

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

WRIT PETITION NO. 3618 OF 2018

NuPower Renewables Pvt. Ltd., .. Petitioner.
v/s.
Asst. Commissioner of Income Tax
1-(2)(2) & Others .. Respondents.

Mr. Percy Pardiwalla, Sr. Advocate with Mr. Jeet Kamdar i/b. Mr. Sameer Dalal, for the Petitioner.
Mr. Sham Walve, for Respondent Nos 1 to 3.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.**
DATE : 7th MARCH, 2019.

P.C:-

Heard learned Counsel for the parties for final disposal of the Petition.

2 Petitioner has challenged a notice of re-opening of an assessment dated 28th September, 2018, for the Assessment Year 2011-12.

3 Brief facts are as under:-

Petitioner is a Limited Company. For the Assessment Year 2011-12, the Petitioner had filed the return of income on 29th September, 2011, declaring loss of Rs.5.97 Crores (rounded of). The Petitioner had filed revised return on 31st March, 2012, declaring loss of

Rs.6.45 Crores. Such return was taken in scrutiny by the Assessing Officer who passed order of assessment under Section 143(3) of the Income Tax, 1961 (in short “the Act”) on 26th December, 2013. In order to do so, he recored the following reasons:-

- “1. *Brief details of the assessee:- The original return of income was e-filed on 29/09/2011, declaring total income of Rs. Nil and current year loss at Rs.5,97,19,479/-. Subsequently, the revised return of income was e-filed on 31-03-2012 showing total income at Rs. Nil and current year loss at Rs.6,45,41,300/-. The case was selected for scrutiny for A. Y. 2011-12. The assessment was completed on 26/12/2013 determining total loss at Rs.6,45,41,300/-. The company is engaged in generation and sale of electricity through wind mill.*
2. *Brief details of information collected/received by the AO:- In this case, information has been received from ADIT (INV.) UNIT-4(2), MUMBAI vide letter dated 15.03.2018, that NuPower Renewables Pvt. Ltd. has received amount of Rs.49,90,48,000/- from Mauritius based Firstland Holdings Ltd. in F. Y. 2010-11 being subscription towards 0.000% Compulsory Convertible Cumulative Preference shares (4,99,048 nos.)*
3. *Analysis of information collected/ received: On perusal of Form 2 filed with ROC in this respect clearly indicates that 4,99,048 nos. of shares has been allotted by M/s. NuPower Renewables Private Ltd. On 31.12.2010 to Firstland Holdings Limited, Mauritius. The source, genuineness and creditworthiness of the foreign entity M/s. Firstland Holdings Limited , Mauritius remains unexplained and needs further investigation. In this respect reference to the competent authorities of Mauritius through FT & TR Division has been made.*
4. *Findings of the AO:- Underassessment of income to the extent of Rs. 49,90,48,000/- involving potential tax effect of Rs.16,96,26,415/-.*
5. *Basis of forming reasons to believe and details of escapement of income:- Information has been received from ADIT(INV.) UNIT-4(2), MUMBAI vide letter dated 15/03/2018, that NuPower Renewables Pvt. Ltd., has received amount of Rs.49,90,49,000/- from Mauritius based Firstland Holdings Ltd. In F. Y. 2010-11 being subscription towards 0.000% Compulsory*

Convertible Cumulative Preference Share (4,99,048 nos.)

On perusal of Form 2 filed with ROC in this respect clearly indicates that 4,99,048 no shares has been allotted by M/s. NuPower Renewables Pvt. Ltd., on 31.12.2010 Firstland Holdings Limited, Mauritius. The source, genuineness and creditworthiness of the foreign entity M/s. Firstland Holdings Limited, Mauritius remains unexplained needs further investigation. In this respect reference to the competent authorities of Mauritius through FT & TR Division has been made.

6. *Escapement of income chargeable to tax in relation to any assets (including financial interest in any entity) located outside India: Not applicable.*

7. *Findings of the AO on true and full disclosure of the material facts necessary for assessment under Proviso to section 147: Findings on examination of records and verification thereof that the assessee had not disclosed fully and truly all material facts necessary for his assessment or that the facts of the case are covered by the explanation 1 to section 147 of the Act.*

8. *Applicability of the provisions of section 147/151 to the facts of the case:- In this case a return of income was filed for the year under consideration and regular assessment u/s. 143(3) was made on 26.12.2013. Since, 4 years from the end of the relevant year has expired in this case, the requirements to initiate proceeding u/s. 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose full and truly all material facts necessary for his assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (refer paragraphs 2,3 and 5). I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed the following material facts necessary for his assessment for the year under consideration.*

The NuPower Renewables Pvt. Ltd., has received amount of Rs.49,90,48,000/- from Mauritius based Firstland Holdings Ltd., in F.Y. 2010-11. The source, genuineness and creditworthiness of the foreign entity M/s. Firstland Holdings Limited, Mauritius,

remains unexplained and needs further investigation. In this respect reference to the competent authorities of Mauritius through FT & TR Division has been made.

It has been resulted in underassessment of income to the extent of Rs.49,90,48,000/- involving potential tax effect of Rs.16,96,26,415/-.

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s. 147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P & L A/c. and balance sheet along with return of income where various information/ material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that, even though the assessee has produced books of accounts, annual report, audited P & L a/c and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly, attracting provisions of Explanation 1 of section 147 of the Act.

It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment/ re-assessment. This fact is corroborated from the contents of notices issued by the AO u/s 143(2)/142(1) and order sheet entries dated 31.10.2013 to 26.12.2013 recorded during the 143(3) proceedings. It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment proceeding and the same may be embedded in annual report, audited P & L A/c. balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. For afore-stated reasons, it is not a case of change of opinion by the A.O.

In view of the above facts, I am satisfied that the assessee's income of Rs.49,90,48,000/- or above, has escaped assessment for the A.Y. 2011-12 within the meaning of section 147 of the Act.

In this case more than four years have lapsed from the end of

assessment year under consideration. Hence necessary sanction to issue notice u/s. 148 has been obtained separately from Principal Commissioner of Income Tax as per the provisions of section 151 of the Act.”

4 Upon being supplied the reasons, the Assessee raised objection to the notice of re-opening of an assessment under a communication dated 5th October, 2018. Such objections were rejected by the Assessing Officer by an order dated 22nd November, 2018, upon which, this Petition has been filed.

5 Appearing for the Petitioner, learned Counsel Shri Pardiwalla, Sr. Counsel, raised following contentions:-

- (i) The impugned notice has been issued beyond a period of four years from the end of the relevant Assessment Year. There was no failure on the part of the assessee to declare fully and truly all material facts;
- (ii) The ground on which the Assessing Officer wishes to rely upon was examined by the Assessing Officer during scrutiny assessment. Without their being any new or additional material, re-opening assessment on the basis of said ground, is not permissible;
- (iii) Counsel contended that, the Assessing Officer desire to carry out enquiries.

6 On the other hand, learned Counsel Shri Walve for the Department oppose the Petition, contending that, the Assessing Officer has recorded elaborate reasons for issuing impugned notice. The genuineness of the investments made in the Assessee-Company by Mauritius based Company, was never at issue before the Assessing Officer

during original scrutiny assessment. Subsequent to passing of the order of assessment, the Assessing Officer received additional information through the investigation wing of the Department on the basis of which, impugned notice of re-opening of assessment has been issued. Petition may, therefore, be dismissed.

7 The reasons recorded by the Assessing Officer proceed on one ground namely- an investment of Rs.49.90 Crores (rounded of) made by a Mauritius based Company called – Firstland Holdings Limited (herein after referred as Firstland) towards share allocation money in Compulsory Convertible Cumulative Preference Shares, issued by the Assessee-Company. According to such reasons, the Assessing Officer had received information from the investigation wing of the department, on the basis of which, he records that, the source, genuineness and creditworthiness of the foreign entity remains unexplained and needs further investigation.

8 With this back-ground, we may peruse the material which was brought during the course of original scrutiny assessment. The Assessing Officer had issued notice under Section 142(1) of the Act, on 2nd August, 2013, asking for various details from the assessee, which included the following:-

*“ copy of balance sheet and profit and loss account
alongwith all annexure.
Whether the company has issued any fresh share during the
year or raised any amount by way of debenture/FD etc. If so,
how the issue expenses have been dealt with in the accounts.”*

9 Such notice was replied by the assessee under a letter dated 8th August, 2013. This contained various annexures. One of them, being

the assessee's balance sheet as on 31st March, 2011. This balance sheet included the following information:-

Sources of Funds	Schedules	2011	2010
Shareholder's funds	3	49,95,48,000	5,00,000

A cash flow statement as on 31st March, 2011 was also produced which includes following information:-

“C) Cash flow from financing activities:

Proceeds from issue of shares 49,90,48,000 5,00,000”

The reply also contained a schedule to the financial statements as on 31st March, 2011, which contend the following information:-

3	Share Capital	2011	2010
	Authorized 4,500,000 (2010: 4,500,000) equity shares of Rs.10 each.	4,50,00,000	4,50,00,000
	500,000 (2010: Nil) compulsorily convertible preference shares of Rs.1,000 each	50,00,00,000	-
		54,50,00,000	4,50,00,000
	Issued, subscribed and paid-up 50,000 (2010:50,000) equity shares of Rs.10 each, fully paid up (refer note I)	5,00,000	5,00,000
	499,048 (2010: Nil) 0.0001% compulsorily convertible cumulative preference shares of Rs.1,000 each, fully paid up (refer note ii)	49,90,48,000	-

	49,95,48,000	5,00,000
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Note:-		
(i) Of the above equity shares, 47,496 (2010: 47,496) equity shares of Rs.10 each, fully paid up, are held by Supreme Energy Private Limited, the Holding Company. (ii) The company has allotted 499,048 (2010: Nil) 0.001% compulsorily convertible cumulative preference shares (CCPS) of Rs.1,000 each fully paid up by way of preferential allotment to Firstland Holdings Limited, Mauritius on 31st December, 2010. The said CCPS shall be converted, on conversion date, into equity shares in accordance with the pricing guidelines prescribed by the Reserve Bank of India such that the price for conversion shall always be higher than the price arrived at pursuant to the pricing guidelines prescribed by the Reserve Bank of India. Where the term “Conversion Date” shall mean the earlier of : (a) one hundred eighty (180) days from the Commencement Date; (b) the date when the CCPS will compulsorily be required to be converted for the filing of the draft red herring prospectus by the company with the Securities and Exchange Board of India, for the purposes of listing the securities of the company, or such other date as may be mutually agreed upon between the parties in writing and where the “Commencement Date” shall mean the date when the relevant government authority grants a commissioning certificate in respect of the last WEG of the last phase of the 150 MW Project.		

10 On 30th October, 2013, the Assessing Officer issued yet

another notice, calling upon Petitioner to supply further details - one of them was as under:-

“ Share capital increased to Rs.499548000/- from Rs.500000/- please explain the source of fund utilized.”

11 In another notice dated 12th November, 2013, the Assessing Officer asked the assessee to supply the details of share capital increased and source of the funds utilized. In response to such further notices, assessee supplied various details under a communication dated 12th November, 2013, in which, it was stated as under:-

“ Information and details pertaining to the increase in share capital by Rs.49,90,48,000/-. The amount has been received towards compulsorily convertible cumulative preference shares from Firstland Holdings Limited, Mauritius. The copy of FCGPR filed with RBI for inward remittance is attached. The copy of Certificate of foreign inward remittance and the extract of Bank statement is also annexed.”

Along with its letter, the Petitioner supplied the details of foreign collaborate, which reads as under:-

“3. Details of the foreign collaborator

Name: FIRSTLAND HOLDINGS LIMITED

*Address: LES CASCADES EDITY CAVELL STREET
PORT LOUIS*

Country: MAURITIUS

*Constitution(specify
whether Foreign National/
Foreign Company/ FVCI/
FII/NRI/PIO/ others): FOREIGN COMPANY.”*

12 The Petitioner had supplied the Certificate of Foreign Inward Remittance of the said funds to the tune of Rs.49.90 Crores, equivalent to

10,600,000.00 US\$. The Petitioner also supplied the bank statement in which, said amount was reflected. The Petitioner had also produced tax residence certificate of Firstland. The Petitioner had also produced the ledger account, containing share application money being credited on 7th July, 2010 and the source thereof.

13 It was after such scrutiny that, the Assessing Officer had passed the order of assessment, in which, he made no additions in respect of the share application money. The entire issue was thus, scrutinized by the Assessing Officer. Despite such scrutiny and the disclosures of the transaction by the assessee, if the Assessing Officer was in possession of additional information, *prima facie*, showing that, the entire transaction was bogus and that, the source of fund itself was not genuine. It may still be open for the Assessing Officer to re-open the assessment.

14 However, whether the Assessing Officer had any such information at his command and the manner in which, the Assessing Officer processed such additional information(s) to form a belief that, income chargeable to tax has escaped assessment, shall have to be gathered from reasons recorded by him for issuing the notice. In this context, we may peruse the reasons more minutely and analyze the contents thereof. The core of the reasons recorded by the Assessing Officer is found in paragraph 2 thereof. In paragraph 2, the Assessing Officer has recorded that, he has received information from the Investigation Wing under a letter dated 15th March, 2018, stating that, the assessee had received an amount of Rs.49.90 Crores from Firstland a Mauritius based company towards subscription for 4,99,048 compulsorily convertible

cumulative preference shares. The Assessing Officer does not refer to any further information received from the Investigation Wing. In short, according to the Assessing Officer, the information received from the Investigation Wing, was confined to the fact that, the assessee had received share application money to the tune of Rs.49.99 Crores from Firstland .

15 This information is not something new to the Assessing Officer. The fact that the assessee had received such share application money from Firstland was part of the assessee's return. It is not as if the Assessing Officer did not notice this information during scrutiny assessment. As noted above through series of correspondence between the assessee and the Assessing Officer, this information was highlighted time and again. The channel of movement of the fund, the source of the fund, purpose of investment and the ultimate destination of the fund, were all part of the record during the assessment proceedings. There is nothing in the reasons recorded by the Assessing Officer to suggest that, such investment is bogus.

16 The rest of the reasons recorded merely refer to the Assessing Officer's observations in the context of the income chargeable to tax which had escaped assessment and the reasons why he believed that, re-opening of an assessment even beyond a period of four years, in the present case , was permissible. In the entire reasons, from paragraph 3 onwards, there is no reference to any additional information which was brought to the notice of the Assessing Officer in this respect.

17 To summarize, the reasons only refer to a simple piece of information supplied to the Assessing Officer by the Investigation Wing, stating that the assessee-company had received share application money of Rs.49.99 Crores from Firstland. To reiterate, this information is nothing which the Assessing Officer did not have at his command when the Assessment was framed. The reasons do not specify that the information supplied to the Assessing Officer by the Investigation Wing, suggested that such investment was non-genuine. In this context, Assessing Officer refers to the requirement of verifying the genuineness of investor and requirement of further investigation. These observations in para 3 of the reasons, would not further the case of the Revenue, these being no information with the Assessing Officer, *prima facie*, indicating that the investments were not genuine. The investigation into the source of genuineness and creditworthiness of the investor company would fall within the relam of fishing enquiries, which is wholly impermissible in law in the context of the re-opening of the assessment. For such reasons, impugned notice is set aside.

18 **Petition is allowed.**

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)