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IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND
HON'BLE MANISH BORAD, ACCOUNTANT MEMBER

ITA No.176/Ind/2020
Assessment Year 2014-15

M/s. Ruchi J Oil Pvt. Ltd, C/o P.D. Nagar & Co, Chartered Accountants, 403, City Plaza, 564 M.G. Road, Indore	Vs.	PCIT, Ujjain
(Appellant)		(Revenue)
PAN:AAGCR4475D		

Appellant by	Shri P.D. Nagar, CA
Respondent by	Shri S.S. Mantri, CIT

Date of Hearing:	10.03.2021
Date of Pronouncement:	25.03.2021

ORDER

PER MANISH BORAD:

The above captioned appeal filed at the instance of the Official Liquidator of the assessee company pertaining to Assessment Year 2014-15 is directed against the orders of Ld. Principal Commissioner of Income Tax (in short 'Ld. PCIT], Ujjain dated 25.03.2020 framed u/s 263 of the Act.

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2. Assessee has raised following grounds of appeal:-

*1)*That the Ld. Pr. Comm. Of Income Tax erred in law in not appreciating the fact that issue of shares at a higher premium than the value determined as per Rule llUA(2)(b) of Income tax Rules to non-resident foreign companies was examined by the ACIT and after proper application of mind, he did not make any addition u/s 56(2)(viib) of the Act because the provision of section 56(2)(viib) are not applicable to non-resident. After proper enquiries, assessment order was passed U/S 143(3) of the Act, not only having detailed discussion regarding issue of share at a premium but also after refining the matter to TPO. Therefore, the order cannot be said to be erroneous and prejudicial to the interest of Revenue because the AO did not commit any error, whatsoever, by ignoring the provisions contained in Section 56(2)(viib) of the Act while completing the assessment, as alleged.

2.That the Ld. Pr. Comm. Of Income Tax erred in law in not considering, vital fact that the provisions of Section 56(2)(viib) of the Act are applicable only in case where consideration against issue of shares is received from any person being a resident as reproduced hereunder :-

"Where a company, not being a company in which tile public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, tile aggregate consideration received for such shares as exceeds tile fair market value of the shares".

Both the companies to whom equity shares were issued at a premium were non-resident companies as proved beyond doubt from remittances received from foreign companies through their banks duly intimated to RBI

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through HDFC Bank. Id. Pr. Comm. of Income Tax invoked the' provisions of Sec. 263 of the Act because there was no discussion regarding applicability of provisions of Section 56(2)(viib) of the Act in the assessment order. The assessment order was neither erroneous nor prejudicial to the interest of Revenue because provisions of Section 56(2)(viib) of the Act were not at all applicable in relation to shares issued to any non-resident at a premium by any company, hence order passed u/s. 263 of the Act, deserves to be quashed.

3. The appellant further craves leave to add, alter, and/or to amend the aforesaid grounds of appeal as and when necessary.

3. Brief facts of the case as culled out from the records are that the assessee is a Private Limited Company engaged in the business of manufacturing and processing of soya Oil. Loss of Rs. 4,14,66,430/- declared in the Income Tax Return e filed on 25.11.2014. Case selected for scrutiny under CASS followed by serving of notices u/s 143(2) and 143(1) of the Act. During the assessment proceedings various information were called by the Ld. A.O. The one which is relevant for the instant appeal is with regard to issuing equity shares to two Non Resident companies namely M/s Toyota Tsusho Corporation, Japan and M/s. J Oil Mills Inc,

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Japan. Both these companies made foreign direct investment for acquiring 92000 and 104000 equity shares respectively of face value of Rs.10/- per share and share premium per share of Rs.2830.68. Since in view of the Ld. A.O these transaction were international transaction he made a reference to the jurisdictional Transfer Pricing Officer (In short ' Ld.TPO") u/s 92CA(1) of the Act for the computation of arms length price. Ld. TPO called for the necessary information after issuing notice u/s 92CA(2) of the Act and was of the view that no adjustment is required to be made to the arms length price of the transaction. After receiving the order of Ld. TPO assessment u/s 143(3) r.w.s. 92CA(3) of the Act was completed by Ld. A.O on 27.12.2017 accepting the returned income of the assessee after thoroughly discussing all the issues including the instant issue of issue of share capital to two non resident companies (discussed in para 6 of the assessment order from page 7 to 12).

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4. Subsequently Ld. Pr. CIT invoking the power u/s 263 of the Act called for the assessment records and after going through the same issued following show cause notice dated 19.02.2020 to the assessee:-

> In this case, the assessee filed return of income for the AY 2014-15 on 25.11.2014 declaring total loss of Rs.4,14,66,430/-. The case was selected for scrutiny through CASS. The assessment was completed u/s 143(3)/92CA(3) 29.11.2017 by the AO (ACIT-2(1), Ujjain] at the total assessed loss and declared in the return of income, which is considered erroneous and prejudicial to the interest of revenue for the following reasons:-
>
> On perusal and examination of records, it is noticed that assessee company issued total number of shares 4,00,000 @10 per share face value and share premium received for Rs.95,27,75,180/- on 3,90,000 shares. Further it is noticed that the assessee company furnished the share valuation report of M/s SSPA & Co, CA for valuation of shares as on date of issue on Discounted Cash Flow (DCF) method and valued share at Rs.2061.35 per share. The assessee company received share premium for Rs.95,27,75,180/- on 3,90,000 shares against share premium valued on the basis of DCF method for Rs.80,39,26,500/- , resulting excess share premium received for Rs.14,88,48,680/- as detailed below:-

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Sl.No.	Name of share Holder	No. of total shares Received	Share premium per share	Total value of Premium per share	Share premium per share	Total share premium	Excess share premium received
1	Ruchi Soya Industries Ltd	204000	2051.35	367961900	2061.35	399901900	(-)1940000
2	J Oil Mills	104000	2830.68	294390720	2061.35	214380400	80010320
3	Toyota Tsusho	92000	2830.68	260422560	2061.35	189644200	70778360
Total		39000-0		952775180		803926500	148848680

Thus, the excess amount received on allotment of shares as share premium for RS.14,88,48,6801- (as tabulated above) should be treated as income of the assessee u/s 56(2)(viib) of the I. T. Act.

In the light of entire facts discussed above, I am of the considered view that the assessment order passed u/s 143(3)192CA(3) on 27.12.2017 for the A.Y. 2014-15 in your case is erroneous as well as prejudicial to the interest of revenue, which requires to be revised u/s 263. However, before I proceed to invoke the powers u/s 263 and pass an appropriate order, I deem it proper to give you an opportunity of being heard in the matter.

5. In compliance to the above notice detailed submissions were filed by the authorised representative of the assessee and after perusing the same Ld. PCIT set aside the assessment order u/s 143(3) r.w.s. 92CA(3) of the Act holding it to be erroneous and prejudicial to the interest of revenue summarily observing as follows:-

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3.1 The case records of the assessee were gone through and it was observed that the assessee claimed share premium at a very high rate in comparison to the rate valued by the firm of Chartered Accountants, in the case of J Oil Mills and Toyota Tsusho on the apparent ground that these were not residents of India. The facts of the case, performance of the business results of the assessee and its overall worth including track records of the Promoter Group i.e. Ruchi Soya, as may be observed from the balance sheet, did not justify in any manner, the rate of share premium charged by the assessee. During the course of assessment proceedings the AO did not examine this aspect of the case and completed the assessment proceedings. Thus, the action of the AO is erroneous and prejudicial to the interest of revenue.

4. In view of the given facts and circumstances, the assessment order of the AO is erroneous and prejudicial to the interest of revenue. The order of the AO is, therefore, set aside to the file of the AO with direction to examine the issue of share premium and pass fresh assessment order, after affording proper opportunity to the assessee. The order dated 29.11.2017 passed u/s 143(3)/92CA(3) is, accordingly, set aside.

6. Aggrieved assessee is now in appeal before the Tribunal.

7. Ld. Counsel for the assessee vehemently argued referring to the following written submissions including the judgments referred and relied therein:-

The company engaged in manufacturing and processing of soya oil had entered into a business agreement with M/s. Ruchi Soya Industries Ltd

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to acquire an undertaking located at Shujalpur on slump sale basis. A Joint Venture was formed with two non-resident companies who subscribed to share capital of the company at a premium. M/s. Ruchi Soya Industries Limited had subscribed 204000 shares @ 2051.35 per share based on share valuation report from M/s. SSPA & Co., Chartered Accountants by adopting Discounted Cash Flow (DCF) methods permitted by Rule 11UA(2)(b) of Income tax Rules, whereas two non-resident companies had subscribed the shares at a premium as under :-

Name of the Company	No of equity shares.	Premium per share
M/s. Toyota Tsusho Corp. Japan	92,000 shares	Rs.2830.68
M/s. J. Oil Mills Inc. Japan	1,04,000 shares	Rs.2830.68
TOTAL	1,96,000 shares	

Foreign Direct Investment (FDI) was made by aforesaid two foreign companies and necessary intimation was submitted to HDFC Bank Ltd by the appellant for its onward submission to Regional office of RBI at its end in compliance to Notification no. FEMB 20/2000-RB dated 03.05.2000.

Adequate enquiries in relation to shares issued at a premium were made by the Asstt. Commissioner of Income tax who passed detailed order u/s 143(3) of the Act. The Pr. Commissioner of Income tax. Later on, invoked provisions of section 263 of the Act on the ground that excess amount received on allotment of shares as share premium from aforesaid non-resident companies should have been treated as income u/s s 56(2)(viib)

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of the Act. The assessment order passed u/s 143(3)/92CA(3) was considered as erroneous as well as prejudicial to the interest of Revenue.

SUBMISSIONS :

At the outset, we submit that questions involved for adjudication regarding validity of order passed u/s 263 of the Act by the Principal Commissioner of Income tax are :-

I) Whether provisions of Section 56(2)(viib) of the Act were applicable in relation to issue of shares at a premium by the appellant to Non-resident companies?.

II) Whether enquiries in depth were made by the AO with regard to issue of shares at a large premium or there was lack of enquiry ?.

III) Because the AO did not discuss the reasons for non-applicability of Section 56(2)(viib) in the assessment order, can it be considered as “erroneous” and “prejudicial to the interest of Revenue” ?.

IV) Whether twin conditions required u/s 263 of the Act were satisfied to justify the order passed by the Pr. Commissioner of Income tax” ?. Our submissions for kind consideration are as under :-Applicability of section 56(2)(viib) of the Act :

We submit that provisions of Section 56(2)(viib) of the Act are applicable only where any consideration for issue of shares is received by the company from any person being a resident, which provision is reproduced hereunder for ready reference :-

“Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares”.

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It is humbly submitted that it is an undisputed fact that both the companies to whom equity shares were issued at a premium were non-resident companies as evident from (a) remittances received from foreign companies through their banks and (b) investment through FDI route duly intimated to RBI. The assessing authority had taken into cognigence these facts and referred the matter to DCIT (TPO) also. Having satisfied that shares were issued to both non-resident companies of Japan, additional premium received by the company was not assessed to tax because provisions of Section 56(2)(viib) of the Act, are not applicable.

From plain wordings of the section 56(2)(viib) it is evident that deeming fiction of law can be invoked in relation to the amount received by the appellant company from a person being a resident against issue of shares at a premium.

The appellant issued the shares at a premium to non-resident companies hence additional premium received was not covered within the scope of Section 56(2)(viib) of the Act. The words “Resident” in the statute cannot be read to include “Non-Resident” also.

Kind attention is invited to following judgments wherein principles of interpretation of the taxing statute have been enumerated :-

a) Mahim Patram Pvt Ltd vs. Union of India (2007) 10 STJ 637 (SC) [Followed in Ratlam Packers Pvt Ltd vs. State of MP (2014) 24 STJ 24 (MP) –

Held “A taxing statute is to be strictly construed. The subject is not to be taxed without clear words of the law. If the person sought to be taxed comes within the letter of the law, he must be taxed, however great hardship may appear to be. On the other hand, if the Legislature cannot bring the subject within the letter of the law, the subject is not

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liable to tax, howsoever apparently within the spirit of law the case might otherwise appear to be. An equitable construction is not admissible in a taxing statute. In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fair at the language used".

b) Vodafone International Holdings B.V. vs. Union of India (2012) 341 ITR 1 (SC)

Held "The Court has to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section. A legal fiction has a limited scope and cannot be expanded by giving purposive interpretation particularly if the result of such

interpretation is to transform the concept of chargeability.

II. Enquiries in depth by the A.O.

Kind attention is invited to assessment order which evidently proves that adequate enquiries were made by the Asstt. Commissioner of Income tax 2-(1), Ujjain regarding shares issued at a premium as under :-

i)Vide First notice u/s 142(1) of the Act dated 30.05.2016 specific querry was raised regarding issue of shares at a premium and applicability of provisions of section 56(2)(viib) of the Act[wrongly typed at 36(viib)] as under :-

"4. As per Balance sheet you have declared issued share capital at Rs.40,00,000/- and share premium receipt at Rs.95,27,75,180/-. There is no sufficient reserve in Balance sheet to work out value of share issued to the share holders. Please give complete details of the share premium and applicability of section 36(viib) of the Income tax Act".

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ii) In response vide letter dated 15.06.2016 (Page 8 of P.B)the company had submitted following details relating to issue of shares at a premium to M/s. Ruchi Soya Industries Limited and two foreign companies :-

a) List of shareholders and Directors of the company (Page 11 & 12 of P.B).

b) Certificates in support of foreign inward remittance issued by M/s. Mizuho Bank Limited and the Bank of Tokyo – Mitsubishi UFJ Ltd (Page 13 of P.B).

c) Letter addressed to HDFC Bank Limited related to FDI. (Page 25 of P.B)

d) Boards Resolution & Certificate issued by Company Secretary confirming statutory compliances related to issue of shares to FDI. (Page 26 to 28 of P.B).

iii) Fresh notice u/s 142(1) of the Act dated 24.08.2016 was issued directing to explain the reasons of large premium on shares vide para 19 &22 of the questionnaire (Page 31 of P.B.) as under :-

"19 – Please explain the reasons for large share premium received during the year"

"22 Scrutiny Reasons :

"1. Low net profit or loss shown from large gross receipt, 2. Large share premium received during the year, 3……4……..5…….6…….".

iv) In response to notice, replies were submitted as under :-

a) On 12.09.2016stating that section 56(2)(viib) of the Act is not applicable to the companyin relation to shares issued at a premium of Rs.2051.35 (1,94,000 shares) and on a premium of Rs.2830.68 (1,96,000 shares). (Page 53 to 55 of P.B – II)

b) Vide letter dated 22.09.2016,large share premium was explained by giving a reference to valuation report and business purchase

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agreement. It was specifically stated that the issue of shares at a premium was well within the provisions of section 56(2)(viib) of the Act.(Page 56 to 59 of P.B – II)

c) Vide letter dated 07.11.2016 – Report of SSPA & Co. was referred with reference to Provisions of Section 56(2)(viib) (Page 60& 61 of P.B – II)and

d) Vide letter dated 15.12.2016, equity shares issued to two non-resident companies at Arms Length price was supported by audit report u/s 92(E) of the Act.(Page 62 to 64 of P.B – II)

v)Considering the fact that shares were issued to Non-Resident Companies,by giving reference to Audit report furnished u/s 92B of the Act (form 3CEB),approval was obtained by the ACITfrom Pr. CIT, Ujjain, to refer the case to Dy. Commissioner of Income tax (TPO). DCIT (TPO) verified the issuance of equity shares to both non-resident companies at

a premium at arms length price and passed the order on 11.09.2017(Page 33 to 35 of P.B).

vi) Vide Para-6.2.3. of the assessment order, the said transaction of issuance of shares at a premium was disclosed and benchmarked. (Page 42&43 of P.B).

vii)The transaction relating to issue of shares to aforesaid two non-resident companies was discussed in Para 6.3.11 of the assessment order passed u/s 143(3) of the Act, with reference to International transaction within the meaning of section 92B of the Act[Page 46 of P.B]

viii) The conclusions drawn by Dy. CIT (TPO) were also considered by the AO vide Para 6.5.2 of the assessment order as under :-

“The Ld. TPO, has considered the issuance of equity shares to both the above mentioned entities as an international transaction but has not made any addition to the value of the same. Therefore, the order of the Ld. TPO

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u/s 92CA(3) as regards valuation of the above transaction and the categorization of the same as an international transaction is acceptable".[Page 47 of P.B]

Thus, Asstt. Commissioner of Income tax made detailed enquiry with reference to such investment and never doubted upon the genuineness of such foreign investment.After due verification of all documents placed on record & having detailed enquiries regarding issue of share at a premium, to both companies, the AO had examined the fact that shares were issued at a premium higher than the value determined as per Rule 11UA(2)(b) of Income tax Rules. There was neither "lack of enquiry" nor "inadequate enquiry" by the ACIT,hence the assessment order passed u/s 143(3) of the Act cannot be treated as erroneous and prejudicial to the interest of Revenue. Reliance is placed upon following judgments:-i) CIT vs. Mehrotra Brothers [2004] 270 ITR 157 (MP)

Held "Whether if while making assessment, Assessing Officer has made an inadequate enquiry , that would not, by itself, give occasion to Commissioner to pass order under section 263, merely because he has different opinion in matter.It is only in cases of 'lack of inquiry' that such a course of action would be open.

Whether further, on facts and law, view taken by Assessing Officer was one of possible views and, therefore, assessment order passed by Assessing Officer could not be held to be prejudicial to interest of revenue - Held, yes

ii) CIT vs. Ratlam Coal Ash Co. - [1987] 171 ITR 141 (MP)

HELD-"In the instant case, the Tribunal had found that the assessee had furnished all the requisite information and that the ITO considering all the facts had completed the assessment. It was further held that in the

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circumstances of the case,it could not be held that the ITO had made assessment without making proper enquiries. In view of these findings, the Tribunal was justified in reversing the order passed by the Commissioner."

iii)Narottam Mishra Vs. CIT [2015] 25 ITJ 506 (ITAT, Indore Bench)

Held “Even this is not the case of the Ld. CIT that certain evidences were overlooked which were very much on record or in the knowledge of the AO. Even this is not the case of Ld. CIT that certain new facts or evidences were brought to the notice of the Revenue Department which were having a direct impact on the income assessed by the AO. Neither there was an escapement of evidence nor there was any evidence now brought to the notice of the revenue department, therefore if that was not the position, then we are not inclined to give our approval to such directions.”

iv) Flexituff International Ltd vs. Pr. CIT (2019) 3 ITJ online 654 (Indore Bench)

(ITA No. 282/Ind/2017 – order pronounced on 14.05.2019 – Para 18) Held “It remains an undisputed fact that the Assessing Officer had made adequate enquires as noted herein above adopting one of permissible view for allowing the assessee’s claim for exemption u/s 10A of the Act before the claim of set off of brought forward and current year loss. The Ld. Pr. CIT took a different view of the matter. However that would not be sufficient to permit Ld. Pr. CIT to exercise the power u/s 263 of the Act because when two views are possible and Ld. Pr.CIT does not agree with the view taken by the Assessing Officer, assessment order cannot be treated as erroneous and prejudicial to the interest of the revenue unless the view taken by the Assessing Officer not unacceptable in law”……”As the Ld. AO; after making detailed enquiry allowed

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assessee's claim of exemption u/s 10A of the Act at Rs.12,51,79,200/-, this action of the Ld. A.O cannot be held as erroneous and prejudicial to the interest of revenue".

We submit that there was must be some prima facie material on record to show that the order is unsustainable in law and the tax which was legally payable has not been imposed. The present case is neither a case of "no enquiry" nor a case where the AO, failed to make "necessary enquiry". In fact, the assessment order was passed after making detailed enquiry and application of mind.

III. Reference in the assessment order regarding non- applicability of Sec. 56(2)(viib):

It is submitted that having satisfied after enquiry and application of mind that section 56(2)(viib) was not applicable in relation to shares issued to NON-RESIDENTS,if the reasons for non-applicability of said section were not specifically referred to in the assessment order, the same cannot be termed as to be "erroneous" order. Reliance is placed on following judgments :-

a) CIT vs. Gabriel India Ltd (1993) 203 ITR 108 (Bom).

Held that "It is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income tax officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualize a case of substitution of the judgment of the Commissioner for that of the Income tax Officer, who passed the order, unless the decision is held to be erroneous ". (At Page 114/115(A)".

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We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income tax Officer without making any enquiry in undue haste" (At Page 116(B).

"Further enquiry and/or fresh determination can be directed by the Commissioner only after coming to the conclusion that the earlier finding of the Income tax Officer was erroneous and prejudicial to the interests of the Revenue" [At Page 117(D)]

b) CIT vs. Reliance Communications Ltd (2017) 396 ITR 217 (Bom.) Held

"Tribunal noted that Assessing Officer had made detailed enquiries about aforesaid aspect and mere fact that he did not make any reference to said issue in assessment order, could not make said order erroneous and prejudicial to interest of revenues - Accordingly, Tribunal set aside revisional order - Whether finding recorded by Tribunal being a finding of fact, no substantial question of law arose there from - Held, yes [Para 11]"

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c)CIT vs.Anil Kumar Sharma - [2011] 335 ITR 83(Delhi)

Held "Though the assessment order does not patently indicate that the issue in question had been considered by the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernible from the record, the proceedings under section 263 would fell into the area of the Commissioner having a different opinion. We are of the view that the findings of facts arrived at by the Tribunal do not warrant interference of this Court. That being the position, the present case would not be one of 'lack of inquiry' and, even if the inquiry was termed as inadequate, "that would not by itself give

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occasion to the Commissioner to pass orders under section 263 of the said Act, merely because he has a different opinion in the matter".

d) CIT vs. M/s. Vikas Polymers (2012) 341 ITR 537 (Del) at Page 548. Held "This is for the reason that if a query was raised during the course of scrutiny by the assessing officer, which was answered to the satisfaction of the assessing officer, but neither the query nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the assessing officer called for interference and revision".

e) CIT vs. Fine Jewellery (India) Ltd (2015) 372 ITR 303 (Bom).
[Idea Cellular Ltd vs. Dy. CIT (2008) 301 ITR 407 (Bom) Followed]

Held "If a query is raised during assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the assessment order would not lead to a conclusion that no mind had been applied to it".

f) CIT vs. Krishna Capbox (P) Ltd - [2015] 372 ITR 310 (All)

Tribunal held that "once inquiry was made, a mere non-discussion or non-mention thereof in assessment order could not lead to assumption that Assessing Officer did not apply his mind or that he had not made inquiry on subject and this would not justify interference by Commissioner by issuing notice under section 263".

In substance, after proper application of mind, by considering the order passed by TPO u/s 92CA(3) of the Act and the fact that shares were issued at a premium to two non-resident foreign companies,the AO did not make any addition u/s 56(2)(viib) of the Act. On such facts, and circumstances, it cannot be construed that any error was committed by

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AO. It is NOT a case of non-application of mind by the Assessing Authority hence the order passed u/s 143(3) of the Act was neither erroneous nor prejudicial to the interest of Revenue.

IV. Erroneous and Prejudicial to the Interest of Revenue :

We submit that it is a well settled law that to invoke the provisions of section 263 both the conditions viz. the order must be "erroneous and prejudicial to the interest of Revenue" must be satisfied. Reliance is placed on the following judicial precedents :-

i) Malabar Industrial Co. Ltd. Vs. CIT - [2000] 243 ITR 83(SC)

Held "The Commissioner has to be satisfied of twin conditions, namely,

(i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the Income tax Officer is erroneous but is not prejudicial to the Revenue, recourse cannot be had to section 263(1) of the Act".

ii) H.H. Maharaja Raja Pawer Dewas - [1982] 138 ITR 518 (MP)

Held "Under section 263(1) two pre-requisites must be present before the Commissioner can exercise the revisional jurisdiction conferred on him. First is that the order passed by the ITO must be erroneous. Second is that the error must be such that it is prejudicial to the interests of the revenue. If the order is erroneous but it is not prejudicial to the interests of the revenue, the Commissioner can not exercise the revisional jurisdiction under section 263(1)..... unless the prejudice to the interests of the revenue is shown, the jurisdiction under section 263(1) cannot be exercised by the Commissioner, even though the order is erroneous".

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iii) V. G. Krishnamurthy vs. CIT - [1985] 152 ITR 683 (Kar)

HEAD NOTE – Section 263 of Income tax Act, can be invoked only when the CIT prima-facie finds that the order made by the ITO was erroneous and was prejudicial to the interest of Revenue. Both these factors must

exist simultaneously. If one or the other of the factorsis absent, the Commissioner cannot exercise the suo moto power of revision under section 263."

Last but not the least, we submit that the Ld. Pr. Commissioner of Income tax did not properly consider the vital fact and ignored the submissions made before him vide letter dated 06.03.2020 (Page 49 to 52 of P.B)in response to his notice wherein it was stated that issue of shares at a premium to Non-Resident does not attract provisions of section 56(2)(viib) of the Act.Vide Para 3.1 of the order passed u/s 263 of the Act, the Pr. Commissioner of Income tax, concluded as under :-

“The facts of the case, performance of the business results of the assessee and its overall worth including track records of the Promoter Group i.e. M/s. Ruchi Soya, as may be observed from the balance sheet, did not justify in any manner, the rate of share premium charged by the assessee…….

During the course of assessment proceedings the AO did not examine this aspect of the case and completed the assessment proceedings. thus, the action of the AO is erroneous and prejudicial to the interest o revenue”.

It may kindly be appreciated that the notice u/s 263 of the Act was issued proposing to treat the income of the assessee u/s 56(2)(viib) of the Act being excess premiumreceived by the company over DCF Method from two non-resident companies at Rs.14,88,48,680/- (as tabulated).

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Contrary to this, in aforesaid conclusion, he observed that the track record of promoter group i.e. M/s. Ruchi Soya Industries Ltd did not justify the rate of share premium charged by the company, which was not examined by the AO. He ignored the fact that the share valuation was based on DCF Method permitted under Rule 11UA of Income Tax Rules, which was accepted all along including in the notice issued u/s 263 of the Act.Thus, he issued the directions to verify rate of premium on shares issued by the company to M/s. Ruchi Soya Industries as well two non-resident companies. Kind attention is invited to the judgment in the case of CIT vs. Ashish Rajpal (2010) 320 ITR 674 (Del.) wherein it was held as under :-

"Whether where notice issued by the Commissioner before commencing proceedings u/s 263 referred to four issues and final order passed referred to nine issues, revisional proceedings were vitiated as a result of beach of principals of natural justice – Held Yes".

It may please be appreciated that,when the provisions of Section 56(2(viib) of the Act were not at all applicable in relation to shares issued at a premium to any non-resident, no error was committed by the AO whatsoever while completing the assessment.We also humbly submit that Ld. Pr.CIT did not apply his mind on the documents available on record when it was specifically argued that Provisions of Section 56(2)(viib) of the Act were not applicable in a case where shares are issued at a premium to non-resident. This fact was overlooked by him while passing the order u/s 263 of the Act.

It is therefore, prayed that none of the conditions for invoking the provisions of section 263 the assessment order is satisfied & the order passed u/s 263 of the Act, deserves to be quashed.

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8. Per contra Ld. Departmental Representative vehemently argued supporting the order of Ld. PCIT and also could not controvert the fact that the provisions of Section 56(2)(viib) of the Act are not applicable for the consideration for issue of shares received from non resident companies.

9. We have heard rival contentions and perused the records placed before us and carefully gone through the decisions referred and relied by the Ld. Counsel for the assessee. The assessee has raised 3 grounds of appeal and the effective grounds are Ground No. 1 & 2 through which the jurisdiction assumed by Ld. PCIT u/s
263 of the Act has been challenged mainly on the ground that the provisions of Section 56(2)(viib) of the Act are not applicable to the Non residents. Though in the written submissions filed by the assessee it is also been contended that the Ld. A.O has discussed the issue of share capital received from non resident companies in depth and it is not the case of no enquiry.

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10. We observe that during the year under appeal assessee issued equity shares to the resident and non resident companies. As per the Discounted Cash Flow (DCF) method provided under Rule 11UA(2b) of the I.T. rules fair market value per equity share was computed by the Chartered Accountant at Rs.2061.35. Assessee company issued 204000 equity shares at Rs.2061.35 per share (Face value per share Rs.10/- and share premium at Rs. 2051.35) to a resident company namely Ruchi Soya Industries Ltd . However following shares were issued to Non Resident companies at a price of Rs.2840.68 per share (Face value per share Rs.10/- and share premium at Rs. 2830.68):-

Name of company	No. of equity shares	Amount
Toyota Tsusho,Japan	92000	261342560
J Oil Mills Inc, Japan	104000	295430720
		556773280

11. Ld. PCIT in the impugned order has referred to the above transactions and came to a conclusion that when the value of each share computed by DCF method is Rs. 2061.35 and excess

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premium of Rs. 779.33 per has been charged to Non Resident companies and then why it has not been added to the income of the assessee by Ld. A.O u/s 56(2)(viib) of the Act. Ld. PCIT further held that since the Ld. A.O did not examine this aspect of the case relating to excess share premium charged to Non Resident companies, order of the Ld. A.O is erroneous and prejudicial to the interest of revenue and deserves to be set aside.

12. Now in the instant appeal after considering the above stated facts and the finding of Ld. PCIT in the impugned order following two issues needs to be examined :-

(1) Whether the provisions of Section 56(2)(viib) of the Act is applicable for the consideration received for allotment of equity shares to Non Resident company;

(2) Whether the Ld. A.O conducted enquiry with regard to the alleged transaction of issue of equity shares to non resident persons during the year.

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13. As regards the first issue is concerned we will first go through the provisions of Section 56(2)(viib) of the Act which reads as follows:-

> (viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:
>
> Provided that this clause shall not apply where the consideration for issue of shares is received—
>
> (i) by a venture capital undertaking from a venture capital company or a venture capital fund [67][or a specified fund]; or
>
> (ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

14. From perusal of the above section it is very much clear that it refers to the consideration for issue of shares received from “any person being Resident”. The provision is very clear and there cannot be any second opinion to this aspect that Section 56(2)(viib) of the Act applies only to Residents. The issue in the instant appeal relates to allotment of equity shares to Non Resident companies. As per DCF method value of equity share is at Rs.2061.35 but the equity shares allotted to non resident is at Rs.2840.68. In the show cause notice issued, Ld. PCIT has only referred to the provisions

of Section 56(2) of the Act stating that the excess amount received 25

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from two non resident companies on allotment of shares should be treated as income of the assessee u/s 56(2)(viib) of the I.T. Act: So the finding of Ld. PCIT is only to the effect that Ld. A.O should have examined the transaction of excess premium received from Non Resident companies which needs to be brought to tax u/s 56(2)(viib) of the Act. However we are of the considered view that this finding of Ld. PCIT is factually incorrect and is not sustainable in law since the provisions of Section 56(2)(viib) of the Act are not applicable to the consideration received from Non Residents for issuing of shares. Ld. Departmental Representative was fair enough to accept this fact that Section 56(2)(viib) of the Act s only applicable to residents and not to Non Residents. Therefore since the very basis of issue of show cause notice u/s 263 of the Act is factually incorrect and the provisions of Section 56(2)(viib) of the Act has been wrongly interpreted by Ld. PCIT by directing the Ld. A.O to tax an amount under a section namely 56(2)(viib) for the consideration received for issue of equity shares which is not applicable to the Non Residents, the proceedings u/s 263 of the Act

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deserves to be quashed. We accordingly order so.

15. As regards the second issue is concerned whether the Ld. A.O has made sufficient enquiry with regard to the alleged transaction of allotment of equity shares to resident and non resident companies, we find that when the case was selected for scrutiny proceedings Ld. A.O issued notice u/s 142(1) of the Act and in para 4 of this notice specific information was called for providing complete details of share premium received at Rs.95,27,75,180/-. In reply the assessee filed necessary details on 15.6.2016 attaching Annexure-II providing details of list of share holders as on 31.3.2014 and equity shares issued during the year. This reply also included specific information about the consideration received from Non Resident companies for allotment of 196000 shares including certificate of foreign remittances by Bank of Tokyo, certificate of foreign remittance by M/s Mizuho Bank Limited, copy of letter dated 11.3.2014 to HDFC Bank regarding Foreign Direct Investment (FDI), copy of Board's resolution regarding allotment of

shares to FDI and copy of certificate issued by Company Secretary

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regarding issue of shares at a premium to non resident which is to be given to RBI.

16. We further observe that Ld. A.O after receiving the above stated reply referred the matter to Transfer Pricing Officer u/s 92(CA)(1) of the Act for computing the arms length price of the international transaction entered into with Toyoto Tsusho and J Oil

Mills for allotment of equity shares at a premium for total consideration of Rs.55,67,73,280/-. Ld. TPO has also examined the transaction and after perusing the records concluded that no adjustment is required to be made to the arms length price of the transaction. In other words the transaction with Non resident company were accepted at a fair market value requiring no adjustment. After receiving the order u/s 92CA(3) of the Act Ld. A.O further discussed the transaction of issuance of share capital to the two non resident companies and since Ld. TPO did not make any adjustment to the value of transaction the same was accepted by the Ld. A.O.

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17. In view of the above facts in our understanding there was a specific enquiry from the Ld. A.O to which the specific reply along with supporting documents were submitted by the assessee during the course of scrutiny assessment proceedings itself. It can be safely concluded that the Ld. A.O had raised queries which were complied by the assessee. Considering these facts in totality, it can be safely concluded that the Assessing Officer made complete enquiry regarding share capital and share premium received from Non resident companies and also called for a report from Ld. TPO on the arms length price of this international transaction. It is a settled position of law that the powers under section 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i. e., the assessment order should be erroneous and prejudicial to the interests of the Revenue. By "erroneous" is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. Thus, where there are two possible views and the Assessing Officer

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has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of the hon'ble High Court of Bombay in the case of CIT v. Nirav Modi [2017] 390 ITR 292 (Born) ; [2016] 71 taxmann.com 272 (Born)."

The Hon'ble Bombay High Court in the case of CIT v. Gabriel India Ltd. [1993] 203 ITR 108 (Born) has held that:

> "the decision of the Income-tax Officer cannot be held to be an erroneous simply because in his order he did not made elaborate discussion in this regard . . . . ."

The Hon'ble Gujarat High Court in the case of Micro Inks Ltd. v. Pr. CIT [2018] 407 ITR 681 (Guj) ; 85 taxmann.com 310 has held that :

> "If the Assessing Officer has adopted a view which is a plausible one, the view would not be open to revision by the Commissioner."

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18. Considering the facts of the case in the light of the judicial decisions discussed hereinabove and on a perusal of the facts, we have no hesitation in holding that the assessment under section 143(3) of the Act was framed after detailed enquiries cannot be considered as erroneous and prejudicial to the interests of the Revenue.

19. In the instant case also Ld. A.O had considered various submissions of the assessee and taken a possible view. Therefore merely because Ld. PCIT did not agree to the opinion/information of the Ld. A.O who has conducted sufficient enquiry regarding the issue raised in this show cause notice issued by Ld. PCIT, provisions of Section 263 of the Act cannot be invoked in order to substitute his own information. It has been held in several decisions (few of them have been relied by the Ld. Counsel also) that if the Ld. A.O has made enquiry to his satisfaction and it is not a case of no enquiry then Ld. PCIT cannot assume the jurisdiction u/s 263 of the Act to again investigate or approach in a particular

manner. Therefore on this aspect also the assessee deserves to

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succeed and the impugned order u/s 263 of the Act deserves to be quashed since there was a detailed enquiry by the Ld. A.O and after thoroughly discussing the issue in the assessment order taking a permissible view within the parameters of the law, there remains no room for Ld. PCIT to assume the jurisdiction u/s 263 of the Act.

20. Thus in view of our discussion made herein above we hereby quash the order of Ld. PCIT framed u/s 263 of the Act and restore the order of the Ld. A.O framed u/s 143(3) r.w.s. 92CA(3) of the Act dated 27.12.2017. Ground No. 1 & 2 of the assessee are allowed.

21. Ground No.3 is general in nature which needs no adjudication.

22. In the result appeal of the assessee is allowed.

Order was pronounced in the open court on 25.03.2021.

Sd/-	Sd/-
(KUL BHARAT) JUDICIAL MEMBER	(MANISH BORAD) ACCOUNTANT MEMBER

Indore; □□□□□ Dated : 25th March, 2021

/Dev

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order
Assistant Registrar, Indore

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