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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decision delivered on: 11.12.2023**

+ **ITA 739/2023**

PR. COMMISSIONER OF INCOME TAX-7 Appellant

Through: Mr. Puneet Rai, Sr. Standing Counsel

versus

TROJAN DEVELOPERS PVT. LTD. Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM APPL. 63831/2023

1. Allowed, subject to just exceptions.

CM APPL. 63832/2023 *[Application filed on behalf of the appellant seeking condonation of delay of 164 days in filing the appeal]*

2. Although this is an application seeking condonation of delay in filing the appeal and the delay as averred is 164 days, Mr. Puneet Rai, learned senior standing counsel says that, as a matter of fact, there is no delay.

2.1. In this behalf, he has drawn our attention to the order dated 16.05.2023 passed by this Court in ITA 278/2023. This order discloses that on 16.05.2023, Mr. Rai had sought leave to withdraw the appeal and the accompanying applications, with liberty to file a fresh appeal. Accordingly,



the writ petition and pending applications were dismissed as withdrawn, with liberty as prayed for.

3. Mr. Rai points out that ITA 278/2023 was withdrawn as, inadvertently, the fact that a miscellaneous application (MA) had been filed with the Tribunal for recall of order dated 10.11.2021 had not been disclosed.

4. It is therefore, Mr. Rai's contention that if the order dated 03.02.2023 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] in the MA preferred by the appellant/revenue is considered, there is no delay in filing the appeal.

5. Since, in any event, we intend to take up the appeal for hearing on merits, according to us, this aspect need not detain us. The delay is condoned in view of the explanation offered by Mr. Rai.

6. The application is accordingly disposed of.

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7. This appeal concerns Assessment Year (AY) 2014-15.

8. *Via* the instant appeal, challenge is laid by the appellant/revenue to the order dated 10.11.2021 passed by the Tribunal.

9. As noticed above, the appellant/revenue had moved a MA before the Tribunal for recall of the order dated 10.11.2021. The MA was, however, dismissed by the Tribunal *via* order dated 03.02.2023.

10. Therefore, in effect the appellant/revenue seeks to assail the foundational order dated 10.11.2021 passed by the Tribunal and also the order dated 03.02.2023 passed in the aforementioned MA.

11. To adjudicate the appeal, the following broad facts are required to be noticed.



11.1. The respondent/assessee had filed its Return of Income [in short, “ROI”] for the AY in issue i.e., AY 2014-15 on 20.09.2014. *Via* the said ROI the respondent assessee declared its income as Rs. 11,43,240/-.

11.2. The record shows that respondent/assessee’s case was picked up for limited scrutiny and a notice under Section 143(2) of the Act was issued on 28.08.2015.

11.3. It is not in dispute that after scrutiny was carried out, limited to the issues raised by the AO, the assessment order dated 29.12.2016 was passed, whereby the income declared by the respondent/assessee in its return, as indicated above, was accepted.

11.4. After nearly two years and three months, the respondent/assessee’s return was questioned by Principal Commissioner of Income Tax [in short, “PCIT”]. Accordingly, a show-cause notice dated 22.02.2019 under Section 263(1) of the Income Tax Act, 1961 [in short ‘the Act’] was served on the respondent/assessee.

11.5. This was followed by the PCIT passing an order dated 31.03.2019 under Section 263 of the Act. At the heart of this order is the PCIT’s view was that the AO had failed to enquire about the issuance of shares at a very high premium to a closely held company.

11.6. It was the PCIT’s view that valuation, as required under Section 56(2) (viib) of the Act, had not been carried out.

11.7. The record shows that the respondent/assessee had issued 28,729 shares to two closely held companies i.e., namely Experience Financial Consultants Pvt. Ltd. [in short, “Experience”] and Sankalp Advisory Services Pvt. Ltd. [in short, “Sankalp”]. The subject shares were issued on 16.12.2013. The details concerning the shares, as set forth in the PCIT’s



order, read as follows:

Sr. No.	Name of the Company	No. of shares	Face Value	Premium	Total Capital	Total Premium	Total consideration
(a)	Experience Financial Consultants Pvt. Ltd.	11222	100	1236	1122200	13870392	1,49,92,592/-
(b)	Sankalp Advisory Services Pvt. Ltd.	17507	100	1236	1750700	21638652	2,33,89,352/-
	Total	28729	100	1236	2872900	35509044	3,83,81,944/-

11.8. It was the PCIT's view that the shareholding of Experience and Sankalp had undergone a change. According to the PCIT, the equity stake in Experience and Sankalp was held by two shareholders, each holding 50% of the equity shares.

11.9. The PCIT also observed based on auditor's report that these shares were transferred in favour of two persons i.e., Mr Kapil Mishra and Ms Kalpana Mishra. According to the PCIT, the AO had failed to examine whether the shares were transferred for a consideration or not.

11.10. As indicated above, the burden of the PCIT's order was that the AO had failed to examine the applicability of Section 56(2)(viib) of the Act, read with Rule 11UA of the Income Tax Rules, 1962 [in short, "Rules"]. It is in these circumstances that PCIT, upon applying the provisions of Section 56(2)(viib) of the Act and Rule 11UA of the Rules, concluded that Rs. 3,42,50,714/- was required to be taxed as per the provisions of Section 56 of the Act under the head "income from the other sources".



12. The moot question that arose for consideration before the Tribunal, *albeit* in appeal, was whether the AO had carried out an enquiry with regard to the shares issued at a premium to Experience and Sankalp. The Tribunal, as it appears, examined the matter at great length and thereafter returned the following findings of fact:

- (i) Three notices were issued to the respondent/assessee i.e., 09.11.2016, 28.11.2016 and 19.12.2016. *Via* notice dated 19.12.2016, the respondent/assessee was explicitly called upon to furnish details, along with evidence, concerning shares allotted by it during the period in issue. Furthermore, the respondent/assessee was also required to furnish the name, address and PAN details of the allottees. Besides this, the respondent/assessee, significantly, was also called upon to submit copies of the share certificate issued and also the calculation made for fixing the issue price. This apart, the respondent/assessee was called upon to furnish the mode adopted for carrying out subject transaction(s), the date of receipt of the share value and the premium along with copy of the bank account.
- (ii) The respondent/assessee responded to the notices and submitted the profit and loss account and the details of the shares and premium, as recorded in the audited balance sheet. The respondent/assessee also submitted confirmations from the entities who had purchased the shares, along with the audited bank statement.
- (iii) The valuation concerning the subject shares was examined by the AO, having regard to the Fair Market Value and the valuation report of an immovable property located 41A, Prithviraj Road, New Delhi, 110001.
- (iv) The respondent/assessee *via* letter dated 28.11.2016 had submitted its explanation concerning the applicability of the provisions of Section



56(2)(viib) of the Act.

(v) The valuation of the aforementioned immovable property was pegged at Rs.17.5 Crores by the registered valuer, which was the justification for the high premium received qua the shares allotted to Experience and Sankalp.

13. Given this position, the Tribunal concluded that the PCIT's view that the AO had not made an enquiry about the shares issued to Experience and Sankalp at high premium, was flawed.

14. Thus, after applying the test that power under Section 263 can only be exercised if the order of the AO is both erroneous and prejudicial to the interest of the revenue, the Tribunal concluded that the order passed by the PCIT was unsustainable.

15. Mr. Rai, in support of the appellant/revenue's case, has relied upon the order of the PCIT. Mr. Rai says that the AO had not conducted a proper enquiry with regard to the valuation of shares.

16. We tend to disagree with Mr. Rai. According to us, the Tribunal has returned findings of fact with regard to the enquiry made.

17. As is evident from the impugned order, notices were issued to the respondent/assessee and explanations were sought with regard to the issuance of shares at high premium.

17.1. *Inter alia*, the explanation given by the respondent/assessee was that the high premium was paid by Experience and Sankalp, having regard to the underlying asset that the respondent/assessee had, which was the immovable property located at Prithviraj Road.

18. According to the respondent/assessee (as computed by the registered valuer), the worth of the said property was pegged at Rs. 17.5 Crores.



19. In our view, having regard to the findings of fact returned by the Tribunal, it is abundantly clear that an enquiry was, indeed, made by the AO with regard to the subject shares being issued at high premium. This was not a case of no enquiry. The PCIT, in our opinion, had committed an error in exercising the powers under Section 263 of the Act.

20. Thus, according to us, no substantial question of law arises for consideration. The appeal is accordingly closed.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

DECEMBER 11, 2023/rk