

OD- 10

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/104/2023
IA NO. GA/1/2023
LNB RENEWABLE ENRGY LIMITED
-VS-
PRINCIPAL COMMISSIONER OF INCOME TAX-2, KOLKATA

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE AJAY KUMAR GUPTA
Date : 19th June, 2023

Appearance :
Mr. J.P. Khaitan, Sr., Adv.
Mr. Pratyush Jhyunjhunwala, Adv.
Mr. Anurag Bagaria, Adv.
...for the appellant.
Mr. Om Narayan Rai, Adv.
Mr. Soumen Bhattacharjee, Adv.
...for respondent

The Court : This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961, is directed against the order dated 30.11.2022 passed by the Income Tax Appellate Tribunal "A" Bench, Kolkata, (the Tribunal) in ITA No. 2011/Kol/2018 and C.O. No. 117/Kol/2018 for the assessment year 2013-14. The assessee has raised the following substantial questions of law for consideration

- (a) Whether the Assessing Officer's appeal was maintainable before the Tribunal when the appellate order was based on his remand

report accepting the valuation report dated March 14, 2018 obtained by the assessee pursuant to the direction of the appellate authority ?

- (b) Whether and in any event the Tribunal was justified in law in reversing the order of the Commissioner of Income Tax (Appeals) and upholding the addition of Rs.8,05,00,000/- by invocation of section 56(2)(viib) of the Income Tax Act, 1961?
- (c) Whether the purported findings of the Tribunal that input for preparing the valuation report dated March 14, 2018 were not correctly supplied to the expert and rejecting the said report and upholding the addition under section 56(2)(viib) of the Income Tax Act 1961, of share premium of Rs.8,05,00,000 as being in excess of the fair market value of the assessee's shares have been arrived at by ignoring the relevant materials and/or by taking into consideration irrelevant and/or extraneous materials and are arbitrary, unreasonable and perverse ?
- (d) Whether and in any event, the provisions of section 56(2)(viib) of the Income Tax Act, 1961 can be invoked in case of issue of shares by a wholly owned subsidiary to its holding company ?
- (e) Whether and in any event, the assessment order passed without complying with the binding direction of the Additional

Commissioner of Income Tax under section 144A of the Income Tax Act, 1961 was ex facie illegal and the Tribunal ought to have decided the said contention of the assessee raised in its cross-objection ?

Heard learned Counsel for the either sides.

The Tribunal by the impugned order had allowed the appeal filed by the revenue challenging the order passed by the Commissioner of Income Tax – Appeals (IV), Kolkata CITA dated 13th June, 2018 arising out of an assessment order under Section 143(3) of the Act dated 30th March, 2016. At the first blush it appears that the facts are very complicated but on a closer examination more particularly with regard to the grounds raised by the assessee the matter is, at the threshold projected by the assessee on certain technical grounds. The brief facts which are required for consideration after considering the correctness of the grounds canvassed by the appellant are that the assessing officer was required to obtain the fair market value of the preference shares and which was required to be referred to the appropriate valuation officer. A direction was issued by the Additional Commissioner of Income Tax, Range 2, Kolkata on 22.3.2016 under Section 144(A) of the Act directing the assessing officer to refer the matter to the valuation officer under Section 142(A) of the Act to estimate the valuation including the fair market value of the asset being equity shares of the

company and obtain a report from the valuation officer. The valuation officer was requested to provide in his valuation report the fair market value of the preference shares in terms of rule 11UA (1)(c)(c) of the Income Tax Rules. The assessing officer instead of referring the same in terms of the direction issued under Section 144A of the Act referred the matter to the valuation officer who deals with valuations of immovable properties. The said authorities had promptly returned the papers on the ground that he does not have jurisdiction to deal with the subject as it is required certain expertise. Aggrieved by the assessment order the assessee was on appeal before the CIT(A). The CIT(A) had issued a direction to the assessee to prepare an expert report and a report to be submitted which was to be in turn examined by the assessing officer for comments. The report was accordingly drawn by expert subject to the CIT(A) which was referred to the assessing officer for his comments/report. The assessing officer did not find any fault in the valuation report submitted by the merchant banker/accountant appointed by the assessee. Accordingly, the appeal filed by the assessee was allowed. Aggrieved by the said order the revenue preferred the appeal before the Tribunal. The assessee filed cross-objection contending that the appeal was not maintainable as the revenue cannot be stated to be an aggrieved person over the order passed by the CIT(A), since the assessing officer did not record any objection or reservation to the valuation report submitted by the expert

appointed by the assessee. The revenue argued their appeal on the merits of the matter seeking to sustain the order passed by the assessing officer. The learned Tribunal after considering the submission on either side in paragraph 12 of the impugned order has held that as far as the preparation of the valuation report and its technical aspects are concerned the Tribunal refrained from making any comments. However, the revenue succeeded in the appeal in the light of the reasoning given by the Tribunal in paragraph 14 of the order which is quoted hereinbelow :-

“14. Now, before us the Revenue has pointed out the fact that the assessee company was incorporated on 07.11.2012 and the cut off date for the valuation of share was 16.11.2012. Further, the fact has been placed before us by the Revenue through its grounds of appeal is that the subsidiary companies were acquired on 29.12.2012 & 10.01.2013 which was after the valuation date i.e. 16.11.2012. This fact of acquiring the wholly owned subsidiaries/step down subsidiaries after the cut off date of valuation of share remain uncontroverted by the assessee and there is no whisper about controverting this fact at any stage during the course of assessment proceedings/appellate proceedings both before the Ld. CIT(A) and before us.”

The submission of the learned Senior Advocate for the appellant/assessee is that the Tribunal ought to have considered that for

funding out project, financial projection had to be made on the basis of future expected cash flow and the business sought to be undertaken had to be value and such exercise was invariably undertaken well in advance. Further, it was contended that the Tribunal should have considered the dates on which entities involved in the project became the assessee's wholly owned subsidiaries or step down subsidiaries was of no consequence. However, the Tribunal failed to consider one of the methods described under Rule 11UA of the 1962 Rules was the "Designated free cash flow method" for determining the value of the business of the company and its shares and the experts have followed the said method and in their report dated 13.11.2012 and 14.03.2018 for the purpose of valuing the assessee's future business and its shares. Several other grounds have also been raised by the assessee. So far as the cross objection is concerned the Tribunal has not considered the specific objection of the assessee that the revenue should not have been said to be an aggrieved person over the order passed by the CIT(A) since the assessing officer did not record and adverse comments on the valuation report which was forwarded by the CIT(A) for its comments and observations. However, the learned Tribunal held that cross-objection merely supports the finding of the learned CIT(A). We are informed that the assessee filed a miscellaneous application before the learned Tribunal in M.A. No. 10 & 14/Kol/2023 with a submission that the appeal filed by the revenue before

the learned Tribunal is not maintainable on the ground that the assessing officer has accepted the valuation report without any adverse finding in the remand report and it is liable to be quashed. The said miscellaneous application is now pending before the Tribunal. From the above discussion and noting the facts we find that once the Tribunal holds that they do not wish to make any comments on the technical aspects, and simultaneously files the valuation reports, two courses were open to the Tribunal, one course could have been adopted, that is was to afford an opportunity to the assessee to explain as to the relevance of the date on which the subsidiary companies were acquired and is it of any significance quay the valuation of the shares which took place admittedly prior to the acquisition on 16.11.2012. The second option was to call for a fresh valuation report from an expert and examine such report on facts, as the Tribunal being the last fact finding authority was entitled to do so. We find either of the two options was not exercised by the Tribunal. Thus considering the totality of the circumstances we are of the view that the assessee should have been afforded an opportunity to explain as to what would be the consequence or relevance of the date on which subsidiary companies were acquired by the assessee and taking note of the opinion of the Tribunal the valuation report should be called for from the experts and that procedure can also be resorted to. That apart, since the assessee has filed a miscellaneous application to consider as

to whether appeal filed by the revenue was maintainable before Tribunal, that issue also needs to be gone into as the cross-objection filed merely to support the finding of the CIT(A).

Thus, for all the above reasons we are of the clear view that the matter is to be reheard and re-decided by the Tribunal on all the issues that may be canvassed both by the assessee and the revenue.

In the result, the appeal filed by the assessee is allowed. The order impugned is set aside. The matter is remitted back to the learned Tribunal for fresh consideration on merits and in accordance with law.

Consequently, the substantial questions are left open.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(AJAY KUMAR GUPTA, J.)