidation process, we deem it just and reasonable to expedite and conclude the hearing of these appeals to their logical ends. Heard learned DR and perused the material available on record.

6. The appellant revenue has filed both these appeals against the respondent corporate debtor through liquidator as the respondent corporate debtor is under the liquidation process. In such a scenario, we are of the view that we must first discuss the legal position as to the determination of appellant revenue's dues and thereafter to make follow-up decision in respect of the merits of the case.

7. At the very outset, it is pertinent to mention that according to the copy of order dated 20.09.2021, passed by the adjudicating authority (NCLT, Mumbai Bench, Court II) in IA1921 of 2019 in CP(IB)1752/MB/C-II/2017 passed u/s. 33(1)(a) of the insolvency and bankruptcy code 2016, the respondent corporate debtor went into the liquidation process. Learned DR seems to have obtained an e–mail reply from the liquidator which states that in the sixth auction held on 29.08.2023, corporate debtor was sold on "going concern basis" and the sale certificate was issued to the successful bidder on 26.03.2024. In such circumstances, the finding to be arrived at in these appeals may be more of academic in nature than of any substance.
8. Learned Representative for the revenue department has however submitted that this appeal shall be deemed to be the continuity of assessment proceedings and no leave of the adjudicating authority is necessary to be obtained by the Revenue Department in respect of such assessment proceedings. There is no legal impediment in deciding this appeal on merit. She has referred Official Liquidator, High Court,...Vs Commissioner of Income Tax, West Bengal, AIR 1970 CAL349, in support of her arguments. The relevant para 49a read as under:

> *"49a. Assessment proceedings and recovery proceedings, although both are proceedings under the Income-tax Act, do not, to my mind, stand on the same footing in so far as leave under Section 446(1) of the Companies Act, 1956 is concerned. So long as the duty of assessment is not performed, the right to recover does not arise at all. Assessment validly done in accordance with the provisions of the Income-tax Act*

is the only way of creating a debt in favour of the Department and does not affect the assets and properties of the company or the scheme of administration thereof or the winding up of the company in any way. When any debt for payment of taxes arises on an assessment, it is open to the Department to prove the debt in liquidation, claim payment thereof and the debt of the Department will be paid in the same manner as the debt of other creditors of the same class) It may also be open to the Department to seek to enforce its right of recovery of the debt in accordance with the provisions of the Income-tax Act. But the right to enforce recovery by taking recourse to recovery proceeding against the assets of the company in liquidation is and cannot be an unfettered right. This right to recover in enforcement of the recovery proceedings under the Income-tax Act is controlled by Section 446(1) of the Companies Act, 1956 and is subject to necessary leave of Court,……"

9. It is true that the IBC is more recent statute. Section 238 of IBC reads as under:

> *"**238. Provision of this Code to override other laws.-** The Provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

10. The non–obstante clause in the above referred Section 238 clarifies that the IBC Code shall have the effect of overriding the provisions of other laws. Section 178 of the Act makes provision in respect of the 'company in liquidation'. The relevant Section 178(6) of the Income Tax Act reads as under:

> *"(1)……..*
> *(2)……*
> *(3)……..*
> *(4)……..*
> *(5)……..*

> *(6) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force [except the provisions of the Insolvency and Bankruptcy Code, 2016]."*

11. Above referred Sub Section 6 of Section 178 of the Act was amended by Section 247 r/w 3rd schedule of IBC with effect from 01.11.2016. This provision makes it clear that IBC code will override the provisions of Income Tax Act 1961.

12. The three judges bench of Hon'ble Supreme Court in Ghanashyam Mishra and Sons Private Limited Through The Authorized Signatory V. Edelweiss Asset Reconstruction Company Limited Through the Director & ORS., Civil appeal no. 8129 of 2019, vide para 95 of its order dated 13.04.2021 held as under:

> *"95. i. That once a resolution plan is duly approved by the Adjudicating Authority under sub- section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;*
>
> *ii. 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;*
>
> *iii. Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall*

> *stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued."*

13. It appears that since no resolution plan was approved by the committee of creditors of corporate debtor within the corporate insolvency resolution process. On the direction of the committee of creditors, the resolution professional moved an application for initiating liquidation process of corporate debtor, which was allowed by adjudicating authority as above. We take further guidance from the judgment dated 26.08.2022 passed by another three judges bench of Hon'ble Supreme Court in Civil Appeal No. 7667 of 2021, Sundaresh Bhatt, Liquidator of ABC Shipyard V. Central Board of Indirect Taxes and Customs, wherein Hon'ble Apex Court, vide paras 43,44,45 & 54, has held as under:

> *"43. In the above context, the judgment of this Court in S.V. Kondaskar v. V.M. Deshpande, AIR 1972 SC 878, is extremely relevant. In that case, this Court, while expounding the interplay of Section 446 of the Companies Act 1956 (bankruptcy provision) with the Income Tax Act, 1961, held as follows:*
>
> > *"7 .....Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446, read as a whole, it appears to us that the expression "other legal proceeding" in sub-section (1) and the expression "legal proceeding" in sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income Tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income tax payable also being a debt has to*

rank pari passu with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court under Section 446 of the Act. The liquidation court, in our opinion, cannot perform the functions of Income Tax Officers while assessing the amount of tax payable by the assessees even if the assessee be the company which is being wound up by the Court. The orders made by the Income Tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income Tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income Tax. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income tax. The argument on behalf of the appellant by Shri Desai is that the winding up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of Section 446 of the Act must be held to vest in that court to be exercised only if considered expedient. We are not impressed by this argument. The language of Section 446 must be so construed as to eliminate such startling consequences as investing the winding up court with the powers of an Income Tax Officer conferred on him by the Income Tax Act, because in our view the legislature could not have intended such a result.

8.The argument that the proceedings for assessment or re-assessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income Tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after income tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income tax determined by the Department should be accepted as a lawful liability on the funds of the company in

liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the Bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding up court. On the view that we have taken, the decisions in the case of Seth Spinning Mills Ltd., (In Liquidation) (1962) 46 ITR 193 (Punj) (Supra) and the Mysore Spun Silk Mills Ltd., (In Liquidation) (1968) 68 ITR 295 (Mys) (supra) do not seem to lay down the correct rule of law that the Income Tax Officers must obtain leave of the winding up court for commencing or continuing assessment or re-assessment proceedings."

44. Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context.

45. From the above discussion, we hold that the respondent could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.

54. On the basis of the above discussions, following are our conclusions:

> *i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.*
>
> *ii) After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods*

> *prescribed under the IBC, before the adjudicating authority.*
> *iii) In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC."*

14. Hon'ble Apex Court in Civil appeal no. 6432-6433 of 2023, principal commissioner of custom V. Rajendra Prasad Tak and others, vide order dated 30.10.2023, has explicitly held that the dues of the central board of indirect taxes and custom department of revenue, are to be paid in accordance with the waterfall mechanism as provided u/s. 53 of the insolvency and bankruptcy code 2016. This dictum is equally applicable in respect of the dues of the central board of direct taxes, department of revenue.

15. In view of aforesaid discussion and law laid down by Apex Court in Sundaresh Bhatt (Supra), we hold that the provisions of IBC 2016 would prevail over the Income Tax Act. However, Income Tax authorities have limited jurisdiction to assess/determine the quantum of Income Tax dues but have no authority to initiate recovery of such dues at its own during the period of moratorium in violation of Section 14 or 33(5) of the IBC as the case may be. The Income Tax Authorities are like any other creditor, may stake their claim before liquidator in the statutory limitation period provided under the IBC. Such claims can be considered in accordance with the waterfall mechanism provided u/s. 53 of IBC. As in the case of civil litigation, an appeal is treated as the continuation of a suit, the outcome of these appeals would also result in the determination of revenue's tax dues only. There is thus no legal impediment

in deciding these appeals, which would amount to determination of tax dues only. In the light of what has been held by us hereinabove, we now proceed to decide the instant matter on merit.

16. As regard the merits of the case, the following points under appeal are to be determined.

    i. Whether learned CIT(A) erred in deleting the addition of Rs. 47,44,00,000/- as unexplained cash credit contrary to the provisions of law?

    ii. Whether learned CIT(A) erred in deleting the addition of Rs. 78,12,014/- in respect of interest expenditure which were added by learned AO on account of section 14A r/w rule 8D (2)(ii) of the Rules?

17. As regards the deletion of addition of Rs. 47,44,00,000/- as unexplained cash credit, it is noted that during the year under assessment, assessee received an amount of Rs. 47,44,00,000/- on account of share capital (including share premium of Rs. 37,95,20,000/-). Learned AO was not satisfied with the justification regarding share premium for want of evidence in respect of identity, creditworthiness and genuineness of the parties from whom share premium was received. Assessing officer treated the aforesaid share capital as unexplained cash credit u/s. 68 of the Act and added back to the total income of the assessee.

18. Learned CIT(A) noted that in response to the questionnaire issued along with AO's notice u/s. 142(1) dated 19.01.2015, assessee, vide reply dated 03.03.2015 furnished copy of form no. 05 filed with ROC under the

provisions of companies Act, copy of share application register and copy of the shareholders' register. Learned CIT(A) further noted that the aforesaid documents had the details such as number of shares allotted, the issue price of the shares, the amount of share premium per share, the name of the person to whom share was issued and the date of issue of shares. Learned CIT(A) found that AO did not make any specific query in respect of furnishing the details and evidences to prove the identity, genuineness of the transaction and creditworthiness of the shareholder in respect of above said share capital and premium.

19. Assessee filed additional evidence under rule 46A of the rules before learned CIT(A), who, after admitting the same, received copy of financial statements of Doshion Ltd. (the shareholder) for the A.Y. 2012-13. The same was forwarded to assessing officer and remand report was called for from the Assessing Officer, who first submitted interim report vide letter dated 10.07.2017. After verification of the case records, fresh evidences and details filed by the assessee during the remand proceedings, it was brought to the notice that the investments were made by the parent company M/S. Doshion Pvt. Ltd. also, all the ROC correspondences were verified during the remand proceedings and no discrepancy was found. The relevant paras 17 to 19 and 21 to 24 of impugned order passed by learned CIT(A), read as under:

"17. As per the details furnished by the appellant during the course of assessment proceedings vide letter dated 03.03.2015, the appellant issued 94,88,000 preference shares of Rs.10/- each at a premium of Rs.40 each to Doshion Pvt. Ltd. (formerly known as Doshion Ltd.) during the year. The appellant therefore raised share capital of

Rs.9,48,80,000/- and share premium of Rs.37,95,20,000/- aggregating to Rs.47,44,00,000/- during the year by issue of preference shares to Doshion Pvt. Ltd. (DPL). The said company is the holding company of the appellant and it held 70% of the equity share holding of the appellant during the previous year. The appellant furnished the financial statements of DPL for FY 2011-12 by way of additional evidence under Rule 46A. During the remand proceedings, the A.O. called for further details such as the shareholding pattern of the appellant company as on 31.03.2012, the copies of the documents submitted to ROC for issue of preference shares, the details regarding utilization of the funds raised by issue of preference shares to DPL and the current status of the preference shares. The appellant furnished the said details to the AO. Based on the examination of the same, the A.O. stated in his interim remand report that the investment in the share capital and premium of Rs.47.44 crores during the year has been made by DPL, which is the parent company of the appellant and that all the ROC correspondence and other details furnished by the appellant were verified during the remand proceedings and no discrepancy has been found. The A.O. stated that it is therefore clear that the appellant had issued shares at a premium to its parent company and an amount of Rs.47.44 crores has been received by the appellant during the year.

18. Subsequently, the A.O. furnished his final remand report vide letter dated 06.09.2017 wherein he stated as under:-

> *Assessee has made his submission on 24.08.2017 wherein in the letter head it is mentioned that photocopy of bank statement of M/s.Doshion Water Solutions Pvt. Ltd. from 01.04.2011 to 31.03.2012 reflecting share premium transaction is given, whereas the bank statement provided, it was seen that assessee has provided bank statement from 02.05.2011 to 13.05.2011. From the bank statement of Doshion Water Solutions Pvt. Ltd. an amount of Rs.4,74,40,000/- (correct figure is Rs. 47,44,00,000/-) has been credited by Doshion Ltd. Further assessee has not submitted any contract note between M/s.Doshion Pvt. Ltd. and M/s. Doshion Water Solutions Pvt. Ltd. for share premium paid/received. Further details called for application made and details of application of loan amount of Rs.37,69,41,403/- with documentary evidence not provided.*

19. Subsequent to the furnishing of the Interim remand report, the A.O. made further examination of the flow of funds from DPL to the appellant for making the said Investment in the preference shares of the appellant. The A.O. noticed on perusal of the balance sheet of DPL that it had obtained a secured loan of Rs.37.69 crores from an NBFC during the year which formed the main source for the Investment made in preference shares of the appellant company. The AO therefore required the appellant to furnish details of the secured loan from NBFC, the manner of application of the loan funds, copy of bank statement of the appellant reflecting flow of funds from DPL towards share capital and premium and copy of contract note between the appellant and DPL for the said transaction. After examining the details furnished by the appellant, the AO reported that the bank statement of the appellant furnished for the period from 02.05.2011 to 13.05.2011 reflected receipt of an amount of Rs. 4,74,40,000/- only from DPL. The AO remarked that the contract note between the appellant and DPL has not been furnished. The AO also stated that the details of the application of the loan funds of Rs. 37.69 crores obtained from NBFC by DPL has not been furnished.

20. ……

21. In the rejoinder, the appellant stated that there was no contract note/agreement between the appellant and DPL for the subscription by DPL to the preference shares issued by the appellant at a premium. The appellant stated that two amounts of Rs.4,74,40,000/- each aggregating to Rs. 9,48,80,000/- were received from DPL towards preference share capital and were credited in the appellant's bank account on

13.05.2011 as per the bank account extract furnished to the AO. The appellant explained that amount to the extent of Rs.37,95,20,000/- representing preference share premium was paid by DPL to Kirloskar Brothers Ltd on behalf of the appellant towards the purchase consideration payable by the appellant to Kirloskar Brothers Ltd towards acquisition of 100% shares of Gondwana Engineers Ltd (GEL) during the year. The appellant explained that the Investment so made by the appellant in the shares of GEL during the year is reflected in the balance sheet of the appellant as on 31.03.2012 under Non-current Investments. The appellant explained that the said amount of Rs. 37.95 crores was palid by DPL out of the secured loan obtained from L & T Infrastructure Finance Co. Ltd, an NBFC, which is reflected as secured loan from NBFC in the balance sheet of DPL. The appellant furnished the coples of the submissions made to the AO in this regard during the remand proceedings.

22. The interim and final remand reports furnished by the AO, the rejoinder furnished by the appellant with regard to the final remand report of the AO and the coples of the submissions made before the AO during the remand proceedings have been carefully examined. Firstly, it is noted that the person who subscribed to the share capital and premium of Rs.47.44 crores raised by the appellant during the year by issue of preference shares at a premium is the holding company of the appellant itself. The said holding company I.e Doshion Pvt Ltd (DPL) held 70% of the pald up equity capital of the appellant company during the year. It is noticed from the perusal of the financial statements of the holding company furnished by the appellant as additional evidence under Rule 46A that the Investment made by the said company in the preference shares issued by the appellant during the year is duly reflected in the balance sheet of the sald company as on 31.03.2012. It is seen from Note 10 of the notes on financial statements that an amount of Rs.47.44 Crores is shown there in under the Non-current investments as Investment in the preference shares of the appellant company. Moreover, it is noticed from the information furnished by the appellant that the holding company is regularly assessed to tax and that the case of the sald company for AY 2012-13 was also scrutinized u/s.143(3) of the Act by DCIT, Circle-1(1)(2), Ahmedabad vide order dated 30.01.2015 wherein nothing adverse has been found with regard to the sources of DPL for the investment made in the preference shares of the appellant during the year.

23. Further, it is noticed from the perusal of the balance sheet of DPL that it had obtained a loan of Rs.37.69 Crores from a NBFC during the year. On perusal of the information and clocuments filed by the appellant before the AO during the remand proceedings, it is seen that the said loan was obtained by DPL from L & T Infrastructure Finance Co. Ltd during the year and the loan amount was utilized for the purpose of investing in the preference shares issued by the appellant to DPL. It is seen that the said loan amount was paid by DPL to Kirloskar Brothers Ltd on behalf of the appellant towards the purchase consideration payable by the appellant to Kirloskar Brothers Ltd towards acquisition of 100% shares of Gondwana Engineers Ltd (GEL) by the appellant during the year. It is seen that the investment of Rs.47.55 crores so made by the appellant in the shares of GEL during the year is reflected in the balance sheet of the appellant as on 31.03.2012 under Non-current Investments. This investment in the shares of GEL comprised of consideration pald for the shares of Rs.47.44 crores and stamp duty expenses incurred on the sald transaction of Rs.11.86 lakhs.

24. Apart from the amount of Rs.37.95 Crores paid by DPL to Kirloskar Brothers Ltd. on behalf of the appellant, DPL paid two identical amounts of Rs.4,74,40,000/- to the appellant towards the subscription of the preference shares issued by the appellant through the banking channel and the same are found credited in the bank account of the appellant on 13.05.2011 as per the bank account statement for the period from 02.05.2011 to 13.05.2011 furnished by the appellant to the AO during the remand

proceedings. It is seen that the remark made by the AO In his final remand report that an amount of Rs.4,74,40,000/- only is found credited in the bank account of the appellant towards the receipt of share capital and premium from DPL is factually incorrect as it is noticed that two such identical amounts are found credited in the bank. account on 13.05.2011 and they aggregated to Rs. 9,48,80,000/-. Thus, it is seen that the flow of funds from DPL to the appellant towards share capital and premium of Rs.47.44 crores comprised of payment through bank of Rs.9.488 crores and payment to Kirloskar Brothers Ltd on behalf of the appellant towards investment in the shares of GEL by the appellant. The application of the funds so raised is seen to be towards acquisition of shares of GEL of Rs.47.55 crores by the appellant during the year……."

20. After examining the additional evidence admitted under rule 46A of the rules and the final remand report submitted before learned CIT(A), the identity, genuineness of the transaction and the creditworthiness of the investor were unambiguously established in respect of the share capital and premium of Rs. 47.44 Crores raised by the appellant by issue of preferential shares. We find that learned CIT(A) has left no stone unturned in taking out the grains from chaff. Learned CIT(A) has rightly deleted the aforesaid addition of Rs. 47.44 Crores as share capital & premium raised by the assessee on the basis of cogent and convincing evidence as stated hereinabove. No interference is warranted in the impugned order to this effect. The first point in respect of ground–1, is determined in negative against the revenue.

21. With regard to the second point under consideration, we shall now examine as to whether the deletion of addition of Rs. 78,12,014/- on account of section 14A, is tenable under law? A Careful reading of the assessment order shows that learned AO found that the assessee company was in receipt of dividend of Rs. 20089500/- which was claimed exempt u/s. 10(34) of the Act, however assessee did not apportion any expenditure attributable to the

exempt income. AO thus computed interest expenditure by resorting to the computation as provided under rule 8D(2)(ii) of the Rules and worked out such interest expenditure as Rs. 78,12,014/-.

22. Learned CIT(A), on examination of assessee's balance sheet found that as on 31.03.2012, appellant assessee had paid up share capital of Rs. 14.48 Crores and reserve and surplus of Rs. 151.97 Crores. The investment, yielding exempt income, were shown at Rs. 48.70 Crores as on 31.03.2012 as against 1.13 Crores as on 31.03.2011. It was noted that assessee's own fund aggregating to Rs. 166.45 Crores were much higher than the investments of Rs. 48.70 Crores that yield exempt income. Relying on HDFC Bank Limited (2014) 366 ITR 505 (Bom) learned CIT(A) deleted the aforesaid addition on the principle that if there are funds available, both interest free and interest bearing loans, than a presumption would arise that investments would be out of interest–free funds, generated or available with company provided that said funds are sufficient to meet investments. On the basis of assessee's balance sheet, the reserves and surplus funds are in multiple times than the share capital of the assessee company. Learned CIT(A), has thus rightly deleted the aforesaid addition. The second point is also determined in negative against the revenue. Now we shall deal with ITA no. 1503/MUM/2018 for A.Y.2009–10.

ITA no. 1503/MUM/2018 of A.Y. 2009-10

23. The revenue has filed this appeal against the impugned order dated 04.12.2017 passed in appeal no. CIT(A)–

12/ACIT–6(2)(2)/432/15–16 by learned CIT(A), wherein learned CIT(A) has partly allowed assessee's appeal by deleting additions of Rs. 56,20,08,225/- u/s. 68 of the Act and Rs. 5,92,513/- u/s. 14A of the Act r/w rule 8D(2)(ii) of the rules which were added vide assessment order dated 30.03.2015.

24. The revenue has preferred this appeal on the ground that deletion of the aforesaid amount on account of share capital/share premium and on account of interest expenditure respectively are not tenable under law. Further, challenged the impugned order, holding the assessment u/s. 147 of the Act as bad in law.

25. The facts of both the appeals are almost similar except the figures and the fact that the investment made in the shares of the appellant company were duly reflected in the consolidated statement of financial position assets. It was established that the investment made by Veolia, in the share capital of the appellant company during the year, which comprised of paid up share capital of Rs. 79,85,000/– and share premium of Rs. 56,20,08,225/– was duly complied with the FEMA provisions and RBI regulations. Remaining aspect of the matter in respect of deletion of aforesaid additions except the validity of the reopening of assessment, has already been considered by us in our conclusive findings arrived at in ITA NO. 78/MUM/2018. Aforesaid findings shall mutatis mutandis apply to the facts of this appeal also. The order of deletion of aforesaid additions made by learned CIT(A) from the total income of the assessee in this appeal, is also upheld.

26. One more additional ground taken by the revenue in this appeal, is the challenge to the order of learned CIT(A), declaring reopening of the assessment as valid u/s. 147 of the Act as bad in law. Learned CIT(A) has ruled that though the re-opening of the assessment u/s. 147 of the Act, was not based on change of opinion, however, learned CIT(A) held that the re–opening of assessment was bad in law for the reasons that it was made without any tangible material and further that the AO had not made any addition in respect of the share premium on the grounds on which the re–assessment was opened. As this fact of non addition is not disputed, hence, this ground remains more of academic in nature. We do not find any error or any infirmity in the well discussed and speaking impugned order, based on cogent and clinching evidence. All the grounds taken by the revenue in this appeal, thus stand dismissed.

27. This Tribunal has the trappings of a Court. Before parting with the matter, the Tribunal, in the role of "parens patriae" of public money, deems it just and proper to make an observation that a tax is a common burden and the only return the tax payer gets, is the participation in the common benefit of a state. Any possibility of dilution or extinction of such tax, directly and substantially affect the welfare of the people at large. In view of law laid down by Hon'ble Apex Court in Sundaresh Bhatt (Supra), there is no shadow of any doubt that when the defaulter/corporate debtor goes either into corporate insolvency resolution process or under liquidation, the taxing authorities can

stake their claims of tax dues either before the resolution professional or before liquidator or before the adjudicatory authority, as the case may be, within the time-limit for completion of insolvency resolution process provided under IBC. Proactive approach of the taxing authorities to stake the claim of dues as creditor, immediately after determination of tax dues subject, of course to the outcome of any pending appeal, may substantiate the claim to a larger extent as the claim has to go through the waterfall mechanism provided u/s. 53 of the IBC as explained by Hon'ble Apex Court in Rajendra Prasad Tak (supra). The copy of this order be sent to CBDT with a request to issue necessary directions to the concerned taxing authorities to avoid any possibility of extinction of such public dues, whenever the corporate debtor goes either into the corporate insolvency resolution process or under liquidation.

28. In the result, the revenue's appeal ITA NO. 78/MUM/2018 & ITA NO. 1503/MUM/2018 stand dismissed. Let the copy of this order be kept on the record of the ITA NO.1503/MUM/2018.

Order pronounced on 18.07.2024.

Sd/–	**Sd/–**
(PRASHANT MAHARISHI)	**(SUNIL KUMAR SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 18/07/2024
Anandi Nambi, *Steno*

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai