

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI**

Before Sh. C. M. Garg, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 4944 /Del/2019 : Asstt. Year : 2014-15

Adit Infrapower & Multitrading Pvt. Ltd., DA-08, 2 nd Floor, Vikas Marg, Shakarpur, New Delhi-110092	Vs	PCIT, Gurgaon
(APPELLANT)		(RESPONDENT)
PAN No. AAHCA5582H		

Assessee by : None

Revenue by : Sh. P. Praveen Sidharth, CIT DR

Date of Hearing: 10.08.2023

Date of Pronouncement: 05.09.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of Id. PCIT, Gurgaon dated 30.03.2019.

2. Following grounds have been raised by the assessee:

"1. The Ld. PCIT has wrongly mentioned in the order that the appellant has issued total 10,00,000 shares/Compulsory Convertible Debenture @ Rs. 249/- per share to various parties against the face value of Rs. 10/- each and received share premium to the tune of Rs. 24,90,00,000/- whereas the appellant has issued 10,00,000 Compulsorily Convertible Debentures of Re.10/- each on premium of Rs. 10/- each aggregating to Rs. 1,00,00,000/- on 31st March 2014 made under the authority of the Memorandum and Articles of Association of the company and Resolution passed by the Board of Directors.

2. The Ld. PCIT has erred in issuing the order u/s 263 of the Income Tax Act, 1961 on the ground that the assessment order passed by the Assessing Officer is

erroneous and prejudicial to the interest of the revenue.

3. The Ld. PCIT has erred in invoking section 263 of Income Tax Act 1961 by stating that Assessing Officer has not conducted proper enquiry with regard to FMV of share premium whereas the appellant vide its submission dated 2nd December 2016 has submitted the copy of Fair valuation certificate pursuant to Discounted Free Cash Flow Method (DCF Method).

4. The Ld. PCIT has further stated in its order that Assessing Officer was required to examine and verify the credit worthiness of the subscriber whereas the appellant vide its submission dated 26th August 2016 has filed the copy of audited accounts for the year ending 31 March 2014 along with the Income tax acknowledgement for the assessment year 2014-15 to prove the credit worthiness of the debenture holder.

5. That the Ld. PCIT has not considered that inadequate inquiry does not amount to lack of inquiry so as to attract the provisions of section 263 of the Income Tax Act in view of even newly inserted provisions of Explanation 2 to section 263 of the Act

6. For that in the facts and circumstances of the case, the order u/s 263 is merely change of opinion. The order u/s 143(3) passed by the Ld. Assessing Officer does not in any way represent erroneous order. The action of the Ld. PCIT was wholly unreasonable, uncalled for and bad in law."

3. For the sake of ready reference, the entire order of the Assessing Officer is reproduced below:

"ORDER U/S 143(3) OF THE INCOME TAX ACT, 1961

Return declaring an income at Rs. 1,49,470/- was E-filed by the assessee on income-tax Network vide acknowledgement No. 37026261270914 on 27.09.2014. The case was processed u/s 143(1) of the Income Tax Act, 1961, accepting the returned income as such. The case was selected under Limited Scrutiny under CASS. Accordingly, statutory notice u/s 143(2) was issued on 18.09.2015. Limited questionnaire alongwith notice u/s 142(1) was issued to the assessee on 25.01.2016.

2. In response thereto, Sh. Naresh Dondiyal, Authorized signatory & Sh. Shanti Narayan & Sh. Parmod Arya CA attended the assessment proceedings from time to time as per records. Requisite information, documents and replies have been furnished, which were placed on record. Books of accounts have been produced and test checked. After discussion returned income of the assessee got accepted."

*Sd/-
(Mohinder Arora)
Income Tax Officer,
Ward-1(1), Gurgaon*

4. The Id. PCIT set aside the order of the Assessing Officer u/s 263 of the Income Tax Act, 1961.

5. Aggrieved, the assessee filed appeal before us.

6. Brief facts of the case are that the assessee furnished its return for the A.Y. 2014-15, declaring income of Rs. 1,49,470/-. The case was selected for scrutiny through CASS. Assessment in this case was completed under section 143(3) of the I.T. Act, 1961 vide order dated 08.12.2016. During the year under consideration, the assessee company has issued total 1000000 shares/Compulsory Convertible Debenture @ Rs.249/- per share to various parties against the face value of Rs. 10/- each and received share premium to the tune of Rs.24,90,00,000/-. During the course of assessment proceedings, the AO has not examined nor enquired the justification of share premium with regard to the FMV and the creditworthiness of the subscriber to whom the said shares/Compulsory Convertible Debentures have been allotted at a huge premium. The A.O. did not apply his mind to verify basic reason of selection of scrutiny case in CASS. The assessee was issued a notice u/s 263 of the I.T. Act, 1961 dated 29.11.2018 by the Id. PCIT as to why the assessment order of the assessing officer should not be set

aside due to its being erroneous and pre-judicial to revenue. No one attended the proceedings or submitted any reply to the show cause notice.

7. On 18.02.2019, the Id. AR, appeared and request for adjournment. The Id. PCIT adjourned the hearing to 22.02.2019. On the said date no one appeared or submitted any reply. On 26.02.2019, the Id. AR appeared and submitted the reply. It was submitted that the AO has assessed the transactions and during assessment proceedings. All the transactions were routed through banking channel. The Id. PCIT has held that convertible debentures are to be necessarily converted into share after a certain period as mentioned in the issuance paper of such debenture. So, for all practical purpose, there is not much difference in facts if premium is charged on shares or convertible debenture. The Id. PCIT has held that the A.O. by not pursued the inquiries to their logical end has made the order erroneous and prejudicial to the interest of revenue.

8. The observation of the Id. PCIT is as under:

"On going through the provisions of section 263(1) of the Income Tax Act, 1961, it is clear that "any order" passed by the Assessing Officer can be revised if it is found to be erroneous in so far as it is prejudicial to the interest of revenue. It is, therefore, clear that the provisions of the Income Tax Act, 1961 gives authority u/s 263 of the Income Tax Act, 1961 to revise any order passed by the Assessing Officer.

With regard to the issue of examining of records, on the basis of which the revision can be undertaken by u/s 263 of the Income Tax Act, 1961, as Para explanation-1(b), the following provisions have been made:

"record [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner". It is, therefore, clear that the revision can take place on the basis of all records

available at the time of examination by the Pr. Commissioner or Commissioner.

In the present case, the counsel/Authorized representative filed the reply wherein the AR submitted that the shares/Compulsory Convertible Debentures were issued and received the share premium as discussed above it is also submitted that the assessee company had furnished all necessary details & documents in respect of the share capital raised by it such as name, address, PAN of the shares/Compulsory Convertible Debenture applicants etc., there was no need of further enquiry. The AO has made inquiries and accepted the same. The Ld. AR submitted that in the light of his discussion, the provisions of section 263 should not be invoked, as it was accepted by AO after verifying necessary documents.

I have considered the reply and the case law submitted by the Ld. AR. it is found that the facts in the case law are not exactly related to the instant case. Assessment records show that the A.O. has not made any independent inquiries regarding the confirmations. No notices u/s 133(6) were sent to the shareholders. On perusal of records, it is found that the AO has not verified any of the returns of the subscribers from the concerned assessing officer of the person to whom shares Compulsory Convertible Debentures have been assessed. Analysis of this statement does not through any light whatsoever on the source of the funds of the subscriber companies. The A.O. should have called for the bank statement duly signed by concerned authority for proper analysis & verification. Further, the replies were just placed on record and no independent inquiries were carried out regarding the fact whether the subscribing companies/individuals were available at the given address, whether they had the financial capability to invest such substantial amounts and whether they were genuine corporate entities.

The A.O. failed to examine a single Director of the assessee company or of the subscribing companies, further, the A.O. also failed to cross verify the Income Tax acknowledgement, balance sheet etc, from the A.Os. of the subscribing companies/individuals.

The AO is required to verify the genuineness of the transactions and whether the assessee has tried to give colour to his income. The Apex Court in the case of Sumati Dayal vs. CIT [214 ITR 801] held that the true

nature of a transaction has to be ascertained in the light of surrounding circumstances. Thus, it is now well settled that tax authorities are entitled to look into surrounding circumstances to find out the reality of a transaction by applying the test of human probability. Reliance is also placed on the Hon'ble Punjab & Haryana High Court in the case of Sh. Harjit Kaur vs. ACIT in ITA 280 of 2013. Relying upon the case of M/s Chandigarh Theatres Pvt. Ltd. in ITA No. 715/Chandi/2007 and CIT Vs. Nova Promoters & Finlease (P.) Ltd., the A.O. is to check whether the transaction is merely accommodation entries and whether it is non-genuine."

9. We have gone through the jurisprudence on this issue relied upon by the Id. PCIT while setting aside the order of the Assessing Officer.

10. The Hon'ble Delhi High Court in Gee Vee Enterprises vs. Addl. CIT [1975] 99 ITR 375 (Delhi) has observed as under:

"The reason is obvious. The position and junction 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."

11. The Hon'ble Delhi High Court had referred to the decision of the Hon'ble Supreme Court in Rampyari Devi Saraogi Vs. CIT [1968] 67 ITR 84 (SC) and Smt. Tara Devi Aggarwal vs. CIT [1973] 88 11 R 323 (SC), wherein it has been 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.

12. The Hon'ble High Court further observed:

"These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return."

13. In view of the above facts of the case and the legal proposition, we hereby affirm the order of the Id. PCIT passed u/s 263 of the Income Tax Act, 1961 setting aside the order of the Assessing Officer.

14. In the result, the appeal of the assessee is dismissed.
Order Pronounced in the Open Court on 05/09/2023.

Sd/-

(C. M. Garg)
Judicial Member

Dated: 05/09/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR