

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “D”, MUMBAI**

**BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.746/M/2021
Assessment Year: 2008-09**

M/s. MGN Agro Properties Pvt. Ltd., (Successor Entity of Krishiraj Trading Ltd.) B-9 Trade World, Kamala Mill Compound, Lower Parel, Mumbai-400 013 PAN: AACCM3422H	Vs.	Pr. CIT (Central), Room No.1920, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vartik Choksi, A.R.
Shri Ajay Nagpal, A.R.

Revenue by : Ms. Mamta Bansal, D.R.

Date of Hearing : 01 . 07 . 2022

Date of Pronouncement : 08 . 09 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. MGN Agro Properties Pvt. Ltd. (hereinafter referred to as ‘the assessee company’) by filing the present appeal, sought to set aside the impugned order dated 30.03.2021 passed by Principal Commissioner of Income Tax, Mumbai [hereinafter referred to as the PCIT] by invoking revisionary jurisdiction conferred under section 263 of the Income Tax Act, 1961 (for short ‘the Act’) on the grounds inter alia that :-

“The Ld. PCIT erred in holding the assessment order passed u/s. 143(3) r.w.s. 254 as erroneous and prejudicial to the interest of the Revenue.”

2. Briefly stated facts necessary for adjudication of the controversy at hand are : the return of income for the year under consideration was filed by M/s. Krishi Raj Trading Ltd. @ Rs.87,93,59,786/-. Assessing Officer (AO) framed assessment under section 143(3) of the Act vide order dated 31.12.2010 at the total income at Rs.1,35,23,232/- under normal provisions and under section 115JB of the Act at Rs.9,27,34,44,000/-. Thereafter, matter went to the CIT(A), then to the Tribunal. The Tribunal set aside the matter to the AO who has framed the assessment under section 143(3) read with section 254 of the Act on 26.04.2017 at the total income under normal provisions at loss of Rs.2,31,025/- and book profit under section 115JB of the Act at the loss of Rs.1,67,64,201/-.

3. The Ld. PCIT while invoking the provisions contained under section 263 of the Act noticed that during the year under consideration two wholly owned subsidiaries namely M/s. Vikram Capital Resource Pvt. Ltd. and M/s. Midfin Cap Lease Ltd. were amalgamated with the assessee. The transferee companies were holding 90,33,701 shares of M/s. Adani Enterprises Ltd. at the time of amalgamation which were sold during the year under consideration for Rs.869.17 crore. Amalgamation of M/s. Midfin Cap Lease Ltd. and M/s. Vikram Capital Resource Pvt. Ltd. was approved by Hon'ble Gujarat High Court on 08.10.2007. As per the scheme of amalgamation the purchase method had to be followed and accordingly the fair value of assets and liabilities was

to be determined as defined in the accounting standard (AS)-14. It was also noticed that shares of M/s. Adani Enterprises Ltd. were to be re-valued as on the effective date of amalgamation i.e. on 01.04.2007 on the basis of equated market price on that date. It was also noticed by the Ld. PCIT that the value per share of M/s. Adani Enterprises Ltd. as on 01.04.2007 was taken at Rs.864/- per share (total consideration of Rs.780.51 crore/ 90,33,701 shares) for the purpose of computing the net profit on the sale of shares as per books, however, the value adopted by the assessee in respect of the shares of M/s. Adani Enterprises Ltd. is found not correct because the closing price of share of M/s. Adani Enterprises Ltd. on 31.03.2007 was Rs.210/- only. As per value per share for computing the capital gain as per books was required to be taken at Rs.210 per share and not at Rs.864/- per share as adopted in the valuation report in view of the scheme of amalgamation approved by the High Court. The book profit computed by adopting this value, therefore is not in compliance to the High Court order. The relevant transactions are summarised in AS-14 as under:

Name of the Amalgamated company	Share of the company held by them as on 31.03.2007	Number of shares held	Book value of shares held	Purchase Value of all the adopted by assessee	Sale value of all the 90,33,701 shares	Net profit Shown by assessee (after adjusting STT)
Vikram Capital Resource Pvt. Ltd.	Adani Exports*	7610686	25.54 crore	780.51 Crore	869.17 Crore	89.94 crore
Mitfin Cap Lease Ltd.	Adani Enterprises	1423015	3.78 crore			
	Total	9033701	29.32 crore			

4. Ld. PCIT noticed that M/s. Adani Exports is now merged with M/s. Adani Enterprises Ltd. The book profit of transfer of

these shares comes to Rs.679.46 crores (i.e. 869.17 crore minus Rs.189.71). As against this book profit the assessee shown book profit of Rs.89.94 crore on this transaction and the AO has accepted this value without ascertaining and examining the correct book profit on transfer of these shares which is in fact Rs.679.46 cores in the original as well as the order passed under section 143(3) read with section 254 of the Act dated 26.01.2017. Since the AO has computed the book profit under section 115JB of the Act without making any enquiry or verification as to correct book profit which is Rs.679.46 crore, the order passed by the AO becomes prima-face erroneous in so far as prejudicial to the interest of Revenue within the meaning of explanation 2(a) to section 263(1) of the Act. After considering the submissions made by the assessee Ld. PCIT proceeded to conclude that the AO did not make enquiries and verification which a prudent and reasonable officer should have made in this case and thereby set aside the assessment order dated 26.04.2017 passed by the AO under section 143(3) read with section 254 of the Act being erroneous in so far as prejudicial to the interest of the Revenue within the meaning of clause (a) of explanation 2 to section 263(1) of the Act and directed him to pass fresh assessment order after computing the book profit under section 115JB of the Act after making necessary enquiries and ascertaining correct facts.

5. Feeling aggrieved from the impugned order passed by the Ld. PCIT under section 263 of the Act the assessee has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. For ready perusal notice issued by Ld. PCIT under section 263 of the Act is extracted as under:

“2. M/s Krishiraj Trading Ltd. (PAN AAACK2257N) is now Now amalgamated with MGN Agro Properties Private Limited (PAN AACCM3422H). Therefore the proceedings u/s. 263 of the Income-tax Act, 1961 in the case of M/s. Krishiraj Trading Ltd. (PAN AAACK2257N) are initiated in the name of MGN Agro Properties Private Limited (PAN AACCM3422H).

3. The return of income for A.Y. 2008-09 was filed BY M/s Krishiraj Trading Ltd, (hereinafter the assessee) on 16-09-2008 declaring the total loss at Rs.87,93,59,786/-. The assessment order u/s. 143(3) was completed on 31.12.2010 determining total income under normal provisions at Rs.1,35,23,232/-and u/s.115JB at Rs.927,34,44,000/-. Thereafter, in pursuance of directions of the Hon'ble ITAT, the set-aside order u/s. 143(3) r.w.s. 254 was passed on 26.04.2017.

4. The case records were called for. On perusal of the same, it was seen that during the year, two wholly owned subsidiaries namely, M/s. Vikram Capital Resource Pvt. Ltd and M/s. Mitfin Cap Lease Ltd were amalgamated with the assessee. The transferor companies were holding the 90,33,701 shares of Adani Enterprises Ltd at the time of amalgamation, which were sold during the year for consideration of Rs.869.17 crores. The amalgamation of M/s. Mitfin Cap Lease Ltd. and M/s. Vikram Capital Resource Pvt. Ltd. was approved by Hon'ble Gujarat High Court on 08.10.2007^ Further, as per scheme of amalgamation, the purchase method had to be followed and accordingly, the fair value of assets and liabilities was to be determined as defined in Accounting Standard (AS)-14. It is noticed that the shares of Adani Enterprises were to be revalued as on 01.04.2007 (i.e., the effective date of amalgamation) on the basis of quoted market price on that date. For the purpose of computing net profit on sale of shares as per books, the value per share of Adani Enterprises as on 01.04.2007 was taken at Rs. 864/- per share (total consideration of Rs. 780.51 crore / 90,33,701 shares). However, the value adopted by the assessee in respect of share of Adani Enterprises Ltd as on 01.04.2007 is found not correct as it was seen from the

historical price quoted in NSE/BSE and also from share price quotation shown in Annual Report of Adani Enterprises Ltd for FY 2006-07 & 2007-08 that closing price of share of Adani Enterprises on 31.03.2007 was Rs. 210 only. In view of the scheme of amalgamation approved by Hon'ble Gujarat High Court, fair value per share for computing capital gain as per books, therefore, should have been taken at Rs. 210/- per share and not at Rs.864/- as adopted in the valuation report. The book profit computed by the assessee by adopting this value, therefore, is not in compliance to High Court order and AS-14.

5. The cost of acquisition shares of Adani Enterprises @210/per share comes to Rs.189.71 crores (for 90,33,701/- share) and not Rs.780.51 crores adopted by the assessee. The book profit on transfer of these shares comes to Rs.679.46 crores (i.e. 869.17 crores - 189.71 crores). As against this book profit, the assessee has shown book profit of Rs.89.94 crores on this transaction and the AO has accepted this value without ascertaining and examining the correct book profit on transfer of these shares (which is in fact Rs.679.46 crore) in the original as well as the order passed u/s. 143(3) r.w.s. 254 of the Income-tax Act, 1961 dated 26.01.2017. Since the AO has accepted the book profit without making any enquiring on verification with regard to correct book profit which is Rs.679.46 crores as discussed above, the order passed by AO becomes prima facie erroneous in so far as prejudicial to the interest of revenue within the meaning of explanation 2(a) to section 263(1) of the Income-tax Act, 1961.

6. In this connection, you are hereby given an opportunity of being heard under sub-section (1) of section 263 of the Income-tax Act, 1961. Your case is fixed for hearing on 25-03-2021 at 4:00 PM. On that day, you may attend before the undersigned at the above-mentioned address, either in person or through your authorized representative, or make written submissions. In case of non-compliance on the stipulated date and time, it will be presumed that you have nothing to say and the order passed by A.O. u/s. 143(3) r.w.s. 254 of the Income-tax Act, 1961 dated 26.04.2017 will be set aside being erroneous in so far as it is prejudicial to the interest of revenue with a direction of pass fresh assessment order taking the book profit on transfer of shares of Rs. 679.46 crores in place of 89.94 crores. Kindly be noted that due to time-barring nature of the proceedings, it will not be possible to ^^ consider the requests for extension, if any.”

8. AO in its assessment order passed under section 143(3) dated 31.12.2010 made additions as under:

Nature of Addition	Remarks

i) STCL not allowed to be c/fd Rs.87.66 Crs	Additions made in Normal Computation
ii) 14A addition of Rs. 1.66 crs r.w.r 8d(iii)(being 0.5% of administrative Expenses)	Additions made in Normal Computation
i) Addition of STCL 87.66 Crs	Additions made to Book Profits
ii) LTCL of Rs.839.94 crs	Additions made to Book Profits
iii) 14A addition 1.66 Crs	Additions made to Book Profits

9. Thereafter, the assessee went in appeal before the Ld. CIT(A) who has deleted all the additions except addition of Rs.1.66 crore under section 14A read with rule 8D vide order dated 04.08.2011.

10. Assessee then preferred appeal before the Tribunal which has restricted the addition made by the AO and confirmed by the Ld. CIT(A) under section 14(A) to **Rs.24,77,461/-** vide its order dated 07.03.2016 . Department has also preferred an appeal against the aforesaid addition/relief granted by the Ld. CIT(A) qua short term capital loss of Rs.87.66 crores allowed by Ld. CIT(A) and in the appeal the Tribunal remitted the issue back to the AO for further verification vide its order dated 07.03.2006.

11. Pursuant to the order passed by the Tribunal the AO framed fresh assessment under **section 254 read with section 143(3)** of the Act vide order dated 26.04.2017 by disallowing the short term capital loss (STCL) and appeal against the said order is pending before the Ld. CIT(A).

12. Assessment order dated 26.04.2017 framed by the AO **under section 254 read with section 143(3) of the Act** being the subject matter of order passed under section 263 of the Act by the Ld. PCIT, has been set aside directing the AO to pass fresh order after computing the book profit under section 115JB of the Act after making necessary enquiries.

13. Undisputedly, two wholly owned subsidiaries namely M/s. Vikram Capital Resources Pvt. Ltd. and M/s. Midfin Cap Lease Ltd. were amalgamated with assessee as approved by Hon'ble Gujarat High Court with effective date of amalgamation as 01.04.2007. It is also not in dispute that the transferee companies were holding 9033701 shares of M/s. Adani Enterprises Ltd. at the time of amalgamation which was sold for Rs.869.17 crore. It is also not in dispute that assessee has taken the value of per share of M/s. Adani Enterprises Ltd. as on 01.04.2007 at Rs.864/- per share (total consideration of Rs.780.51 crores for 9033701 shares) for the purpose of computing net profit on sale of shares under section 115JB of the Act whereas closing price of share of M/s. Adani Enterprises Ltd. on 31.03.2007 was Rs.210 per share only. It is also not in dispute that for the purpose of computing the capital gain as per books per share value was required to be taken at Rs.210 per share and not Rs.864 per share as adopted in the valuation report in view of the scheme of amalgamation approved by the Hon'ble High Court. It is also not in dispute that M/s. Adani Export is now merged with M/s. Adani Enterprises Ltd. and the book profit on transfer of these shares comes to Rs.679.46 crore (i.e. 869.17 crore – Rs.189.71 crore). It is also not in dispute that as against the actual book profit the assessee shown book profit of Rs.89.94 crore on this transaction and the AO has accepted this value without ascertaining and examining the correct book profit on transfer of these shares which is in fact Rs.679.46 crores in the original assessment as well as assessment order passed under section 143(3) read with section 254 of the Act dated 26.01.2017.

14. The Ld. A.R. for the assessee challenging the impugned order contended inter alia that assessment order framed under section 143(3) read with section 254 of the Act cannot be a subject matter of section 263 of the Act ; that assessment order in question was not passed independently by the AO rather it was passed pursuant to the directions issued by the Tribunal while giving appeal effect; that the provisions contained under clause C of explanation 1 to section 263 of the Act bars the power of Ld. PCIT for invoking jurisdiction in respect of the matter which had been considered and decided in such appeals by the Tribunal; that assessee has duly furnished computation of income under the normal provisions as well as under provisions contained under section 115JB of the Act before the AO and thereafter he has passed the assessment order. The Ld. A.R. relied upon the order passed by co-ordinate Bench of the Tribunal in case of Aishwarya Rai Bachchan vs. PCIT (2022) 135 taxmann.com 335 (Mumbai-Trib.) and in case of Mrs. Jyoti Harshad Mehta-Legal Heir of Late Husband S. Mehta vs. PCIT in ITA No.1159/M/2020 order dated 26.03.2021.

15. However, on the other hand, Ld. D.R. for the Revenue in order to repel the argument addressed by the Ld. A.R. for the assessee contended inter alia that in the original assessment passed by the AO under section 143(3) of the Act the AO has not ascertained and examined the correct book profit on transfer of these shares in the original as well as order passed under section 143(3) read with section 254 of the Act; that even the Ld. CIT(A) in its order dated 04.08.2011 has not examined the issue but he has merely given a reference as to the value of the share in para 2 of

page 32; that when the issue in question has never been decided by the AO /CIT(A) there is no question of merger and relied upon the decision rendered by Hon'ble Supreme Court in case of CIT vs. Shri Arbuda Mills Ltd. (1998) 98 Taxman 457 (SC), Hon'ble Bombay High Court in case of CIT vs. Ballarpur Industries Ltd. (2017) 85 taxmann.com 10 (Bombay) & Vedanta Ltd. vs. CIT (2021) 124 taxmann.com 435 (Bombay) and Hon'ble Karnataka High Court in case of CIT vs. Namdari Seeds (2011) 16 taxmann.com 9 (Kar.).

16. In the backdrop of the aforesaid undisputed facts, order passed by the Ld. Lower Revenue Authorities, argument addressed by Ld. Authorised Representative of the parties to the appeal and case law relied upon the sole question arises for determination in this case is:

“as to whether AO has framed the original assessment under section 143(3) and assessment under section 263 read with section 254 of the Act without ascertaining and examining correct value of shares @ Rs.864 per share as adopted in the valuation report as against Rs.210 per share as per scheme of amalgamation approved by the High Court effective from 01.04.2007.”

17. We have perused the order passed by the co-ordinate Bench of the Tribunal in case of Mrs. Jyoti Harshad Mehta-Legal Heir of Late Husband S. Mehta (supra) which has been decided in favour of the assessee on the ground that the assessment order passed “in consequence of giving appeal effect of the order passed by the Ld. CIT(A) which is not included in the order eligible for revision in the aforesaid explanation of section 263 of the Act and technically it cannot be called to be the order of AO and clause C of

explanation 1 to section 263 of the Act clearly debars the power of Ld. CIT for invoking jurisdiction in respect of the matter as has been considered and decided in such appeal”.

18. But we are of the considered view that facts of the case at hand are distinguishable because issue as to ascertaining and examining the correct book profit on transfer of 90,33,701 shares of M/s. Adani Enterprises Ltd. @ Rs.210/- per share comes to Rs.189.71 crore and not Rs.780.51 crore as adopted by the assessee was never examined by the AO either in original assessment or in assessment framed under **section 143(3) read with section 254 of the Act.**

19. It is apparent on record that the AO has computed the book profit under section 115JB of the Act without making any enquiry or verification qua the correct book profit which is Rs.679.46 crores and not Rs.189.71 crore as taken by the assessee, thus making the assessment order prima-facie erroneous in so far as prejudicial to the interest of the Revenue within the meaning of explanation 2(a) to section 261(3) of the Act.

20. Hon'ble Bombay High Court in case of CIT vs. Ballarpur Industries Ltd. (supra) held that when the AO had allowed claim without examining it with due verification, exercise of jurisdiction of commissioner under section 263 of the Act was justified. In another case cited as Vedanta Ltd. vs. CIT (2021) 124 taxmann.com 435 (Bombay) Hon'ble Bombay High Court held that when assessment was completed without proper enquiries, the Commissioner was competent to invoke revisionary jurisdiction and direct fresh assessment under section 263 of the Act.

21. The Ld. D.R. for the Revenue relied upon a decision rendered by Hon'ble Supreme Court of India in case of CIT vs. Shri Arbuda Mills Ltd. (supra) wherein "Commissioner has exercised his powers under section 263 of the Act in respect of the claim relating to 3 items which were decided by the ITO in favour of the assessee and were not subject matter of the appeals by the assessee – assessee contended that order of ITO merged with that of Commissioner (Appeals) so as to exclude jurisdiction of the Commissioner under section 263 of the Act. The question arose before the Hon'ble Apex Court as to whether in view of the amendment in section 263 by the Finance Act, 1989 with retrospective effect, power of Commissioner under section 263 of the Act would extend and would be deemed always to have extended to three items because same had not been considered and decided in appeal filed by the assessee." Answer to this question was given by the Hon'ble Supreme Court in affirmative.

22. We have perused the order dated 04.08.2011 passed by the Ld. CIT(A) available at page 72 to 111 of the paper book and order passed by co-ordinate Bench of the Tribunal available at page 124 to 136 of the paper book.

23. Perusal of the order passed by Ld. CIT(A) and co-ordinate Bench of the Tribunal in assessee's own case goes to prove that the issue flagged by Ld. PCIT while invoking the jurisdiction under section 263 of the Act as to the cost of acquisition of shares of Adani Enterprises "at the rate of Rs.210 per share which comes to Rs.189.71 crores (for 90,33,701 shares) and not Rs.780.51 crores as adopted by the assessee" has not been examined/verified by the

AO/ Ld. CIT(A) nor any such ground was raised before the Ld. CIT(A). So no enquiry, no verification as to the issue flagged by Ld. PCIT has been made by the AO.

24. However, when co-ordinate Bench of the Tribunal restored the matter to the files of the AO with the direction to decide the matter de-novo after thorough examination of the same the issue as to giving finding by the AO that “assessee gains from the sale of shares of Adani Enterprises” was alive and AO was not restricted by the Tribunal to decide the issue as to the short term capital loss claimed by the assessee to the tune of Rs.88.50 crore being fictitious only rather denovo trial was directed to be made. In these circumstances, the contentions raised by the Ld. A.R. for the assessee that when the issue is remanded back, AO passed the order by giving appeal effect and the same cannot be subjected to revision under section 263 of the Act is not sustainable.

25. Because issue flagged by the Ld. PCIT remained dormant before the AO as well as the Ld. CIT(A) during the initial assessment framed under section 143(3) of the Act and during the assessment framed under section 143(3) read with section 254 of the Act. As discussed in the preceding paras Hon’ble Bombay High Court in case of Ballarpur Industries Ltd. (supra) and in case of Vedant Ltd. vs. CIT (supra) held that when the assessment was completed without proper enquiry the Commissioner was competent to invoke the jurisdiction and direct fresh assessment under section 263 of the Act.

26. Identical issue has also been decided by the Hon’ble Supreme Court in case of Shri Arbuda Mills Ltd. (supra) as

discussed in preceding para No.19 the ratio of which is when Ld. PCIT exercises his power under section 263 of the Act in respect of claim relating to 3 items which was decided by the ITO in favour of the assessee and were not subject matter of the appeal by the assessee there is no question that order of ITO merged with that of Commissioner(Appeals) so as to exclude jurisdiction under section 263 of the Act because under the amended provisions contained under section 263 of the Act power of Commissioner under section 263 of the Act would extend and would be deemed to have been extended to three items because the same had not been considered and decided in appeal filed by the assessee.

27. In the instant case also the issue flagged by Ld. CIT(A) as to not ascertaining and examining the correct book profit on transfer of 9033701 shares of Adani Enterprises at the rate of Rs.201 per share which comes to Rs.189.71 crore and not at the rate of Rs.864 per share which comes to Rs.780.51 crore, which the AO has accepted without ascertaining and examining the correct facts and without making necessary enquiries/verifications which made the assessment order erroneous so far as prejudicial to the interest of the Revenue, was never agitated or decided by the Ld. CIT(A) or Tribunal in original assessment or assessment framed under section 143(3) read with section 254 of the Act. So in these circumstances the Ld. PCIT has the power under section 263 of the Act. So we are further of the view that in the case laws relied upon by the assessee referred to para 12 of the order are not applicable to the facts and circumstances of the case.

27. In view of what has been discussed above when the issue flagged by Ld. PCIT has never been ascertained/examined to compute the correct book profit qua the transfer of these shares there is no question of merger of the order. Moreover, when the assessment order is apparently erroneous so far as prejudicial to the interest of the Revenue having been decided by the AO in favour of the assessee without ascertaining or examining the same order passed by Ld. PCIT does not call for any interference by the Tribunal. Consequently, appeal filed by the assessee is hereby dismissed.

Order pronounced in the open court on 08.09.2022.

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

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

Mumbai, Dated: 08.09.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.