

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER

&

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 2216/MUM/2023 (A.Y. 2010-11)

Jayam Realty Management Pvt Ltd., Recondo Compound Inside Municipal Asphalt Compound S.K. Ahire Marg, Worli Mumbai - 400030 PAN: AACCCJ0004G	v.	Pr.CIT Room No. 330, 3 rd Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Vimal Punamiya & Shri Himanshu Gandhi
Department Represented by	:	Shri Ankush Kapoor
Date of Conclusion of Hearing	:	07.11.2023
Date of Pronouncement	:	13.12.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Principal Commissioner of Income Tax, Mumbai -1, [hereinafter in short "Ld. Pr.CIT"] dated 31.03.2021 for the A.Y.2010-11 passed under section 263 of Income-tax Act, 1961 (in short "Act").

2. Brief facts of the case are, assessment u/s. 143(3) r.w.s. 147 of the Act was completed on 22.12.2017 for A.Y.2010-11 assessing total income at ₹.NIL. While examining the records, Learned Principal Commissioner of Income-Tax, Mumbai-1 [hereinafter in short "Ld. Pr.CIT"] observed that, during the year under consideration the assessee had issued 8000 fully paid up equity shares of face value of ₹.10 at a premium of ₹.62,490/- to Jayem Real Estate Private Limited (in short "JREPL"). Further, he observed that, during the assessment proceedings, in support of the share premium so received from JREPL., the assessee had submitted a copy of audited Balance Sheet as on 31.03.2009 of JREPL and statement of bank account for the period 26.03.2009 to 20.07.2009 from Punjab National Bank and Bank Statement from 7th August, 2008 to 23rd April, 2010 from The Royal Bank of Scotland of JREPL. The assessee had also filed copy of return of Income of JREPL, for A.Y 2017-18. Assessee filed the copies of Balance Sheet, Bank Statement and return of income for A.Y. 2017-18 of Harmony Construction Pvt. Ltd. Further, assessee had also submitted copy of the valuation report wherein it is observed that the equity shares were valued following Future Discounted Cash Flow Method.

3. Ld. Pr.CIT observed that during the year under consideration, assessee had shown turnover of business of ₹.NIL. The total income for the year under consideration was also shown at NIL. The submission of the bank statement, return of income of the party for A.Y. 2010-11 during the assessment proceedings does not automatically prove the correctness and genuineness of the assessee's claim. In the instant case, he observed that the cash flow of the assessee is NIL. The prediction of sales and operating expenses has been done by the assessee without any rationale. DCF theory holds that the value of all cash flow generating assets from fixed-income to investments of an entire company - is the present value of the expected cash flow stream given some appropriate discount rate.

4. Ld. Pr.CIT also observed that the forecast of future revenues has been made by the management and the Valuer has not undertaken any independent inquiry. He observed that projections made by the assessee are nowhere near to the actual state of affairs. He observed certain discrepancies on the valuation report submitted by the assessee. Therefore, he came to the conclusion that the share premium remained unexplained and therefore, Assessing Officer should have invoked the provisions of section 68 of the Act in respect of the share premium so received and Ld. Pr.CIT observed that Assessing Officer has completed

the assessment without correct application of facts and without correct application of law which was required at the assessment stage. Accordingly, he held that assessment order passed under section 143 r.w.s. 147 of the Act on 11.12.2017 for the A.Y. 2010-11 is found not only erroneous but also "prejudicial to the interest of the revenue". Accordingly, he issued show cause notice under section 263 of the Act dated 08.03.2021 to the assessee. In response Ld.AR of the assessee submitted as under: - (As reproduced in 263 order)

".....

Your goodself vide PARA 8 & 9 of the notice dated 8.03.2021 of revision proceedings u/s 263 have alleged that Ld. AO failed to apply provision of section 68 on share premium. Therefore, the contention raised by your goodself that it is an "incorrect application of law, is factually incorrect. We have to state that Ld. AO had after applying the parameters of provision of section 68 on the transaction come to a conclusion that provision of section 68 cannot be applied in present situation due to following reasons:-

a) SECTION 68 NOT APPLICABLE IN AY 2010-11 AS THE AMOUNT WAS RECEIVED IN AY 2009-10:-

It is undisputed fact that share application money was received by the assessee before 31.03.2009 and thus the same is part of transaction in AY 2009-10 and not in AY 2010-11. This was evident from Bank Statement, Financials and Audit report which are part of Assessment Record and duly referred by your honour in money ENT notice u/s 263. The same are also enclosed in the paper book. Therefore, provision of section 68 cannot be applied in AY 2010-11, as the section applies in the year when amount gets credited.

The assessee further submits that;

....

To tax the share capital/ premium received by the closely held company was introduced from AY 2013-14 with prospective effect.

Hence, the alleged propose application of section 68 by your goodself in AY 2010-11 is not tenable in law, as section 68 doesn't have charging provision to tax share capital/ premium before AY 2013-14. Therefore, the Ld. AO rightly conclude that provision of section 68 cannot be applied in assessee's case."

The assessee further submits that

....

It is pertinent to note that the definition of income as provided under section 2(24)(xvi) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the assessee in the previous year relevant to the assessment year 2009-10. Thus, the Ld. AO rightly applied provision of Income Tax Act, 1961 and did not charge share premium as income.

The assessee further submits that

...

Thus, in assessee's case the assessee has proved during assessment proceedings the credit worthiness of Investor company as required under section 68 of the Income Tax Act, 1961 read with section 106 of the Evidence Act, 1872. In view of the said facts, the assessment order passed under section 143(3) rws 147 cannot be called erroneous and prejudicial to the interest of the Revenue within the meaning of section 263.

..."

In support of its contention, the assessee relied on certain judicial pronouncements including CIT vs. Usha Stud Agricultural Farms Ltd. (2009) 183 Taxman 277(Delhi), CIT vs. Parmeshwar Bohra, [(2008) 301 ITR 404 (Raj)], Orissa Corpn. (P) Ltd. 159 ITR 78(SC) DCIT v. Rohini Builders [2002] 256 ITR 360(Guj HC), CIT vs Gagandeep Infrastructure Ltd vs 394 ITR 680 (Bom), CIT vs. Apeak Infotech 88 Taxmann.com 695 (Bom HC), ITO VIS Arogya Bharti Health Park Pvt Ltd ITA No.2943/ Mum/2014. Etc.

5. After considering the submissions of the assessee, Ld. Pr.CIT

rejected the submissions of the assessee with the following reasons: -

"1. The assessee has argued that the provisions of section 68 were not in force during AY 2010-11, therefore proceedings under section 263 should be dropped. But the assessee has failed to understand that the primary contention of the current proceedings under section 263 is that the transaction under consideration was made without any underlying proof or any scientific rationale.

2. Also, the assessee has put forward the point that the credit worthiness of the investor had been proven during assessment proceedings. But the primary question being raised in these proceedings is regarding the genuineness of the transaction. A transaction between 2 parties, having no scientific underlying calculations is nothing but a sham transaction.

3. In addition to this, it is also pertinent to point out that the assessee's turnover and cash flow were Nil, which makes the transaction under discussion even more questionable

4. Further to this, the assessee did not provide any valuation report from an independent valuer, nor did the AO during the assessment proceedings call for it. The AO failed to apply his mind in the matter, leading to huge loss to the interest of revenue. The assessment proceedings under section 147 were Initiated to investigate this transaction, and the AO failed to verify it. This makes the assessment order erroneous as well as prejudicial to the interest of revenue

5. The assessee has given the reference of section 2(24)(xvi) and has argued that its applicability with respect to amount received for issue of shares in in excess of value is not valid for the AY under consideration. The contention of the assessee is not acceptable. Any transaction which is a sham transaction needs to be brought to tax as per the prevailing law and as per the provisions of the Income tax Act 1961 In this case, the verification and analysis of the records have been done very superficially by the AO, leading to the passing of the erroneous order under question.

6. With the above observations, Ld. Pr.CIT directed the Assessing Officer to redo the assessment denovo by invoking Explanation 2 to section 263 of the Act and directed the Assessing Officer to reframe the assessment afresh after giving opportunity to the assessee before passing his order.

7. Aggrieved with the above order, assessee is in appeal before us raising following grounds in its appeal: -

"1. On the facts and circumstances of the case and law, the Ld. PCIT erred in passing the order under section 263 of the IT Act, 1961 inspite of the fact that the assessment order was neither erroneous nor prejudicial to the interest of the revenue.

2. On the facts and circumstances of the case and law, the Ld. PCIT failed to considered that provision of section 68 is not applicable in present case money was received in AY 2009-10 instead of AY 2010-11. Thus, the Ld. AO has correctly applied the provision of Income Tax Act, 1961 and revision of such order is out of preview of provision of section 263 of Income Tax Act, 1961.

3. On the facts and circumstances of the case and law, the Ld. PCIT failed to considered that when two views are possible and Id. AO adopted one of possible view then the provision of section 263 is not applicable.

4. On the facts and circumstances of the case and law, the Ld. PCIT failed to considered that provision of Section 68 is applicable on share capital and share premium from AY 2013-14 whereas the year under consideration is AY 2010-11. Thus, the Ld. AO rightly applied the provision of law and not required revision under section 263 of Income Tax Act, 1961.

5. The appellant craves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing."

8. At the time of hearing, we observe that there is a delay of 473 days (after excluding the COVID-19 period) in filing the present appeal before us. In this regard assessee has filed the detailed affidavit before us requesting for condonation of delay, in the affidavit assessee has submitted as under: -

"1. I am a director of the Jayem Realty Management Private Limited (JRMPL or assessee) since 8th September 2017. The assessee is a company incorporated under the provisions of Companies Act, 1956 and engaged in the business of development of real estate projects in India.

2. Mr. Anuj Jain, is concerned person for looking after the accounts and Tax compliances of the Company.

3. A Revision order under section 263 of Income Tax Act, 1961 was passed for AY 2010-11 on 31.03.2021. However, that time COVID-19 Second Wave was going and he also left the job abruptly. He did not give proper handover and charge to anyone. So, we were not unaware about any such revision order being passed by the Ld. PCIT.

4. On 25.05.2023 when we been served with recovery notice dated 15.05.2023 physically we come to know about such order and we immediately initiated the process for filling the appeal.

5. Due to such unfortunate events, there has been a delay of 473 days in filing our Appeal (after excluding the period of Period till 28.02.2022 as per the decision of Hon'ble Supreme Court in Suo Motu Writ Petition (C) No.3/2020 (in Re: Cognizance For Extension of Limitation).

6. Under the aforesaid circumstances, the appellant submits that the delay in filling appeal was neither attributable to the appellant nor intentional nor warranted and if the delay is not condoned then appellant will suffer irreparable loss and injury. Therefore, the delay caused due to genuine and bona fide reasons, So We request your honour to kindly condone the delay in the interest of justice and equity.

7. In view of above and in the interest of justice, we request your honour to kindly condone the delay in filling appeal and decide the matter on merit. I shall remain grateful for this act of kindness.

Whatever stated hereinabove is true and correct to the best of my knowledge and belief.

9. The assessee also filled the affidavit of Mr. Anuj Jain, it is reproduced below: -

"I, Anuj Jain, aged 45 years, a Male Indian Inhabitant, residing at 1406, Gundecha Premier, Thakur Village, Kandivali East Mumbai 400101, do hereby state and declare on Solemn affirmation as under:

- 1. I was employed with Nitco Ltd. as a Senior General Manager-Taxation.*
- 2. M/s Jayem Realty Management Private Limited (JRMPL) is an associate group entity of Nitco Group.*
- 3. Mr. Vimal Punmiya was Authorized by the Nitco Group to represent the Income Tax matters before the Income Tax authorities.*
- 4. Representatives of Nitco Group assisted Mr. Vimal Punmiya during the course of hearing and representation. I have submitted information in relation to Jayem Realty Management Private Limited to Mr Vimal Punmiya to represent the matter during the pendency of the matter.*
- 5. I had tendered my resignation on 05.02.2021 from the NITCO Group which was accepted on 15.02.2021 with Last working day on 06.04.2021.*
- 6. The registered email Id of JRMPL on income tax portal was djjj503@yahoo.in. That email id was never accessed by me.*
- 7. A notice u/s 263 dated 08.03.2021 was received by the JRMPL on 18.03.2021 with the compliance date of 16.03.2021, As the notice was received after lapse of hearing date, an request for adjournment cum rescheduling of the matter was filed before the authorities on 18.03.2021.*
- 8. Reply in response to Notice u/s 263 was submitted on 24.03.2021.*
- 9. Till 06.04.2023 order passed u/s 263 in the case of JRMPL was not brought to my notice.*
- 10. Further during that period. Due to covid pandemic management couldn't appoint the new Taxation Manager till 06.04.2023. Hence, I have handed over all available documents under instruction of MR.Vivek Talwar, MD of Nitco Limited.*
- 11. I have been approached by the management on 01.11.2023, to narrate the facts of Revision Proceeding under section 263 of Income Tax Act, 1961.*

Whatever stated hereinabove is true and correct to the best of my knowledge and belief."

10. On the other hand, Ld. DR filed its written submissions objecting to the submissions of Ld. AR, for the sake of clarity it is reproduced below:-

*"Fact Sheet in case of Jayem Realty Management Pvt Ltd. (A.Y 2010-11)
in ITA No. 2216/M/2023 filed by CIT (DR), F Bench, ITAT Mumbai*

Date of passing original order u/s 143(3) r.w. 147	22.12.2017
Date of Order u/s 263	31.03.2021
Date of filing appeal against 263 order	15.06.2023
Delay in filing appeal against 263 order	2 yrs. 3 months (More than 800 days)
Delay, even if period excluded till 28.02.22 as per Hon'ble SC decision, as claimed by assessee	1 yr. 3 months (More than 473 days)
Date of passing order u/s 147 r.w.s 263	30.03.2022
Opportunity provided by AO on various dates in March 2022	No replies/response to AO

- *It may kindly be noted that Jayem Realty Management Pvt. Ltd. was represented by Mr Vimal Punmiya, Mr Anuj Jain and Mr Ankit Mamania, CA and authorised representative of assessee who attended from time to time during assessment;*
- *Assessee is a real estate developer who has the capacity to engage professional CA firm;*
- *The assessee is not ignorant of law, as it was well aware of the Income Tax proceedings and had hired professional Chartered Accountant, for representing their case and to guide them;*
- *Detailed replies were also filed by assessee during 263 proceedings;*
- *As claimed by assessee in his affidavit, only Mr Anuj Jain has left;*
- *If we see Form 36, the Authorized representative continues to be Mr Vimal Punmiya;*
- *In fact, Assessee has filed this appeal as an afterthought, only when it did not get a favourable order from the AO, consequent to the order passed by the PCIT u/s.263 of the Act.*
- *Thus, the reasons given for delay have no basis and as such assessee does not have any substantial reason for filing delayed appeal.*
- *Hence, Hon'ble bench is requested to reject the petition filed by the assessee for condonation of delay and dismiss the appeal filed by the assessee and uphold order of the PCIT u/s.263 of the IT Act, 1961."*

11. Further, Ld. DR submitted that the order was also forwarded to the assessee based on the e-mail ID filed by the assessee in the latest return of income. He objected to the condonation plea raised by the assessee and he submitted that the assessee has communicated only the above said e-mail ID through which the order was properly served on the assessee. The plea raised by the assessee cannot be accepted.

12. On the other hand, Ld. AR submitted that no doubt the assessee has filed the return of income through the above said e-mail ID, however, e-mail ID belongs to the persons who is looking after the accounts and tax compliances. Further, pointed out that the e-mail ID communication submitted by the Ld. DR clearly shows that e-mail ID was bounced back. Therefore, address was not proper. However, agreed that assessee has failed to update the communication address to the Assessing Officer.

13. Considered the submissions of both the parties and we observe that no doubt assessee has not given proper e-mail ID address to the jurisdictional Assessing Officer and apparently that e-mail ID available with the department is not correct and it is evident that the communication sent through this e-mail ID is bounced back. Therefore, it is clear that assessee is not aware of the above said order until recovery

notices were served on the assessee physically. We are inclined to condone the delay for the sake of overall justice. However, at the cost payable by the assessee, therefore, we impose cost of ₹.10,000/- (Rupees Ten Thousand Only) to be payable to the account of Prime Minister Relief Fund.

14. On the merits, Ld.AR of the assessee submitted that assessee has received application money in the A.Y. 2009-10 and the shares were allotted during the impugned assessment year i.e., A.Y. 2010-11. He submitted that originally 143(1) assessment was completed and based on the information received from office of Registrar of Companies, Mumbai through PCCIT – 1, Mumbai, intimating that assessee has issued 8000 equity shares at huge premium of ₹.62,490/-. Based on the above information the assessment was reopened under section 147 of the Act and in compliance of the above, the assessee has filed all the relevant information before Assessing Officer which is placed at Page No. 33 of the Paper Book. He also submitted that in the reassessment proceedings itself Assessing Officer has verified all the issues raised by the Ld. Pr.CIT in his order and fairly accepted the submissions of the assessee and he brought to our notice order passed under section 143 r.w.s. 147 of the Act which is placed in Page Nos. 91 to 93 of the Paper Book.

15. Ld.AR of the assessee submitted that section 68 of the Act is not applicable in the current assessment year since the assessee has received the funds in previous assessment i.e., A.Y. 2009-10 and credited the funds in share application money pending allotment. Further, he submitted that even section 56(2)(vii)(b) was not applicable considering the fact that it is applicable only from A.Y. 2013-14.

16. On the other hand, Ld. DR submitted that as per the ROC records assessee has actually allotted the shares only during the current assessment year, therefore, provisions of section 68 of the Act is applicable only from this assessment year. Further, he brought to our notice Balance Sheet of JREPL and he brought to our notice Page No. 56 of the Paper Book where they have declared the long term investments and also he brought to our notice that the above investments were made by JREPL by borrowing the funds from unsecured creditors of the same amount and he supported the findings of the Ld. Pr.CIT.

17. In the rejoinder, Ld.AR of the assessee submitted that even though 56(2)(vii)(b) is applicable from A.Y. 2013-14, however, the valuation method adopted by the assessee is the same as proposed by the I.T.Rules

in 11UA as per which one of the accepted method is DCF method is followed by the assessee.

18. Considered the rival submissions and material placed on record, we observe that it is fact on record that assessee has issued 10,000 shares in the previous assessment year at face value and subsequently assessee has issued 8000 equity shares at the face value of ₹.10/- with a premium of ₹.62,490/- to its own sister concern i.e., JREPL even though assessee has not commenced its business and declared NIL turnover and NIL income during the current assessment year. Assessee is in real-estate business and it had valued its shares adopting DCF Method which is one of the method Under Rule 11UA. Since assessee has issued shares with a huge premium, the case of the assessee was reopened under section 147 of the Act and the Assessing Officer has verified the details by directing the assessee to submit all the relevant information relating to these transactions which includes Balance Sheet, bank statements and return of income of the assessee as well as shareholder i.e., JREPL. Assessee has submitted all the relevant information before Assessing Officer and Assessing Officer has considered those details and taken one of the possible view and accepted the return of income filed by the

assessee, it is also fact on record that assessee has not commenced his business.

19. On the other hand, Ld. Pr.CIT upon verification of the assessment order felt that Assessing Officer has not applied his mind to verify the valuation adopted by the assessee and considering the fact that assessee has not commenced his business and how the assessee is able to value the shares at such huge premium. Ld. Pr.CIT is of the view that the valuation report and figures were submitted by the assessee and the same was accepted by the valuer without applying or undertaking independent enquiry. Therefore, he is of the opinion that the above assessment order is "erroneous" as well as "prejudicial to the interest of the revenue". Accordingly, he remanded the matter back to the file of the Assessing Officer to redo the assessment afresh.

20. On careful consideration of the above facts on record we observe that the issue was the same when the assessment was reopened and the Assessing Officer has verified the details submitted by the assessee before him and came to one of the possible view. Now the same issue was raised by the Ld. Pr.CIT under section 263 proceedings and again he has remitted the issue back to the file of the Assessing Officer to redo the assessment afresh. There are absolutely no fresh facts on record and he

makes another possible view on the same subject and facts on record. We observe that the shares were issued to its own sister concern and the premium was received from one of the group companies. The share premium was valued by the assessee adopting one of the approved method and same group company is willing to subscribe and accordingly paid the value of above shares of the assessee company. Further, the funds were received by the assessee during A.Y. 2009-10 and credited the same in Share Application Money. The same was explained before Assessing Officer, which was duly accepted by him. Now, Ld. CIT(A) is of the view that it should be analysed under section 68 of the Act, since the credit was made in the A.Y.2009-10, the provisions of section 68 of the Act cannot be invoked in A.Y. 2010-11 i.e., during impugned assessment year under consideration. Therefore, we are inclined to set-aside the 263 order passed by the Ld.Pr.CIT. Accordingly, appeal filed by the assessee is allowed.

21. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 13th December, 2023.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai / Dated 13.12.2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum