IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5716 OF 2022

GRI Towers India Private Limited …**Petitioners**
Versus
Union of India and Anr. **...Respondents**

Mr. P. J. Pardiwalla, Senior Advocate, with Mr. Dharan Gandhi, for Petitioner.
Mr. Suresh Kumar, for Respondents-Revenue.

CORAM: K. R. SHRIRAM &
DR.NEELA GOKHALE, JJ.
DATED: 29th January 2024

PC:-

1. Petitioner in May, 2012, had acquired 100% equity shares of a company Shrenik Industries Private Limited ("**Shrenik**") by purchasing 9 lakh equity shares of Rs.10/- each at a premium of Rs.508.20 from third party promoters. Petitioner, therefore, had paid Rs.518.20 per share. Petitioner has relied upon a valuation report dated 30th May 2012 obtained from an independent valuer. The valuation was based on Discounted Cash Flow ("**DCF**") method based on projections of Shrenik.

2. During Assessment Year (**"AY")** 2014-15, Shrenik had issued equity shares of face value of Rs.10 per share at a premium of Rs.508.20 and Rs.582.92 per share to Petitioner. The issue price was determined on the basis of valuation reports following the DCF

method. Subsequently, Shrenik got amalgamated with Petitioner effective from 1st April 2015. In its return of income filed on 29th November 2014 for AY 2014-15, Petitioner declared NIL taxable income. The assessment was concluded after scrutiny proceedings and an assessment order dated 15th December 2016 under Section 143(3) of the Income Tax Act, 1961 ("**Act**") was passed. One of the reasons for picking up the return of income for scrutiny assessment as stated in the assessment order is large share premium during the year.

3. Later, Petitioner received a notice dated 22nd March 2019 under Section 148 of the Act alleging that there is reason to believe that Petitioner's income has escaped assessment for AY 2014-15. Petitioner was provided the reasons for reopening vide communication dated 17th August 2019. Petitioner filed its objections by a communication dated 30th August 2019, which came to be rejected by a letter dated 20th November 2019. Since the order disposing Petitioner's objections was without any reasons, Petitioner filed a Writ Petition in this Court being Writ Petition No.3417 of 2019. The order disposing objections came to be quashed and set aside and the matter was remanded for *de-novo* consideration. Subsequently, a fresh order disposing objections was passed being order dated 6th January 2022, which is impugned in this Petition. Upon receiving the fresh order on objections dated 6th January 2022,

Petitioner filed this Writ Petition. During the pendency of this Writ Petition an assessment order dated 31st March 2022 under Section 143(3) read with Section Section 148 of the Act came to be passed and a notice of demand dated 30th March 2022 and notice dated 30th March 2022 for imposing penalty under Section 274 read with Section 271(1)(c) of the Act also came to be issued. All these three have been challenged in this Petition by amending the Petition pursuant to leave granted on 5th May 2022. Pleadings are completed and hence, we decided to dispose the Petition at this stage itself with the consent of counsel. Therefore, Rule made returnable forthwith.

4. Though various grounds have been taken in the Petition, the primary ground that Mr. Pardiwalla raised was, this is a clear case of change of opinion because the issue of excessive share premium was the subject matter of consideration during the assessment proceedings.

5. Mr. Suresh Kumar submitted that the entire premium charged was on the basis of certain projections, which were not achieved and when the actual performance for AY 2013-14 to 2016-17 is seen, there is absolutely no connection between the actual figures and figures considered for valuation of shares. He submitted that company has taken highly inflated figures for the purpose of valuation of shares. Mr. Suresh Kumar further added that there appears vast difference in valuation adopted by Petitioner and

performance and the valuations have been made with projections that are arbitrary figures merely to suit the value of shares adopted at the time of transfer to avoid taxation under Section 56(2)(viib) of the Act. Mr. Suresh Kumar submitted that the projections in the figures have no basis at all and it has been done only to justify the premium collected to avoid paying income tax.

6. The fact that the issue of large share premium issued during the year was the subject matter of consideration during the assessment proceedings cannot be disputed. In the assessment order for AY 2014-15 passed on 15th December 2015, it is recorded that "*the case was selected for scrutiny under Computer Assisted Scrutiny Selection i.e. CASS under Compulsory category for complete scrutiny for the reason to verify......large share premium received during the year.......*". Petitioner was first served a notice dated 4th July 2016 under Section 142(1) of the Act in which Petitioner was called upon to submit "details and confirmations including sources of capital introduced by you during the year, if any. Copies of bank accounts from which capital introduced may also be filed." Petitioner filed reply dated 1st August 2016 in which it is stated as under:

> *"2. During the period under reference, there is addition of Share Capital of Rs. 20,16,99,350.56 including share premium. During the year, the company has issued fresh shares 304225 No's at Rs. 518.20 (Face value Rs. 10 and share premium Rs 508.20) and 74,292.00 No's at Rs. 592.93 (Face value Rs. 10 and share premium Rs 582.93) to Gestamp Powergear Windsteel Pvt. Ltd. In this connection we are enclosing herewith following documents:*

> *i. Summary chart showing details of addition in share capital and share premium*
>
> *ii. Copies of bank statement in which capital has been introduced.*
>
> *iii. Copy of Income tax acknowledgment, financial statements and copy of FIRC of investing company Gestamp Powergear Windsteel Pvt. Ltd."*

7. Subsequently, during the assessment proceedings, Petitioner also filed a letter dated 15th September 2016 by which Petitioner submitted a copy of share valuation certificates for allotment during the AY 2013-14. Copies of the documents are also annexed to the said letter dated 15th September 2016.

8. Therefore, the subject matter of large share premium received during the year was under active consideration of the Assessing Officer ("**AO**") during the assessment proceedings. As held by Division Bench of this Court in ***Aroni Commercials v. Deputy Commissioner of Income Tax (2)(1)***[1], once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. Therefore, there can be no doubt that the very issue of share premium was subject matter of consideration by the AO during the original assessment proceedings, which would mean that reopening of assessment is merely on the basis of change of opinion of the AO from that held earlier during the course of the assessment proceedings. This change of opinion does

1 [2014] 44 taxmann.come 304

not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment. It would also be useful to quote paragraphs 9 and 10 of ***Bhavani Gems (P.) Ltd. v. Assistant Commissioner of Income Tax*** [2], which read as under:

> *"9. In our view, the reason to reopen is purely on the basis of change of opinion. Indisputably queries have been raised during the assessment proceedings regarding large share premium received during the year, the details of investors and petitioner has provided all details sought for. While providing the workings, petitioner also explained that the Goodwill of Rs. 26 Crores has been factored while arriving at the share premium. Even in the assessment order, the Assessing Officer has referred to notice issued under section 143(2) as well as 142(1) of the Act and the Assessing Officer has also confirmed having received all information.*
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> *10. As held by this Court time and again and particularly in Aroni Commercials Ltd. v. Dy. CIT [2014] 44 taxmann.com 304/224 Taxman 13 (Mag.)/362 ITR 403 that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised."*
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> *(emphasis supplied)*

9. Therefore, in our view, the reopening of the assessment for AY 2014-15 is not justified. In view of this finding of ours, we do not consider it necessary to go into the other issues on determination of fair market value, etc.

10. Rule made absolute. Petition disposed in terms of prayer clause

2 [2022] 138 taxmann.com 537 (Bombay)

(a), which reads as under;

> *"(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the said notice dated 22nd March, 2019, ("Exhibit F") and the subsequent Order dated 06th January, 2022 ("Exhibit P") and the impugned assessment order dated 30th March 2022 ("Exhibit V1"), the impugned notice of demand dated 30th March 2022 ("Exhibit V2"), and the impugned show cause notice issued u/s 274 r.w.s. 271(1)(c) of the Act dated 30th March 2022 ("Exhibit V3");"*

(DR.NEELA GOKHALE, J.) **(K. R. SHRIRAM, J.)**