

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**Mumbai “D” BENCH, MUMBAI**  
**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER**  
**AND**  
**SMT RENU JAUHRI, ACCOUNTANT MEMBER**  
**ITA No.2907/M/2024**  
**Assessment Year: 2018-19**

<b>Max Hospitals and Allied Services</b> 401, 4 <sup>th</sup> Floor, Man Excellenza, S. V. Road, Vile Parle (W.), Mumbai- 400056 <b>PAN: AAGCR9198D</b>	Vs.	<b>Principal Commissioner of Income Tax Mumbai- 3</b> Room No.612, 6 <sup>th</sup> Floor, Aayakar Bhavan, Maharishi Karve Road, Mumbai- 400020.
<b>Appellant</b>	:	<b>Respondent</b>

**Present for :**

**Assessee by** : Shri Dr. K. Shivaram a/w Shri Rahul K.  
Hakani

**Revenue by** : Ms. Sanyogita Nagpal (CIT-DR)

**Date of Hearing** : 21.11.2024

**Date of Pronouncement** : 30.12.2024

**O R D E R**

**Per Beena Pillai, JM:**

Present appeal arises out of order u/s. 263 of the act dated 27.03.2024 passed by PCIT, Mumbai- 3 for assessment year 2018-19 on following grounds of appeal:

**General ground**

1. That the order passed by the Principal Commissioner of Income Tax ("Learned PCIT") under Section 263 of the Income Tax Act, 1961 ("Act") is bad in law and void ab-initio.
2. That the order of the learned PCIT is bad in law, being based on surmises and conjectures without any finding of fact as to how the order passed under section 143(3) of the Act was erroneous or prejudicial to the interest of the revenue.

**Jurisdictional grounds / on merits**

1. The learned PCIT erred in revising u/s 263 rw Explanation 2 the assessment order passed u/s. 143(3) dt 07/06/2021 with respect to the issue of valuation of shares/charging of premium without appreciating that the assessment order passed by the Assessing Officer was neither erroneous nor prejudicial to the interest of the revenue and hence the order of revision is bad in law.
2. The learned PCIT failed to appreciate that the Assessing Officer has issued specific questions in the course of assessment proceedings in respect of valuation of shares/charging of premium during the course of assessment proceedings and the assessee had furnished all details pertaining to the issue of valuation of shares/charging of premium during the course of assessment proceedings and the learned Assessing Officer has accepted the valuation & allowed the same after making proper & specific enquiry with reference to Section 56(2)(viib) for valuation of shares. The assessment order was passed by the Assessing Officer after due application of mind and after making due investigation / enquiries, which fact is clearly borne from the assessment records and hence was not a case of lack of enquiry as envisaged in Explanation 2 to section 263 and hence the assessment order was neither erroneous nor prejudicial to the interest of the revenue and hence the order of revision is bad in law.
3. The Learned PCIT failed to appreciate that Section 56(2)(viib) is not attracted in the facts of the present case as Appellant has issued shares on premium on the basis of valuation report obtained from category-1 Merchant Banker and hence the order of revision is bad in law.
4. The learned PCIT erred in revising the order with respect to the issue of valuation of shares/charging of premium on wrong assumption of facts that the Valuation report showed profits whereas they actually showed losses and hence the order of revision is bad in law.

5. *Without prejudice to above, the learned PCIT has no jurisdiction to decide the issue on merit in revision jurisdiction by applying the wrong principle of law and relying on the case laws which are not applicable to the facts of the appellant particularly when according to him the Assessing Officer has not made verification/inquiry & hence the revision order may be set aside*
6. *Without prejudice to above, the learned PCIT failed to appreciate that on the issue of valuation of shares/charging of premium the Assessing Officer had adopted a possible view which view was not unsustainable in law and thus the assessment order cannot be termed as erroneous and prejudicial to the interest of the revenue and hence the order of revision is bad in law.*
7. *The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.”*

**Brief facts of the case are as under:**

**2.** The assessee filed its original return of income on 27.10.2018 declaring loss of Rs.6,02,39,098/- assessment order u/s. 143(3) r.w.s. 144B of the act was passed on 07/06/2021, determining total loss of Rs. 3,31,36,890/- after making addition of depreciation on intangible assets at Rs.2,63,67,188/- and disallowance made u/s. 14A of Rs. 7,35,020/-. Subsequently the case was selected for review.

**2.1.** The Ld.PCIT on perusal of the record observed that assessee had issued shares to the some investors at the premium of Rs.20 per share. To justify the premium charged on the shares issued during that year, valuation report dated 06/06/2016 from Merchant Banker i.e. SPA Capital Advisors Ltd., was furnished, who certified the fair value of the shares of the assessee as on 31/05/2016 at Rs.20/- per share.



**2.2.** The Ld.PCIT noted that, Ld.AO while passing the scrutiny assessment order for A.Y. 2017-18 on 22.12.2019 rejected the valuation report submitted by the merchant banker and adopted fair value of shares at face value of Rs.10 per share thereby brought excess share premium to tax. It was observed by Ld. PCIT that, the fundamentals of the assessee were same for the year under consideration as well as assessment year 2017-18. The Ld.PCIT was thus of the opinion that a consistent approach should have been adopted by the Ld.AO for year under consideration and valuation report filed by the assessee should be rejected and excess share premium received by the assessee during the year under consideration should have been taxed u/s. 56 (2) (b) of the act.

**2.3.** Accordingly, notice u/s. 263 was issued on 01.03.2024. For the sake of convenience, the said notice is scanned and reproduced as under:

*“Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the THE INCOME TAX ACT, 1961-Assessment Year 2018-19.*

*In this regard, a hearing in the matter is fixed on 08/03/2024 at 03:25 PM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have e-filing using portal the link: [incometaxindiaefiling.gov.in](http://incometaxindiaefiling.gov.in) Radiant Life Care Mumbai Private Limited, (PAN: AAGCR9198D) for A.Y. 2018-19*

*Notice u/s 263 for hearing in the above mentioned case.*

*2. The assessee had filed its return of income on 27.10.2018 declaring current year loss at Rs.6,02,39,098/-. The assessment order was u/s 143(3) r.w.s. 144B of the Income Tax Act, 1961 on 07.06.2021 determining total loss at Rs.3,31,36,890/-, after making addition of Depreciation on*

intangible Assets of Rs.2,63,67,188/- and Rs.7,35,020/- on account of 'Disallowance u/s 14A of the Act.

3. On perusal of the assessment records, it is seen that the assessee Company has issued and allotted 50,50,506 equity shares of Rs. 10/- each at a premium of Rs. 29.60/- per share to its holding company namely Radiant Life Care Private Limited. The shares were allotted on a valuation of Rs. 39.60/- per share i. e. Equity Share of Rs. 10/- each at a premium of Rs. 29.60/- per share. Shares were issued on the basis of valuation done by Category | Merchant Banker Spa Capital Advisors Limited. The SPA Capital Advisors Pvt. Ltd. had vide its valuation report dated 13/10/2017 certified the fair value of the shares of the Company as on October 11, 2017 at Rs. 39.58/- per equity share. The Merchant Banker adopted Discounted Cash Flow (DCF) method to value the shares of the company. Total Share premium of Rs. 14,94,94,978/- was received during the A.Y.2018-19.

4. Perusal of the assessment records of previous assessment year i.e. A.Y. 2017-18 revealed that during the A.Y. 2017-18 also assessee had issued shares to the same investor at the premium of Rs.20 per share. To justify the premium charged on the shares issued during that year valuation report from the same Merchant Banker ie. SPA Capital Advisors Ltd was furnished who had vide its valuation report dated 06.06.2016 certified the fair value of the shares of the company as on May 31 2016 at Rs.20/- per share. The assessing officer while passing scrutiny assessment order for A.Y. 2017-18 on 22/12/2019 rejected the valuation report submitted by the Merchant Banker and adopted the fair value of shares at face value of the shares i.e. Rs.10 per share and brought the excess share premium to tax. The A.O. analysed the annual accounts of the assessee company till 31/03/2019 and pointed out that the assessee company was making huge losses since the year of inception. Further, the A.O. compared the valuation report with the actual financials and concluded that the assessee's profits before tax and/or after tax as projected for the years had not been met even upto 31.03.2019, which clearly indicated that the inflated profits were adopted for computing the value of the share by mentioned following DCF method. Therefore, the A.O. mentioned in the order that the projections on which the premium was based had not only been proved wrong but very far from the actual position as was evident from the books of accounts of said years and did not support the actual financials of the assessee company. Based on the above grounds, the AO rejected the Valuation Report in made additions accordingly. AY 2017-18 and

5. Further, it is observed that the fundamentals of the company were not changed in AY 2018-19 as well and the assessee company is still making huge losses. Thus, the findings for AY 2017-18 still hold good for AY 2018-19 also. Consequently, consistent approach should have been adopted by

the AO and AO should have rejected the valuation report and should have taxed the share premium of Rs.29.60 per share received during the year under section 56(2)(viib). Omission in this regard has resulted in underassessment of income of Rs. 14,94,94,978/-.

6. From perusal of the assessment records of the AY 2017-18, it is seen that the Assessing Officer after considering the financial position of the assessee company till 31.03.2019 as well as the valuation report, arrived at the conclusion that inflated profits were adopted for computing the value of the share by following DCF method as the company did not meet the projected profit before/after tax for years even till 31.03.2019. The actual audited financials of the assessee as per the return of income filed for AY 2017-18, A.Y 2018-19 and 2019-20 are as under:

	AY 2017-18	AY 2018-19	AY 2019-20
Profit Before Tax	(3,59,48,434)	(4,66,00,307)	(5,12,97,005)
Profit After Tax	(3,59,48,434)	(4,66,00,307)	(5,12,51,837)

Accordingly, the Assessing Officer held that the projections on which the premium was based has not only been proved wrong but also is very far from the actual position as is evident from the books of accounts of succeeding years and does not support the actual financials of the assessee company.

7. During the year under consideration i.e. AY 2018-19, the financials of the company were not changed much from the previous AY 2017-18. Further, the assessee company issued and allotted 50,50,506 equity shares of Rs.10 each at a premium of Rs.29.60 per share. The financials of the company for the AY 2018-19 does not justify charging of shares at premium of Rs.29.60 per share. The assessee company has shown Revenue from Operations at Rs.82,209/- and Other Income of Rs.81,11,792/- and has suffered huge losses in the year under consideration also. Therefore, it can be safely concluded that inflated profits have been adopted for computing the value of the share. Also, considering the facts of the case for AY 2017-18 (wherein the Assessing Officer analysed the financials of the assessee till 31.03.2019), the share premium of Rs.29.60 per share received during the the Act.

8. Since the assessment order u/s 143(3) r.w.s. 144B of the Income Tax Act, 1961 on 07.06.2021 for the A.Y. 2016-17 is passed by the AO without making any proper and sufficient inquiries or verification which should have been made and to make corresponding additions/disallowances after making such inquiries which ought to have been made. The same is deemed to be erroneous in so far as it is prejudicial to the interest of Revenue.

9. In view of the aforesaid reasons, it is proposed to revise the assessment order u/s 143(3) r.w.s. 144B dt. 07.06.2021, under section 263 of the





Income Tax Act, 1961, being erroneous in so far as it is prejudicial to the interest of revenue..

10. You are hereby given an opportunity to represent your case as to why the proposed action u/s 263 be not pursued and necessary order be passed on the issues discussed above as well as other issues that may come to the notice of the undersigned during this proceeding. You or any duly authorized person can appear on the date and time mentioned in this Notice at Room No.612 Aayakar Bhavan, M. K. Road, Mumbai-400020 or you may file written submission which will be considered while passing the revision order. Failure to comply will lead to the conclusion that you have nothing to offer and you are agreeable to the proposed action as deemed fit on the materials available on record or gathered during this proceeding.”

**2.4.** In response to the said notice, the assessee filed its response on 13.03.2024 placed at page 79 by submitting as under:

“To

The Principal Commissioner of Income Tax -3,  
Room No. 612, 6th Floor, Aayakar Bhavan,  
M. K. Road, Mumbai - 400 020.

Sir.

Re: Reply to show cause notice under section 263 of the Income-tax Act, 1961 ('the Act') in the matter-of-Radiant Lifecare Mumbai Private Limited, ('the assessee') for assessment year 2018-19 PAN-AAGCR9198D

DIN: ITBA/REV/F/REV1/2023-24/1061859961(1)

With reference to the above and under instructions from our above-named client we hereby state that our client is in receipt of notice dated 01.03.2024/08.03.2024 requiring the assessee to show cause as to why the remedial action under section 263 be not taken with respect to assessment order dated 07.06.2021 passed by the assessing officer under section 143(3) r.w.s. 144B of the Income-tax Act, 1961, being erroneous in so far as it is prejudicial to the interest of revenue. We hereby submit our reply to various points raised in the above mentioned notice as under:

1. On perusal of the assessment records, it is seen that the assessee Company has issued and allotted 50,50,506 equity shares of Rs. 10/- each at a premium of Rs. 29.60/- per share to its holding company namely Radiant Life Care Private Limited. The shares were allotted on a valuation of Rs. 39.60/- per share i. e. Equity Share of Rs. 10/- each at a premium of Rs. 29.60/- per share. Shares were issued on the basis of valuation done by Category I Merchant Banker Spa Capital Advisors Limited. The SPA Capital Advisors Pvt. Ltd. had vide its valuation report dated 13/10/2017 certified the fair value of the shares of the Company as on October 11,

2017 at Rs. 39.58/- per equity share. The Merchant Banker adopted Discounted Cash Flow (DCF) method to value the shares of the company. Total Share premium of Rs. 14,94,94,978/- was received during the A.Y.2018-19.

Our submission

i) The assessee Company is engaged in the business of operations and management of hospitals. During the FY 2014-15 under reference the assessee Company the assessee Company has entered into an agreement with Dr. Balabhai Nanavati Hospital for acquiring the Operation and Management Rights of Nanavati Hospital for a period of 29 years. The assessee Company has entered into the agreement with Dr. Balabhai Nanavati Hospital on 16.07.2014. Acquisition of Operations & Management Rights by the Company enhanced its value in terms of earning capacity and accordingly time to time the Company has obtained valuation of its shares done by category I Merchant Banker Spa Capital Advisors Limited.

ii) During the year the assessee Company has issued and allotted 50,50,506 equity shares of Rs. 10/- each at a premium of Rs. 29.60/- per share. The Company has allotted shares to the holding company namely Radiant Life Care Private Limited (formerly known as Halcyon Finance and Capital Advisors Private Limited).

iii) For AY 2018-19 Spa Capital Advisors Pvt. Ltd. has vide its valuation report dt. 11/10/2017 certified the fair market value of the shares of the Company as on that date at Rs. 39.58/- per equity share. The assessee has allotted shares at fair market value as certified by Spa Capital Advisors Ltd. vide their Valuation Report dt. 11/10/2017.

2. Perusal of the assessment records of previous assessment year i.e. A.Y. 2017-18 revealed that during the A.Y. 2017-18 also assessee had issued shares to the same investor at the premium of Rs.20 per share. To justify the premium charged on the shares issued during that year valuation report from the same Merchant Banker i.e. SPA Capital Advisors Ltd was furnished who had vide its valuation report dated 06.06.2016 certified the fair value of the shares of the company as on May 31 2016 at Rs.20/- per share. The assessing officer while passing scrutiny assessment order for A.Y. 2017-18 on 22/12/2019 rejected the valuation report submitted by the Merchant Banker and adopted the fair value of shares at face value of the shares i.e. Rs.10 per share and brought the excess share premium to tax. The A.O. analysed the annual accounts of the assessee company till 31/03/2019 and pointed out that the assessee company was making huge losses since the year of inception. Further, the A.O. compared the valuation report with the actual financials and concluded that the assessee's profits before tax and/or after tax as projected for the years had not been met even upto 31.03.2019, which clearly indicated that the inflated profits were adopted for computing the value of the share by



mentioned following DCF method. Therefore, the A.O. mentioned in the order that the projections on which the premium was based had not only been proved wrong but very far from the actual position as was evident from the books of accounts of said years and did not support the actual financials of the assessee company. Based on the above grounds, the A.O. rejected the Valuation Report in AY 2017-18 and made additions accordingly.

Our submission

The assessee has issued shares at premium in the AY 2017-18 on the basis of Merchant Banker's report. In the assessment procedure the assessee provided all the necessary information including the valuation report of the valuer, however the Ld. AO misinterpreted the report by ignoring the fact that the valuer took consolidated financial figures (which included Dr. Balabhai Nanavati's figures as well) as the base for valuation but the Ld. AO misunderstood the valuation report and rejected the valuation report incorrectly concluding that assessee's profits before tax as projected for the years in the report had not been met even upto 31.03.2019. In this regard we submit that the Ld. AO completely misinterpreted and misunderstood the valuation report as valuation clearly stated that valuation as per DCF method was calculated taking into account Audited Financial Statements of the assessee and consolidated financial projections of the assessee including of Dr. Balabhai Nanavati's figures as well up to March, 2030, hence while calculating fair market value the Merchant Banker has considered projected financials of the assessee including of Dr. Balabhai Nanavati's figures as well. However, the Ld. AO failed to appreciate the fact and made additions. The assessee is in appeal against the same.

3. Further, it is observed that the fundamentals of the company were not changed in AY 2018-19 as well and the assessee company is still making huge losses. Thus, the findings for AY 2017-18 still hold good for AY 2018-19 also. Consequently, consistent approach should have been adopted by the AO and AO should have rejected the valuation report and should have taxed the share premium of Rs.29.60 per share received during the year under section 56(2)(viib). Omission in this regard has resulted in underassessment of income of Rs.14,94,94,978/-.

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4. From perusal of the assessment records of the AY 2017-18, it is seen that the Assessing Officer after considering the financial position of the assessee company till 31.03.2019 as well as the valuation report, arrived at the conclusion that inflated profits were adopted for computing the value of the share by following DCF method as the company did not meet the projected profit before/after tax for years even till 31.03.2019. The actual audited financials of the



assessee as per the return of income filed for AY 2017-18, A.Y 2018-19 and 2019-20 are as under:

	AY 2017-18	AY 2018-19	AY 2019-20
Profit Before Tax	(3,59,48,434)	(4,66,00,307)	(5,12,97,005)
Profit After Tax	(3,59,48,434)	(4,66,00,307)	(5,12,51,837)

Accordingly, the Assessing Officer held that the projections on which the premium was based has not only been proved wrong but also is very far from the actual position as is evident from the books of accounts of succeeding years and does not support the actual financials of the assessee company.

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5. During the year under consideration i.e. AY 2018-19, the financials of the company were not changed much from the previous AY 2017-18. Further, the assessee company issued and allotted 50,50,506 equity shares of Rs.10 each at a premium of Rs.29.60 per share. The financials of the company for the AY 2018-19 does not justify charging of shares at premium of Rs.29.60 per share. The assessee company has shown Revenue from Operations at Rs.82,209/- and Other Income of Rs.81,11,792/- and has suffered huge losses in the year under consideration also. Therefore, it can be safely concluded that inflated profits have been adopted for computing the value of the share. Also, considering the facts of the case for AY 2017-18 (wherein the Assessing Officer analysed the financials of the assessee till 31.03.2019), the share premium of Rs.29.60 per share received during the year under consideration should have been taxed u/s 56(2)(viib) of the Act.

Our submission

We wish to mention here that the assessee is making losses as separate entity is due to the fact that the assessee company is engaged in the business of operations and management of Dr. Balabhai Nanavati Hospital and had acquired the Operation and Management Rights of Nanavati Hospital for a period of 29 years. Dr. Balabhai Nanavati Hospital was in bad shape and it was well considered that for initial 4-5 years there will be losses in operation. However as explained herein above the valuation report has been made after considering the consolidated financial projections which included Dr. Balabhai Nanavati's figures as well. Here we wish to mention the fact that even in the valuation report dated October 11, 2017 for initial 5 years the profit was negligible in which in the first three years the valuer took negative PBT(EOI) for the base for valuation. The assessee Company has issued shares on the fair market value of its share derived by the professional and method as prescribed under Rule 11UA of the Income Tax Rules, 1962. You will appreciate the fact that the assessee has provided all the necessary

information to the Ld. AO during the assessment proceedings for A.Y 2018-19. The Ld.AO has specifically asked and verified the details shares issued including the premium and after verifying all the document including the valuation reports, the Ld. AO has passed the assessment order. It is pertinent to note that the Ld. AO at the time of assessment proceedings has asked for the assessment orders for the earlier years and was fully aware of the fact that in the earlier years there was addition on account of share premium account, however in spite of that after satisfying himself with all the documents and he correctly analyzed valuation report and accepted the valuation report passes the assessment order. A copy of the all the relevant assessment documents submitted in this regard at the time of assessment proceedings are attached as annexure 1.

Now we would like to refer provisions of section 56(2) (viib) as under:

56 (2) In particular; and without prejudice to the generality of the provisions of sub- section 1, the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely:-

(viib) Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received-

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Explanation. For the purposes of this clause,

(a) the fair market value of the shares shall be the value-

(1) as may be determined in accordance with such method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher;

From the provisions of section 56(2)(viib) as reproduced above, the provisions are applicable only if the consideration for issue of shares as received exceeds the fair market value of the shares so issued and as per the provisions of section fair market value means the value as may be determined in accordance with such method as may be prescribed or as

may substantiated by the Company based on various factors as mentioned in the explanation to that section, whichever is higher.

The assessee Company has issued shares on the fair market value of its share derived by the professional and method as prescribed under Rule 11UA(2)(b) of the Income Tax Rules, 1962 r.w.s. 56(2) (viib) of the Income Tax Act, 1961.

In view of the facts mentioned above and the provisions of section 56(2)(viib), we hereby submit that the issue of shares by the assessee Company during the year at Rs. 39.58/- per share was at fair market value of its shares and the provisions of section 56(2)(viib) are not applicable to it."

6. Since the assessment order u/s 143(3) r.w.s. 144B of the Income Tax Act, 1961 on 07.06.2021 for the A.Y. 2016-17 is passed by the AO without making any proper and sufficient inquiries or verification which should have been made and to make corresponding additions/disallowances after making such inquiries which ought to have been made. The same is deemed to be erroneous in so far as it is prejudicial to the interest of Revenue.

7. In view of the aforesaid reasons, it is proposed to revise the assessment order u/s 143(3) r.w.s. 144B dt. 07.06.2021, under section 263 of the Income Tax Act, 1961, being erroneous in so far as it is prejudicial to the interest of revenue.

Our submission

During the course of assessment proceedings u/s. 143(3) the learned Assessing Officer has required details of large share premium received by the assessee Company and the assessee Company has vide its letters dt. 07.01.2021, 02.02.2021, 03.04.2021 and 19.04.2021 submitted details of shares allotted along with various documents required. The assessee Company has also submitted copies of valuation reports of shares issued by category 1 Merchant Banker Spa Capital Advisors Limited certifying the valuation of shares of the Company on the relevant dates. The learned Assessing Officer has verified all these details submitted to him during the course of assessment proceedings and required the assessee Company to show cause as to why the provisions of section 56(2)(viib) should not be applied to the shares allotted during the year by the Company. The assessee replied for the same with facts and documentary proofs and the Ld. AO accepted the facts of the assessee.

It is further reiterated that the aforesaid issues raised by your Honor was considered and/ allowed by the assessing officer after due application of mind.

Therefore, this case is not prejudicial to the interest of Revenue."

**2.5.** After considering the above submissions by the assessee, the Ld.PCIT observed and held as under:

*“7. The reply of the assessee was carefully perused and is not acceptable. From perusal of the assessment records of the AY 2017-18, it is seen that the Assessing Officer after considering the financial position of the assessee company till 31.03.2019 as well as the valuation report, arrived at the conclusion, that inflated profits were adopted for computing the value of the share by following DCF method as the company did not meet the projected profit before/after tax for years even till 31.03.2019. The actual audited financials of the assessee as per the return of income filed for AY 2017-18, A.Y 2018-19 and 2019-20 are as under.*

	AY 2017-18	AY 2018-19	AY 2019-20
Profit before Tax	(3,59,48,434)	(4,66,00,307)	(5,12,97,005)
Profit after Tax	(3,59,48,434)	(4,66,00,307)	(5,12,51,837)

*8. Accordingly, the Assessing Officer held that the projections on which the premium was based has not only been proved wrong but also is very far from the actual position as is evident from the books of accounts of succeeding years and does not support the actual financials of the assessee company.*

*9. During the year under consideration ie. AY 2018-19, the financials of the company were not changed much from the previous AY 2017-18. Further, the assessee company issued and allotted 50,50,506 equity shares of Rs.10 each at a premium of Rs.29.60 per share. The financials of the company for the AY 2018-19 does not justify charging of shares at premium of Rs.29.60 per share. The assessee company has shown Revenue from Operations at Rs.82.209/- and Other Income of Rs.81.11,792/- and has suffered huge losses in the year under consideration also. Therefore, it can be safely concluded that inflated profits have been adopted for computing the value of the share. Also, considering the facts of the case for AY 2017-18 (wherein the Assessing Officer analysed the financials of the assessee till 31.03.2019), the share premium of Rs 29.60 per share received during the year under consideration should have been taxed under section 56(2) (vib) of the Act which was not done by the Assessing Officer while completing the assessment proceedings.*

*10. The order under section 143(3) r.w.s 144B of the Act dated 25.9.2021 is erroneous in so far it is prejudicial to the interest of the revenue. The phrase prejudicial to the interests of the Revenue is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta*



in *Dawjee Dadabhoy & Co. v. S.P. Jain* ((1957) 31 ITR 872 (Cal)), the High Court of Karnataka in *CIT v. T. Narayana Pai* (1975) 98 ITR 422 (Kant), the High Court of Bombay in *CIT v. Gabriel India Ltd.* ((1993) 203 ITR 108 (Bom)) and the High Court of Gujarat in *CIT v. Minalben S Parikh* (1995) 215 ITR 81 (Guj) treated loss of tax as prejudicial to the interests of the Revenue. The High Court of Madras in *Venkatakrishna Rice Co. v. CIT* (1987) 163 ITR 129 (Mad)) interpreting "prejudicial to the interests of the Revenue". The High Court held.

"In this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration."

11. It has to be noted that for the AY 2017-18, addition was done by the Assessing Officer under section 56(2)(viih) of the Act. Therefore, applying the ratio of the decision of the Hon'ble High Court of Madras in the *Venkatakrishna Rice Co*(supra), the order under section 143(3) r.w.s 144B sets a bad trend or pattern for the same issue for the subsequent years. Therefore, the order u/s 143(3) r.w.s 1448 dated 25.9.2021 is erroneous so far as it is prejudicial to the interests of revenue..

12. It is pertinent to mention that the Hon'ble SC in the case of *CIT Vs Paville Projects P Ltd*(2023) 149 taxmann 115(SC) held that the scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. It is further observed that if due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

13. Thus, it is clear that, the order passed by the Assessing Officer under 143(3) r.w.s. 1448 of the Income Tax Act, 1961 dated 07.06.2021 is erroneous in so far as it is prejudicial to the interests of the revenue.

14. After considering the facts and submissions of the assessee, the order under section 143(3) r.w.s. 144B of the Act dated 07.06.2021 is set aside under section 263 of the Act and the Assessing Officer is directed to bring the share premium to taxation and make fresh assessment after giving sufficient opportunity to the assessee to furnish the details with respect to the issues involved and pass the order in accordance with law."

Aggrieved by the order of Ld.PCIT, assessee is in appeal before this Tribunal.

**3.** The Ld.AR reiterated the submissions made before the Ld.PCIT during the review proceedings. In addition, he submitted that, the Ld.AO during the original assessment proceedings applied his mind to the valuation report filed for the year under consideration, and took into account losses incurred in the initial years of operation. He submitted that, there was variation in the cash flows for A.Y. 2017-18 an 2018-19 and the valuation was based on consolidated figures of profits and losses. Referring to various notices issued by Ld.AO u/s. 142(1) of the act and response filed by the assessee during the original assessment proceedings the Ld.AR submitted as under;

- A. *“During the course of assessment proceedings u/s. 143(3) the learned Assessing Officer has vide Notice u/s 142(1) dated 25/3/2021 [Pg 1-3] raised specific query about (i) details of large share premium received by the assessee Company to verify the applicability of Section 56(2)(viib).*
  - *Assessee filed reply dated 3/4/21.[Pg 4-52][8-9]The assessee Company has vide its letter dt. 12/10/2017 [Pg 131-165] submitted details of shares allotted during the year along-with Valuation reports.*
- B. *Also, AO had issued notice u/s 142(1) dtd 28/10/2019 [Pg 248-250] asking for details of share capital received along-with valuation report.*
  - *Assessee filed reply and also intimated status of assessment in previous assessment years. [Pg 251-253]*
- C. *One of the issue for carrying out scrutiny was large share premium. [See Pg 1 of the Assessment order.*
- D. *It is respectfully submitted that since enquiry was specifically made with Drespect to the share premium the invocation of revisionary jurisdiction u/s 263 for the same issue is bad in law.*
  - *In CIT v. Development Credit Bank Ltd. (2010) 323 ITR 206 /(2011) 196 Taxman 329 (Bom.)(HC) P. (210) para 7&8 it was held that since the enquiry was specifically held with reference to the issue of capital gain by the AO in original asst. therefore invoking revisionary jurisdiction u/s. 263 on the issue of capital gains was not justified. [Pg.No-254-257 PBIII]*
- E. *It is respectfully submitted that as A.O. has verified the issue of share premium in the course of original Assessment proceedings and adopted*

*one possible view, the exercise of Jurisdiction u/s 263 of the Income Tax Act by the Commissioner is not sustainable.”*

**3.1.** The Ld.AR placed reliance on the following decisions to support the argument that, once enquiry was specifically held with reference to the issue consider under revisionary proceedings, invoking provision of section 263 on the same issue is not justified:

1. *Decision of Hon'ble Supreme Court in case of CIT vs. Paville Projects Pvt. Ltd. reported in (2023) 453 ITR 447*
2. *Decision of Hon'ble Supreme Court in case of CIT vs. Max India Ltd. reported in (2007) 295 ITR 282*
3. *Decision of Hon'ble Bombay High Court in case of CIT vs. Nirav Modi reported in (2017) 390 ITR 292*
4. *Decision of Hon'ble Supreme Court in case of Malabar Industries Ltd. Vs. CIT reported in (2000) 243 ITR 83*
5. *Decision of Hon'ble Bombay High Court in case of CIT vs. Development Credit Bank Ltd reported in (2010) 323 ITR 206*

**3.2.** The Ld.AR submitted that, to invoke revisionary proceedings u/s. 263 the twin condition vis; the assessment order should be erroneous in so far as prejudicaition in interest of revenue must be satisfied. He submitted that, the following decision has upheld the view that where there are two views possible and the Ld.AO has adopted one of the possible view, the exercise of powers u/s. 263 cannot arise.

**3.3.** The Ld.AR further proposed that, merely because the Ld.AO did not make any mention of the issue in respect of which specific notices were issued to the assessee, and did not make any reference to the enquires contented, will not warrant exercise of jurisdiction u/s. 263 of the act. In support of this proposition he placed reliance on following:

1. Decisions of Hon'ble Supreme Court in case of *Ld.PCIT vs. R K. Jain* reported in (2024) 297 taxmann.com 369
2. Decision of Hon'ble Delhi High Court in case of *Ld.PCIT vs. Trojan Pvt Ltd.* reported in (2024) 297 taxmann.com 177.

**3.4.** The Ld.AR submitted that, revisionary proceedings cannot be sustained based on assessment order of earlier year, as each assessment year is separate year and principles of *res-judicata* do not apply. In support of this proposition he relied on the decision of *Hon'ble Bombay High Court in case of Macrotech Developers Ltd. vs. ACIT* reported in (2022) 139 taxmann.com 333.

**3.5.** The Ld.AR raised a proposition that, unless the view of the Ld.AO is unsustainable in law, revisionary proceedings cannot be resorted, to substitute one view against the view already taken by the Ld.AO. He submitted that, the view taken by the Ld.AO in the original proceedings was a plausible view based on the details and explanations submitted by the assessee with respect to the taxability of share premium. It is the submissions of the Ld.AR that, the Ld.AO reached to the conclusion that, no addition was called for in respect of the same merely to replace that view, 263 cannot be initiated. In support of this, he placed reliance on following:

1. Decision of Bombay High Court in case of *Ld.PCIT vs. Shiv Sahay Punarvasan Prakash Ltd.* reported in (2023) 456 ITR 336
2. Decision of Bombay High Court *Grasim Industries Ltd. vs CIT* reported in (2010) 321 ITR 92.

**3.6.** The Ld.AR thus submitted that, the Ld.AO verified all the details furnished by the assessee in response to notice issued referred to herein above placed at pages of the paper book mentioned therein. He specifically referred to notice issue on

28/10/2019 calling for the assessment orders passed in point no 9 and details of share capital received at point no. 10. The Ld.AR thus submitted that, there is no evidence on behalf of the revenue to justify the proceedings initiated u/s. 263 of the act, as all the relevant details/ information regarding the share premium received are on record.

**3.7.** He placed reliance on the *decision of Coordinate bench of this Tribunal in assessee's own case for A.Y. 2015-16 and 2016-17* dated wherein on identical issue the revisionary proceedings, with respect to valuation of shares/charging of premium was upheld. The Ld.AR argued that, the facts prevailed in A.Y. 2015-16 and 2016-17 were different, vis-a-vis the year under consideration. He submitted that, in those years the responses filed by the assessee during the original assessment proceedings on identical issues were considered to be not filed before the Ld.AO as the copies relied by the assessee therein were did not carry and inward stamp of the office. He submitted that, those assessment years were prior to the faceless assessment period and assessee did not have any proof of the details having filed with the Ld.AO during assessment proceedings. He submitted that in the present year all replies to the specific query raised by Ld.AO was responded by way of e-filing, which is verifiable from the acknowledgement placed at page 251-252 of paper book. He submitted that from ITBA Portal, it is evident that all submissions were made by the assessee before the authorities below. He thus submitted that, the ratio laid down by the decision



referred to hereinabove in assessee's own case is not applicable to the present facts of the case and the proceeding initiated by the Ld.PCIT u/s. 263 of the act, deserved to be quashed.

**3.8.** On the contrary, the Ld.DR submitted that, the Ld.AO merely issued notices calling for the details/ information regarding the share capital received against, which shares were issued by the assessee. He submitted that, no enquiry was conducted based on the submissions furnished by assessee during the scrutiny proceedings, Ld.DR placed reliance on Explanation 2 to section 263 of the act, according to which the assessment order so passed is deemed to be erroneous, in so far as prejudicial to the interest of the revenue. He submitted that, the Ld.AO failed to carry out enquiries which ought to have been made in present facts of the case, more so when assessment order for A.Y. for 2017-18 was available with the Ld.AO wherein a disallowance was made in respect of the excess share premium by rejecting the valuation report submitted by the Merchant Banker. He placed reliance on the categorical observations of Coordinate Bench of this *Tribunal* for assessee's own case for A.Y. 2015-16 and 2016-17 in ITA NO. 895-896/M/2021 vide order dated 31.05.2022. The copy of the said order is placed at page 163-195 of the paper book 2 filed before this *Tribunal*.

**3.9.** The Ld.DR filed before this *Tribunal* extract of order sheets from ITBA portal, wherein he drew attention to the order sheet entry dated 20.04.2021, scanned and reproduced as under;



AAGCR91980/U143842

Cause notice as below				
Signature:				
20/04/2021	Added Additional Remarks	RAO - Assessment Unit	-	
<p>Notings/Remarks: Reason: Low income in comparison to very high investments appearing in balance sheet. Large business loss set off against other head of income. Outcome: the assessee furnished the submission that "the assessee company has incurred higher amount of fixed overheads like employee benefit expenses, legal and professional fees and depreciation costs during the financial year 2017-18 relevant to assessment year 2018-19. As explained the assessee company was involved in operational management of Dr. Balabhai Nanavati Hospital during the relevant previous year and therefore no revenue was continue in loss in the relevant previous year and therefore no revenue was accrued to the assessee company, also the revenue generated from other sources during the year was not sufficient to cover the aforesaid expenditure and as a result it incurred substantial business loss." During the assessment proceeding the assessee submitted the details which were requisitioned through Notice u/s 142(1). However, it was found that excess depreciation was claimed by the assessee. Hence, Depreciation claimed on intangible asset is disallowed and disallowance was made u/s 14A which was not offered in the computation of income. Reason: Inflow of funds in an entity consistently showing loss before depreciation and Large share premium received during the year (verify applicability of Sec 56(2) (viib) or any other relevant section) Outcome: in the submission it was found that the assessee Company has issued shares on the fair market value of its shares derived by the professional and method as prescribed under Rule 11UA of the Income Tax Rules, 1962. Hence no action taken on this issue.</p>				
Signature:				
20/04/2021	Pending for approval of Draft assessment Order	AO - Assessment Unit	RANGE - Assessment Unit	
Notings/Remarks: submitted for approval of Draft assessment order				
Signature:				
23/04/2021	Draft Assessment Order approved	RANGE - Assessment Unit	AO - Assessment Unit	
Notings/Remarks: Approved.				
Signature:				

13/11/2024 16:16

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**3.10.** The Ld.DR thus supported the orders passed u/s. 263 of the act on the issue which has not been verified by the Ld.AO during the original scrutiny proceedings. He submitted that, it is very clear from the above order sheet noting that Ld.AO did not verify the issue regarding valuation by the merchant banker and merely proceeded on the premise that the assessee issued shares on fair market value, by holding that, it is as per the method prescribed as per Rule 11 UA of the act. The Ld.DR argued that based

presumption, no verification/enquiries were conducted by the Ld.AO on the issue.

**3.11.** The Ld.DR referring to the decisions relied by the Ld.AR submitted that all are distinguishable on facts. He submitted that, the decision of *Hon'ble Delhi Tribunal* in case of *Vaaan Infra Ltd. Vs. PCIT reported in (2024) 205 ITD 331* pertains to assessment year prior to the insertion of Explanation on (2) to section 263. He submitted that, after insertion of Explanation 2, *Hon'ble Supreme Court* considered proceedings initiated u/s. 263 of the Act in case of *CIT vs. Amitabh Bacchan reported in (2016) 69 taxmann.com 170*. *Hon'ble Supreme Court* upheld revisionary proceedings initiated due to no/ lack of enquiry or verification that should have been made on the issue considered in the notices issued.

He thus submitted that the Ld. PCIT was correct in exercising his powers u/s. 263 of the act, by virtue of Explanation (2) to section 263 of the Act.

We have perused the submissions advanced by both sides in light of records placed before us.

**4.** In the present facts of the case the power under section 263 has been exercised only on one ground which is elucidated in the notice dated 01.03.2024 issued to the assessee reproduced herein above.

**4.1.** The Ld. PCIT was of the opinion that due verification should have been carried out by the Ld.AO in respect of the inflated profits adopted by the merchant banker for computing the value of the shares under DCF method (Rule 11 UA), having regards to the fact



that, the assessee incurred loss in the initial years of his operation. The Ld. PCIT was of the opinion that, the Ld.AO should have carried out necessary enquires/verification in respect of the projections on which the premium was based and whether it was far from the actual position as was evident from the books of accounts filed by the assessee in response to the notices issued during the assessment proceedings.

**4.2.** The Ld. PCIT was of the opinion that such necessary enquires/verification was necessary more so when the financials of the company had not undergone much change. The Ld.DR placed reliance on the order sheet entries wherein the following order sheet entry dated 20-04-2021 stated. At the cost of repetition the same is reproduced once again as under:

Cause notice as below				
Signature:				
20/04/2021	Added Additional Remarks	RAO - Assessment Unit	-	
<p>Notings/Remarks: Reason: Low income in comparison to very high investments appearing in balance sheet. Large business loss set off against other heads of income. Outcome: The assessee furnished the submission that "the assessee company has incurred higher amount of Fixed overheads like employee benefit expenses, legal and professional fees and depreciation costs during the financial year 2017-18 relevant to assessment year 2018-19. As explained the assessee company was involved in operational management of Dr. Balabhai Nanavati Hospital during the relevant previous year and hospital was continue in loss in the relevant previous year and therefore no revenue was accrued to the assessee company, also the revenue generated from other sources during the year was not sufficient to cover the aforesaid expenditure and as a result it incurred substantial business loss." During the assessment proceedings the assessee submitted the details which were requisitioned through Notice u/s 142(1). However, it was found that excess depreciation was claimed by the assessee. Hence, Depreciation claimed on intangible asset is disallowed and disallowance was made u/s 14A which was not offered in the computation of income. Reason: Inflow of funds in an entity consistently showing loss before depreciation and Large share premium received during the year (verify applicability of Sec 56(2)(viib) or any other relevant section). Outcome: In the submission it was found that the assessee company has issued shares on the fair market value of its shares derived by the professional and method as prescribed under Rule 11UA of the Income Tax Rules, 1962. Hence no action taken on this issue.</p>				
Signature:				
20/04/2021	Pending for approval of Draft assessment Order	AO - Assessment Unit	RANGE - Assessment Unit	
Notings/Remarks: submitted for approval of Draft assessment order				
Signature:				
23/04/2021	Draft Assessment Order approved	RANGE - Assessment Unit	AO - Assessment Unit	
Notings/Remarks: Approved.				
Signature:				

**4.3.** Specific emphasis was laid on the following extract from the above order sheet entries:

*“Reason: Inflow of funds in an entity consistently showing loss before depreciation and Large share premium received during the year (verify applicability of Sec 56(2) (vii) or any other relevant section) Outcome: in the submission it was found that the assessee Company has issued shares on the fair market value of its shares derived by the professional and method as prescribed under Rule 11UA of the Income Tax Rules, 1962. Hence no action taken on this issue.”*

**4.4.** On perusal of the above, it is categorically clear that the Ld.AO accepted the submissions of the assessee that, the shares issued are on fair market value as prescribed under Rule 11 UA. The Ld.AO thus did not undertake any further verification in order to ascertain the basis of valuation of shares at the premium determined by the merchant banker. Therefore though it could be treated as one of the possible views, is not based on any enquires or verification carried out by the Ld.AO. It is noted that the Ld. CIT after going through the assessment records came to such a conclusion of necessary verification/enquires having not been conducted by the Ld.AO and accepted the submissions of the assessee on the face of it. This leads to the conclusion that the assessment order to that extent would be erroneous in the light of Explanation (2) to section 263 of the act.

**4.5.** At this juncture, it is relevant to extract Explanation 2 to section 263 that reads as under:-

*“Explanation 2- For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [for the Transfer Pricing Officer, as the case may be], shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal*



*[Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,-*

*(a) the order is passed without making inquiries or verification which should have been made,*

*(b) the order is passed allowing any relief without inquiring into the claim:*

*(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

*(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]”*

**4.6.** The revisionary proceedings initiated in the present facts of the case is due to no enquiries or verification made by the Ld.AO even though there were sufficient materials available on the record during the assessment proceedings. Merely because assessee furnished all relevant information as called for, is not sufficient to hold that the view adopted by the Ld.AO is a plausible view after the insertions of Explanation 2 to section 263. In support we refer on the decision of the *Hon'ble supreme court in case of CIT vs. Amitabh Bacchan (supra)*. We therefore reject the arguments advanced by the Ld.AR on this aspect and the decisions relied on the proposition advanced are distinguishable.

**4.7.** The Ld. PCIT was satisfied that order passed by the Ld.AO was erroneous in so far as prejudicial to the interest of revenue more so when in the course of assessment proceedings though assessee filed all details as called for in respect of excess share premium, the Ld.AO summarily accepted the submissions of assessee by making an entry in the order sheet as reproduced herein above.

**4.8.** The scheme of the Income Tax Act, is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to erroneous order of the assessing officer, the Revenue is losing tax lawfully payable by assessee, it will certainly be prejudicial to the interest of the revenue. As held in the case of *Malabar Industries Co. Ltd., Vs. CIT* reported in 243 ITR 83, Hon'ble Supreme Court has held that, the Commissioner can exercise revision jurisdiction u/s 263, if he is satisfied that the order of the assessing officer sought to be revised is:

*(i) erroneous; and also*

*(ii) prejudicial to the interests of the revenue.*

**4.9.** The word 'erroneous' has not been defined in the Income Tax Act. It has been however defined at page 562 in Black's Law Dictionary (seventh Edition) thus';

*'erroneous, adj. Involving error, deviating from the law'.*

**4.10.** At page 650 of Law Lexicon, the scope of Error, Mistake, Blunder, and Hallucination has been explained as under:

*"An error is any deviation from the standard or course of right, truth, justice or accuracy, which is not intentional. A mistake is an error committed under a misapprehension or misconception of the nature of a case. An error may be from the absence of knowledge, a mistake is from insufficient or false observation. Blunder is a practical error of a peculiarly gross or awkward kind, committed through glaring ignorance, heedlessness, or awkwardness. An error may be overlooked or atoned for, a mistake may be rectified, but the shame or ridicule which is occasioned by a blunder, who can counteract. Strictly speaking, Hallucination is an illusion of the perception, a phantasm of the imagination. The one comes of disordered vision, the other of discarded imagination. It is extended in medical science to matters of sensation, whether there is no corresponding*

*cause to produce it. In its ordinary use it denotes an unaccountable error in judgement or fact, especially in one remarkable otherwise for accurate information and right decision. It is exceptional error or mistake in those otherwise not likely to be deceived.*

**4.11.** Section 263 of the Income-tax Act seeks to remove prejudice caused to the revenue by such erroneous order passed by the Ld.AO. It empowers the Commissioner to initiate *suo moto* proceedings, either in a case where the assessing officer takes a wrong decision without considering the materials available on record, or he takes a decision without making an enquiry into the matters, where such inquiry was *prima facie* warranted. In order to ascertain whether an order sought to be revised under Section 263 is erroneous, it should be seen whether it suffers from any of the aforesaid forms of error.

**4.11.1.** In the present facts, it is clear from the order sheet entry reproduced herein above that, the Ld.AO accepted assessee's valuation and the price determined by the assessee's merchant banker to be the market value of shares. The Commissioner in such circumstances is within his powers to regard such order as erroneous on the ground that, in the circumstances of the case, the Ld.AO should have made further inquiries before accepting the claim made by the assessee. The reason is obvious, unlike Civil Court which bases its decisions on the evidence produced before it, the role of an Assessing Officer under the Income-tax Act is not only that of an adjudicator but also of an investigator. He must

discharge both the roles effectively. In other words, he must carry out investigation where the facts of the case so required and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. In our view, an order sought to be revised under Section 263 would be erroneous and fall in the aforesaid category of "errors" as it is, based on incorrect assumption of facts and non-application of mind to something which was obvious and required application of mind, thereby caused prejudice to the interest of the revenue.

**4.12.** It cannot be lost out of sight that, the scheme of assessment has undergone radical changes in recent years. It deserves to be noted that the present assessment was made under Section 143(3) of the Income-tax Act. In other words, the Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. The Assessing Officer is required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. He should be fair not only to the assessee but also to the Public Exchequer. The Assessing Officer has got to protect, on one hand, the interest of the assessee in the sense that, the assessee is not subjected to any amount of tax in excess of what is legitimately due, and on the other hand, he has a duty to protect the interests of the revenue and to see that no one dodges the revenue and escapes without paying legitimate tax. The Assessing Officer is not expected to put

blinkers on his eyes and mechanically accept what the assessee claims. It is the duty of the Ld.AO to ascertain the truth of the facts stated by the assessee and the genuineness of the claims made in the return when the circumstances of the case are such as to provoke an inquiry. Arbitrariness in either accepting or rejecting the claim has no place. *Hon'ble Supreme Court* in many cases have taken such view. To name a few, *Hon'ble Supreme Court* in case of *Rampyari Devi Saraogi v. CIT* reported in 67 ITR 84, *Smt. Tara Devi Aggarwal v. CIT* reported in 88 ITR 323, and *Malabar Industrial Co. Ltd* in case of 243 ITR 83.

**4.13.** In the present facts of the case, the order passed by the Ld.AO, therefore becomes erroneous because enquiry has not been made regarding the share valuation report based on which the assessee determined the share value at premium. It was incumbent on him to verify by making necessary enquiries, more so when in the immediately preceeding assessment year in assessee's own case the valuation report by the merchant banker was rejected on similar facts.

**4.14.** In case of *Malabar Industrial Co. Ltd.*(supra) *Hon'ble Supreme Court*, we refer to following observation as under:

*"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall the orders passed without applying the principles of natural justice or without application of mind."*



**4.15.** In our humble view, arbitrariness in decision-making would always need correction regardless of whether it causes prejudice to an assessee or to the Exchequer. The Legislature has taken ample care to provide for the mechanism to have such prejudice removed. While an assessee can have it corrected through revisional jurisdiction of the Commissioner under Section 264 or through appeals and other means of judicial review, the prejudice caused to the Exchequer can also be corrected by invoking revisional jurisdiction of the Commissioner under Section 263. Arbitrariness in decision-making causing prejudice to either party cannot therefore be allowed to stand and stare at the legal system. It is difficult to countenance such arbitrariness in the actions of the Assessing Officer.

**4.16.** It is the duty of the Assessing Officer to adequately protect the interest of both the parties, namely, the assessee as well as the State. If he fails to discharge his duties fairly, his arbitrary actions culminating in erroneous orders can always be corrected either at the instance of the assessee, if the assessee is prejudiced or at the instance of the Commissioner, if the revenue is prejudiced. While making an assessment, the assessing officer has varied role to play. He is the investigator, prosecutor as well as adjudicator. As an adjudicator he is an arbitrator between the revenue and the taxpayer and he has to be fair to both. His duty to act fairly requires that when he enquires into a substantial matter like the present one, he must record a finding on the relevant issue giving,

his reasons therefore, which is absent in the present facts of the case. Merely by passing an order sheet entry, the Ld.AO accepted the value as per the valuation report to be the market value and admits that no further enquiry has been made. It is settled law that while making assessment on assessee, the ITO acts in a quasi-judicial capacity. An assessment order is amenable to appeal by the assessee and to revision by the Commissioner under Sections 263 and 264. Therefore, a reasoned order on a substantial issue is legally necessary.

**4.17.** The decisions relied by the Ld.AR referred to in the preceding paragraphs also points to the same direction. They have all held that orders which are subversive of the administration of revenue, must be regarded as erroneous and prejudicial to the interests of the revenue. If the Assessing Officers are allowed to make assessments without application of mind and without carrying out necessary enquiries, as has been done in the present facts of the case, the administration of revenue is bound to suffer. Similarly, without discussing the nature of a transaction and materials on record, if an assessing officer makes addition to the income of an assessee, the same also would have been considered erroneous by any appellate authority as being violative of the principles of natural justice which require that the authority must indicate the reasons for an adverse order. We find no reason why the same view should not be taken when an order is against the interests of the revenue. As a matter of fact such orders are prejudicial to the interests of

both the parties, because even the assessee is deprived of the benefit of a positive finding in his favour, though he may have sufficiently established his case.

Accordingly based on the above discussions we hold that provision of section 263 has been rightly invoked in the present facts of the case and grounds- raised by the assessee stands dismissed.

**5.** However in the impugned order dated 27/03/24 passed u/s. 263 of the act it is noted that the Ld. PCIT directed to bring the share premium to taxation and to make fresh assessment after giving sufficient opportunity to the assessee to furnish the details with respect to the issue involved and passed the order in accordance with law. In our understanding, such a direction would lead to a direct addition in the hands of the assessee by the Ld.AO without analyzing the documents furnished by the assessee in accordance with law. We have already mentioned in Para Nos. 4.14 & 4.15 herein above that the Ld.AO makes addition in the hands of the assessee without having regards to the evidences/details furnished and without carrying out necessary enquiries/verification, the addition so made would have to be considered as erroneous as been violative of the principles of natural justice.

**6.** We therefore expunge the observation of Ld. PCIT in Para 14 of the impugned order and direct the Ld.AO to carry out *denovo* verification of the issue having regards to the evidences furnished by the assessee by carrying out necessary verification/enquires in



accord with law. Needless to say that proper opportunity of being heard must be granted to assessee.

**Accordingly the grounds raised by the assessee stands dismissed.**

**In the result the appeal filed by the assessee stands dismissed.**

**Order pronounced in the open court on 30-12-2024.**

**Sd/-  
RENU JAUHRI  
ACCOUNTANT MEMBER**

**Sd/-  
BEENA PILLAI  
JUDICIAL MEMBER**

Place: Mumbai,

Dated: 30.12.2024

*Snehal C. Ayare, Stenographer/Dragon*

**Copy of the order forwarded to :**

1. The Appellant
2. The Respondent
3. Ld.DR, ITAT, Mumbai
4. Guard File
5. CIT

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**