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

WRIT PETITION NO.3593 OF 2018

Aurum Renewable Energy Private Limited … Petitioner

V/s.

Assistant Commissioner of Income-tax
Circle 5(1)(1), Mumbai and ors. … Respondent

Mr.Madhur Agrawal i/by Mr.Atul Jasanti for the Petitioner.
Mr.Sham Walve for the Respondent.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 24, 2019.

P.C.:-

1. Heard learned counsel for the parties for final disposal of the petition.

2. Petitioner has challenged a notice of reopening of assessment dated 22nd March, 2018 for the assessment year 2011-12.

3. Brief facts are as under:-

Petitioner is a company registered under the Companies Act. For the assessment year 2011-12 the petitioner had filed a return of income on 11th June, 2012 declaring "Nil" income. The return was taken in scrutiny by the Assessing Officer who passed order under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 6th March, 2014 computing petitioner's income at Rs.99,000/- . To reopen such assessment the Assessing Officer issued the impugned notice. In order to do so he had recorded the following reasons:-

> "1. In this case, the assessee filed return of income on 11.06.2012 declaring total income at Rs.NIL. Further, assessment u/s 143(3) of the I.T.Act, 1961 was completed vide order dated 06.03.2014 determining total income at Rs.99,000/-.
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> 2. Further on verification it is found that the company was incorporated on 16.07.2010 i.e. in the F.Y. 2010-11 and the A.Y. 2011-12 was the first assessment year. It is seen that the authorized capital of the assessee company is Rs. 4,00,00,000/-(40,00,000 shares of Rs.10 each). Out of this 39,90,000 shares were issued at a premium of Rs.145/-per share (total share premium 57,85,50,000/-). However, no details as to how the share premium was worked out at Rs.145/- per share are on record. The assessee has to explain the claim and source of the credit entry in the books of accounts. It means explaining the source alone is not enough but the nature should also be explained. If the

explanation offered by the assessee is not satisfactory, then the amount of share premium needs to be taxed. Therefore, if the assessee explains that the amount received is share premium, but there is no justification for quantum of premium, then it can safely be held that nature of premium is not proved. In the present case the nature of premium is not proved.

3. In the light of the above, there is an escapement of income on account of failure to examine this issue amounting to Rs.57,85,50,000/-, which should have been brought to tax.

4. In view of the above, I have "reasons to believe" that income chargeable to tax, to the tune of Rs.1,00,000/- or more has escaped assessment for A.Y. 2011-12 within the meaning of Section 147 of the I.T.Act, 1961, on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. Accordingly, the assessment is to be reopened u/s 147 of the I.T.Act, 1961 by way of issuance of notice u/s 148.

5. In view of the above, it is requested that approval may be granted to reopen the .... the authorized capital of the assessee company is Rs.4,00,00,000/- (40,00,000 shares of Rs.10 each) . Out of this 39,90,000 shares were issued at a premium of Rs.145/- per share (total share premium 57,85,50,000/-). However, no details as to how the share premium was worked out at Rs.145/- per share are on record. The assessee has to explain the claim and source of the credit entry in the books of accounts. It means explaining the source alone is not enough but the nature should also be explained. If the explanation offered by the assessee is not satisfactory, then the amount of share premium

> need to be taxed. Therefore, if the assessee explains that the amount received is share premium, but there is no justification for quantum of premium, then it can safely be held that nature of premium is not proved. In the present case the nature of premium is not proved.
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> 6. In the light of the above, there is an escapement of income on account of failure to examine this issue amounting to Rs.57,85,50,000/-, which should have been brought to tax.
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> 7. In view of the above, I have "reasons to believe" that income chargeable to tax, to the tune of Rs.1,00,000/- or more has escaped assessment for A.Y. 2011-12 within the meaning of Section 147 of the I.T. Act, 1961, on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. Accordingly, the assessment is to be reopened u/s 147 of the I.T.Act, 1961 by way of issuance of notice u/s 148.
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> 8. In view of the above, it is requested that approval may be granted to reopen the assessment u/s 147 of the I.T. Act, 1961 and to issue notice u/s 148 of the Act in this case as required under provisions of Sec. 151(1) of the Act."

4. Upon being supplied the reasons, the petitioner raised objections to the notice of reopening of assessment under letter dated 26th November, 2018. Such objections were rejected by the Assessing Officer by an order dated 10th December, 2018. Hence,

the petition.

5. Having heard learned counsel for the parties and having perused the documents on record, we notice that the impugned notice have been issued beyond the period of four years from the end of relevant assessment year. There is neither any allegation, nor any suggestion in the impugned notice that income chargeable to tax has escaped assessment due to the failure of the assessee to disclose truly and fully all material facts. Only on this ground therefore, the impugned notice would be rendered invalid.

6. There is yet another ground why we cannot allow the Assessing Officer to act on such notice. This is so because in the original scrutiny the assessment, the Assessing Officer had examined the issue on which he now wants to reopen the assessment. In the reasons recorded he had referred to the authorized capital of the assessee-company of Rs.4 crores representing 40 lakhs shares of Rs.10/- each, out of which 39 lakhs 90 thousand shares were issued at the premium of Rs.145 per share. He has recorded that no details as to how the share

premium was worked out at Rs.145 per share was produced on record. It was on account of this that Assessing Officer held the belief that the share premium sum of Rs.57.85 crores (rounded off) had escaped assessment. In the order of assessment itself, after putting the petitioner to notice, the Assessing Officer had made limited disallowance on this ground as can be seen from the below quoted portion of the order of assessment:-

> "**Difference is share subscription**:
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> It is seen from the Balance Sheet that during the year the assessee has received funds from its holding company M/s Aurum Ventures Pvt. Ltd. In the form of share subscription and share premium of Rs.61,22,65,500/-. The assessee has filed copy of confirmed account of M/s Aurum Ventures Pvt. Ltd. and the other individual share holder. It is further seen that the total share holders fund as reflected in the Balance Sheet of the assessee company is Rs.61,85,50,000/-. Out of which confirmation have been filed of two share subscriber which totals Rs. 61,84,50,000/- . Thus there is a difference of Rs.1,00,000/-. Adjusting for the fund of the third nominal share holder share there is a difference of Rs.99,000/-. This amount remains to be reconciled and the assessee has agreed to the addition of this amount. Accordingly, an amount of Rs.99,000/- is added u/s 68 of the Act. Penalty proceeding is also initiated u/s.271(1)(c) for furnishing of inaccurate particulars of income separately on this issue."

7. The Assessing Officer now cannot have second innings and re-examine the same issue, in absence of any tangible material outside the record within his possession. Any attempt on his part would be based on mere change of opinion.

8. In the result, impugned notice is set aside. Petition is disposed of accordingly.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**

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