

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

**BEFORE JUSTICE (RETD.) C V BHADANG, PRESIDENT &
MS PADMAVATHY S, AM**

**I.T.A. No. 5616/Mum/2024
(Assessment Year: 2014-15)**

Dy.CIT, CC-4(1), Room No. 418, 4th Floor, Kautilya Bhawan, BKC, Mumbai-400051.	Vs.	Wheelabrator Alloy Casting Ltd. 4th Floor, Runwal and Omkar Esquare Eastern Express Highway, Opp Sion Chunabhatti Signal, Sion, Maharashtra-400022. PAN: AAACW0462F
Appellant)	:	Respondent)

Appellant /Assessee by : Ms. Vinita Shah, AR
Revenue / Respondent by : Shri Arun Kanti Datta, CIT-DR
Date of Hearing : 03.06.2025
Date of Pronouncement : 06.06.2025

ORDER

Per Padmavathy S, AM:

This appeal by the revenue is against the order of the Commissioner of Income Tax Appeals-52 Mumbai (in short "CIT (A)") dated 30.08.2024 for Assessment Year (AY) 2014-15. The revenue raised the following grounds:

"1. Whether on the facts and in the circumstances of the case, the Ld.CIT(A) is justified in deleting the addition of Rs. 6,20,00,000/- u/s. 56(2)(viib) of the Income Tax Act, 1961 on account of issue of share on premium."

2. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in allowing carry forward of the loss of Rs. 17,79,57,276/- without

considering the fact that it falls under ambit of section 79 of the Income Tax Act, 1961.”

2. The assessee is a domestic company engaged in the business of real estate development and manufacturing. The assessee filed the return of income for AY 2014-15 on 29.11.2014 declaring Nil income. The Assessing Officer (AO) completed the assessment under section 143(3) of the income tax act the act) on 29.12.2016 accepting the income returned by the assessee. Subsequently, the Principle Commissioner of Income Tax (Central) 2, Mumbai initiated proceedings u/s.263 of the Act and set aside the order passed under section 143(3) with a direction to make a fresh assessment. The AO subsequently passed the order under section 143(3) r.w.s. 263 of the Act wherein the income of the assessee is assessed at Rs.4,48,95,860/-.

3. Aggrieved the assessee filed an appeal before the CIT(A). Before the CIT(A), the assessee submitted that an appeal was preferred against the order under section 263 before the Tribunal and that the coordinate bench has held that the order under section 263 is bad in law. Accordingly the assessee submitted that the order under section 143(3) r.w.s.263 does not survive and liable to be quashed. The CIT(A) by placing reliance on the order of the Tribunal allowed the appeal in favour of the assessee. The relevant findings of the CIT(A) is extracted below –

“6. The present order of the AO has arisen as a consequence to the Section 263 order passed by the Pr.CIT. Against the Section 263 order, the appellant had preferred an appeal before the Hon'ble ITAT. The same came to decided vide ITA No 3410/Mum/2019 dt. 24.01.2022. In the said order, with regard to Ground No. 1 & 2, the Hon'ble ITAT, 'G' Bench Mumbai has held as under:-

"6.7. As stated above, the shares were allotted by the assessee company to M/s. Runwal Developers Pvt. Ltd., on 12/07/2013. The aforesaid definition of balance sheet talks about accounts getting audited by the statutory auditor u/s.224 of the Companies Act, 1956 on the balance sheet date which is 31st March. Admittedly,

the valuation date in the instant case for allotment of shares is 12/07/2013. Admittedly no audited accounts were available with the assessee company as on the valuation date i.e. 12/07/2013. Hence, as per the aforesaid definition of balance sheet given in Rule 11U(b) of the Rules, the assessee company had to refer to figures reflected in the audited balance sheet as on 31/03/2012 which has been duly done by the assessee in the instant case as is evident from page 120 of the paper book filed before us containing the workings for arriving at the fair market value for unquoted equity shares at Rs.407.64 per share. Accordingly, the assessee had allotted shares @Rs.410 per share which includes face value of Rs. 100 and premium of Rs.310/- per share. We find that the audited balance sheet as on 31/03/2013 of the assessee company was signed on 31/08/2013. Hence, as on the valuation date i.e. 12/07/2013, the assessee company had only audited balance sheet as on 31/03/2012 which was used by the assessee for determination of fair market value of shares. This is in accordance with Rule 11U(b) of the rules. Hence, the observation made by the Id. PCIT in para 6.3 of his order is not in accordance with law.

6.8. We find that the Id. DR vehemently relied on the observations made by the Id. PCIT in para 6.12 and 6.14 thereon to his order and argued that the fair market value of shares as on the valuation date as per 11UA of the Rules was Rs Nil and hence, the assessee has not justified the allotment of shares to its holding company at a premium of Rs.310/- per share. We find that the Id. PCIT in order to arrive at this conclusion had relied on the audited figures commencing from 31/03/2013 to 31/03/2016. We have already held in detail that since, as on the valuation date, the audited balance sheet was not available with the assessee, as per Rule 11U(b) of the Rules, the assessed is entitled to take the audited balance sheet figures as on 31/03/2012 and determine the fair market value. No error had been pointed out by the Id. PCIT in the said determination of fair market value of shares as on 31/03/2012 which was duly filed before him by the assessee. The law is very well settled that if the Id. AO had not made any enquiry and that the said detail had been duly furnished before the Id. PCIT by the assessee company during the course of revision proceedings u/s. 263 of the Act, the Id. PCIT is duty bound to make independent verification on his own before coming to the conclusion that the order of the Id. AO is erroneous and prejudicial to the interest of the Revenue. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Nirav Modi reported in 390 ITR 292 wherein the relevant operative portion is reproduced hereunder:-

"10. The Revenue placed reliance upon the decision of the Delhi High Court in DG Housing Projects Ltd., (supra) that as the Assessing Officer had not enquired into the source of the source of the gifts received by the Assessee, the Assessment

Order is erroneous. The aforesaid decision holds that the power of Revision under Section 263 of the Act would normally be exercised in case of no enquiry and not in cases of inadequate enquiry. However, even in case of inadequate enquiry by the Assessing Officer, the order of the Assessing Officer could be erroneous in two classes of situation. The first class would be where orders passed by the Assessing Officer are ex-facie erroneous i.e. a decision rendered ignoring a binding decision in favour of the Revenue or where enquiry is per-se mandated on the basis of the record available before the Assessing Officer and that is not done. In the second class of cases, where the order is not ex-facie erroneous, then the CIT must himself conduct an enquiry and determine it to be so. The Court held that it is not permissible to the CIT while exercising power under Section 263 of the Act to remit the issue to the Assessing Officer to re-examine the same and find out whether earlier order of Assessment is erroneous. It is the CIT who must hold that the order is erroneous, duly supported by reasons. In the present facts, the CIT in exercise of its powers under Section 263 of the Act has merely restored the Assessment to the Assessing Officer to decide whether the gifts were genuine and, if not, then the Assessment could be completed on application of Section 68 of the Act. In this case, the order passed by the Assessing Officer is not per-se erroneous and further the CIT has not given any reasons to conclude that the order is erroneous. In fact, he directs the Assessing Officer to find out whether the order is erroneous by making further enquiry. This the decision of the Delhi High Court in DG Housing Projects Ltd., (supra), clearly negates. In the above view, the decision of Delhi High Court in DG Housing Projects Ltd., (supra) would not assist the Revenue in the present facts."

*6.9. Hence, it could be safely concluded that in the valuation report submitted by the assessee before the Id. PCIT for justifying the allotment of shares at a premium, the Id. PCIT could not find any fault thereon. Hence, **there cannot be any error that could be attributed in the order of the Id. AO warranting revision u/s.263 of the Act by the Id. PCIT. Hence, the revision order passed u/s.263 of the Act on this aspect is hereby quashed.**"*

*7. In view of the above decision of Hon'ble ITAT, I am of the view that the addition made by the AO cannot be sustained. The same is deleted. Accordingly, **Ground No. 1 & 2 stand ALLOWED.**"*

4. We heard the parties and perused the material on record. From the perusal of the observations of the Tribunal relied by the CIT(A) as extracted above, we notice that the coordinate bench of the Tribunal has held that there is no error in the order

passed by the AO under section 143(3) of the Act and that the revision under section 263 is not warranted. We further notice that the coordinate bench while holding so has considered the impugned issue on merits. The AO has passed the order under section 143(3) r.w.s.263 on the basis of the order under section 263 setting aside the earlier order under section 143(3). Given that the order under section 263 quashed as per the decision of the coordinate bench the order under appeal before us does not have a leg to stand. The ld DR before us submitted that the revenue has preferred an appeal before the Hon'ble High Court against the decision of the Tribunal and hence the issue should be kept alive. However we are unable to agree with the said contention for the reason that at present, the order under section 263 is non-est and therefore the order under section 143(3) r.w.s.263 passed as a result of the said revision order cannot survive. In view of this discussion we see no reason to interfere with decision of the CIT(A) in deleting the additions made by the AO.

5. In result the appeal of the revenue is dismissed.

Order pronounced in the open court on 06-06-2025.

Sd/-
(JUSTICE (RETD.) C V BHADANG,)
President

**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

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

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai