

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1180/Mum./2022
(Assessment Year : 2017-18)

BLA Power Pvt. Ltd.
84, Maker Chambers-III
Nariman Point, Mumbai 400 021
PAN – AACCB9792P

..... Appellant

v/s

Principal Commissioner
of Income Tax-3, Mumbai

.....Respondent

Assessee by : Shri Nitesh Joshi
Revenue by : Dr. Mahesh Akhade

Date of Hearing – 01/12/2022

Date of Order – 28/02/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 23/03/2022, passed under section 263 of the Income Tax Act, 1961 ("*the Act*") by the learned Principal Commissioner of Income Tax-3, Mumbai ("*learned PCIT*"), for the assessment year 2017-18.

2. In this appeal, the assessee has raised the following grounds: –

"1. On the facts and in the circumstances of the case and in law, the Learned Principal Commissioner of Income Tax [PCIT] has erred in making revision u/s 263 of the Act to set aside the assessment order dated 20.12.2019 passed u/s 143(3) of the Act on the ground that order is erroneous in so far as it is prejudicial to the interest of the revenue.

2. *On the facts and in circumstances of the case and in law, the Learned PCIT has erred in directing the Assessing Officer to pass a fresh assessment order after giving due opportunity to the assessee in respect to -*

- (a) disallow interest of Rs. 7,73,29,874/- u/s 36(1)(iii) of the Act,*
- (b) deny carry forward of losses pertaining to AY 2014-15 and 2016-17 amounting to Rs. 24,96,63,568/- u/s 79 of the Act,*
- (c) consider share premium of Rs. 3,50,00,000/- as income u/s 56(2)(viib) of the Act.*

3. *The appellant craves leave to add, alter, amend and/or rescind any grounds of appeal during the course of the hearing."*

3. The only grievance of the assessee is against the revision order passed by learned PCIT under section 263 of the Act.

4. The brief facts of the case as emanating from record are: The assessee is a company and is engaged in the business of power and energy. For the year under consideration, the assessee filed its return of income on 06/11/2017, declaring a total loss of Rs.50,37,76,622. Subsequently, the assessee filed a revised return of income on 31/10/2019, declaring a total loss of Rs.55,74,26,854. The assessee's case was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act were issued and duly served on the assessee. The Assessing Officer vide order dated 20/12/2019 passed under section 143(3) of the Act assessed the total income of the assessee at a loss of Rs.55,74,26,854.

5. Subsequently, vide notice dated 25/02/2022, issued under section 263 of the Act, revisionary proceedings were initiated in the case of the assessee on the basis that (i) the assessee has capitalised interest expenses of Rs.13,35,03,728, instead of Rs.21,08,33,602. Therefore the difference of Rs.7,73,29,874, is required to be added to the total income of the assessee;

(ii) as per section 79 of the Act, the assessee is not entitled to carry forward of earlier years brought forward losses, which was allowed by the Assessing Officer; and (iii) the premium received by the assessee on the issue of shares to M/s Prism Cement Ltd is in excess of the fair market value, which is taxable as per section 56(2)(vii)(b) of the Act. It was alleged that on all the above issues, the Assessing Officer failed to make necessary enquiries, and therefore the assessment order is erroneous insofar as it is prejudicial to the interest of Revenue.

6. In response to the aforesaid notice, neither the assessee nor any of its representatives made any submission. Therefore, the learned PCIT passed the impugned order on the basis of material available on record. Vide impugned order dated 23/03/2022, the learned PCIT held that the non-verification by the Assessing Officer on the issues highlighted in the show cause notice, which was required in the facts and circumstances of the case, and consequent loss of Revenue has rendered the assessment order to be erroneous insofar as it is prejudicial to the interest of the Revenue. The learned PCIT, vide impugned order, after referring to Explanation to section 263 of the Act set aside the assessment order and directed the Assessing Officer to pass a fresh assessment order on the aforesaid issues after giving due opportunity to the assessee. Being aggrieved, the assessee is in appeal before us.

7. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the assessee could not reply to the notice issued under section 263 of the Act as no notice was received by it. As regards the merits, the learned AR by referring to the various documents forming part of the paper

book submitted that the Assessing Officer, during the assessment proceedings, had examined all the aspects and after considering the submissions of the assessee passed the assessment order. The learned AR submitted that the mere absence of discussion in the assessment order will not render it to be erroneous insofar as it is prejudicial to the interest of Revenue.

8. On the contrary, the learned Departmental Representative ("*learned DR*") submitted that the queries raised by the Assessing Officer during the assessment proceedings were in respect of other issues, and the issues highlighted in the impugned order were not examined by the Assessing Officer. The learned DR further submitted that there is no discussion/analysis in the assessment order on the basis of which it can be held that the Assessing Officer after due application of mind accepted the plea of the assessee on the issues raised in the impugned order. The learned DR submitted that the Assessing Officer has not examined the applicability of various provisions of the Act and concluded the assessment at the returned loss. Thus, no enquiry was made by the Assessing Officer, and even if some enquiry was made, the same was not as per law and therefore, the same cannot be said to be a proper enquiry.

9. We have considered the rival submissions and perused the material available on record. The impugned revisionary proceedings under section 263 of the Act were initiated in respect of 3 issues. Vide impugned order, inter-alia, it was held that the assessee had capitalised interest expenses of Rs.13,35,03,728, only in relation to Unit-2 and added in the computation of income instead of interest expenses which works out to Rs.21,08,33,602, on

proportionate basis up to 13/03/2017. Thus, the difference amount i.e. Rs.7,73,29,874, was not added to the total income of the assessee, and no enquiry in this regard, which was warranted in the facts and circumstances of the case, was made by the Assessing Officer resulting in assessment order to be erroneous insofar as prejudicial to the interest of the Revenue. The relevant findings of the learned PCIT, vide impugned order, are as under:-

"5.1 In this case, the assessee has capitalized 2nd unit amounting to Rs.301,24,86,862/- in books of account in FY 2015-16 however, the same is actually capitalized but put to use on 13.03.2017 for claiming depreciation as per IT Act. Assessee has not furnished any commencement certificate of the Unit-2. It further P seems from financial statement for the year under consideration that the assessee has utilized entire interest bearing borrowed funds for purchasing the assets and incurred finance cost of Rs.44,89,91,398/- during AY 2017-18 and the same is debited in P&L A/c. However, the assessee has capitalized interest expenses of Rs.13,35,03,728/- only related to unit 2 and added in computation of income instead of interest expenses which works out to Rs.21,08,33,602/- on proportionate basis upto 13th March 2017. Thus the difference amount (Rs.21,08,33,602 - Rs. 13,35,03,728) i.e. Rs.7,73,29,874 was required to be added in total income. Failure to make necessary inquiries on this issue which were warranted in the facts and circumstances of the case and failure to apply mind by the Assessing Officer on facts before him on all perspective have rendered the assessment order erroneous in so far it is prejudicial to the interest of revenue."

10. During the hearing, learned AR by referring to the annual accounts on page 13 of the paper book submitted that during the year, the assessee debited finance cost of Rs.44,89,91,398 in its profit and loss account. The learned AR referred to the breakup of finance cost on page 50 of the paper book, which includes interest to bank, interest on debentures, interest to others and bank charges. Learned AR submitted that during the year the assessee capitalised expenditure of Rs.13,35,03,728, under section 36(1)(iii) of the Act, and disallowed the same while filing its return of income. By referring to the show cause notice dated 12/12/2019, on pages no.106-107 of

the paper book, learned AR submitted that a specific query was raised by the Assessing Officer regarding disallowance of interest expenses on debentures of Rs.83,32,313. In reply thereto, the assessee vide submission dated 20/12/2019, on pages no.108-110 of the paper book, submitted that the assessee company has already capitalised the interest cost till the date of put to use and accordingly disallowed Rs.13,25,03,730, under section 36(1)(iii) of the Act. The learned AR submitted that in this regard the assessee also filed the detailed working of the aforesaid disallowance under section 36(1)(iii) of the Act. On the contrary, the learned DR submitted that the only query raised by the Assessing Officer was pertaining to disallowance of debenture expenses and thus the issue under consideration and revisionary proceedings was not examined by the Assessing Officer.

11. As evident from the record, the assessee has capitalised Unit-2 expenses amounting to Rs.301,24,86,862, in the books of account in the financial year 2015-16 however, the same was actually put to use on 13/03/2017, for claiming depreciation as per the Act. As per the learned PCIT, the assessee utilised entire interest-bearing borrowings for the purchase of assets and incurred finance cost of Rs.44,89,91,398, during the year. However, the assessee has capitalised interest expenses of Rs.13,35,03,728, in relation to Unit-2 instead of interest expenses, which works out to Rs.21,08,23,602, on a proportionate basis up to 13/03/2017. Thus the difference amount of Rs.7,73,29,874, was not added to the total income of the assessee. We find that the finance cost of Rs.44,89,91,398, also includes interest on debentures of Rs.83,32,313. During the assessment proceedings, vide show cause notice

dated 12/12/2019, we find that the Assessing Officer only asked the assessee to show cause as to why the interest expense on debentures of Rs.83,32,313, should not be disallowed being capital in nature and be added back to the total income of the assessee. In its reply dated 20/12/2019, the assessee submitted that the amount capitalised of Rs.13,35,03,730 (i.e. from 01/04/2016 to 13/03/2017) under section 36(1)(iii) of the Act includes proportionate interest on debentures of Rs.78,98,576, and the remaining amount of Rs.4,33,733, was claimed as revenue expenses by the assessee. Thus, it was submitted by the assessee that it has already capitalised the interest cost on debentures till the Unit-2 was put to use. We are of the considered view that though the assessee has provided detailed working of computation of disallowance under section 36(1)(iii) of the Act, however, it is not evident from the record that any specific enquiry/investigation/examination of such details was ever conducted by the Assessing Officer or any show cause notice was issued by the Assessing Officer to examine the other components of expenditure during the assessment proceedings. The assessee has also not brought on record any show cause notice issued by the Assessing Officer on this issue. Since the issue under consideration during the assessment proceedings was only confined to the disallowance of interest expenses on debentures, therefore, we are of the considered view that revision proceedings under section 263 of the Act have correctly been initiated in respect of this issue. Accordingly, to this extent, the impugned order passed under section 263 of the Act is upheld.

12. The 2nd issue raised in the impugned order is pertaining to the applicability of section 79 of the Act. Vide impugned order, inter-alia, it was

held that the assessee has diluted shareholding in respect of major shareholder vis-à-vis the preceding years in which loss was incurred, and thus as per section 79 of the Act the assessee is not entitled to carry forward earlier years brought forward losses, which was allowed by the Assessing Officer. Since no enquiry in this regard, which was warranted in the facts and circumstances of the case, was made by the Assessing Officer resulting in the assessment order to be erroneous insofar as prejudicial to the interest of the Revenue. The relevant findings of the learned PCIT, vide impugned order, are as under:-

"5.2 The assessee has claimed brought forward losses of Rs.6,05,78,105/- pertaining to AY 2014-15 and Rs. 18,90,85,463/- for AY 2016-17 to be carried forward to subsequent year in its return of income. The share holding pattern of the assessee company has been changed in AY 2017-18. In A.Y. 2016-17, M/s BLA Power Holding Pvt Ltd. was major stake holder with 99.99% of equity shares. During AY 2017-18. M/s BLA Power Holding Pvt. Ltd. has diluted its share-holding to 44.07% by transferring 46746430 shares to Bank in pursuant to Sustainable Structuring of Stressed Assets (S4A) agreement executed on 21.02.2017. The AO had also given the assessee vide notice dated 09.12.2019 an opportunity to explain why the carry forward of brought losses should not be disallowed in pursuant to change in share holding pattern by 51% or more. In this regard, it is noticed that the assessee has not filed any reply and AO is silent on this issue in assessment order. As per provision of section 79 in case of company, not being a company in which the public are substantially interested, shall not be allowed to carry forward and set-off the losses against the income of previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one percent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less that fifty-one percent of the voting power on the last day of the year or years in which the loss was incurred. Prima facie, the assessee is not entitled to carry forward of earlier years brought forward losses mentioned above pertaining to AY 2014-15 & 2016-17, which was allowed by the Assessing Officer. Failure to make necessary inquiries on this issue which were warranted in the facts and circumstances of the case and failure to apply mind by the Assessing Officer on facts before him on all perspective have rendered the assessment order erroneous in so far it is prejudicial to the interest of revenue."

13. We find that the Assessing Officer vide notice dated 22/08/2019, forming part of the paper book from pages no.221-226, asked the assessee to provide

the complete details of brought forward losses and unabsorbed depreciation of the earlier years. Vide another notice dated 09/12/2019 issued under section 142(1) of the Act, forming part of the paper book from pages no.115-116, the Assessing Officer, during the assessment proceedings, raised a specific query regarding the change in shareholding pattern by 51% or more and accordingly, asked the assessee to show cause as to why the carry forward of brought forward losses by the assessee be not disallowed. We find that vide its submission dated 17/12/2019, forming part of the paper book from pages no.117-119, the assessee submitted the reasons for the change in shareholding pattern during the year and also made submissions regarding non-applicability of section 79 to the facts of the present case. From the perusal of the notices issued by the Assessing Officer and the reply filed by the assessee, we find that this issue was specifically raised during the scrutiny assessment proceedings and the same was duly replied to by the assessee. Therefore, it cannot be concluded that this aspect was not examined by the Assessing Officer. We find that the Hon'ble jurisdictional High Court in CIT vs Reliance Communication Ltd, [2016] 69 taxmann.com 103 (Bombay) held that the fact that the Assessing Officer did not make any reference in the assessment order cannot make the order erroneous when the issues were indeed looked into.

14. During the hearing, the learned DR placed reliance upon the decisions of Hon'ble jurisdictional High Court in CIT vs Ballarpur industries Ltd., [2017] 85 Taxmann.com 10 (Bom.) and Jeevan Investment and Finance Pvt. Ltd vs CIT, [2017] 291 CTR 241(Bom.) The learned DR also placed reliance upon the

decision of coordinate bench of the Tribunal in Sify Software Ltd. Vs ACIT, [2017] 80 Taxmann.com 273 (Chennai-Trib.). From the perusal of the decisions, we find that in the facts before the Hon'ble Courts either the question raised was not responded to by some explanation or no query was raised during the assessment proceedings. However, such is not the facts of the present case as is evident from the notices issued by the Assessing Officer and the reply filed by the assessee. Therefore, the decisions relied upon by the learned DR are factually distinguishable. During the hearing, the learned AR placed reliance upon the decisions of the coordinate bench of the Tribunal in Khajrana Ganesh Properties Pvt Ltd. vs DCIT, in ITA No. 2629/Mum/2014, order dated 07/09/2017 and DCIT vs Instant Traders Private Limited, [2018] 96 Taxmann.com 378 (Mum-Trib.), wherein it has been held that the issue whether the loss in the year may be carried forward to following year and set off against the income of subsequent year is liable to be determined by the Assessing Officer who deals with the assessment of such a subsequent year. Thus, in view of the facts and circumstances of the present case, we are of the considered opinion that this issue was duly examined by the Assessing Officer during the scrutiny assessment proceedings. Therefore, the impugned revision order passed under section 263 of the Act is set aside to this extent.

15. The 3rd issue raised in the impugned order is pertaining to the taxability of the share premium received by the assessee under section 56(2)(vii)(b) of the Act. Vide impugned order, inter-alia, it was held that during the year the assessee has transferred 46746430 equity shares to banks as loan repayment by valuing the same at Rs.5.37 per share, therefore same is to be accepted as

fair market value and the premium of Rs.3.5 crores received by the assessee from M/s Prism Cement Ltd is to be considered in excess of the fair market value of the share as per the provisions of section 56(2)(vii)(b) of the Act. Since no enquiry in this regard, which was warranted in the facts and circumstances of the case, was made by the Assessing Officer resulting in the assessment order to be erroneous insofar as prejudicial to the interest of the Revenue. The relevant findings of the learned PCIT, vide impugned order, are as under:-

"5.3. It is seen from the record, the assessee has issued 17500000 equity shares, each having value of Rs.12 with FV of Rs. 10/share to M/s. Prism Cement Ltd. and received share premium of Rs.35000000/-. During the year, the assessee has transferred 46746430 equity shares to banks as loan repayment by valuing Rs.5.37/share. The details transactions are mentioned below:

Sr. No.	Name of Bank	Equity Share Issued	No. Of Shares	Rate (Rs./Share)
1.	Allahabad Bank	70890400	13201192	5.3699
2.	United Bank of India	44858760	8353587	5.3699
3.	Andhra Bank	17571980	3272250	5.3699
4.	Corporation Bank	58765730	10943339	5.3699
5.	Bank of India	58941450	10976062	53699
TOTAL:-		251028320	46746430	

Since the assessee has accepted the price of Rs.5.37share, this price can be considered as fair market value of the share and thus premium of Rs.3,50,00,000/- received by the assessee from Prism Cement Ltd. is to be considered in excess of fair market value of the share as per provision of the section 56(2)(vii)(b) of the Act. Failure to make necessary inquiries on this issue which were warranted in the facts and circumstances of the case and failure to apply mind by the Assessing Officer on facts before him on all perspective have rendered the assessment order erroneous in so far it is prejudicial to the interest of revenue."

16. We find that the Assessing Officer vide notice dated 22/08/2019 issued under section 142(1) of the Act, forming part of the paper book from pages no.221-226, sought, inter-alia, party-wise details of share capital raised and

share application money received by the assessee. Vide another notice dated 25/10/2019 issued under section 142(1) of the Act, forming part of the paper book from pages no.227-231, the Assessing Officer sought the details in respect of shares issued during the year, inter-alia, along with a copy of valuation report used to determine the value of shares. We find that the assessee in its reply to the aforesaid notice, vide submission dated 08/11/2019, forming part of the paper book from pages no.232-251, provided the copy of board resolutions authorising issue of shares, valuation certificate for issuing shares to M/s Prism Cement Ltd and share certificates issued to shareholders (viz. M/s Prism Cement Ltd, Allahabad Bank, Bank of India, Corporation Bank, Union Bank of India, and Andhra Bank). We find that vide aforesaid submission the assessee also provided the details in the format required by the Assessing Officer, as is evident from page No. 236 of the paper book. From the perusal of the valuation report, on page 243-244 of the paper book, we find that the auditor determined the net asset value per share of the assessee at Rs.13.24. During the hearing, the learned AR submitted that the aforesaid valuation was as per the provisional financial statement, and even as per the final financial statement, the net asset value per share of the assessee is Rs.11.92 per share, which were issued to M/s Prism Cement Ltd at a premium of Rs.2 per share with the face value of Rs.10 per share. However, we find that it is not the claim of the learned PCIT that the shares were issued at price higher than the valuation as per the final financial statement, and rather the price at which shares were issued to the banks was taken as the fair market value by the learned PCIT.

17. As noted elsewhere, the assessee vide its submission dated 17/12/2019 filed before the Assessing Officer explained the change in shareholding pattern during the year by 51% or more. We find that in the said submission the assessee submitted that as it was facing severe difficulties in repayment of existing loans due to the reasons, like (a) lower sales realisation due to reduced power sale traffic, (b) higher fuel cost due to take over of coal mine, (c) lack of adequate working capital, the lender banks as per the guidelines issued by RBI agreed to structure the existing loan under the Scheme of Sustainable Structuring of Stressed Assets, whereby the promoter shareholding was diluted by issuing shares to the banks. Under the aforesaid scheme, one of the requirements was that the loan given by the lender banks are to be converted into equity shares/preference shares and part of promoter shares were also to be transferred to the lender bank. In pursuance of the above scheme, the assessee company, during the year, converted the existing loan given by the banks into equity shares. Accordingly, the shares were issued to banks, namely, Allahabad Bank, Bank of India, Corporation Bank, Union Bank of India and Andhra Bank. We find that the disclosure regarding the issuance of shares to the aforesaid bank was also made by the assessee in its audited financials on page 36 of the paper book. Thus, it is evident that the circumstances under which shares were issued to the banks were completely different than the shares issued to M/s Prism Cement Ltd., as the earlier was under the Scheme/Guidelines issued by RBI. Thus, in view of the facts and circumstances of the present case, we are of the considered opinion that this issue was duly examined by the Assessing Officer during the scrutiny

assessment proceedings. Therefore, the impugned revision order passed under section 263 of the Act is set aside to this extent.

18. In view of the aforesaid findings, the impugned order passed by the learned PCIT under section 263 of the Act is sustained partially. As a result, grounds raised by the assessee are partly allowed.

19. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open Court on 28/02/2023

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 28/02/2023

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai