

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" MUMBAI**

**BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2508/MUM/2018
Assessment Year: 2013-14**

Smiti Holding & Trading Co. Pvt. Ltd. 3A, Barodawala Mansion, 81, Dr. Annie Besant Road, Worli, Mumbai-400018.	Vs.	Principal CIT, Room No. 611, Aayakar Bhavan, Mumbai- 400020.
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PAN No. AARCS4593G
Appellant

Respondent

Assessee by	:	Mr. H.N. Motiwala, AR
Revenue by	:	Mr. C.S. Gulati, DR

Date of Hearing	:	19/07/2018
Date of pronouncement	:	25/09/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order u/s 263 of the Income Tax Act 1961, (the 'Act') dated 28.03.2018 passed by the Pr. Commissioner of Income Tax -8 [in short 'PCIT'], Mumbai.

2. The grounds of appeal filed by the assessee read as under:

1.1 On the facts and circumstances of the case and in law, the Ld. PCIT erred in passing the order u/sec 263 and setting aside the assessment order passed under section 143(3) of the Act without recording that the said assessment order was erroneous and prejudicial to the interest of revenue, particularly without examination of acquisition of unquoted shares of M/s

Suprasad Investments & Trading Co. Pvt. Ltd. at fair market value which was more than the book value as per r.w.Rule 11UA was seen by the Dy. C.I.T - Circle 8(2)(1), Mumbai, in her order u/sec 143(3) dated 26.2.2016.

1.2 The said Ld. PCIT erred in not considering the fact that the said A.O. completed the assessment u/sec 143(3) after proper inquiries and verification of relevant documents to her satisfaction and in compliance of the provisions of sec. 56 (2)(viiia) r.w. Rule 11UA (1) (c) (b) and therefore the said order was not erroneous and prejudicial to the interest of the revenue.

1.3 Without prejudice to above, the said Ld. PCIT erred in not considering the fact that the appellant had never acquired unquoted shares of M/s Omega Properties Pvt.Ltd. and M/s Dakshina Properties Pvt.Ltd. and therefore, examination on valuation of the said two companies U/Rule 11 UA(1)(c)(b) by the said A.O. was not required,

1.4 The said Ld. PCIT erred in not considering the fact that the appellant had acquired the unquoted equity shares of M/s Suprasad at a fair market value of Rs.7,262/- per share based on the valuation report of a professional firm whereas the value of the same determined on the basis of book value as provided u/s 11UA(1)(c) (b) was Rs.1,490/- per share and therefore the said CIT erred in setting aside the assessment.

1.5 Without prejudice, to above the said Ld. CIT(A) erred in not appreciating the fact that the Rule 11UA(1)(c)(b) which was in force in AY 2013-14 provided for valuation of shares of unquoted companies on the basis of Book Value of assets of the company.

3. The background facts of the case are that the PCIT, on perusal of the case records for the impugned assessment year observed that the Assessing Officer (AO) *vide* order sheet entry dated 20.01.2016, had requested the assessee to furnish the fair market value of the investments in shares i.e. (i) quoted equity shares of Asian Paints Ltd. (5403062 shares for Rs.493,87,58,137/-), (ii) unquoted equity shares of

Suprasad Investments & Trading Co. Pvt. Ltd. (2750 shares acquired for Rs.2,00,50,100/-) and (iii) unquoted equity shares of Geetanjali Trading & Investment Pvt. Ltd. (5283062 shares acquired for Rs.440,28,15,429/-). The PCIT also noticed from the case records that in response to the above specific query, the assessee *vide* submission dated 28.01.2016 had filed details in respect of Asian Paints Ltd. only. No details in respect of Suprasad Investment & Trading Co. Ltd. and Geetanjali Trading & Investment Pvt. Ltd. were provided and the assessment u/s 143(3) was completed on 26.06.2016, without examining the fair market value of investment by the assessee in these two companies. The PCIT further found that information had been received from the DCIT-4(1)(1) that during the scrutiny assessment of M/s Dani Shares & Stocks Pvt. Ltd., it was observed that the above company had transferred 2750 shares of Suprasad Investment Trading Pvt. Ltd. *vide* share purchase agreement dated 01.03.2013 at the value of Rs.7,262/- per share. Also M/s Suprasad Investment & Trading Pvt. Ltd. had two wholly owned subsidiaries viz. M/s Omega Properties Pvt. Ltd. and M/s Dakshina Properties Pvt. Ltd. Thus by virtue of holding 50% shares in the parent/holding company i.e. M/s Suprasad Investments & Trading Co. Pvt. Ltd., the assessee also became 50% share holder of both the subsidiary companies.

3.1 In response to the notice u/s 263 dated 01.03.2018, issued by the PCIT on the above issues, the assessee filed a submission dated 21.03.2018 submitting the following:

(a) Shares of M/s Geetanjali Trading Co. Pvt. Ltd. were not purchased at all. It is in fact a 100% holding company of the assessee.

(b) The FMV of Asian Paints share was considered while valuing the subsidiary company share and considered in the value of share of Suprasad Investment & Trading Co. Pvt. Ltd.

(c) FMV is applicable only from 01.04.2018 in Rule 11UA and not earlier.

Stating the above facts, the assessee submitted before the PCIT that the assessment order passed by the AO is neither erroneous nor prejudicial to the interest of revenue and therefore, following the decision in *Malabar Industries Co. Ltd.*, action u/s 263 is not warranted in this case.

3.2 However, the PCIT was not convinced with the above explanation of the assessee and referring to (i) computation of FMV as per the assessee, (ii) FMV as on 31.03.2012 of Omega Properties Pvt. Ltd. and Dakshina Properties Pvt. Ltd. and (iii) computation of FMV of shares as done by the DCIT-4(1)(1), Mumbai, found that there was considerable variation in valuation of shares as done by the AO as per the proposal and as submitted by the assessee in the course of proceedings before him. The assessment order passed does not reveal that a detailed examination of acquisition of assets and applicability of section 56(via) and Rule 11UA was undertaken in acquisition of shares of Suprasad Investments & Trading Co. Pvt. Ltd.

In view of the above reasons, the PCIT set aside the order u/s 143(3) dated 26.02.2016 passed by the AO with a direction to make a fresh order after examining the issue of valuation of shares of Suprasad Investments & Trading Co. Pvt. Ltd.

4. Before us, the Ld. counsel of the assessee files a Paper Book (P/B) containing (i) Copy of questionnaire issued by Dy. CIT-8(2)(1), (ii) Submission before DCIT-8(2)(1) during assessment proceedings u/s 143(3), copy of letter filed on 28.01.2016 along with copy of valuation of unquoted equity shares of M/s Suprasad Investment and Trading Co. Pvt. Ltd. u/s 11UA, (iii) Copy of valuation report of valuer M/s Manubhai & Co., CA, dated 25.01.2013, (iv) Comparative Statement of Fair Value U/Rule 11UA of M/s Suprasad Investment and Trading Co. Pvt. Ltd. with copy of Financial Statement for FY 2012-13, (v) Comparative Statement of Fair Value U/Rule 11UA of M/s Omega Properties Pvt. Ltd. with copy of Financial Statement for FY 2012-13, (vi) Comparative Statement of Fair Value U/Rule 11UA of M/s Dakshina Properties Pvt. Ltd. with copy of Financial Statement for FY 2012-13, (vii) Submission before CIT during proceedings U/Sec 263 (a) Copy of show cause Notice U/Sec 263, (b) Letter filed dated 21.03.2018, (c) Letter filed dated 22.03.2018 and (viii) Copy of Financial Statement of Smiti Holding and Trading Co. Pvt. Ltd. for FY 2012-13.

The Ld. counsel submits that during the impugned assessment year, the assessee had purchased 2750 unquoted equity shares of Suprasad Investment & Trading Co. Pvt. Ltd. at a cost of Rs.7,290/- per share amounting to Rs.2,00,50,010/- based on the valuation report of a

CA firm of M/s Manubhai & Co., Mumbai. It is stated that the assessee had submitted valuation of shares of M/s Suprasad Investment & Trading Co. Pvt. Ltd. under Rule 11UA to the AO *vide* letter dated 28.01.2016 and the AO, after verification of all the details in consideration of provisions of section 56(2)(viiia) r.w. Rule 11UA completed the assessment u/s 143(3) dated 26.02.2016.

The Ld. counsel further submits that the assessee has not acquired any shares in Geetanjali Trading & Investment Pvt. Ltd. during the impugned assessment year and therefore, the question of furnishing details of the said shares does not arise. The assessee had received 52,86,062 equity shares of Asian Paints Ltd. from its holding company viz. Geetanjali Trading & Investment Pvt. Ltd. Since the said holding company holds 100% shares of the assessee, the said transfer is exempt u/s 47(iv) of the Act. Further, section 56(2)(viiia) does not apply to shares of a quoted company (Asian Paints Ltd.) received by the assessee. Therefore, it is stated that the question of valuation of these shares at market value does not arise.

Further, the Ld. counsel submits that the assessee had submitted computation of value of share under Rule 11UA of M/s Suprasad Investment & Trading Co. Pvt. Ltd. along with the balance sheet as on 31.03.2012 *vide* letter dated 28.01.2016. The value of shares of M/s Suprasad Investment & Trading Co. Pvt. Ltd. as worked out under Rule 11UA is Rs.1,490/- per share and the assessee had purchased these shares at Rs.7,262/- per share.

The Ld. counsel also submits that Rule 11UA as in force in the impugned assessment year does not provide and require to replace FMV of quoted shares to book value and therefore, the value derived by the DCIT 4(1)(1) cannot be substituted to the value as derived under Rule 11UA. It is categorically stated by him that the market value under Rule 11UA is to be worked out by dividing the net worth (i.e. share capital + reserves) by the number of shares. This Rule 11UA has been amended by CBDT Notification No. GSR 865 (E)(No. 149/136/2014-TPL) dated 12.07.2017 providing for substitution of market value of all the assets, effective from AY 2018-19.

Thus the Ld. counsel submits that in view of the provisions of section 56(2)(viia) r.w. Explanation to clause (vii) and Rule 11UA, no addition is warranted u/s 56(2)(viia) and therefore, the order of the AO can neither be treated as erroneous or prejudicial to the interest of revenue.

Relying on the order dated 04.04.2018 of the Tribunal, Kolkata in the case of *Poonam Bhotika v. ITO* (ITA No. 665/Kol/2017 for AY 2012-13) and order dated 07.03.2018 of the Tribunal Delhi in the case of *M/s Minda SM Technocast Pvt. Ltd. v. Addl. CIT* (ITA No. 6964/Del/2017 for AY 2014-15), the Ld. counsel submits that the order passed u/s 263 dated 28.03.2018 by the PCIT in the instant case be set aside.

5. *Per contra*, the Ld. DR makes a specific reference to para 3(a) of the order u/s 263 dated 28.03.2018 of the PCIT and submits that as per the information received from the DCIT-4(1)(1), during the assessment proceedings of Dani Shares & Stocks Pvt. Ltd., it came to light that M/s

Suprasad Investments & Trading Co. Pvt. Ltd. had two wholly owned subsidiaries viz. M/s Omega Properties Pvt. Ltd. and M/s Dakshina Properties Pvt. Ltd. Thus, by virtue of holding 50% shares in the parent/holding company i.e. M/s Suprasad Investments & Trading Co. Pvt. Ltd., the assessee also became 50% shareholder of both the subsidiary companies. During the assessment proceedings of M/s Dani Shares & Stock Pvt. Ltd., the assessee-company was requested to furnish the financials of the two subsidiaries by the DCIT-4(1)(1), Mumbai. The assessee chose not to submit the financials of the subsidiaries stating its inability to access the required financials. Therefore, the AO downloaded the said details from the website of MCA. Reportedly, the two subsidiaries viz. M/s Omega Properties Pvt. Ltd. and Dakshina Properties Pvt. Ltd. were holding substantial investment in shares of listed company Asian Paints Ltd.

The Ld. DR further submits that the assessment order dated 26.02.2016 passed by the AO does not reveal that a detailed examination of acquisition of assets and applicability of section 56(viia) and Rule 11UA was done at all in acquisition of shares of Suprasad Investments & Trading Co. Pvt. Ltd. Further, the valuation of shares of M/s Suprasad Investments & Trading Co. Pvt. Ltd. necessitates the valuation of shares of Omega Properties Pvt. Ltd. and Dakshina Properties Pvt. Ltd. and these were not done by the AO.

Thus the Ld. DR supports the order passed by the PCIT.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We find that the assessee had not acquired any shares in Geetanjali Trading & Investment Pvt. Ltd. during the impugned assessment year and therefore, the question of furnishing details of the said shares does not arise. It is stated in Note No. 8(3) of the Balance Sheet that “during the period following investments of Asian Paints Ltd. have been transferred from the holding company at cost”. The assessee had received 52,86,062 equity shares of Asian Paints Ltd. from its holding company i.e. Geetanjali Trading & Investment Pvt. Ltd. and since the said holding company holds 100% shares of the assessee-company, the said transfer is exempt u/s 47(iv) of the Act. Further, section 56(2)(viiia) does not apply to shares of a quoted company (Asian Paints Ltd.) received by the assessee. Therefore, the question of valuation of these shares at market price does not arise.

We find that the assessee had submitted computation of value per share under Rule 11UA of M/s Suprasad Investment & Trading Co. Pvt. Ltd. along with balance sheet as on 31.03.2012 *vide* letter dated 28.01.2016. It is evident from the official seal dated 28.01.2016 of the office of Asstt./Dy. CIT-8(2)(1) Mumbai, indicating the receipt.

At this juncture, for reference, we produce below Rule 11UA as in force in AY 2013-14.

“Rule 11UA(1)(c)(b)

Fair market value of unquoted equity shares :

The fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely:—

the fair market value of unquoted equity shares $= (A-L) \times (PV)/(PE)$, where,

A= book value of all the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

L= book value of liabilities shown in the balance sheet, but not including the following amounts, namely:—

- (i) the paid-up capital in respect of equity shares;
- (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;
- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
- (iv) any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balance-sheet;

PV= the paid up value of such equity shares;"

6.1 A similar issue arose in *M/s Minda SM Technocast Pvt. Ltd.* (supra). The AY is 2014-15. The facts are that the assessee had acquired shares of M/s Tuff Engineering Pvt. Ltd. (in short 'TEPL') at Rs. 5 per share. The shares were acquired by the assessee from three companies. The assessee claimed to have valued the shares of TEPL as per the provisions of Rule 11UA and filed a copy of the report prepared by the Chartered Accountants in support of its claim to justify the price of shares at which these were required. However, the AO was of the view that the assets declared by TEPL in its balance sheet should have been valued as per the circle rate while determining the value of shares acquired by the assessee. Accordingly, the AO determined the value of shares at Rs.45.72 per share of TEPL and treated the difference of Rs.40.72 as income from other sources u/s 56(2)(viiia) of the Act. The view taken by the AO was subsequently confirmed by the Ld. CIT(A). In appeal, the Tribunal *vide* order dated 07.03.2018 held :

“6.4 On the plain reading of above Rule, it is revealed that while valuing the shares the book value of the assets and liabilities declared by the TEPL should be taken into consideration. There is no whisper under the provision of 11UA of the Rules to refer the fair market value of the land as taken by the Assessing Officer as applicable to the year under consideration. Therefore, we are of the view that the share price calculated by the assessee of TEPL for Rs. 5 per shares has been determined in accordance with the provision of Rule 11UA. In holding so, we find support and guidance from the judgment relied by the learned Authorized Representative which has been discussed in the preceding paragraphs. Therefore, we have no hesitation in reversing the order of the lower authorities. Hence, the grounds of appeal of the assessee are allowed.”

6.2 From the above, it is evident that Rule 11UA as in force in AY 2013-14 does not provide to replace fair value of quoted shares to book value and therefore, the value derived by the DCIT 4(1)(1) cannot be substituted to the value as derived under Rule 11UA.

Rule 11UA, during the relevant period, provides for valuation of unquoted equity shares by adopting the amount as per 'book value'.

In *Malabar Industrial Co. Ltd. v. CIT* (2000) 243 ITR 83 (SC), the Hon'ble Supreme Court has held that the Commissioner has to be satisfied with the twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of the conditions is absent-if the order of the AO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue-recourse cannot be held to section 263(1) of the Act.

The factual scenario depicted hereinabove is to be examined on the anvil of the above enunciation of law. As stated earlier, Rule UA as in force in the impugned assessment year, does not provide and require to replace fair value of quoted shares to book value and therefore, the value derived by the DCIT-4(1)(1) cannot be substituted to the value as derived under Rule 11UA.

Rule 11UA provides for valuation of unquoted equity shares by adopting the amount as per 'book value'.

In view of the above reasons, we set aside the order u/s 263 passed by the PCIT.

7. In the result, the appeal is allowed.

Order pronounced in the open Court on 25/09/2018.

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 25/09/2018

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai