

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

(Through Virtual Court)

BEFORE SHRI INTURI RAMA RAO, AM  
AND SHRI S. S. VISWANETHRA RAVI, JM

आयकर अपील सं. / ITA No.927/PUN/2018  
निर्धारण वर्ष / Assessment Year : 2013-14

Ashdan Developers Pvt. Ltd.  
(Earlier known as KUL Developers Pvt. Ltd.),  
Solitaire World, Level-8, S.No.36/1/1,  
Opposite Regency Classic,  
Mumbai Bangalore Highway,  
Baner, Pune-411045.

PAN : AABCL4100E

.....अपीलार्थी / Appellant

बनाम / V/s.

Pr. CIT-6,  
Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil S. Pathak  
Revenue by : Shri Abhinay S. Kumbhar

सुनवाई की तारीख / Date of Hearing : 14.12.2021  
घोषणा की तारीख / Date of Pronouncement : 16.12.2021

**आदेश / ORDER**

**PER INTURI RAMA RAO, AM:**

This is an appeal filed by the assessee directed against the order of Id. Pr. Commissioner of Income Tax- 6, Pune ('PCIT' for short) dated 27.03.2018 for the assessment year 2013-14 passed u/s 263 of the Income Tax Act, 1961 ('the Act').

2. The assessee company raised the following grounds of appeal :-

"1] The learned CIT erred in revising the asst. order passed by the learned A.O. u/s 143(3) dated 30.03.2016 without appreciating that the said asst. order was neither erroneous nor prejudicial to the interest of the revenue and accordingly, the revision order passed u/s 263 is null and void.

2] The learned CIT erred in setting aside the issue regarding the taxability of share premium received by the assessee company of Rs.24,90,59,250/- on

*the ground that the learned A.O. had not made proper enquiries during the course of asst. proceedings.*

*2.1] The learned CIT failed to appreciate that the learned A.O. had called for the relevant documents relating to the receipt of share premium by the assessee company and after due verification of all the details, the claim of the assessee was accepted and accordingly, there was no reason to set aside the asst. order on this issue.*

*2.2] The learned CIT erred in not appreciating that the share premium received by the assessee was in accordance with the provisions of section 56(2)(viib) and no addition was warranted on this issue and hence, there was no reason to set aside the asst. order for reverifying the details relating to this issue.*

*3] The learned CIT erred in setting aside the asst. order with respect to the claim of expenditure of Rs. 1,74,46,083/- on the ground that the same was allowed by the learned A.O. without proper verification and application of mind.*

*3.1] The learned CIT erred in not appreciating that the issue regarding claim of expenditure was allowed by the A.O. after due application of mind and hence, there was no question of setting aside the asst. on the ground that the claim was allowed by the A.O. without proper application of mind.*

*3.2] The learned CIT failed to appreciate that assessee had already commenced its business and accordingly, the expenditure claimed of Rs.1,74,46,083/- was allowable and therefore, there was no reason to set aside the asst. on this issue.*

*4] The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”*

3. Briefly, the facts of the case are as under :-

The appellant is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of real estate. The return of income for the assessment year 2013-14 was filed on 29.09.2015 declaring loss of Rs.1,71,14,273/-. The assessment, against the said return of income, was completed by the Deputy Commissioner of Income Tax, Circle-14, Pune (‘the Assessing Officer’) vide order dated 30.03.2016 passed u/s 143(3) after making disallowances on account of (i) Loan processing charges of Rs.87,64,000/- and (ii) Expenditure on increasing share capital of Rs.22,63,562/-.

4. Subsequently, the ld. PCIT, on examination of the assessment record, noticed that the appellant company issued equity and preference shares at premium of Rs.5,215/- and Rs.24,140/-. The appellant company issued

47850 preference shares of face value of Rs.10 per share to M/s. Kumar Sineew Developers Pvt. Ltd., a sister concern of the appellant company and received a share premium aggregating to sum of Rs.24,95,37,750/-. The appellant company also issued 1120 equity shares of face value of Rs.10 per share to ICICI Asset Management Company Ltd. at a premium of Rs.24,140/- per share and received share premium of Rs.2,70,36,800/-. The ld. PCIT observed that the Fair Market Value of the shares of the appellant company as on 01.04.2012 is only Rs.10,000/-. Therefore, the ld. PCIT came to conclusion that the appellant company charged premium in excess of Fair Market Value of shares. Accordingly, the ld. PCIT formed an opinion that the provisions of section 56(2)(viib) are squarely applicable but, the Assessing Officer, without conducting any proper enquiries during the course of assessment proceedings in respect of receipt of share premium, accepted the claim of the assessee.

5. The ld. PCIT also noticed that the claim of the appellant company for allowance of expenditure of Rs.1,74,46,083/- came to be allowed even without offering corresponding income to tax. Hence, the ld. PCIT considered the assessment order dated 30.03.2016 passed u/s 143(3) is erroneous and prejudicial to the interest of the revenue and, accordingly, issued a show-cause notice dated 05.02.2018 u/s 263 proposing to review assessment order. In response to the said show-cause notice dated 05.02.2018, the appellant company vide its letters dated 14.03.2018 and 19.03.2018 filed detailed explanation as to how the assessment order cannot be termed as "erroneous" contending that the appellant had followed one of the prescribed methods i.e. Discounted Cash Flow Method and the net worth of value of share is computed at Rs.22,568/- following the Discounted Cash Flow Method. He also submitted that the Assessing Officer had conducted the

requisite enquiries took view that provision of section 56(2)(viib) have no application.

6. However, the ld. PCIT considering the contents of the report of valuation of shares furnished by the Chartered Accountant, namely, Sachin R. Bansal & Co. dated 26.09.2012 observed that :

- (i) The valuation report was prepared by the Chartered Accountant solely based on the data provided by the promoters of the appellant company without independently verifying the veracity, accuracy and completeness of the information provided by the promoters of the appellant company.
- (ii) There is a wide deviation between the actual performance and projected performance.
- (iii) The valuer i.e. Chartered Accountant applied discount factor of 20% which is not based without any valid basis.
- (iv) The valuer had not discussed anything as to how the key factor, namely, Cash Flow Project Discount Rate on term value while computing the Discounted Cash Flow Method.

7. Based on the above observations, the ld. PCIT came to conclusion that the Fair Market Value of shares determined by the valuer is not correct. According to the ld. PCIT, the Assessing Officer had failed to make enquiry into this. Therefore, the assessment order is erroneous and prejudicial to the interest of the revenue.

8. Similarly, the ld. PCIT was of the opinion that the expenditure of Rs.1,74,46,083/- came to be allowed as deduction without examining as to the satisfaction of the conditions laid down u/s 37(1) of the Act. Accordingly, he set-aside the assessment order with direction to the Assessing Officer to redo the same after conducting a detailed enquiry and verification of the valuation report, etc. after giving an opportunity of being heard to the appellant vide order dated 27.03.2018.

9. Being aggrieved by the above order of revision, the appellant is before us in the present appeal.

10. The ld. AR submitted that the issue of receipt of share premium and valuation of the shares was examined by the Assessing Officer during the course of assessment proceedings. He submitted that the Assessing Officer had issued a notice dated 19.10.2015 u/s 142(1) seeking details as to share premium received during the year vide Item No.8 of the notice, which is placed at page nos.42 to 45 of the Paper Book. The query raised by the Assessing Officer was duly answered by the appellant vide letter dated 06.12.2015, which is placed at page nos.46 to 108 of the Paper Book. He also filed copy of the order sheet entry of the Assessing Officer, wherein on 07.12.2015 the Assessing Officer recorded that the assessee had filed written submission as to the valuation of shares, valuation report, etc., which is placed at page no.113 of the Paper Book. Thus, it is submitted that the finding of the ld. PCIT that no enquiry was made by the Assessing Officer as to the valuation of equity shares is contrary to the material on record. The ld. AR further submitted that when the Income Tax Rules gives an option to adopt one of method of valuation of shares, either Fair Market Value of the shares or Discounted Cash Flow Method of the shares. The Assessing Officer cannot substitute his own method in place of method adopted by the assessee.

11. According to the ld. AR, the Assessing Officer had rightly accepted the method adopted by the assessee and the ld. PCIT cannot term the assessment order as "erroneous" merely because in the opinion of the ld. PCIT, the appellant should have adopted Fair Market Value for the purpose of valuation of the shares. It is also further submitted that the ld. PCIT cannot disregard the valuation report of shares furnished by the Chartered Accountant citing

that the valuation report was furnished by the Chartered Accountant based on the information furnished by the assessee company. The valuation report furnished by the Chartered Accountant cannot be tinkered with by the Id. PCIT, as the issue of valuation of shares is a technical complex problem which should be left for consideration to the expert in the field. In any event, he submitted that there is no material on record to indicate that the valuation was made on a fundamental erroneous basis. Even the valuation report is found to be wrong, the only course of action open to the assessing authority is to refer the valuation of shares to another expert in the field. In the absence of enabling the provisions for making reference to another expert in the field, the Commissioner cannot tinker with the valuation report submitted by the Chartered Accountant. He also placed reliance on the decision of the Delhi Bench of the Tribunal in the case of Cinestaan Entertainment (P.) Ltd. vs. ITO, 106 taxmann.com 300 (Delhi - Trib.). Thus, it was submitted that the exercise of revision made by the Id. PCIT is invalid in law as the Assessing Officer after making proper enquiries took a view that no addition on account of receipt of share premium can be made placing reliance on the decisions of (i) Hon'ble Bombay High Court in the case of CIT vs. Nirav Modi, 71 taxmann.com 272 (Bombay) and (ii) Hon'ble Karnataka High Court in the case of CIT vs. Chemsworth (P.) Ltd., 119 taxmann.com 358 (Karnataka).

12. Without prejudice to the above, it is contended that even assuming for a moment, the Assessing Officer made inadequate enquiry that would not by *ipso facto* confer power of revision with Commissioner u/s 263 merely because he has a different opinion on the issue. It is only in case of total lack of enquiries the power of revision u/s 263 can be exercised. He also placed reliance on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Sunbeam Auto Ltd., 189 Taxman 436 (Delhi).

13. As regards to the applicability of Explanation 2 to section 263 of the Act, it is submitted that the Explanation 2 has no retrospective application placing reliance on the decision of Co-ordinate Bench of the Tribunal in the case of Smt. Shruti Rahul Mane vs. Pr.CIT in ITA No.1056/PUN/2016 order dated 27.06.2019. He also submitted that the Commissioner had not invoked the Explanation 2 to section 263 in the show-cause notice. It is submitted that in case where the Commissioner had failed to invoke the Explanation 2 to section 263 in the show-cause notice, the Explanation 2 cannot be pressed into service placing reliance on the decision of the Hon'ble Supreme Court in the case of PCIT vs. Shreeji Prints (P.) Ltd., 130 taxmann.com 294 (SC).

14. It is also contended that valuation of preference or equity shares cannot be termed as an excessive in view of the fact that the assessee company issued 1120 equity shares of face value of Rs.10 per share to ICICI Asset Management Company Ltd. at a premium of Rs.24,140/- per share and received share premium of Rs.2,70,36,800/- and the provisions of section 56(2)(viib) has no application in the case of genuine transactions as there is no allegation of money laundering and illegality of consideration received on allotment of shares placing reliance on the decision of Mumbai Bench of the Tribunal in the case of Freedom Wealth Solutions Pvt. Ltd. vs. ITO in ITA No.7000/Mum/2019 order dated 22.09.2021. Thus, it was contended that the ld. PCIT was not justified in exercising the power of revision u/s 263 of the Act and prayed for quashing of the order passed u/s 263 of the Act and in directing the Assessing Officer to make an enquiry into the issue of share premium and applicability of provisions of section 56(2)(viib) of the Act.

15. The grounds of appeal relating to the revision of allowability of expenditure of Rs.1,74,46,083/- are not pressed during the course of hearing of the appeal before us.

16. On the other hand, ld. CIT-DR submitted that the ld. PCIT was justified in exercising the power of revision in the facts of present case as the Assessing Officer had failed to enquire into the veracity of the valuation report of shares furnished by the Chartered Accountant. It is a case of total lack of enquiry on the part of the Assessing Officer placing reliance on the decision of the Co-ordinate Bench of the Tribunal in the case of Jalgaon People's Co-op Bank Ltd. vs. PCIT, 127 taxmann.com 243 (Pune - Trib.).

17. We heard the rival submissions and perused the material on record. The issue in the present appeal relates to the validity of the revision exercised by the ld. PCIT u/s 263 of the Act in respect of issue of receipt of share premium. The Parliament had conferred the power of revision on the Commissioner of Income Tax u/s 263 of the Act in case the assessment order passed is erroneous and prejudicial to the interests of revenue. In order to invoke the power of revision, the above two conditions are required to be satisfied cumulatively. References in this regard can be made to the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT, 243 ITR 83 (SC) and in the case of CIT vs. Max India Ltd., 295 ITR 282 (SC). The error in the assessment order should be one that it is not debatable or plausible view. In a case where the Assessing Officer examined the claim took one of the plausible view, the assessment order cannot be termed as an "erroneous". Therefore, the issue that is required to be examined is whether the Assessing Officer had carried out any enquiry or verification on the issue of receipt of share premium and applicability of provisions of section 56(2)(viib) during the course of assessment proceedings. In the present case, the Assessing Officer had called for the details of receipt of share premium as well as the report of valuation of shares from the Chartered Accountant and the assessee had duly responded to the above query raised by the Assessing

Officer by submitting all the requisite information as called for by the Assessing Officer. However, the assessment order is silent on this aspect but under scrutiny of the order sheet entry as well as the notices issued u/s 143(2), it would reveal that the Assessing Officer had enquired into the issue sought to be revised by the ld. PCIT. Therefore, it cannot be said that there is total lack of enquiry on the part of the Assessing Officer. As a matter of fact, it was specifically brought to the notice of the Assessing Officer that the appellant company issued 47850 preference shares of face value of Rs.10 per share at premium to M/s. Kumar Sinev Developers Pvt. Ltd., a sister concern of the appellant and received a share premium aggregating to sum of Rs.24,95,37,750/-. The appellant company also issued 1120 equity shares of face value of Rs.10 per share to ICICI Asset Management Company Ltd. at a premium of Rs.24,140/- per share and received share premium of Rs.2,70,36,800/- and report of valuation of shares given by the Chartered Accountant was also furnished. In these circumstances, we do not agree with the ld. CIT-DR that no enquiry was made into the issue of receipt of share premium and the very fact that the Assessing Officer had called for report of valuation of shares given by Chartered Accountant goes to show that Assessing Officer had enquired and had gone into issues of applicability of provisions of section 56(2)(viib) of the Act.

18. The courts have made a distinction between “lack of enquiry” and “inadequate enquiry”. If there was enquiry even an inadequate that would be itself give no occasion to the Commissioner to exercise the power of revision u/s 263 as held by the Hon’ble Bombay High Court in the case of CIT vs. Gabriel India Ltd., 203 ITR 108 (Bombay) and followed by the Hon’ble Delhi High Court in the case of CIT vs. Sunbeam Auto Ltd., 332 ITR 167 (Delhi) and in the case of CIT vs. Anil Kumar Sharma, 335 ITR 83 (Delhi). The relevant

paragraphs of the decision of the Hon'ble Delhi High Court in the case of Sunbeam Auto Ltd. (supra) are extracted hereunder :-

*"We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open. In Gabriel India Ltd.'s case (supra), law on this aspect was discussed in the following manner :*

*". . . From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is 'erroneous insofar as it is prejudicial to the interests of the revenue'. It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous insofar as it is prejudicial to the interests of the revenue must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. [See : Parashuram Pottery Works Co. Ltd. v. ITO[1977] 106 ITR 1 (SC) at page 10]. ....."*

19. In the present case, from the observation made by the ld. PCIT in 263 order, it is clear that had the ld. PCIT appraised the report of valuation of shares placed before the Assessing Officer, he would not have accepted the valuation report. This observation, in our considered opinion, cannot be accepted in view of the fact that the power of revision u/s 263 does not allow for supplanting or substituting the view of the Assessing Officer. The

appreciation of material placed before the Assessing Officer is exclusively within his domain which cannot be interdicted by a superior officer while exercising powers u/s 263 of the Act on the ground that if he had appraised the said material, he would have come to a different conclusion in view of the law laid down by the Hon'ble Supreme Court in the case of Parashuram Pottery Works Co. Ltd. vs. ITO, 106 ITR 1 (SC). The relevant observation of the said decision of the Hon'ble Supreme Court in the case of Parashuram Pottery Works Co. Ltd. (supra) is reproduced hereunder :-

*“From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. . . . There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.” .....*

20. The Commissioner of Income Tax cannot exercise the power of revision with a view to initiate fishing and roving enquiry in the matters and orders which are already concluded as held by the Hon'ble Supreme Court in the case of Parashuram Pottery Works Co. Ltd. (supra).

21. Further, we are of opinion that valuation of shares is a technical, complex problem, which should be left to the consideration of expert in the field and is surrounded by a number of myths and is not an exact science

and is driven, *inter-alia*, by the purpose of valuation, statutory requirements, business factors, etc.. Valuation, in practice, is guided by a number of approaches as suitably adjusted for subjective circumstances. The report of an expert can be found fault by another expert in the field. Neither the Assessing Officer nor the Commissioner is competent to examine the veracity or the completeness of the valuation report given by an expert. The ld. PCIT cannot come to the conclusion that the report of valuation of shares is unacceptable in the absence of report from another expert. The material on record does not suggest any error in the methodology adopted in the report. As held by the Hon'ble Supreme Court in the case of Parashuram Pottery Works Co. Ltd. (supra). The power of revision cannot be exercised with a view to causing roving enquiries.

22. Further, we are of the considered opinion that the power of revision cannot be exercised to set-aside the assessment order to enable Assessing Officer to conduct another fruitless enquiry to reach the same result which was arrived at earlier, even if the enquiries held that it would be empty formatting as the shares were also issued to unrelated parties i.e. 1120 equity shares of face value of Rs.10 per share to ICICI Asset Management Company Ltd. at a premium of Rs.24,140/- as held by the Hon'ble Madras High Court in the case of CIT vs. Sakthi Charities, 244 ITR 226 (Madras). The relevant observation of the Hon'ble Madras High Court in the case of Sakthi Charities (supra) is reproduced hereunder :-

*“8. .... The revisional power is not meant to be exercised to correct every error of fact, but the error must be of such a nature that is erroneous and prejudicial to the interests of the revenue. We are of the view that the Commissioner would have no jurisdiction to revise an order of assessment, if the final conclusion arrived at by the ITO would not be different even after considering the particular fact which the Commissioner had directed the ITO to consider. Further, the power of revision is not meant to be exercised for the purpose of directing the ITO to hold another investigation when the order of the Assessing Officer was not found to be erroneous.”*

23. Further, in our considered opinion, we need not go to the issue whether the Clause (a) and (b) of Explanation 2 inserted to section 263 of the Act have retrospective or prospective application since in the facts of the present case, we found that there was an enquiry by the Assessing Officer into the issues sought to be revised by the ld. PCIT, we also found that there is no material on record to show that there is error in the assessment order passed by the Assessing Officer. In these circumstances, we are of the considered opinion that in the facts of the present case, the ld. PCIT was not justified in exercising the power of revision in respect of issue of receipt of share premium. Thus, the ground of appeal nos.2 to 2.2 stands allowed in favour of the assessee.

24. The grounds of appeal nos.3 to 3.2 are not pressed during the course of hearing of appeal. Hence, the same are dismissed as not pressed.

25. In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced on this 16<sup>th</sup> day of December, 2021.

**Sd/-**

**(S. S. VISWANETHRA RAVI)**  
न्यायिक सदस्य/JUDICIAL MEMBER

**Sd/-**

**(INTURI RAMA RAO)**  
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 16<sup>th</sup> December, 2021.

Sujeet

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr.CIT-6, Pune.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.