

**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHRI B.R. BASKARAN, AM AND SHRI SANDEEP GOSAIN, JM**

आयकर अपील सं./ I.T.A. No. 2795/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2004-05)

M/s. Rachana Finance & Investments Pvt. Ltd. 'A' wing, 2 nd Floor, Mhatre Pen Building, Senapati Bapat Marg, Dadar (West), Mumbai-400 028.	बनाम/ Vs.	Commissioner Of Income Tax-9, 3 rd Floor, Aaayakar Bhavan, M. K. Road, Mumbai-400 020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACR 4930A		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

आयकर अपील सं./ I.T.A. No. 2794/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2004-05)

M/s. Repute Properties Pvt. Ltd. 'A' wing, 2 nd Floor, Mhatre Pen Building, Senapati Bapat Marg, Dadar (West), Mumbai-400 028.	बनाम/ Vs.	Commissioner Of Income Tax-9, 3 rd Floor, Aaayakar Bhavan, M. K. Road, Mumbai-400 020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACR 4929A		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Ajay R. Singh
प्रत्यर्थी की ओर से/Respondent by	:	Shri Ajit K. Shrivastva

सुनवाई की तारीख / Date of Hearing	:	07/12/2015
घोषणा की तारीख / Date of Pronouncement	:	23/03/2016

आदेश / ORDER

Per Sandeep Gosain, J. M.:

The Present Appeals have been filed by two Assessee's against the order of Commissioner of Income Tax-9, dated 28.03.2014 for A.Y. 2004-05. This is common order covering the disposal of two appeals which have been preferred by two separate assesseees against two separate orders of the Id. CIT, Mumbai both dated same passed u/s 263 of the Act pertaining to Assessment Year 2004-05.

2. Since both the parties agreed that the facts and the issues involved in both these appeals are identical, therefore the cases have been heard and dispose off by this common order for the sake of convenience and brevity.

2. First we will take up **ITA No. 2795/Mum/2014** filed by the assessee, **M/s. Rachna Finance and Investments Pvt. Ltd.** for A.Y. 2004-05 and the outcome of the same will be applicable to other analogous appeal i.e. **ITA No. 2794/Mum/2014** filed by another assessee namely, **M/s. Repute Properties Pvt. Ltd.** for A.Y. 2004-05.

3. In appeals of assessee, **M/s. Rachna Finance and Investments Pvt. Ltd.,** the impugned order dated 28.03.2014 which has been passed by the CIT wherein

the CIT has invoked his jurisdiction u/s 263 of the Act for AY 2004-05 which is under consideration before us.

4. The brief facts of the case are that the CIT was of the firm belief that the assessment order u/s 143(3) r.w.s. 147 passed on 28.10.2011, was erroneous inasmuch as it was prejudicial to the interest of the revenue. The entire issue revolves around investments of Rs.25 lakhs by way of share application and share premium in share of M/s. Turkhia Group of Companies. The CIT(A) was also of the belief that the Assessing Officer has not verified the issue regarding high share premium paid by assessee to M/s. Turkhia Group of Companies and the money trail while completing the assessment u/s 143(3) r.w.s. 147 for AY 2004-05. Accordingly, the CIT has passed an order u/s 263 of the I.T. Act,1961 thereby holding that the assessment order u/s 143(3) r.w.s. 147 dated 28-10-2011 for AY 2004-05 is set aside with the direction to the AO to frame afresh assessment in the light of observation made in impugned order against which the assessee has filed present appeal before us on the grounds mentioned herein below.

1. *“On the facts and circumstances of the case and in law, the Ld. Commissioner of Income Tax has erred in coming to the conclusion that assessment order passed u/s 143(3) r.w.s. 147 dated 28.10.2011 is*

- erroneous and prejudicial to the interest of the revenue without appreciating the facts of the case.*
2. *On the facts and circumstances of the case and in law, the Ld. Commissioner of Income Tax has erred in setting aside the assessment order passed u/s 143(3) r.w.s. 147 dated 28.10.2011 with a direction to the Assessing Officer to frame fresh assessment.*
 3. *The appellant craves leave to alter, amend, modify or substitute any ground/grounds and to add any new ground or grounds on or before the appeal is disposed off.”*

2. The brief facts of the case are that the assessee filed return of income for AY 2004-05 on 15.11.2004 declaring total income at Rs.6,658/-. Thereafter the case was reopened on 31.03.2011 after obtaining prior approval of Addl. CIT, Range 9 (3), and Mumbai. After considering the case of both the parties, the AO passed assessment order u/s 143(3) r.w.s. 147 of the I.T. Act on 28.10.2011. Whereby the total income of assessee company was assessed at Rs.6,658/-. CIT noted that the assessee has invested an amount of Rs.25 lakhs by way of share application and share premium in share of M/s. Turkhia Group of Companies and noticed that the assessing officer has not verified the issue regarding the high share premium paid

by assessee to M/s. Turkhia Group of Companies therefore after serving show cause notice and considering reply, the CIT passed order u/s 263 of I.T. Act, 1961.

3.1 Aggrieved by the said order the assessee filed the present appeal before us on the grounds mentioned herein above.

Ground No. 1&2

4. Since all the grounds raised by the assessee are inter-connected and inter-related therefore we thought it fit to dispose off the same through the present common order.

4.1 At the very outset Id. AR representing the assessee submitted before us that the assessment order passed u/s 143 r.w.s. 147 dated 28.10.2011 by the assessing officer is neither erroneous nor prejudicial to the interest of revenue and the provision of section 263 were not at all attracted under the facts and circumstances of the case. It was further submitted by Id. AR that the assessment was reopened on the ground of examination of source of investment made by assessee of Rs.25 lacs towards acquisition of shares from one company M/s. Turakhia Feromat Pvt. Ltd. The amount was received from Shirdi Industries Ltd and the bank statement was also submitted on record where in the amount received by the assessee company

was reflected. The copy of bank statement of Shirdi Industries Ltd and copy of acknowledgement of said company were also submitted before the AO. Assessing Officer after detailed examination and making full inquiries in the matter passed the assessment order and therefore there is no case of the said order being erroneous. Specific stand taken by the Id. AR is that the assessment order was passed on the basis of evidence on record and inquiries to the source of money and investment made by Assessee Company. And since there is no other new evidences which has been brought on record to substantial the ground taken by CIT therefore there is no justification in passing the impugned order u/s 263. The Id. AR further submitted that the department made inquiries for justification of premium for issuing of shares in the case of recipient company who received the money and issued the shares and since no share application money was received by the assessee therefore the examination of justification of share premium was not at all warranted in the case of the assessee for which the assessee also relied upon judgement of co-ordinate bench in case of M/s. Turakhia Feromat Pvt. Ltd. passed by ITAT Mumbai Bench and as per the aforesaid mentioned judgement ITAT was pleased to set aside the similar order passed u/s 263 of the I.T. Act in the said case.

5. On the other hand Id. DR representing the revenue has relied upon the orders passed by CIT(A) u/s 263 of the I.T. Act and it was submitted by Id. DR that since

the assessing officer failed to examine the issue of share application and share premium while completing the assessment u/s 143 r.w.s 147 dated 28.10.2011 therefore, the Id. CIT(A) was right in passing the order u/s 263 of I.T. Act.

6. We have heard the counsels for both the parties and we have also perused the material placed on record as well as the orders passed by the lower authorities and after considering the same and reading section 263(1) it makes it clear that the pre-requisite to the exercise of jurisdiction by the commissioner *suo motto* under section 263 of the Act is that the order of the AO is erroneous in so far as it is prejudicial to the interest of the revenue. The commissioner has to be satisfied with the twin conditions:

- (i) the order of the AO sort to be revised is erroneous and
- (ii) it is to be prejudicial to the interest of the revenue. If one of the condition is absent it cannot be invoke jurisdiction u/s 263 of I.T. Act for these observations, we find support from the decision of Hon'ble Supreme Court, in case of 'Malabar Industrial Co. Ltd vs. CIT' (SC) 243 ITR 83. We have noticed that in this case order of assessment was passed and subsequently the case was reopened u/s 147 on the similar grounds which have been raised by the Commissioner and thereafter the assessment u/s 143 r.w.s. 147 was completed on 28.10.11. Since in the present case the assessment was reopened on the ground of examination of sources of

investments made by the assessing officer of Rs.25 lakhs towards purchase of shares from one M/s. Turakhia Feromat Pvt. Ltd, in this respect it was submitted by assessee that the amount was received from Shirdi Industries Ltd and the bank statement of Shirdi Industries was also submitted on record along with copy of bank statement of Shirdi Industries and copy of acknowledgement of return of the said company along with the bank statement of assessee company. In the present case the assessing officer after detailed examination of records had passed the assessment order and the said facts are also mentioned by the assessing officer while passing the order u/s 143 r.w.s. 147 of the Act wherein it has been categorically mentioned by the AO that the representative of the assessee furnished relevant details and after discussing the total income of the assessee company was assessed which shows the consideration of all the documents and application of mind by the AO. It is also an undisputed fact that there is no further evidence which has come on record after passing of order by AO. Since the AO has examined the issue by making necessary enquiries, the assessment order cannot be held erroneous. Since the view taken by the AO is one of the possible views the assessment order cannot be held to be prejudicial to the interest of revenue.

6.1 We have also perused the orders passed by the coordinate Mumbai bench of ITA Nos. 4148 to 4152/Mum/2013 in case of 'M/s. Turakhia Ferromet Pvt. Ltd. vs.

CIT' And ITA Nos.3966 to 3969/Mum/2013 in case of 'M/s. Standard Conduits Pvt. Ltd. vs. CIT' wherein also the issue before the coordinate bench of ITAT was same i.e. u/s 263 of the Act and the companies named above are the recipient companies who received the money and issued the shares. In their case also the CIT(A) for the year under consideration and for other years had passed orders u/s 263 of the Act on similar grounds and the coordinate bench in the case of recipient company had set aside the order of the CIT(A) u/s 263 of the Act and it is noteworthy that the coordinate bench orders setting aside the order under section 263 of the Act is in respect of recipient company who actually received the money from the assessee and issue the shares.

6.2 We have also perused the paper book filed by the assessee which contains all those documents which were filed before the AO as well as the CIT including copy of return of income, computation of income and annual accounts, copy of notice u/s 148 dated 31.03.2011, copy of reply dated 14/10/2011 submitted to the assessing officer along with details of investment and advances along with confirmation of accounts, copy of bank statement of the assessee as well as recipient company and copy of annual accounts of Shirdi Industries.

6.3 In the present case although the AO has mentioned regarding the submissions of documents and discussion carried out but still the CIT has mentioned while passing the order u/s 263 of the Act that the order of AO is erroneous and prejudicial to the interest of revenue. In this respect we would further like to mention that the order of AO in the present case may be brief but that by itself is not a sufficient reason to hold the order of assessment as erroneous and prejudicial to the interest of the revenue. The scope of interference u/s 263 is not to set aside merely unfavourable orders and bring to tax some more money to the treasury nor is the section meant to get at sheer escapement of revenue which is taken care of by other provisions in the Act. Power under Section 263 cannot be exercised for starting fishing and roving enquiries. In the garb of exercising power under Section 263, the Commissioner cannot initiate proceedings with a view to starting fishing and roving enquires in matters or orders which are already concluded.

6.4 We have also perused the judgement relied upon by the Id. DR decided by ITAT Kolkata Bench in case of 'Bisakha Sales (P.) Ltd. vs. CIT' however in the above cited case the assessee had received share application money with huge and unjustified share premium from corporate entities but in the present case the assessee has not received share application money or share premium from

corporate entities. Since the facts of the cited case are different and are not similar to the facts of the present case hence the cited judgement is distinguishable and is not applicable to the facts of the present case. Similar is the position of another case decided by Kolkata High Court titled 'CIT vs. Maithan International' facts of the afore mentioned case are also different and distinguishable and therefore the said judgment is also not applicable to the facts of the present case.

7. After considering the entire facts and material evidences brought on record reproduced elsewhere in the order by us, in our considered view the order of CIT u/s 263 of the Act does not stand on its own leg, we accordingly set aside the order of CIT u/s 263 dated 28.3.14 and restore that of the AO. This ground raised by the assessee in the appeal is allowed.

Ground No.3 is general in nature and needs no separate adjudication.

8. Now, we will take up the appeal filed by the assessee M/s. Repute Properties Pvt. Ltd. ITA No. 2794/Mum/2014 (A.Y. 2004-05).

8.1 The impugned order in the aforesaid appeal dated 28.3.14 has been passed by the CIT u/s 263 of the Act where in the CIT has invoked its jurisdiction for AY

2004-05 on similar issue was involved in the appeal of assessee i.e. Rachana Finance Investments Pvt. Ltd. wherein we have already given our thoughtful consideration to the grounds raised by the ld. Counsel of the assessee as well as the ld. DR and considering the entire facts and the material brought on record, we have already set aside the order passed by CIT u/s 263 of the Act. Since the facts and circumstances of this appeal under consideration are similar. Therefore, following our own decision given in the afore said appeal, we also allow the present appeal of the assessee, namely M/s. Rachana Finance & Investments Pvt. Ltd. and set aside the order dated of CIT u/s 263 of the Act.

7. In the result, the Assessee's appeals are allowed.

Order pronounced in the open court on 23rd March, 2016

Sd/-
(B.R. Baskaran)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :23.03.2016

Ps. Ashwini

Sd/-
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai