

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH  
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&  
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.3410/Mum/2019  
(Assessment Year : 2014-15)**

M/s. Wheelabrator Alloy Castings Ltd., Runwal & Omkar Esquare Sion-Chunabhatti Signal Sion, Mumbai – 400 022	Vs.	Principal Commissioner of Income Tax, Central-2 Mumbai 1920, 19 <sup>th</sup> Floor, Air India Building Nariman Point, Mumbai – 400 021
<b>PAN/GIR No.AAACW0462F</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Rakesh Joshi
Revenue by	Shri Jayant Jhaveri
<b>Date of Hearing</b>	<b>30/11/2021</b>
<b>Date of Pronouncement</b>	<b>24/01/2022</b>

**आदेश / O R D E R**

**PER M. BALAGANESH (A.M.):**

This appeal in ITA No.3410/Mum/2019 for A.Y.2014-15 preferred by the assessee against the revision order of the Pr. Commissioner of Income Tax (C) in appeal dated 29/03/2019 u/s.263 of the Act.

2. Though the assessee has raised several grounds of appeal before us, only effective issue to be decided in this appeal is as to whether the Id. PCIT had validly assumed revisionary jurisdiction u/s.263 of the Act in the facts and circumstances of the instant case.

3. We find that assessee was in the business of manufacturing of non-ferrous strips, foils and sheets. However, during the year, the company has discontinued the said business and had commenced the business of real estate development. The company decided to monetize its asset at Lal Bahadur Shastri Marg, Bhandup (W), Mumbai by way of development of real estate on the said plot.

4. We have heard rival submissions and perused the materials available on record. We find that assessee is a builder and developer and had filed its return of income for the A.Y.2014-15 on 29/11/2014 declaring total income of Rs. 'Nil'. The assessment was completed u/s.143(3) of the Act on 29/12/2016 accepting the returned income. This assessment was sought to be revised by the Id. PCIT u/s.263 of the Act by issuing show-cause notice thereon. The various grounds raised in the show-cause notice of the Id. PCIT are reproduced as under:-

(20)



OFFICE OF THE  
PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL)-2  
ROOM NO. 1920, 19<sup>TH</sup> FLOOR, AIR INDIA BUILDING,  
NARIMAN POINT, MUMBAI-400021.  
PHONE NO: 22040515, 22040130

No. Pr.CIT(C)-2/263/Wheelabrator Alloy Castings /2018-19 Date:19.03.2019

To  
The Principal Officer  
M/s Wheelabrator Alloy Castings Limited.  
5<sup>th</sup> Floor, Runwal & Omkar Esquire,  
Off Eastern Exp Highway Sion,  
Mumbai - 400 022

Sir/Madam,

**Sub: Show cause notice u/s 263 of the Income Tax Act, 1961 for  
A.Y. 2014-15 - Regarding.**

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On examination of the records in your case, it is seen that the order u/s.143(3) of the I.T. Act passed on 29.12.2016, is found to be erroneous and prejudicial to the interest of Revenue on the following grounds:

1. It is observed from the record that as per the balance sheet there has been change in shareholding pattern/voting power by more than 51% during the year under consideration. It is to be noted that under the said circumstances, the brought forward loss of earlier years should not have been allowed to be carried forward as per provisions of section 79 of the IT Act, 1961. Hence, you are requested to explain as to why the brought forward loss of earlier years should not be disallowed to be carried forward as per provisions of section 79 of the IT Act, 1961.
2. It is observed that during the year, you have allotted 2,00,000 Equity Shares of face value Rs.100/-, at share capital of Rs.100/- and at a securities premium of Rs. 310/- per share.

It is also observed from record that you have claimed that the share premium was charged on the basis of discounted cash flow method (DCF).

Your sole claim to justify in charging the huge premium of Rs.310/- per share amounting to Rs.6,20,00,000/- was on the estimated discounted free cash flow [DCF Method] for valuation of shares, albeit



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MURARILAL AGARWAL  
A.C.A.

M. No. 34399

no such valuation was filed before AO which may be done now. On perusal of the returns filed in subsequent assessment years, it is seen that this was an unrealistic assumption, given the actual performance and the cash flow and financial statement of the company in the subsequent years. It is clear that this valuation was made on unrealistic assumptions to artificially increase the value of shares.

Therefore, the valuation of shares is required to be done as per Rule 11UA of the Income Tax Rules, 1962. The valuation of shares as per Rule 11UA be submitted. In any case, it is seen that a premium of Rs.6.20 crores was taken over and above the face value of the shares of the company. Show cause as to why the addition u/s.56 (2) (viib) be not made in your case.

3. It is noticed from the fixed assets schedule that you have shown land at Rs.297.18 crores and later the same has been converted into stock-in-trade. You are required to compute the capital gains and could have submitted to the AO on the conversion of capital asset into stock in trade u/s 45(2) of the IT Act, 1961 which has not been done by you. As per record, you have also not furnished documentary evidences and other details as to whether any cost of improvement has been added to the land in question. In this regard, you are requested to show-cause as to why capital gain should not be computed as per provisions of section 45(2) of the IT Act, 1961 and kept on record for future purpose.
4. It is noticed that you have shown advances from customers of Rs.80,61,28,215/-. You have not submitted the name of party, address, PAN, amount and also identify the flat / property against advances was received from the said customer and also copy of agreement entered into, if any. That is the AO has not verified whether these deposits are business receipts or loan.
5. On the facts and circumstances of the case, it is clear that in respect of the aforementioned issues, the order of the AO is erroneous in as much as prejudicial to the interest of the revenue within the meaning of Section 263 of the Income Tax Act, 1961 on account of the income having escaped assessment due to lack of inquiry and examination by the Assessing Officer. Accordingly, you are hereby required to show



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A.C.A.


M. No. 34399

cause as to why the order of AO be not set aside on the grounds delineated above.

7. An opportunity of being heard is being given in the matter on **25.03.2019** at **11.00 AM** to explain why an order u/s.263 may not be passed, considering the above issues. Your written response on the above matter should reach this office on or before **22.03.2019**. If you fail to appear on the scheduled date and time either in person or through authorized representative, it shall be presumed that you have nothing to say in the matter and the decision shall be taken on the basis of material available on record.



Yours faithfully,

  
(IRINA GARG)  
Pr. Commissioner of Income Tax,  
Central -2, Mumbai.

4.1. The assessee gave a reply in response to the said show-cause notice vide letter dated 25/03/2019 personally submitted before the Id. PCIT. The said receipt is enclosed in pages 23-30 of the paper book. Yet another reply was also filed by the assessee vide letter dated 26/03/2019 vide pages 31-34 of the paper book. One more reply was also filed by the assessee vide letter dated 26/03/2019 filed on 27/03/2019 before the Id. PCIT, which is enclosed in pages 35-36 of the paper book.

5. With regard to the issue regarding alleged change in the shareholding pattern /voting power by more than 51%, the assessee submitted that the details pertaining to the change in shareholding and allowability of carry forward of losses have been duly furnished by the assessee before the Id. AO during the course of assessment proceedings vide letter dated

09/12/2016 filed before the Id. AO. Infact, this letter was filed in response to a specific query raised by the Id. AO vide notice u/s.142(1) of the Act dated 18/07/2016 vide point No.6 thereon. In the said letter dated 09/12/2016, the assessee had submitted that assessee company carried forward the loss of Rs.18,33,68,830/- as on 31/03/2013 and that the voting power of up to 51% in the company were beneficially held by the same set of shareholders as on 31/03/2013 and 31/03/2014 which was in compliance to the requirements of Section 79 of the Act. The assessee also furnished the comparative list of shareholders who continued to beneficially own 51% shares in the company in a tabulated form as under:-

Name of shareowner	Percentage holding on 31 <sup>st</sup> March, 2013		Percentage holding on 31 <sup>st</sup> March, 2014	
	Nos.	%	Nos.	%
Mr. Subhash S Runwal	35,046	35.04	35,346	11.78
Mrs. Chanda S Runwal	24,483	24.48	24,483	8.16
Mr. S S Runwal (HUF)	9,932	9.93	9,932	3.31
Runwal Developers P. Ltd	100	0.1	200,100	66.70
Sub-total	69,561	69.55	269,861	89.95
Others	30,439	30.45	30,139	10.05
Total	100,000	100	300,000	100

5.1. The assessee preliminarily raised objection that since this aspect was duly examined by the Id. AO in the original assessment proceedings, there was adequate enquiry carried out by the Id. AO in this regard and hence, the said assessment cannot be termed as erroneous on the ground of lack of enquiry as alleged by the Id. PCIT. The assessee further pointed out before the Id. PCIT that the benefit to carry forward and set off of

business loss for the previous years shall be available if 51% of the control and voting power of the company remains unchanged. The assessee also placed reliance on the decision of the Hon'ble Karnataka High Court reported in 379 ITR 375 in the case of CIT vs Amco Power Systems Ltd., wherein it was held that the expression "not less than 51% of voting power" used in Section 79 of the Act indicates that in order to invoke provisions of the said section, only voting power is relevant and not shareholding pattern. It was pointed out that change in shareholding pattern of the company is distinct from the control and voting power of the company. It was also pointed out that although the shareholding of M/s. Runwal Developers Pvt Ltd. in assessee company had been increased to 66.70%, there has not been any change in the controlling power. It was pointed out that voting power of up to 51% in the assessee company was beneficially held by the same set of shareholders as on 31/03/2013 and 31/03/2014 as per requirements of Section 79 of the Act. The assessee also pointed out that Mr. Subhash S Runwal and Ms. Chanda S Runwal held considerable control in M/s. Runwal Developers Pvt. Ltd., as well, both holding 79.40% of voting power thereon. The assessee also enclosed shareholding pattern together with copy of audited balance sheet and profit and loss account of Runwal Developers Pvt. Ltd., along with annexures as on 31/03/2014. Accordingly, it was pleaded that the control of both assessee company as well as that of M/s. Runwal Developers Pvt. Ltd., lie beneficially in the hands of Mr. Subhash S Runwal and Ms. Chanda S Runwal although there has been a change in the shareholding pattern of the assessee company in A.Y.2014-15 there was no change in the controlling powers as the same remain with Mr. Subhash S. Runwal and Ms. Chanda S Runwal. Accordingly, the assessee pleaded that assessee indeed had complied with the provisions of Section 79 of the Act and consequently entitled for carry forward of losses.

5.2. The assessee also drew the attention of the Id. PCIT that the Id. AO again vide notice u/s.142(1) of the Act dated 19/08/2016 had specifically posed a question on the very same issue during the course of assessment proceedings and assessee had vide reply dated 09/12/2016 had responded to the same.

5.3. The assessee also pointed out before the Id. PCIT that the very same issue was also subject matter of rectification proceedings by way of issuance of notice u/s.154 of the Act for A.Y.2014-15 dated 06/02/2019 wherein the Id AO raised the very same query. In response to the said 154 notice, the assessee filed a detailed reply dated 18/02/2019 filed in tapal on 22/02/2019. The assessee also placed reliance on the decision of the Co-ordinate Bench of Mumbai Tribunal in the case of Wadhwa and Associates Realtors Pvt. Ltd., vs. ACIT reported in 92 Taxmann.com 37 wherein it was held that ownership of shares with same person is not contemplated for denying set off of loss u/s.79 of the Act and requisite test is whether 51% of voting power is beneficially held by same persons on last day of previous year and on the first day of next year. The Id. AO after going through the reply filed by the assessee in this regard dropped the 154 proceedings vide order u/s.154 of the Act dated 15/03/2019. The Id. PCIT however, disregarded all the contentions of the assessee and held in para 7.5 of his order that the Id. AO had not examined the implications of the change of the transfer of these shares from Mr. Subhash S Runwal and Ms. Chanda S Runwal to M/s. Runwal Developers Pvt. Ltd., and whether the actual beneficial owner of voting rights continued to exist in the same ratio. Accordingly, the Id. PCIT treated the order passed by the Id AO as erroneous in as much as it is prejudicial to the interest of the Revenue and invoke his revisionary jurisdiction u/s.263

of the Act by setting aside the order of the Id. AO for denovo adjudication.

5.4. We find that the Id. DR vehemently argued that in the original assessment, the case was selected under limited scrutiny and that the issue of carry forward of losses u/s.79 of the Act was not the subject matter of limited scrutiny. Hence, no enquiry in any manner whatsoever was carried out by the Id. AO with regard to compliance to provisions of Section 79 of the Act, which makes this order erroneous and prejudicial to the interest of the Revenue. Because of this, the Id. PCIT had invoked revision jurisdiction u/s.263 of the Act. We are unable to persuade ourselves to accept to this proposition made by the Id. DR in view of the fact that when a particular item was not subject matter of verification by the Id. AO under limited scrutiny, the Id. AO would be right in not verifying the same in the limited scrutiny proceedings. Hence, the non-verification of an item which is not forming part in limited scrutiny could not make the order of the Id. AO erroneous. On this ground itself, the revision order passed by the Id. PCIT u/s.263 of the Act deserves to be quashed. However, we find from the facts and evidences available on record in the form of paper book filed before us, the arguments advanced by the Id. DR is factually incorrect, in as much as due examination was indeed carried out by the Id. AO in the original assessment proceedings with regard to compliance to provisions of Section 79 of the Act by raising specific query on two occasions i.e. one vide letter dated 18/07/2016 and another letter dated 19/08/2016. To these specific queries on the compliance to provisions of Section 79 of the Act due to change in shareholding pattern, the assessee had indeed filed a reply on 09/12/2016.

5.5. We find that in the said reply letter dated 09/12/2016, the assessee had indeed submitted the complete list of shareholding pattern as on 31/03/2013 and as on 31/03/2014 in a tabular form. It has already been reproduced herein supra. From the said tabular form, it could be seen that substantial shareholding from Mr. Subhash S Runwal and Ms. Chanda S. Runwal had been transferred to M/s. Runwal Developers Pvt. Ltd., during the F.Y.2013-14 relevant to A.Y.2014-15. It is not in dispute that Mr. Subhash S. Runwal and Ms. Chanda S Runwal beneficially held 79.40% of voting power in M/s. Runwal Developers Pvt. Ltd., Hence, it is only a change of shareholding between individual to a company and that company is also substantially held by the very same individuals. Hence, we find that though the shareholding pattern had undergone drastic change, the beneficial voting power remains the same. Hence, there could not be any violation of provisions of Section 79 of the Act. We also find that the Hon'ble Karnataka High Court on the very same aspect in the case of CIT vs. Amco Power Systems Pvt. Ltd., reported in 379 ITR 375 had categorically held that the expression "not less than 51% of voting power" used in Section 79 of the Act indicates that in order to invoke provisions of the said section, only voting power is relevant and not shareholding pattern". Hence, the argument advanced by the Id. AR that change in shareholding of the company is distinct from the control and voting power of the company is correct.

5.6. We also find that similar decision was rendered by the Co-ordinate Bench of this Tribunal in the case of Wadhwa and Associates Realtors Pvt. Ltd., vs. ACIT reported in 92 Taxmann.com 37 dated 14/02/2018 wherein it was held as under:-

*"21. The word used in section 79 of the Act is ..."held"... and not "owned". This indicates that ownership of the shares with the same person is not contemplated*

*for denying the set off of the loss. Furthermore the word preceding "held" is "beneficially" which is an adjective/adverb of the word "benefit". Therefore, what is to be seen is whether the benefit of voting rights is held by the same persons. The phrase "beneficially held" would contemplate wider meaning to cover a situation wherein if a person is able to influence voting rights to the extent of 51% in the company seeking set off through chain of holding then same would be sufficient not to disentitle the set off of the loss. The phrase used in section 79(a) "...beneficially held by persons who beneficially held" would indicate indirect control of voting rights through chain of holding by the same group. In the instant case as evident from chart above, Mr. Vijay Wadhwa and Mrs. Vinita Wadhwa through their shareholding in RPL and WGH can be said to be holding 51% voting power in the assessee company as on 31st March 2009 and 31st March 2010 and directly as on 31st March 2012. Therefore, the assessee is entitled to set off the loss under consideration in the assessment year 2012-13."*

5.7. Hence we hold that the assessee would be entitled for benefit of carry forward of loss as there was no violation u/s.79 of the Act, even on merits.

5.8. We also find that the Id. AO in the instant case had an occasion to examine the very same issue of compliance to provisions of Section 79 of the Act twice during the assessment proceedings by way of raising queries on two occasions i.e. vide letter dated 18/07/2016 and letter dated 19/08/2016 and further during rectification proceedings u/s.154 of the Act. This rectification proceeding was evidently dropped by the Id. AO vide order dated 15/03/2019. Hence, it could be safely concluded that the Id. AO had indeed made adequate enquiries and examinations with regard to compliance of provisions of Section 79 of the Act on the aspect of allowability of carry forward of losses. Hence, the revision order passed u/s.263 of the Act by the Id. PCIT on this aspect is hereby declared as bad in law.

6. With regard to yet another issue for which revision jurisdiction u/s.263 of the Act was invoked by the Id. PCIT regarding allotment of shares at a premium and its taxability in the context of Section

56(2)(viib) of the Act is concerned, we find that assessee during the year had allotted 200000 equity shares of Rs.100/- each at a premium of Rs.310 per share to M/s. Runwal Developers Pvt. Ltd., In this regard, the Id. AO vide notice u/s.142(1) of the Act dated 18/07/2016 had raised a specific query with regard to allotment of 200000 equity shares on receipt of share premium of Rs.6.20 Crores including the basis of arriving at the premium together with the workings thereon and related compliance with Registrar of Companies (ROC). The assessee initially gave a reply letter dated 29/07/2016 stating that assessee company had allotted 200000 equity shares of Rs.410 per share (value of Rs.100/- per share value of Rs.300/- per share) to its parent company M/s. Runwal Developers Pvt. Ltd., during the year under consideration. The assessee enclosed copy of resolution and form No.2 for allotment of shares filed with ROC. The Id. AO vide further letter dated 19/08/2016 also posed the same question during the course of assessment proceedings. The assessee vide letter dated 04/10/2016 replied to the Id. AO that 200000 equity shares were allotted to M/s. Runwal Developers Pvt. Ltd. It was also pointed out that the development potential of the land held by the assessee company would have to be considered at current market rates for the purpose of determining the actual net worth of the company. Accordingly, it was pleaded that the allotment of shares at premium to its parent company i.e. M/s. Runwal Holdings Pvt. Ltd. by the assessee. These submissions were accepted by the Id. AO during the course of assessment proceedings.

6.1. This assessment was later sought to be revised by the Id. PCIT on the ground that allotment of 200000 equity shares to M/s. Runwal Developers Pvt. Ltd., at a share premium of Rs.310/- per share was

not enquired by the Id. AO in the course of assessment proceedings and that the same was accepted by the Id. AO even without the valuation report of the assessee company. The Id. PCIT also stated that the valuation report was indeed submitted by the assessee before him vide letter dated 26/03/2019 which was made as per the prescribed method under Rule 11UA of the Income Tax Rules. But from the said working, the Id. PCIT observed that for the purpose of arriving at the fair market value of shares, the assessee has taken valuation of items from the balance sheet as on 31/03/2012 whereas the shares were issued during the F.Y.2013-14 relevant to A.Y.2014-15 and that the valuation report provided is not pertaining to the assessment year under consideration. The Id. PCIT also proceeded to determine the value of shares as on 31/03/2014 as per Rule 11UA at Rs. Nil by way of comparative figures as on 31/03/2013 to 31/03/2014 in a tabular form as under:-

		As on 31.03.2013	As on 31.03.2014	As on 31.03.2015	As on 31, 03. 2016
	Total Assets (A)	315,99,64,726	445,21,73,386	630,63,60,028	855,01,97,905
Less:	Liabilities (L)	329,66,89,707	452,27,08,953	618,72,80,961	839,75,45,006
	(A-L)	(-)13,67,24,981	(-)7,05,35,567	11,90,79,066	214,26,652,899
	Paid up Capital (PE)	1,00,00,000	3,00,00,000	11,13,64,800	11,13,64,800
	Paid up Value (PV)	100	100	100	100
	$\frac{A-L}{PE} \times PV$	0	0	106.93	128.09

6.2. The assessee submitted that it had decided to allot shares to M/s Runwal Developers Pvt Ltd vide Board Resolution dated 12/07/2013 and the following documents were submitted before him during the course of hearing :-

- a) Board resolution for meeting held on 12/07/2013 , wherein it was decided to allot 200000 equity shares of Rs 100 each at a premium of Rs 310 per share to M/s Runwal Developers Pvt Ltd.
- b) Form No. 23, being Registration of Resolution and agreement for the Board Meeting held on 12/07/2013, duly filed before the Registrar of Companies (ROC).
- c) Notice issued to shareholders dated 12/07/2013 calling for an Extraordinary General Meeting (EGM) to be held on 14/08/2013 for increasing the authorized share capital and for considering / approving the allotment of 200000 shares of Rs 100 each at a premium of Rs 310 per share to M/s Runwal Developers Pvt Ltd together with the Explanatory Statement thereon.
- d) Copies of resolutions passed in the said EGM for increase in authorized share capital , alteration to Articles of Association and for preferential allotment of shares to M/s Runwal Developers Pvt Ltd.
- e) Board Resolution for meeting held on 30/10/2013, wherein the shares have been accepted for allotment and necessary corporate actions directed to be carried out in lieu of the same.

6.3. The Id. PCIT ignoring the aforesaid documents, merely based on the aforesaid valuation, observed that the value of share as on 31/03/2014 was Rs Nil and hence, the assessee company could not justify the receipt of share premium at all and accordingly, the said premium is taxable u/s. 56(2)(viib) of the Act. However, in the final

paragraph of his order, the Id. PCIT gave a general direction to the Id. AO to re-examine the issue and make a fresh assessment thereon.

6.4. The Id. AR before us admitted the fact that the valuation report was not furnished before the Id. AO. However, the same was duly furnished before the Id. PCIT. The said valuation report is dated 12/07/2013 from an independent Chartered Accountant which was furnished before the Id. PCIT. The said valuation was done based on the audited balance sheet as on 31/03/2012. It was pointed out that the said valuation was made in accordance with Explanation (a) (i) of Section 56(2)(viib) of the Act r.w.r. 11UA of the Income Tax Rules.

6.5.. We find that the prescribed method u/s.56(2)(viib) of the Act under the aforesaid clause (i) is mentioned in Rule 11UA of the Rules. Rule 11UA prescribes that fair market value of unquoted equity shares shall be value on the valuation date of such unquoted equity shares as determined in the following manner namely:-

$$\frac{(A-L) \times (PV)}{(PE)}$$

*Where A= book value of 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 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, 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;*

6.6. We find that the expression "balance sheet" is not defined in Rule 11UA of the IT Rules. However, the same is defined in Rule 11U which also talks about determination of fair market value of assets which includes unquoted shares. Hence, the definition of balance sheet given in Rule 11U(b) of the IT Rules would be relevant in this case which reads as under:-

*“(b) “balance-sheet”, in relation to any company, means,—*

*(i) for the purposes of sub-rule (2) of rule 11UA, the balance-sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company appointed under section 224 of the Companies Act, 1956 (1 of 1956) and where the balance-sheet on the valuation date is not drawn up, the balance-sheet (including the notes annexed thereto and forming part of the accounts) drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company;*

6.7. As stated above, the shares were allotted by the assessee company to M/s. Runwal Developers Pvt. Ltd., on 12/07/2013. The aforesaid definition of balance sheet talks about accounts getting audited by the statutory auditor u/s.224 of the Companies Act, 1956 on the balance sheet date which is 31<sup>st</sup> March. Admittedly, the valuation date in the instant case for allotment of shares is

12/07/2013. Admittedly no audited accounts were available with the assessee company as on the valuation date i.e. 12/07/2013. Hence, as per the aforesaid definition of balance sheet given in Rule 11U(b) of the Rules, the assessee company had to refer to figures reflected in the audited balance sheet as on 31/03/2012 which has been duly done by the assessee in the instant case as is evident from page 120 of the paper book filed before us containing the workings for arriving at the fair market value for unquoted equity shares at Rs.407.64 per share. Accordingly, the assessee had allotted shares @Rs.410 per share which includes face value of Rs.100 and premium of Rs.310/- per share. We find that the audited balance sheet as on 31/03/2013 of the assessee company was signed on 31/08/2013. Hence, as on the valuation date i.e. 12/07/2013, the assessee company had only audited balance sheet as on 31/03/2012 which was used by the assessee for determination of fair market value of shares. This is in accordance with Rule 11U(b) of the rules. Hence, the observation made by the Id. PCIT in para 6.3 of his order is not in accordance with law.

6.8. We find that the Id. DR vehemently relied on the observations made by the Id. PCIT in para 6.12 and 6.14 thereon to his order and argued that the fair market value of shares as on the valuation date as per 11UA of the Rules was Rs Nil and hence, the assessee has not justified the allotment of shares to its holding company at a premium of Rs.310/- per share. We find that the Id. PCIT in order to arrive at this conclusion had relied on the audited figures commencing from 31/03/2013 to 31/03/2016. We have already held in detail that since, as on the valuation date, the audited balance sheet was not available with the assessee, as per Rule 11U(b) of the Rules, the assessee is

entitled to take the audited balance sheet figures as on 31/03/2012 and determine the fair market value. No error had been pointed out by the Id. PCIT in the said determination of fair market value of shares as on 31/03/2012 which was duly filed before him by the assessee. The law is very well settled that if the Id. AO had not made any enquiry and that the said detail had been duly furnished before the Id. PCIT by the assessee company during the course of revision proceedings u/s.263 of the Act, the Id. PCIT is duty bound to make independent verification on his own before coming to the conclusion that the order of the Id. AO is erroneous and prejudicial to the interest of the Revenue. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Nirav Modi reported in 390 ITR 292 wherein the relevant operative portion is reproduced hereunder:-

*“10. The Revenue placed reliance upon the decision of the Delhi High Court in DG Housing Projects Ltd., (supra) that as the Assessing Officer had not enquired into the source of the source of the gifts received by the Assessee, the Assessment Order is erroneous. The aforesaid decision holds that the power of Revision under Section 263 of the Act would normally be exercised in case of no enquiry and not in cases of inadequate enquiry. However, even in case of inadequate enquiry by the Assessing Officer, the order of the Assessing Officer could be erroneous in two classes of situation. The first class would be where orders passed by the Assessing Officer are ex-facie erroneous i.e. a decision rendered ignoring a binding decision in favour of the Revenue or where enquiry is per-se mandated on the basis of the record available before the Assessing Officer and that is not done. In the second class of cases, where the order is not ex-facie erroneous, then the CIT must himself conduct an enquiry and determine it to be so. The Court held that it is not permissible to the CIT while exercising power under Section 263 of the Act to remit the issue to the Assessing Officer to re-examine the same and find out whether earlier order of Assessment is erroneous. It is the CIT who must hold that the order is erroneous, duly supported by reasons. In the present facts, the CIT in exercise of its powers under Section 263 of the Act has merely restored the Assessment to the Assessing Officer to decide whether the gifts were genuine and, if not, then the Assessment could be completed on application of Section 68 of the Act. In this case, the order passed by the Assessing Officer is not per-se erroneous and further the*

*CIT has not given any reasons to conclude that the order is erroneous. In fact, he directs the Assessing Officer to find out whether the order is erroneous by making further enquiry. This the decision of the Delhi High Court in DG Housing Projects Ltd., (supra), clearly negates. In the above view, the decision of Delhi High Court in DG Housing Projects Ltd., (supra) would not assist the Revenue in the present facts.”*

6.9. Hence, it could be safely concluded that in the valuation report submitted by the assessee before the Id. PCIT for justifying the allotment of shares at a premium, the Id. PCIT could not find any fault thereon. Hence, there cannot be any error that could be attributed in the order of the Id. AO warranting revision u/s.263 of the Act by the Id. PCIT. Hence, the revision order passed u/s.263 of the Act on this aspect is hereby quashed.

7. The Id. AR pointed out that with regard to other two issues that were subject matter of revision order u/s.263 of the Act, the same are not pressed by him as the Id. AO in the giving effect proceedings had not made any additions. Accordingly, the grounds raised in that regard are hereby dismissed as not pressed. To support this, the Id. AR also placed the giving effect order passed by the Id. AO u/s.143(3) r.w.s. 263 of the Act dated 30/12/2019 on record.

**8. In the result, appeal of the assessee is partly allowed.**

Order pronounced on 24/01/2022 by way of proper mentioning in the notice board.

**Sd/-**  
**(AMARJIT SINGH)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 24/01/2022

KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

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