

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“RAJKOT” BENCH, RAJKOT**

[Conducted through E-Court at Ahmedabad]

**BEFORE SHRI PRAMOD M. JAGTAP, VICE PRESIDENT  
& SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR**

आयकर अपील सं./I.T.A. No. 83/Rjt/2021  
(निर्धारण वर्ष / Assessment Year : 2016-17)

<b>M/s. Leopard Vitrified Pvt. Ltd.</b> Survey No.128/P/1, 129/P2/P3 and 130/P1/P2, Village : Matel, Morbi - 363621	<b>बनाम/ Vs.</b>	<b>The Pr. CIT-1 Rajkot</b>
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCL5903E		
(Appellant)	..	(Respondent)

अपीलार्थी ओर से/Appellant by :	Shri Dhinal Shah, A.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri Ajai Pratap Singh, CIT. DR

सुनवाई की तारीख / Date of Hearing	12/05/2022
घोषणा की तारीख /Date of Pronouncement	07/07/2022

**ORDER**

**PER MAHAVIR PRASAD, JM:**

The appeal has been preferred by the assessee against the order of the Principal Commissioner of Income Tax, Rajkot-1 (‘PCIT’ in short) vide Appeal No. ITBA/REV/F/REV5/2020-21/1031636529(1) dated 21.03.2021 arising in the assessment order dated 21.12.2018 passed by the Assessing

Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY. 2016-17.

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

- “1. *The order u/s. 263 of the Act is bad in law.*
2. *The learned Pr. CIT has erred in law as well as on facts in not considering the submissions of the appellant on the strength of which the assessment order was neither erroneous nor prejudicial to the interest of revenue and therefore, the provisions of Section 263 of the Act were not applicable to the case of the appellant.*
3. *The learned Pr. CIT has erred in law as well as on facts in setting aside the assessment order passed by the Id. A.O. u/s. 143(3) of the Act and directing de-novo assessment regarding verification of equity share capital and fresh unsecured loans.”*

3. The facts of the case are that the assessee is a company engaged in the manufacturing of wall tiles. The assessee e-filed its return of income for A.Y. 2016-17 for loss of Rs.8,43,97,887/-.

3.1 On perusal of record, it was seen that during the assessment year under consideration, the assessee company had issued 15,39,00,000 equity shares at Rs. 10 each to various persons thereby raising equity share capital by Rs. 15,39,00,000/-. Further, it was seen that the assessee has also availed fresh unsecured loans aggregating to Rs. 5,63,49,427/- from directors, share-holders and other persons out of which Rs. 73,59,970/- were repaid during the year. Perusal of the records further revealed that the assessee furnished copies of ITR, Bank Statements and balance-sheet from some of the persons (Share holders and/or loan providers). On further verification of records, it was revealed that barring a few, most of the share-holders claimed to have invested amounts of about 10-15 times their returned income and no explanation was found to be available on records for source of such investments by these share-holders. In one of such

glaring case, in the case of one Smt. Kalpaben Sanjaybhai Patel, it was seen that she declared her source of income as tailoring work declaring returned income at Rs. 2.20 lacs and she claimed to have made huge share capital investment of Rs. 72.30 lacs (i.e. 33 times the income). Similar was the case with other female members, who have invested in the capital of the company. Moreover, the bank statements provided revealed that immediate cash / cheque deposits were appearing in almost all the bank statements prior to issue of cheque either as share application money or as unsecured loan. Looking to the income declared by these share-holders, it could be seen that these subscribers were not men of affluent means who could have afford making investments irrespective of the chances of return on investments. It is not a secret that share investment in an un-listed company does not give easy exit route and are normally illiquid for a considerable time with few/limited exit options. Further, looking to the income declared by the assessee company, it can be stated that no reasonable return on such investment by way of dividend is visible in these cases. In such scenario, no prudent investor would like to stack such huge amount of money, that to borrowed, in shares of the assessee company where no return on investment appeared forthcoming. Further, perusal of the submissions made by the assessee during the course of assessment proceedings, it was seen that none of the documents so provided were verified or signed by the respective share-holder/ depositor. It was also observed that as per the Audit report, the assessee has raised share capital amounting to Rs. 15.39 crores whereas as per the submissions of the assessee, the same was to the tune of Rs. 14.94 crores. It was further observed that the assessee had submitted balance-sheet in respect of some of the share-holders/depositors. On perusal of such balance-sheet, it was seen that these persons have availed huge loans, sometimes 7-14 times of their own capital, and had invested such borrowed money in the assessee company in the form of

share capital or deposits/loan. Again, it appeared weird on the part of a prudent person to make such investment having no foreseeable return prospects.

3.2 In view of the above, the learned PCIT ought to have conducted necessary enquiries, as mandated by the provisos of section 68 of the Act, to verify and enquire/ investigate the identity and credit-worthiness of the creditor (loans)/ shareholder and ascertain whether the transaction was genuine and whether these subscribers were creditworthy enough to make such huge investments or not. However, it appeared from the assessment record that the AO accepted the share capital/ loans without any verification whatsoever on the face of the submissions made by the assessee.

4. Thereafter, a show cause notice u/s. 263 of the Act was issued to the assessee. As to why the order passed u/s. 143(3) of the Act dated 21.12.2018 should not be subjected to revision u/s. 263 of the Act as under:

4.1 Return of income has been e-filed on 01/10/2016 for A.Y. 2016-17 declaring loss of Rs. 8,43,97,887/-. The case of has been selected for complete Scrutiny (CASS) specifically to examine:

- 1). whether outward foreign remittance is from disclosed sources and appropriate withholding and reporting obligation have been complied with;
- 2). whether the share capital is genuine and from disclosed sources;
- 3). whether receipt of foreign has been correctly offered for tax; and,
- 4). whether sundry creditors are genuine.

Assessment order u/s. 143(3) for the A.Y. 2016-17 was passed by DCIT, Morbi Circle, Morbi, being the Assessing Officer (AO), on 21/12/2018 accepting the returned loss.

4.2 On verification of the assessment records, it is seen that fresh share capital of Rs. 15,39,00,000/- (15390000 shares @ Rs. 10 each) has been raised during the year. Further, receipt of unsecured loans of Rs.5,63,49,427/- from directors, shareholders & others have also been reported out of which Rs. 73,59,970/- have been repaid during the year, leaving Rs. 4,89,89,457/- outstanding as on 31/03/2016. In this regard, the ledger accounts from the books of Assessee Company along with copies of ITR, Bank Statements and balance sheets of some of these persons (Share applicants and unsecured loan providers) have been submitted before the AO. A summary Chart in respect of the details submitted during the assessment proceeding is prepared from the assessment records, during the review process, which is enclosed as Annexure.

4.3 On perusal of the details uploaded, it is noted that some shareholders loan providers claimed to have invested / lent amounts which are 20-35 times their annual returned income. For instance, 1). Shri Bhavesh Dhanjibhai (Sr No. 9 of the Chart), given Rs. 19.60 lakhs of unsecured loan and invested Ra. 15.40-Lac in share capital whereas his returned income AY 2016-17 is only Rs. 98,310/-; 2) Shri Raviklumar Jayntibhai Bhorania (Sr. No. 22 of the Chart), given Ra. 14 Lacs of unsecured loan and invested Rs. 15.40 lacs in share capital whereas his returned income of AY 2016-17 is only Rs. 1,73,710/- and 3) Smt. Kalpnaben Sanjaybhai Patel (Sr. No. 30 of the Chart), invested Rs. 72.30 lacs in share capital whereas her returned income of AY 2016-17 is only Rs. 2,21,840/-. Further, it is found that Smt. Kalpaben is showing tailoring work as source of her income. It is

perplexing to note that a lady with only income returned of R.s 2.2 Lacs made huge share capital investment of Rs. 72.30 lacs (i.e. 33 times the income). Similar is the case with other female members, who have invested in the capital of the company. Moreover, the bank statements provided revealed that immediate cash / cheque deposits are appearing in almost all the persons bank statements prior issuing cheque either as share application money or as unsecured loan. Even in such glaring instances, the AO has not examined the nature and source of money in the hands of these persons.

4. First proviso to sec. 68 of the Act clearly provided that in respect of share capital, explanation offered by the assessee-company shall be deemed to be not satisfactory unless the share holder offers explanation about the nature and source of such investment and the AO is satisfied about such explanation. First proviso to section 68 of the Act is as under:-

"Provided that when the assessee is a company (not being a company in which the public are substantially interest) and the sum so credited consists of share application money, share capital share premium or any such amount by whatever name called, any explanation offered by such assessee- company shall be deemed to be not satisfactory, unless-

- a). The person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such so credited; and
- b). Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory"

4.4 In the present case, where documents are uploaded they are not duly signed and apart from mere filing of balance sheet, no explanation is available on record for the source of investment in the hands of the share

holders. Further, details provided in respect of the share application money during the assessment proceeding pertain to 32 share holders with total share investment of Rs. 14,94,10,000/- whereas in the audit report the company has reported to have raised share capital of Rs. 15,39,00,000 during the year. It is thus seen that the AO accepted the claim of genuineness of Share Capital Investment without making inquiries or verification of the claim, as prescribed in clause (a) & (b) of first proviso to sec. 68 of the Act.

4.5 Further, in respect of cases where Balance Sheet were filed and visible, it is seen that the investors have staked up huge loans on their personal balance sheets which is even higher than their own capital in some cases. For example, 1) Shri Ravikumar Jayntibhai Bhorania (Sr No. 24 of the Chart) has invested total Rs. 35 Lac (Rs. 19.60 Las of loan and Rs. 15.40 of Share Capital) during the year. Onm perusal of his Balance Sheet to trace the source of these investment it is seen thathe has repositrd Rs. 3.17 Lacs of own fund (i.E. capital), Rs. 44.88 Lacs of borrowed fund (i.e. Unsecured Loans) 2) Shri Vipulbhai Shamjibhai (Sr. No. 28 of the Chart) has invested total Rs. 75.40 Lac (Rs 60 Lac of loan Rs. 15.40 of share Capital during the year. On perusal of his Balance Sheeet to trace the source of these investments it is seen that he has reported Rs. 9.90 Lacs of own fund (i.e. capital), Rs. 76 Lacs of borrowed fund (i.e. Unsecured Loans). It is quite unusual that a person is borrowing money which is 7-14 times of his own capital and utilized this money invest in shares on which no return are received for year together. These glaring discrepancies should have raised the antenna of the AO and he should have conducted necessary enquiries / verification. However, the AO accepted the share capital investment and loans without verification / inquiries that should have been made.

4.6 Thereafter, in response to the abovesaid notice, the assessee replied that out of total share capitals, the amount of Rs.3,16,62,000/- pertains to opening balances. The same cannot be subject matter of revision proceedings under s.263 of the Act for the year under consideration and in respect of Shri Jagdishbhai Naranbhai panara, the assessee mentioned correct amount of share capital is Rs.15,40,000/- as against Rs.16,00,000/- stated by the learned PCIT and in support of its contention, assessee submitted the details of opening balance and date wise receipt of correct amount of share capital and unsecured loan which are subject matter of present revision proceedings under S. 263 of the Act. It was further submitted that the entire amount of share capital and unsecured loans have been received by assessee's company prior to the commencement of commercial operation and income generating activity. To prove this, assessee is enclosing herewith first sale bill of our company which was issued on 01.01.2016 whereas the entire amount of share capital and unsecured loans were received prior to that date which fact is evident from the chart given in PCIT's order at page 5. Thus the entire amount of share capital and unsecured loans has been entirely received prior to the commencement of commercial operations and income generating activity of our company. This being the position, the share capital and unsecured loans can under no circumstances be regarded as undisclosed income of the assessee company u/s. 68. The reason is there is no source of income, there cannot be any question of having earned undisclosed income which can be deemed and taxed u/s. 68. The aforesaid legal position is well settled by following judicial pronouncements wherein the addition made u/s. 68 in the hands of the assessee on the reasons of insufficient documents and non discharge of primary onus was deleted on the ground that the amount represented by such addition was received prior to commercial operations and income generating activities and therefore, it cannot be

regarded as undisclosed income u/s. 68 of the Act. In support of his contention, assessee relied on following pronouncements:

- *Supreme Court in case of Bharat engineering & Construction Co. -83 ITR 187,*
- *Supreme Court in case of P. K. Noorjahan- 237 ITR 570,*
- *Gujarat High Court in case of Mitesh Rolling Mills Pvt Ltd. - 258 ITR 278,*
- *Gujarat High Court in case of Green Finance Ltd. -judgment dated 10.11.2014 in Tax Appeal No. 67-68 of 2001,*
- *Delhi High Court in case of Five Vision Promoters Pvt Ltd. - 380 ITR 289,*
- *Ahmedabad ITAT in case of Praful (Agarwal) Art Prints Pvt Ltd. ITA No. 3568/Ahm/2007,*
- *Ahmedabad ITAT in case of Siyed Paper Mills Ltd. - ITA No. 1544-1545/Ahm/2007,*
- *Agra ITAT in case of M/s. Garg Preservation Pvt. Ltd- ITA No. 79/Agra/2012,*

4.7 The assessee further contended that the order passed by the AO was not erroneous and therefore, the revision under section 263 was not permissible as held by Hon'ble Supreme Court in case of Malabar Industrial Co. (243 ITR 83). As regards proviso to section 68, the assessee contended that when no addition can be made u/s. 68, point of no or insufficient inquiry made by the A.O. with reference to proviso to section 68 also becomes academic and redundant as far as the assessment of the assessee company is concerned. The assessee also contended that even if the Revenue disagreed with the legal view expressed in aforesaid judgments, it will be a case of two possible legal views in which case also the revision u/s. 263 was not permissible in view of Supreme Court judgment in case of Max India Ltd.(295 ITR 282) wherein the SC held that revision u/s. 263 is not permissible when two views are possible.

4.8 But, learned PCIT did not agree with the contention of the assessee and held that learned AO failed to make the vital inquiries as to whether the depositors/subscribers are genuine or verifiable? Whether the depositors/subscribers are creditworthy? Whether the source of the source is explained in view of the amended provisions of Section 68 of the Act?

From the perusal of the case records of the assessee for the relevant assessment year, there is nothing on record to show that the AO has ever confronted the assessee on these issues and had the AO examined all the above issues, he should have made some noting either in the order sheet or any kind of reference would have been made in the submissions made by the assessee. Therefore, it is not a case of inadequate inquiry but a clear cut case of lack of inquiry. The lack of inquiry or verification at the relevant time by the AO would constitute prejudice to the interest of Revenue and would involve error of fact and law which are vital to the issue on which the case was selected for scrutiny and held that:

*“14. Considering the above mentioned facts, I hold that the assessment order dated 21.12.2018 finalized by the Assessing Officer u/s.143(3) of the Income-tax Act, 1961 is erroneous and prejudicial to the interest of revenue within the meaning of section 263 of the Income-tax Act, 1961 and hence the order passed by the Assessing Officer u/s. 143(3) dated 21.12.2018 is hereby set aside. Accordingly, the Assessing Officer is directed to make fresh assessment after verifying the genuineness, creditworthiness and identity of the depositors/subscribers as also after providing proper opportunity of being heard to the assessee.”*

5. We have gone through the relevant records and impugned order and heard both the parties. In this case, question before us is whether Learned PCIT was justified in initiating proceedings u/s. 263 of the Act or not. We can see that learned AO made proper enquiry and during assessment proceedings, all details such as, i. list of unsecured loan received during the years; ii. list of share holders; iii. Copy of ledger accounts of each share holder. Iv. Copy of ledger accounts of each lender in its books; v. copies of contra confirmation; vi. Copy of bank statement; vii. Copy of bank account; 8. Copy of income tax return alongwith computation of income & ix. Copy of PAN were submitted. We have noticed that Company was formed in 2013 for vitrified files and stated commercial production in 2016. The co-ordinate bench in case of Hitendra A. Nanavati vs. CIT

(2012) 20 taxmann.com 248 (Ahmedabad), it has been held that where learned AO was satisfied with explanation of assessee, a change of opinion or view would not enable CIT to exercise jurisdiction under S.263 of the Act.

*“4.4 While adjudicating a similar issue, Hon'ble Supreme Court in the case of CIT v. Max India Ltd. (supra) relying upon its earlier decision in the case of Malabar Industrial Co. Ltd. (supra) held as under:*

*"The phrase 'prejudicial to the interests of the Revenue' in s. 263 of the IT Act, 1961, has to be read in conjunction with the expression 'erroneous' order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. For example, when the AO adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law."*

*4.5 Similar views were expressed by the Hon'ble apex Court in Greenworld Corporation (supra).*

*4.6 Similarly, Hon'ble Gujarat High Court in the case of CITv. R.K. Construction Co. [2009] 221 CTR (Gui) 415/r20081 12 DTR (Gui) 210/[2009] 313 ITR 65 (Gui) held as under :*

*"As far as law is concerned, the AO has taken a particular view on the basis of evidence produced before him. On the basis of the said material and materials which were collected by the CIT in revisional proceedings, the CIT has taken a different view. However, in the revisional proceedings under s. 263, it is not open for the CIT to take such a different view in view of the decisions of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 159 CTR (SO 1/r20001 243 ITR 83 (SO. There is nothing on record to suggest that the view taken by the AO is unsustainable at law. This Court has also taken the same view in case of CIT v. Arvind Jewellers [2002] 177 CTR (Gui) 546/120031 259 ITR 502 (Guj) whereby the order passed by the CIT under s. 263 of the Act was quashed and set aside."*

*4.7 In the case of CIT v. Arvind Jewellers [2002] 177 CTR (Guj) 546/12003] 259 ITR 502 (Gui) it was observed that the finding of fact given by the*

*Tribunal was that the assessee had produced relevant material and offered explanations in pursuance of the notices issued under s. 142(1) as well as s. 143(2) of the Act and after considering the material and explanations, the ITO had come to a definite conclusion. Since the material was there on record and the said material was considered by the ITO and a particular view was taken, the mere fact that a different view can be taken should not be the basis for an action under s. 263. The Hon'ble jurisdictional High Court, therefore, took the view that the order of revision was not justified. In the words of the Hon'ble High Court it was held as under :*

*"Coming to the facts of the present case, it is the finding of fact given by the Tribunal that the assessee has produced relevant material and offered explanations in pursuance of the notices issued under s. 142(1) as well as s. 143(2) of the Act and after considering the materials and explanation, the ITO has come to a definite conclusion. The CIT did not agree with the conclusion reached by the ITO. Sec. 263 of the Act does not empower him to take action on these facts to arrive at the conclusion that the order passed by the ITO is erroneous and prejudicial to the interests of the Revenue. Since the material was there on record and the said material was considered by the ITO and a particular view was taken, the mere fact that a different view can be taken, should not be the basis for an action under s. 263 of the Act and it cannot be held to be justified."*

*4.8 In CTT v. Mehrotra Brothers [2004] 270 ITR 157 (MP), the Hon'ble High Court gave the stamp of approval to the order of the Tribunal which, after relying on CIT v. Ratlam Coal Ash Co. [1987] 65 CTR (MP) 305/M9881 171 ITR 141 (MP), had held that when the AO considered the records before him and completed the assessment after considering the evidence filed and after his satisfaction about the genuineness of cash credits, the order of revision under s. 263 on the vague ground that the AO did not make proper enquiry was not valid.*

*4.9 Hon'ble Punjab & Haryana High Court in the case of CIT v. Deepak Mittal [2010] 37 DTR (P&H) 8/[2010] 324 ITR 411 (P&H) held that change of opinion by reappraising the evidence is not within the parameters of revisional jurisdiction of the CIT under s. 263 of the Act."*

In view of the above legal position, share capital, share application money and unsecured loan in the present case can never be regarded as undisclosed income of the assessee under S.68 of the Act. Thus, we hold that in present case the revision under S.263 of the Act is not permissible.

In view of the above, we set aside the order of the learned PCIT and allow the appeal of the assessee.

6. In the result, the appeal filed by the Assessee is allowed.

**This Order pronounced in Open Court on 07/07/2022**

Sd/-  
(P. M. JAGTAP)  
VICE PRESIDENT

Ahmedabad: Dated 07/07/2022

Sd/-  
(MAHAVIR PRASAD)  
JUDICIAL MEMBER

*True Copy*

*S.K.SINHA*

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Deputy/Asstt. Registrar  
ITAT, Rajkot