

**IN THE INCOME TAX APPELLATE TRIBUNAL  
NAGPUR BENCH, NAGPUR  
BEFORE SHRI VIKRAM SINGH YADAV, ACCOUNTANT  
MEMBER AND SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**I.T.A Nos. 34/NAG/2021  
(ASSESSMENT YEAR-2013-14)**

DP Jain Dariapur Jasondhi (Annuity) Road Projects Pvt. Ltd. U/7, Himalaya Accord Apartment, Opp. Law College, Amravati Road, Nagpur. PAN:AAECD0823H	<b>Vs.</b>	Pr. CIT, Central, Nagpur.
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**I.T.A Nos. 35/NAG/2021  
(ASSESSMENT YEAR-2013-14)**

DP Jain Datia Bhandar Toll Road Projects Pvt. Ltd. U/7, Himalaya Accord Apartment, Opp. Law College, Amravati Road, Nagpur. PAN:AAECD0401H	<b>Vs.</b>	Pr. CIT, Central, Nagpur.
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**I.T.A Nos. 36/NAG/2021  
(ASSESSMENT YEAR-2013-14)**

DP Jain Ujjain Package Annuity Road Projects Pvt. Ltd. U/7, Himalaya Accord Apartment, Opp. Law College, Amravati Road, Nagpur. PAN:AAECD0400G	<b>Vs.</b>	Pr. CIT, Central, Nagpur.
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<b>Assessee by</b>	<b>Shri Rajesh Loya, CA</b>
<b>Revenue by</b>	<b>Shri Rajeev Benjwal, CIT-DR</b>

<b>Date of Hearing</b>	<b>08.06.2022</b>
<b>Date of Pronouncement</b>	<b>29.08.2022</b>

**ORDER**

**PER SHRI VIKRAM SINGH YADAV, A.M.:**

These are appeals filed by the aforesaid three assessees against the respective orders of Id. PCIT Central, Nagpur dated 31.03.2021 pertaining to A.Y. 2013-14 passed u/s 263 of the Act. Since common issues are involved, all these appeals were heard together and are being disposed off by this consolidated order.

2. With the consent of both the parties, the case of the assessee in ITA No 34/Nag/2021 was taken as a lead case for the purposes of present discussion wherein the assessee has taken the following grounds of appeal:

*“(1) That the notice issued u/s 263 and the order of the Learned Pr. Commissioner of Income Tax (Central), Nagpur passed u/s. 263 are bad in law and wrong on facts. On the facts and circumstances of the case, the assessment order passed by the AO u/s. 153A r.w.s 143(3) was neither erroneous nor prejudicial to the interest of the Revenue and therefore the action of the Pr. CIT (Central) is illegal and liable to be quashed.*

(2) *That the learned Pr. CIT erred in law and on facts in assuming jurisdiction u/s 263 on the issue, adjudication of which is beyond the scope of provisions of section 153A itself, in absence of any incriminating material found during the course of search and in the circumstances when the original assessment order passed u/s 143(3) is unabated and became final.*

(3) *That the learned Pr.CIT erred in law and on facts in setting aside the order of the AO passed u/s 153A r.w.s. 143(3) of the Income Tax Act, 1961 holding that the AO has not made adequate enquiry of the Fair Market Value (FMV) of shares and directing him to frame fresh assessment. On the facts and circumstances of the case, the Pr. CIT erred in disregarding the fact available on record that sufficient enquiry was conducted and after being satisfied about the correctness of the same, AO accepted the returned loss.*

(4) *That the learned Pr.CIT erred in law and on facts in rejecting the basis adopted for determining FMV of shares. On the facts and circumstances of the case, the FMV of shares was determined in accordance with the provisions of section 56(2) (viib) and rules prescribed thereunder and in such circumstances, the action of the Pr. CIT (Central) is beyond jurisdiction u/s 263 and therefore highly unjustified.*

(5) *That the learned Pr.CIT erred in law and on facts in not accepting the method adopted by assessee company for determining FMV of shares. On the facts and circumstances of the case, the assessee company has chosen one out of the options suitable in accordance with the records including concession agreement, period*

*of project development & annuity receivable, business structure and future prospects of the company and therefore the action of the Pr. CIT is contrary to provisions of the Act.*

*(6) That the learned Pr.CIT erred in law and on facts in directing the AO to initiate penalty proceedings as per the provisions of the Act.*

*(7) That for any other ground with kind permission of your honour at the time of hearing of appeal.”*

3. Briefly the facts of the case are that the assessee company is engaged in the business of road development and has entered into a concession agreement with MPRDC for strengthening, widening, maintaining and operating of Badwah-Katekut-Ashapur- Khalwa-Singot and Dariapur- Jasondhi to Maharashtra border (MDRs Package-III) on BOT (Annuity) basis for 15 years from appointed date. The assessee company filed its original return of income on 31.10.2013 declaring loss of Rs.11,51,097/- which was taken up for scrutiny and assessment order u/s 143(3) was passed on 25.01.2016 accepting the return of income. Thereafter, search and seizure operations u/s 132 were conducted in case of DP Jain Group of cases on 26.07.2016 wherein case of the assessee was also covered and accordingly notice u/s 153A was issued and duly served on the assessee. In response, the assessee filed its return of income declaring total income at nil and

which was accepted by the AO by virtue of assessment order passed u/s 143(3) r.w.s. 153A on 06.12.2018.

4. The assessment records were subsequently called for examination by Id. PCIT, Central Nagpur and a show cause was issued to the assessee stating that assessee company has raised funds to the tune of Rs.24,77,41,900/- during the previous year through issue of equity shares of face value of Rs.10 at a premium of Rs.60 per share. The fair market value of the shares as per Rule 11UA comes to Rs.(-) 7.68 per share whereas the share have been allotted at Rs.70 per share and there is huge difference in the FMV as per Rule 11UA and the valuation adopted by the assessee using the discounted cash flow method. The excess share premium so received by the assessee ought to have been assessed in accordance with the provisions of section 56(2) (viib) of the Act and the erstwhile AO had not verified this issue. It was stated by the Id. PCIT that the AO has failed to take cognizance of this crucial aspect and lack of inquiry on this aspect by the erstwhile AO has made the assessment order erroneous and prejudicial to the interest of Revenue and accordingly a show cause u/s 263 was issued.

5. In response to the show cause, the assessee submitted that there are two valuation methods prescribed under Rule 11UA wherein the valuation can be undertaken either based on the value of asset and liabilities or on the basis of valuation certificate obtained from a Chartered Accountant. It was submitted that the assessee, on the basis of a Chartered Accountant valuation certificate, which was furnished during the course of assessment proceedings, computed the fair market value of shares at Rs.70 per shares. It was submitted that the assessee company had executed the concession agreement with MPRDC, under which the assessee company would be receiving annuity income for approximately 15 years after achieving commercial operation date i.e., after full construction of project highway. During the year under consideration, the project highway was under development and substantial expenditure has been incurred in the project. It was accordingly submitted that the basis taken by the Id. PCIT to value shares based on assets and liabilities is thus not depicting the true worth of company rather the valuation adopted by the company is based on scientific approach which take into consideration the nature of business activity and the future revenue generation prospects. It was submitted that the project of the company shall have the effect on profitability as well as reserves in the subsequent years up to the date of termination of concessionaire agreement which has been allotted by a government

organization and therefore, the authenticity and certainty of future profit cannot be doubted. Therefore, the company has adopted the method based on the future prospects of the company and not on the basis of assets and liabilities. It was accordingly submitted that the valuation is in accordance with law and more specifically as per method prescribed in Rule 11UA itself. It was further submitted that the AO has duly verified all the aspects of issue of shares and valuation thereof basis details and documents filed during the assessment proceedings. After due application of mind, the AO was satisfied with the submission of the assessee and no adverse inference was drawn during the assessment proceeding. Thus, once the AO after verification has taken a view with regard to the said issue, the assessment order cannot be said to be erroneous in so far as prejudicial to the interest of Revenue.

6. The submissions so filed by the assessee were considered but found not acceptable to the Id. PCIT. As per the Id. PCIT, the assessee has submitted a working of the share premium as per the discounted cash flow method and has also furnished a certificate from a Chartered Accountant as provided in section 56(2) (viib) of the Act read with Rule 11UA(2)(b) and the AO has accepted the said certificate without making any further enquiries. Thereafter in para 5.1 of the

impugned order, the Id PCIT has stated that where the fair market value of the share of the assessee company as on 30.11.2012 (date of allotment) is calculated as per rule 11UA from the value of assets and liabilities as on 01.04.2012, the same works out to Rs 3.75 per share and thereafter, has held that there is a huge difference in the fair market value as per Rule 11UA and valuation adopted by the assessee using discounted cash flow method.

7. The Id PCIT has further held that from the material available on record, the assessee company is not going to derive any income other than annuity income and the present Earning per share comes to Rs (-) 7.68/- and with such a fixed fund flow, how will the assessee company is going to recoup the capital is uncertain from the financials of the company. It was held by the Id PCIT that unless and until the assessee company produces the evidences to substantiate the basis of projections in cash flow, it is not possible to determine the fair market value of the shares more so where the Chartered Accountant while issuing the valuation certificate has given a disclaimer that the financial projections along with other relevant information and data pertaining to the projects as submitted by the assessee have been solely relied upon while determining the value of the shares as the DCF method. It has been stated by the Id PCIT that the Chartered Accountant

has merely applied the formula to the data provided by the assessee company without any independent verification of the accuracy and completeness which gives rise to the suspicion that the valuation of shares is not realistic one keeping in view the growth and stature of the assessee company. It was accordingly held that the ld PCIT that unless and until the assessee provide the evidence as to how the projected cash flow, IRR, expected growth rate, etc have been arrived at, it would not be possible to consider the merits of the DCF method adopted by the assessee.

8. It was finally held by the ld PCIT that the share premium received by the assessee company was required to be further verified and excess found, if any should have been brought to tax in accordance with the provisions of section 56(2)(viib) of the Act and as the AO has not done the same, he is of the opinion that the assessment order passed by the AO is erroneous and the income has been under-assessed causing prejudice to the Revenue. Accordingly, the assessment order so passed by the AO under section 143(3) read with 153A was set aside for framing fresh assessment by conducting necessary enquiries. Against the said findings and the direction of the ld. PCIT, the assessee is in appeal before us.

9. During the course of hearing, the Id. AR submitted that the assessment in this case was originally completed u/s 143(3) dated 25.01.2016 and thereafter search was conducted on 26.07.2016 and therefore, the original assessment order passed u/s 143(3) was unabated and had become final and in absence of any incriminating material found during the course of search, the adjudication of issue of shares premium is beyond the scope of provisions of section 153A itself. Therefore, the invocation of the jurisdiction by the Id. PCIT u/s 263 for examining the same is bad in law. It was submitted that whether the addition on account of issue cannot be made under the provisions of section 153A, the action of invocation of provisions of section 263 is out of the four corners of law and in support, reliance was placed on the decisions of the Hon'ble Bombay High Court in the case of CIT, Central vs. Murli Agro Products Ltd. [2014] 49 taxmann.com 172 (Bom), Continental Warehousing Corporation (Nhava Sheva) Ltd [2015] 58 taxann.com 78 (Bom) and Coordinate Kolkata Benches decision in case of M/s Indian Roadways Corporation Ltd. vs. PCIT (*ITA No 787/Kol/2018 dated 12.09.2018*).

10. It was further submitted that the provisions of section 56(2)(viib) and Rule 11UA provide an option to the assessee to determine the FMV of the shares on

assets based method or DCF method. It was submitted that the option exercised by the assessee cannot be interfered with and the new method cannot be thrust upon the assessee. It was submitted that the valuation of shares by the assessee is supported by a certificate from a Chartered Accountant which is issued after taking into consideration the concession agreement entered into with MPRDC, the period of the project development and annuity receivable etc. It was submitted that the valuation on the basis of assets and liabilities as suggested by the Id. PCIT is inappropriate and the share premium is always determined on the basis of present business and its future cash flow/income which is a peculiar and scientific approach in infrastructure business. It was submitted that the projection of profitability is based on the major portion of income which is fixed annuity income that would be arising in all the future years until the expiry of period of 15 years from the appointed date in accordance with terms of the concession agreement entered into with MPRDC. It was submitted that the authenticity and certainty of future profits is undoubtful in view of the fact that the project is allotted by the Government Organisation.

11. It was further submitted that the assessment was made after due application of mind by the AO and the AO was satisfied with the details and justification with

regard to the valuation of shares. It was submitted that on the same set of documentary evidence, the revision proceedings cannot be initiated as it amounts to change of opinion. It was submitted that merely because the Id. PCIT did not agree with the opinion of the AO who has conducted sufficient enquiry, provision of section 263 cannot be invoked. In support, reliance was placed on the Coordinate Mumbai Benches decision in case of DCIT vs. Credtalpha Alternative Advisors P. Ltd. [2022] 134 taxmann.com 223 (Mumbai Trib).

12. Per contra, Id. CIT DR vehemently argued the matter and submitted that proceedings under section 263 are validly and legally initiated as the Id PCIT is well within his jurisdiction to revise the order passed under section 143(3) r/w 153A of the Act. It was further submitted that the valuation certificate so submitted by the Chartered Accountant is not in a prescribed format and even the figures so mention therein are not based on judgment or analysis independently undertaken by the Chartered Accountant and the same has only been provided by the assessee which has been taken into consideration while issuing the Valuation Certificate. It was accordingly submitted that in such circumstances, DCF method cannot be applied and the Id PCIT was right to stating that the fair market value of the shares have to be determined based on net assets method. Further our reference

was drawn to the finding of the Id. PCIT DR which are contained at para 5.2 to 5.5 of the impugned order which read as under:

*“5.2. From the above it can be seen that there is a huge difference in the fair market value as per rule 11UA and the valuation adopted by the assessee using Discounted Cash Flow method. Further, it is seen from material on record that the company is not going to derive any income other than the annuity income and the present Earning Per Share is negative(-7.68). With such a fixed fund flow, how will the assessee company recoup the capital advances is itself uncertain from the financials of the company. Unless and until the assessee produces the evidences to substantiate the basis of projections in cash flow, it is not possible to determine the fair market value of the share. This is more particularly in view of the disclaimer given by the CA along with the certificate wherein, it was categorically stated that the financial projection of cash flows along with other relevant information and data pertaining to the said projects .submitted by the assessee firm itself were solely relied upon by the CA while-fusing the DCF method for calculation and that the CA has not ventured into the analysis and feasibility .of the data provided in relation to the concerned project.*

*5.3 The CA while making valuation of the shares, solely relied upon information provided by the assessee firm, merely applying the formula to the data provided by the assessee without any independent verification of the accuracy and completeness of the information. This gives rise to the suspicion that the valuation of shares is not a realistic one keeping in view the growth and stature of the firm. As far as DCF*

*method is concerned it is always possible for the firm to decide the proposed value of the shares first and then travelling back to tailor the figures with the reverse engineering process, to suite their convenience. Therefore, unless and until the assessee provides the evidence justifying the facts and figures it would not be possible to consider the merits of the DCF method adopted by the assessee for correct determination of the share price.*

*5.4. The assessee's counsel has only argued that the AO cannot discard the DCF certificate even in the 263 proceedings without arguing on merits as to how the projected cash flow, IRR, expected growth rate, etc. have been arrived at.*

*5.5. Therefore, the share premium received by the assessee company was required to be further verified and excess found, if any, should have been brought to tax in accordance with the provisions of sec.56(2)(viib) of the IT Act by the Assessing Officer. As the Assessing Officer has not done the same, I am of the opinion that the order passed by the AO is erroneous and on account of that income has been under assessed causing prejudice to the Revenue.”*

13. We have heard the rival contentions and perused the material available on record. In this case, the assessee company had originally filed its return of income on 31.10.2013 declaring loss of Rs.11,51,097/- which was taken up for scrutiny and assessment order u/s 143(3) was passed on 25.01.2016 accepting the loss as declared in the return of income. Thereafter, search and seizure operations u/s 132

were conducted in case of DP Jain Group of cases on 26.07.2016 wherein case of the assessee was also covered and proceedings u/s 153A were initiated by issuance of notice on 20.05.2017. Therefore, as on the date of search, the original assessment proceedings stood finalized and were not pending and in terms of second proviso to section 153A, the assessment proceedings which stood already concluded and finalized shall not abate. In such a scenario, it is a settled legal proposition that such a concluded assessment can be reiterated and could not be disturbed in the fresh proceedings initiated by virtue of notice u/s 153A in absence of any incriminating material gathered or unearthed during the course of search. The Id AR has referred to the decision of the **Hon'ble Jurisdictional High Court** in case of **CIT(Central) vs Murli Agro Products Ltd** (*supra*) wherein the Hon'ble High Court has held as under:

*“9. What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in*

*which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A(2) provides that when the assessment made under Section 153(A)(1) is annulled, the assessment or reassessment that stood abated shall stand revived.*

*10. Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. By a circular No. 8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal, revision or rectification pending against finalised assessments/reassessments would not*

*abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A (1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).*

*11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalised on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalised on 29-12-2000.*

*12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act could not have disturbed the assessment/ reassessment order which has attained finality, unless the materials gathered in the course of the*

*proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.*

*13. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act.”*

14. In the instant case, the Id PCIT has challenged the action of the AO in accepting the fair market value of shares issued at the premium by the assessee company during the year under consideration and the sole basis of such challenge is that the assessee has adopted the DCF method of valuation which the Id PCIT has found not reliable and in such a scenario, as per the Id PCIT, the assessee should have adopted net asset method of valuation. The basis of arriving at such a finding by the Id PCIT is that the Chartered Accountant while issuing the valuation

certificate has merely applied the formula to the data provided by the assessee company without any independent verification of the accuracy and completeness which gives rise to the suspicion that the valuation of shares is not realistic one. It has been further held by the Id PCIT that the assessee company has failed to produce the evidence to substantiate the basis of projections of cash flows used while determining the valuation under the DCF method. We therefore find that the Id PCIT is questioning the DCF method on the basis of incomplete information furnished by the assessee and reliance thereof by the Chartered Accountant while determining and issuing the valuation certificate and acceptance of valuation so arrived at by the AO while framing the assessment. There is however nothing which has been stated by the Id PCIT either in the show-cause notice or in the whole body of the impugned order which in any way even remotely suggest that any material or information has been found/ unearthed during the course of search which shows that the data or information which has formed the basis of valuation, howsoever incomplete as so stated by the Id PCIT, which has been supplied by the assessee and is available on record, is not correct or is at variance with any data or information which has been unearthed during the course of search or even during the course of proceedings u/s 153A of the Act. Rather, we find that such a view has been formed by the Id PCIT on the basis of information already available in the

assessment records as is clear from para 5 of the impugned order where he says that:

*“on perusal of the assessment records and the financial statements of the assessee company, it is seen that the assessee company has raised funds through the issue of equity shares to the tune of Rs 24,77,41,990/- from M/s DP Jain & Co Infra Pvt Ltd during the financial year 2012-13. The assessee company was asked to explain the same and the assessee company has furnished the working of the premium as the discounted cash flow method and also furnished a certificate from the Chartered Accountant as provided in section 56(2)(viib) read with Rule 11UA(2)(b). The Assessing officer has accepted the certificate without making any further enquiries.”*

15. Further, even during the course of hearing before us, the Id CIT/DR has not brought to our notice any incriminating material found during the course of search as regards the valuation of shares and methodology so adopted by the assessee company which applying the DCF method of valuation. Therefore, in absence of any incriminating material found during the course of search which is at variance or contrary to the information already available on record and which establishes that the valuation so accepted under the concluded assessment proceedings was

erroneous, where the order has been passed by the AO u/s 143(3) r/w 153A accepting the NIL return so filed by the assessee, no fault can be found with the order so passed by the AO and consequently, the Id PCIT could not have invoked the provisions of section 263 of the Act as what cannot be done by the AO, the same cannot be done indirectly by the Id PCIT by invoking his jurisdiction u/s 263 of the Act. We therefore agree with the contention so advanced by the Id AR in this regard and on this ground itself, the order so passed by the Id PCIT u/s 263 deserve to be set-aside and the order of the AO is hereby sustained.

15. In view of the same, the other contentions raised by the Id AR have become academic in the nature and the same are left upon and have not been adjudicated upon.

16. In the result, the appeal of the assessee is allowed.

17. In ITA No. 35/NAG/2021 and ITA No. 36/NAG/2021, identical grounds of appeals have been raised by the assessee and it has been submitted by both the parties, the facts and circumstances of these two cases are exactly identical and similar contentions as raised in ITA No. 34/NAG/2021 may be considered.

18. In light of submissions made by both the parties where admittedly the facts and circumstances of the cases are identical and similar contentions have been advanced, our findings and directions contained in ITA No. 34/NAG/2021 shall apply *mutatis mutandis* to these two appeals and both the appeals are thus allowed in favour of the respective assesseees and against the Revenue.

19. In the result, all three appeals filed by the respective assesseees are allowed.

Order pronounced on 29/08/2022.

**Sd/-**

**(Yogesh Kumar U.S.)  
JUDICIAL MEMBER**

**Sd/-**

**(VIKRAM SINGH YADAV)  
ACCOUNTANT MEMBER**

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar