

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI
BEFORE SHRI AMARJIT SINGH, JM AND SHRI S. RIFAUH RAHMAN, AM

आयकर अपील सं/ I.T.A. No.906/Mum/2021
(निर्धारण वर्ष / Assessment Years: 2016-17)

Chalk Farm Ventures Pvt. Ltd. No.202, Delta Building, Hiranandani Gardens, Powai, Mumbai-400076.	बनाम/ Vs.	PCIT-1 B Wing, Ashar IT Park, 6 th Floor, Wagle Industrial Estate, Thane- 400604
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGCC0332A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Sanjay Parikh	
Revenue by:	Shri Ashok Kumar Kardam (DR)	

सुनवाई की तारीख / Date of Hearing: 21/03/2022
घोषणा की तारीख /Date of Pronouncement: 26/04/2022

आदेश / ORDER

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 26.03.2021 passed by the Principal Commissioner of Income Tax-01, Thane [hereinafter referred to as the “PCIT”] relevant to the A.Y.2016-17 in which the Principal Commissioner of Income Tax-01 has invoked the provisions u/s 263 of the I.T. Act, 1961.

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

- “Ground A: Proceeding u/s 263 of the IT Act is invalid and bad in law*
- 1. The learned Principal Commissioner of income Tax, Thane-1, (Pr. CIT) erred in facts and in passing the order u/s. 263 without appreciating that the appellant company was under liquidation and no order u/s. 263 could be passed without giving adequate notice to the liquidator of the appellant company.*
 - 2. he appellant prays that your honour hold that the order passed by the AO u/s. 263 is bad in law as the same is passed without issuing notice to the liquidator of the appellant company.*



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Ground B : Without prejudice holding that the order u/s. 143(3) is erroneous and prejudicial to the interest of the revenue

3. Without prejudice to Ground A, the learned Pr. CIT erred on facts and in law in setting aside the order passed by the Assessing officer (AO) u/s 143(3) of the Act dated 30/10/2018 by holding that the order is erroneous and prejudicial to the interest of the revenue because the assessment has not only been made without proper verification but not applying the relevant provisions of the Act.

4. The learned Pr. CIT erred on facts and in law in holding that software expenses are capital asset and an intangible asset and is not allowable as a deduction u/s. 371(1).

5. The learned Pr. CIT erred of facts and in law in holding that the appellant failed to submit as to how the software purchased/developed by the appellant has no enduring benefit.

6. The learned Pr. CIT erred on facts and in law in holding that the order passed by the AO is erroneous without appreciating the fact that the claim of software development expenditure was allowed as a revenue expenditure after due inquiry, verification and examination.

7. The learned Pr. CIT erred on facts and in law in holding that the appellant had not submitted any documents in order to prove the identity, genuineness a creditworthiness of the entities from whom the appellant had received capital through allotment of convertible preference shares at a premium of Rs. 1,88,637/-.

8. The learned Pr. CIT erred in law and facts in holding that the order passed by the AO is erroneous without appreciating the fact that the preference shares were issued at a fair and reasonable price and hence the capital introduced was genuine and the share premium of Rs.1,88,637 per share was accepted after due verification and examination.

9. 'The learned Pr. CIT ought to, have appreciated that if two views are possible, revision u/s 263 of the Act is not permissible.



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10. Your Appellant prays before-Your Honour that the order passed by the AO was neither erroneous nor prejudicial to the interest of the revenue and hence the order u/s. 263 may be annulled.

11. The appellant craves leave to add, alter, amend, delete or modify any of the above Grounds of Appeal.”

3. The brief facts of the case are that the assessee filed its return of income on 30.09.2016 declaring total income to the tune of Rs. Nil and claiming loss to the tune of Rs.3,95,07,555/- for the A.Y.2016-17. Thereafter, the case was selected for scrutiny under CASS. Thereafter, the assessment was completed on 30.10.2018 by accepting the returned income/loss. It was observed that the assessee is a technology platform which facilitates EMI financing for online shoppers. The AO allowed the expenses incurred on software development charges which inter alia includes an amount of Rs.1,88,50,794/- and Rs.11,94,528/- like platform subscription, server charges, technical fees, professional and consultancy fee which are in nature of capital expenditure but claimed as revenue expenditure. Further, it was observed that the assessee has received capital through allotment of convertible preferential shares at a premium of Rs.1,88,637/- per share. The AO allowed the claim of the assessee without proper verification. Thus, the AO did not properly verify the above facts while passing the order u/s 143(3) of the Act which caused this order prejudicial to the interest of the revenue. Notice was issued and after the reply of the assessee, order u/s 263 of the Act was passed. Feeling aggrieved, the assessee filed the present appeal before us.

ISSUE Nos. 3 to 10

4. Under these issues the Ld. Representative of the assessee has challenged the reopening of the assessment in view of the provisions u/s 263 of the Act on merits. Before going further, we deem it necessary to advert



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the reason for the revision order u/s 263 of the Act dated 30.10.2018 on record: -

“It is seen from the case record that you have filed your return of income for A.Y. 2016-17 on 30.09.2016 declaring total income at Rs. Nil and claiming loss of Rs. 3,95,07,555/-. Subsequently, your case was selected for scrutiny under CASS and thereafter, the assessment order u/s 143(3) of the Act was passed on 30/10/2018 by determining your total income of Rs. Nil.

03. It has been further observed from the records that, the assessment in this case was completed on 30.10.2018 accepting the returned income of the assessee. However, the AO allowed the expenses incurred on software development charges like, platform subscription, server charges, technical fees, professional and consultancy fee which are in nature of capital expenditure but claimed as revenue expenditure.

04. Further, it is also noticed from the case record that the assessee has received capital through allotment of convertible preferential shares at a premium of Rs. 1,88,637/per share. However, the AO allowed the claim of the assessee without proper verification of facts. It is evident from the above facts that the A.O has not properly verified the facts at the time assessment proceedings by applying his mind.

05. In view of the above, I am of the opinion that the assessment passed by the AO u/s 143(3) of the Act on 30.10.2018 is erroneous in so far as it is prejudicial to the interest of the revenue, because the assessment has been made not only without proper verification but also not applying the relevant provisions of the Act properly. Therefore, I propose to pass such order as circumstances of the case justify, including an order enhancing, modifying the assessment, or cancelling the assessment and directing fresh assessment, within the meaning of Section 263 of the Income-tax Act, 1961.



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06. *In view of the above facts, your case is fixed for hearing on 22.03.2021 at the above mentioned address, you are requested to submit your say in the matter failing which it shall be presumed that you have nothing to say in the matter and the case will be decided on the basis of information available in the records and on merits.*

07. *You may submit your compliance/say on or before 22.03.2021 by post in physical format (hard copy) or through electronic mode on the official e-mail address of this Office viz. thane.pcit1@incometax.gov.in, which will be duly considered before finalization of the proceedings in your case.”*

5. In brief, the reason which has been taken into consideration by PCIT is that the AO allowed the expenses incurred on software development server charges, technical fees, professional and consultancy fee. The PCIT is of the view that the same is capital in nature whereas claimed as revenue expenses. The PCIT is also of the view that the AO failed to verify the facts properly. The assessment order has been passed on 30.10.2018 in view of the provisions u/s 143(3) of the Act. The AO issued the notice u/s 142(1) of the Act on 22.05.2018 to the assessee. The assessee also replied for the same on 04.10.2018 in which the details were submitted. The relevant details were furnished which lies at page no. 31 to 32 of the paper book which is hereby reproduced as under: -

“Note on large value of foreign remittances and low/nil business income

The assessee company has been formed during the year under reference to facilitate EMI financing for online shoppers. in order to act as a facilitator for smooth lending of money from NBFC's/Banks to customers for online shopping, necessary software needs to be purchased/developed which will provide ease of access for availing the facility and attract customers which will in turn benefit all the parties involved.



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To get the business started, necessary staff has been recruited during the year for whom the following expenses has been incurred:

Employee Benefit Expenses	Amount
Director's Expenses (Provision)	1,04,307
Provision for gratuity	1,37,561
Insurance Expense- Employees	1,41,037
Salaries	55,07,097
Staff Welfare	2,75,664
Total	61,65,666

In relation to the salaries paid, we are enclosed the month-wise payroll details. Further, various expenses have been incurred for software development, platform subscription and server charges, technical fees, professional and consultancy fees. Many of these services mentioned have been availed from outside India and hence, there are huge foreign remittances made to those parties. The details of foreign remittances made outside India outside India along with copies of form 15CA/15CB are enclosed.

In this regards, we are submitting the details of following expenses forming part of "other expenses Note no. 18 of Profit and loss account" which are above Rs. 1 lakh.

Particulars	Amount
Bank Charges	1,62,847
Boarding & Lodging	1,44,505
Marketing & Promotional Expenses	5,32,570
Rental Expenses (Agreement enclosed)	2,86,450
Telephone & Internet	2,57,182
Travelling & Conveyance Expenses	12,41,746
Professional & Consultancy fees	54,94,443
Interest on Service Tax	2,16,850
Rates & taxes	2,16,113
Repairs & Maintenance	2,61,711
Web Logo & Designing Fees	11,94,528
Platform Subscription & Server Charges	37,54,046
Technical fees	6,33,452
Software Data Charges	3,19,059
Software Development Charges	1,88,50,794
Below 1 Lakh	2,13,704
Total	3,37,80,000



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Further, TDS has been duly deducted on all the expenses liable for deduction of tax at source. TDS acknowledgements for Q1, Q2 and Q3 are enclosed

As this was the first year of business and moreover as the idea of business is unique, huge expenses have been incurred to create the necessary platform and start the business activities which has led to an overall loss from the business during the year.

From the above details and documents on record, your goodself will appreciate that the expenses have been incurred towards the business activity of the assessee and are thus, allowable.”

6. The assessee also replied vide letter dated 23.10.2018 with regard to the explanation of preference share. The relevant annexure is hereby reproduced as under: -

“Note on issue of - reference shares during the year at premium

During the year under reference the assessee has issued 591 preference shares of Face Value Rs. 100 at premium of Rs. 1,88,637/each. The details of the said issue are as under:

Name of the Shareholder	No of shares	Share premium received
Amit Bhatiani	10	18,86,370
Anuradha Duggal	11	20,75,007
Blazing Trial Holding PTE Ltd.	18	33,95,466
Dr. Nelson Holzner	10	18,86,370
MV Subbaiah	10	18,86,370
On Mauratius	52	98,09,124
Ribbit Capital Mauratius III	470	8,86,59,390
Shivashish Chatterjee	10	18,86,370
Total	591	11,14,84,467

Please note that Ribbit Capital Mauratius Ill and On Mauritius are SEBI registered Venture Capital Fund. As per the provision to Section 56(2)(viib) of the Income Tax Act, 1961 the said provision is not applicable where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund or from non-residents.



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Further, the preference shares have been issued at around the same time at Rs. 1,88,737/- per share, to all the persons mentioned above.”

7. All the relevant record was with the AO before passing the order u/s 143(3) of the Act dated 30.10.2018. However, the said assessment order is hereby reproduced as under: -

“The assessee has e-filed its Return of Income for A.Y 2016-17 on 30.09.2016 declaring Nil income and claiming loss of Rs.3,95,07,555/- . The case was selected for scrutiny through Computer Aided Scrutiny Selection (CASS) under complete category. The, reason for selected for scrutiny is 1) whether the share capital is genuine and from disclosed sources, (2) whether the fund received in the form of share premium are from discloses source and have been correctly offered for tax, and (3) whether receipts of foreign remittance has been correctly offered to tax.

2. Notice u/s 143(2) of the Act was issued on 03.07.2017. Thereafter notice u/s 142(1) of the I.T. Act, 1961 was issued on 22.05.2018 through ITBA portal. in response to above notices the M/s. GBCA & Associates, Chartered Accountants, AR of the assessee, made online submissions through ITBA and has submitted hard copy of the submission in this office, the assessee filed detailed note on business activities of the assessee company, note of large value of foreign remittances and low/nil business, income, copies of Form 15CA and 15CB, details of expenses alongwith copies of invoices, TDS certificates, Directors Report along with audited accounts, details of sundry creditors, copy of return of income alongwith computation of income, profit & loss account, balance sheet and details of bank accounts with copies of bank statements.

3. As submitted, the assessee is a private limited company and is a technology platform which facilitates EMI financing for online shoppers. The company ties up with Ecommerce Companies (Merchant



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Partners or Merchants) and Banks/NBFCs (Lender Partners or Lenders) to enable retail customers shopping on Merchants to avail a loan from Lenders so they can spread the purchase price over easy instalments. The company has developed a technology platform which helps customers to apply for a loan digitally and submit key information required for Lenders to make a decision on the an.

4. The submissions of the assessee is verified and placed on record. From the Profit & Loss Account of the company it is seen that the revenue from operations is Rs.22,190/- and other income of Rs.9,52,581/and the expenses claimed are at Rs.4,01,06,445/-. Thus the assessee company has declared total loss at Rs.3,95,07,550/-. It has been submitted that the F.Y. 2015-16 was the first year of business of the assessee company and as the idea of business is unique, huge expenses have been incurred to create the necessary platform and start the business activities which has led to an overall loss from the business during the year under consideration.

5. As regards to preference shares, during the year the assessee company has issued 591 preference shares of Face Value Rs.100/at a premium of Rs.1,88,637/-; thus the total share premium received is Rs.11,14,84,467/-. The relevant details in this regard i.e. share certificates, Return of Allotment in Form No.PAS-3, have been obtained, verified and placed on record.

6. Subject to the above remarks, total income of the assessee for A.Y.2016-17 is accepted.

COMPUTATION OF TOTAL INCOME		
1. Profit & Gains of Business or Profession		
As per computation		(4,04,60,136)
2. Income from Other sources		
As per computation		9,52,581
Total Income:		3,95,07,555
Unabsorbed Loss :		3,95,07,555
Total Assessed Income:		Nil



8. Para 4 and Para 5 of the assessment order speaks that the AO has considered all the facts before passing the order dated 30.10.2018. The AO has already been taken the possible view before the completing the assessment. The AO has already taken the possible view. The assessment is not further liable to be reopened. In this regard, we also find support of the law settled in **Malabar Industrial Co. Ltd. V CIT (2000) 243 ITR 83 (SC)**, **CIT Vs. Gabriel India Ltd. (1993) 203 ITR 108**, **CIT Vs. Nirav Modi (2017) 390 ITR 292**, **CIT Vs. Chemsword P. Ltd. (2020) 119 taxmann.com 358 & CIT Vs. Future Corporate Resources Ltd. (2021) 132 taxmann.com 173**. In view of the said factual circumstances and the law relied by the Ld. Representative of the assessee, we are of the view that the PCIT has wrongly passed the order u/s 263 of the Act. Accordingly, we set aside the order of the PCIT u/s 263 of the Act in question.

ISSUEU Nos. 1 & 2

9. Since the issue nos. 3 to 10 has already been decided in favour of the assessee, therefore, deciding the issue nos. 1 & 2 would only be academic in nature, hence, nowhere required for specific adjudication.

10. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the open court on this 26/04/2022

Sd/-

(S. RIFUAR RAHMAN)
ACCOUNTANT MEMBER

Sd/

(AMARJIT SINGH)
JUDICIAL MEMBER

Mumbai; Dated 26/04/2022
Vijay Pal Singh, (Sr. PS)



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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**