

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.99/SRT/2022

निर्धारण वर्ष/Assessment Year: (2017-18)

(Physical Court Hearing)

Komal Industries Pvt. Ltd., B-904, International Commerce Centre, Ring Road, Near Kadiwala School, Surat-395002.	<b>Vs.</b>	Principal Commissioner of Income Tax-1, Aaykar Bhawan, Nr. Majura Gate, Opp New Civil Hospital, Surat-395001
<b>स्थायी लेखासं./जीआइआरसं./PAN/GIR No.: AADCK6228Q</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

निर्धारिती की ओर से /Assessee by	None (Written Submissions)
राजस्व की ओर से /Respondent by	Shri Ashok B. Koli, CIT-DR
सुनवाई की तारीख/Date of Hearing	05/01/2023
उद्घोषणा की तारीख/Date of Pronouncement	23/01/2023

**आदेश / ORDER**

**PER DR. A. L. SAINI, AM:**

By way of this appeal, the assessee has challenged the correctness of the order passed by the Learned Principal Commissioner of Income Tax – 1, Surat [in short ‘the Ld. PCIT’], dated 28.02.2022, under section 263 of the Income Tax Act, 1961 [hereinafter referred to as ‘the Act’].

2. The grounds of appeal raised by the assessee are as follows:

*“1. On the facts and circumstances of the case, the order passed by the learned Principal Commissioner of Income Tax (Pr. CIT) under section 263 of the Act is bad, both in the eyes of law as well as facts of the case.*

*2. On the facts and circumstances of the case, learned Pr. CIT overlooked the fact that the order of the Assessing Officer was not erroneous nor was the order prejudicial to the interest of the revenue.”*

3. None appeared on behalf of the assessee, however the assessee has filed written submission before the Bench dated 20.12.2022 and stated that considering the written submissions, the appeal may be adjudicated.

4. Brief facts *qua* the issue are that assessee company, (M/s. Komal Industries Pvt. Ltd.) had filed its return of income for A.Y. 2017-18 on 14.10.2017 declaring total income at Rs. nil. Thereafter, the case was selected for complete scrutiny and scrutiny assessment under section 143(3) of the Act was finalized on 13.11.2019 accepting the return of income.

5. Later, the Ld. PCIT has exercised his jurisdiction under section 263 of the Act. On perusal of records, it was noticed by ld PCIT that company had issued 3,74,000 shares on 20.06.2016 to its directors and their relatives at a premium of Rs.40 and face value of Rs.10 per share aggregating to Rs.50 per share. By issuing shares at a premium rate, company received the share premium of Rs.1,49,60,000/- during the year under consideration. The company has adopted fair market value/book value of shares and premium on the basis the certificate issued under Rule 11UA of the IT. Rule dated 01.03.2016 by the Chartered Accountant Shri Chetan Joshi (M. No. 132207). It was further noticed that Shri Chetan Joshi is the same CA who was appointed by the company as an auditor under section 44AB of the Act, which is a violation of the sub-Rule (a)(i) of the Rule 11UA of the I.T. Rule. Thus, in absence of valid certificate under Rule 11U of the IT. Rule for the share premium of Rs.1,49,60,000/- received during the year was liable to be treated as income from the other sources under the provisions of section 56(2)(viib) of the Income Tax Act and tax was required to be levied accordingly. The Assessing Officer [herein after referred to '**the AO**'] has passed the order u/s 143(3) of the Act dated 13.11.2019 without making inquiries which should have been made and without application of mind. This makes the order erroneous in so far as it is prejudicial to the interest of the Revenue and requiring revision of the order u/s. 263 of the IT. Act, 1961 for A.Y. 2017-18. Accordingly, proceedings for revision of order u/s 263 of the Act were initiated by issuing show cause notice bearing DIN ITBA/REV/F/REV1/2020-21/1039321500(1) dated 02.02.2022. A complete detail of the facts on account of which the remedial action u/s. 263 of the Act proposed was discussed in the show-cause letter. The assessee was required to

furnish the reply through the e-filing portal on or before 15.02.2022. In response to above show-cause notice the company has not submitted any reply. Therefore, a hearing notice bearing letter/DIN No. ITBA/REV/F/REV1/2021-22/10393915215(1) dated 18.02.2022 has been issued to the assessee requiring to file submit its reply through e-proceeding on or 28.02.2022.

6. In response to the above notices, the assessee company submitted its reply electronically. The reply of the assessee company was considered; by Id PCIT and various contentions raised by the assessee were dealt by Id PCIT, as follows:

“(a) The assessee stated that in respect to issuance of share with premium, the assessee company had submitted the entire details of issuance of share along with various documents.

(b) The assessee company further stated that the assessee company had taken Certificate of valuation of shares from Statutory Auditor as well as other independent Chartered Accountant with regards to the valuation of shares and calculation of shares issued on premium to the directors. However, due-to oversight the valuation certificate of Independent Chartered Accountant other than the Auditor of the company was not submitted by the company staff. The company requested to consider the reply and accepted the mistake committed due to clerical lapse. The assessee submitted copy of Valuation certificate issued on 09.06.2016 by the Chartered Accountant, Shri Dali J. Shah, the CA other than its statutory auditor.

7. The Id PCIT, then rejected the contention of the assessee and held as follows:

*“ All the details in respect to issuance of shares with premium has submitted by the assessee company during the assessment proceedings. However, fair market value/book value of shares and premium was adopted on the basis of the Valuation Certificate issued by same CA who was appointed by the company as an auditor under section 44AB of the Act, which is a violation of the sub-Rule (a)(i) of the Rule 11UA of the IT. Rule: The relevant para of the Rule 11U of the Rule reproduced as under-  
“(a) "accountant" ,—*

(i) for the purposes of sub-rule (2) of rule 11UA, means a fellow of the Institute of Chartered Accountants of India within the meaning of the Chartered Accountants Act, 1949 (38 of 1949) who is not appointed by the company as an auditor under section 44AB of the Act or under section 224 of the Companies Act, 1956 (1 of 1956); and

(ii) in any other case, shall have the same meaning as assigned to it in the Explanation below sub-section (2) of section 288 of the Act,"

The assessee further stated that it had obtain valuation certificate from statutory auditor also for its internal purpose. If the assessee company had adopted FMV of the share premium on the basis of Certificate dated 09.06.2016 issued by Accountant other than its statutory auditor, then there was no need to obtain another valuation certificate on the same day for same valuation. Moreover, the assessee had not submitted the copy of the Valuation Certificate (furnished during the revision proceeding) issued by Shri Dali j. Shah, CA before the Assessing Officer, during the course of assessment proceedings. Therefore, genuineness of the Certificate issued by other CA was left to be verified by the AO. Therefore, contentions of the assessee company is not correct, hence rejected. The valuation of shares, as submitted by the assessee during the assessment proceedings is not valid as per the definition of Accountant provided in Income Tax Rules for the purpose of section 56(2)(viib) of the I.T. Act. The AO has accepted the same without due application of mind and without causing inquiry to determine the fair market value as required by law. In view of the above discussion, it is clear that the AO has not inquired into the issue of Valuation of the Shares in view of the provisions of Rule 11U and 11UA of the Income Tax Rules. Thus, the assessment order dated 13.11.2019 is found to be erroneous in so far as it is prejudicial to the interest of Revenue. Reliance is also placed on the decision of the Hon'ble High Court of Delhi in the case of CIT Vs. Nagesh Knitwears P. Ltd and others (2012) 345 ITR 135 (Del) wherein was held that "as far as Section 263 is concerned, we have examined the said Section in depth and detail in ITO Vs. D G Housing Projects Ltd. decided on 1st March, 2012, in ITA No. 179/2011 and observed as under:

Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression prejudicial to the interest of the Revenue is of wide import and is not confined to merely loss of tax. The term erroneous means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.

The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word erroneous includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits."

The Hon'ble Delhi High Court has also considered the ratio laid down in earlier decisions of the Hon'ble Supreme Court in Rampyari Devi Sarogiv. CIT (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal v. CIT (1973) 88 ITR 323 (SC), wherein it was held that "**where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue.**"

The Hon'ble Delhi High Court in case of Gee Vee Enterprises Vs. Additional Commission of Income-Tax, Delhi-I, (1975) 99 ITR 375, held that "the position and function of the Income-tax

Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct?

Further, the interpretation of expression "**erroneous in so far as it is prejudicial to the interest of revenue**" has been a contentious one. In order to provide clarity on the issue Explanation 2 to section 263(1) has been inserted vide Finance Act, 2015 w.e.f. 01.06.2015. With this insertion, it is now possible to revise the order passed u/s 144 of the Act. In this case, clause (a) of the Explanation 2 of Section 263 of the IT., Act 1961 is clearly applicable since the AO concerned has passed the assessment order without making enquires or verification which should have been made in respect of the issues depicted in the foregoing paragraphs and has allowed excess relief in respect of depreciation allowance during the course of assessment proceeding. For the sake of brevity, Explanation 2 to section 263 (1) has been reproduced here under:

**263. Revision of orders prejudicial to revenue.**

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—  
(a) the order is passed without making inquiries or verification which should have been made;  
In view of the facts and circumstances of the case and the discussions made in the foregoing paragraphs, the assessment order u/s 143(3) of the IT. Act passed by the Assessing Officer in the case of the assessee for the A.Y. 2017-18 on 13.11.2019 is held to be erroneous in so far as it is prejudicial to the interest of Revenue. Accordingly, the assessment order u/s.143(3) of the Income-tax Act, 1961 dated 13.11.2019 for A.Y. 2017-18 in the instant case is set aside with a direction to the Assessing Officer to pass fresh assessment order after taking into consideration the issues as may have been already considered together with the issue discussed herein above also. Needless to mention that while passing the fresh assessment order, consequent to this order under section 263 of the IT. Act, the Assessing Officer shall grant reasonable and sufficient opportunity of being heard to the assessee.”

8. Aggrieved by the order of Ld. PCIT, the assessee is in appeal before us.
9. The written submission is submitted by assessee before the Bench, which is reproduced below:

“The appellant is a private limited Company and is carrying on textile business since long. For Asstt. Year 2017-18, the case was selected for Limited Scrutiny (Computer Aided Scrutiny Selection), and issue identified for examination was Share Premium only [ Notice issued u/s. 143(2) of the Income tax Act, 1961 Dated 20/09/2018 - Page No. 08 to 11 ]. In response to the said notice issued from time to time, the appellant Company had furnished all relevant details of share issued and premium collected. - submission dated 21/05/2019 Page No. 19 to 22). The assessment was finalized u/s. 143(3) of the Income tax Act, 1961 on 13/11/2019 accepting returned income as assessed income. (Page No. 12 and 13). In the month of February 2022,

*proceedings u/s. 263 for the revision of order was initiated by the Hon'ble PCIT, Surat-1 for the shares issued at premium to existing shareholders on the basis of valuation made by the Chartered Accountant who was also a statutory auditor of the Company. (Notice dated 02/02/2022 - Page No. 14 to 16). On receipt of the said notice, the Appellant Company came to know that, at the time of assessment proceedings, by virtue of may be staff mistake / clerical lapse, the Company had furnished a valuation certificate of the Chartered Accountant, who also happened to be a Statutory Auditor of the Company. The appellant Company had submitted its response to the Hon'ble PCIT vide submission dated 24/02/2022 (Page No. 17 to 24), wherein the fact was well explained that the appellant had obtained two valuation certificates from CAs, one from Statutory auditor and the other from an independent CA. The appellant Company had also submitted a copy of board resolution passed on 28/06/2019 for issuance of shares with premium. It was also explained to the Hon'ble PCIT that by clerical mistake, the staff had submitted statutory auditor's certificate for the said valuation instead of the Certificate issued by CA Dali J Shah (Membership No.132203) dated 09.06.2016, an independent Chartered Accountant. The learned PCIT, considered the assessment order dated 13.11.2019 as erroneous as was prejudicial to the interest of the revenue with the remark that the certificate of CA Dali J Shah was not submitted during the course of assessment proceedings and therefore genuineness of the certificate needs to be verified....”*

10. We have heard the Ld. Departmental Representative (Ld. DR) for the Revenue and gone through the written submission filed by the assessee. We have also gone through the order passed by the Ld. PCIT and noted that no inquiry was made by the Assessing Officer. We have gone through the assessment order passed by the Assessing Officer u/s 143(3) dated 13.11.2019 and noted that assessing officer has not discussed the issue raised by ld PCIT. It is a case of no inquiry on the part of Assessing Officer, therefore Ld. PCIT has rightly exercised his jurisdiction under section 263 of the Act.

11. We note that company has adopted fair market value/book value of shares and premium on the basis the certificate issued under Rule 11UA of the I.T. Rule dated 01.03.2016 by the Chartered Accountant Shri Chetan Joshi (M. No. 132207). It was further noticed that Shri Chetan Joshi is the same CA who was appointed by the company as an auditor under section 44AB of the Act, which is a violation of the sub-Rule (a)(i) of the Rule 11UA of the I.T. Rules. Thus, in absence of valid certificate under Rule 11U of the I.T. Rules for the share premium of Rs.1,49,60,000/- received during the year should be liable to be treated as income from the other sources under the provisions of section 56(2)(viib) of the Income Tax Act. The Assessing Officer has not examined this issue. The expression prejudicial to the interest of the revenue is of wide import and is not confined to merely loss of tax. The term erroneous means a

wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law. Therefore, we hold that order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue, hence we confirm the findings of ld PCIT.

12. In the result, appeal filed by the assessee is dismissed.

Order is pronounced on 23/01/2023 by placing the result on the Notice Board.

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

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

सूरत /Surat

दिनांक/ Date: 23/01/2023

*SAMANTA /Dkp Out Sourcing Sr.P.S*

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

**// True Copy //**

By Order

Assistant Registrar/Sr. PS/PS  
ITAT, Surat