

IN THE INCOME TAX APPELLATE TRIBUNAL
“H” BENCH, MUMBAI**BEFORE SHRI PRASHANT MAHARISHI (ACCOUNTANT MEMBER)**
AND
SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)ITA No. 726/Mum/2021
(Assessment year 2015-16)

Humuza Consultants 6 th Floor, Wokhardt Towers Bandra Kurla Complex Bandra East Mumbai-400 01 PAN : AAHFH9240E	vs	The Principal Commissioner of Income-tax-19, Mumbai Room no. 228, 2 nd Floor, Matru Mandir Tardeo Road, Mumbai-400 007
APPELLANT		RESPONDENT

Appellant by	Shri JD Mistry & Hiten Chande
Respondent by	Shri K.K. Mishra (CIT,DR)

Date of hearing	07-12-2021
Date of pronouncement	07-01-2022

ORDER

Per Prashant Maharishi (AM):

01. This appeal is filed by Humuza Consultants (the assessee / appellant) against the order (impugned order) passed by Principal Commissioner of Income tax, Mumbai-19 (The Learned PCIT) under section 263 of the Income-tax Act, 1961 (The Act) dated 09/03/2021. By this order, ld PCIT held that assessment order passed under section 143(3) of the Act on 06/12/2017 by the Assistant Commissioner of Income tax 23(1), Mumbai (The Learned AO) is erroneous and prejudicial to the interest of the revenue. Assessee is aggrieved and therefore in appeal before us.
02. Assessee has raised following grounds of appeal:-

The appellant objects to the order dated 9 March 2021, passed by the learned principal Commissioner of income tax – 90, Mumbai (principal CIT) u/s 263 of the contract act, 1961 (the act) on the following grounds of appeal

On the facts and in circumstances of the case and in law, the learned principal CIT:-

Revision U/S 263 of the Act

- 1) erred in holding that the assessment order dated 6 December 2017 passed u/s 143 (3) of the act by the learned assessing officer is erroneous as well as prejudicial to the interest of the revenue in passing the order u/s 263 of the act.
- 2) erred in holding that the learned AO failed to carry out necessary enquiries is warranted by the facts and circumstances of the case during the course of assessment proceedings u/s 143 (3) of the act and therefore the assessment order is erroneous insofar as it is prejudicial to the interest of revenue.
- 3) erred in not appreciating that the learned AO has adopted one of the possible views regarding taxability of the receipt of shares and therefore the assessment order of the learned AO cannot be regarded as erroneous insofar as it is prejudicial to the interest of the revenue
- 4) erred in setting aside the assessment order and directing the learned AO for assessment order after examining the issue of receipt of gift and taxability thereof
- 5) erred in directing the AO to examine the taxability u/s 68 of the act when the issue was never raised during the course of proceedings u/s 263 of the act and therefore no opportunity provided to the appellant in respect of the same

- 6) erred in directing the AO to examine taxability u/s 68 of the act in case the transaction is not found to be a valid gift without appreciating that the same has no implication on the taxability of receipt of shares in the hands of the appellate as the same is not taxable u/s 56 (2)(viia) of the act
- 7) erred in not appreciating that whether the transaction is considered receipt of shares by way of gift or receipt of shares without consideration, the same is not taxable u/s 56 (2)(viia) of the act in the hence of the appellant and therefore the assessment order is neither erroneous nor prejudicial to interest of revenue
- 8) erred in relying on explanation 2 to Section 263 of the act when the same is not applicable

Taxability of shares received by way of Gift

- 9) erred in not appreciating that the receipt of share is not taxable u/s 56 (2) (viia) of the act in the hands of the appellant
- 10) erred in holding that the transaction of gift by (1) Palanpur Holdings & Investments Pvt Ltd (2) Dartmour Holdings Pvt Ltd (3) Khorakiwala Holdings & Investments Pvt Ltd to the appellant is not a valid gift transactions on various grounds below which have no implication on the taxability of receipt of shares in the hands of the appellant as the same is not taxable u/s 56 (2) (viia) of the act:-
 - one of the essentials of the transaction of gift i.e. transfer of assets from donor to the donee is not fulfilled
 - there is no registered document transferring the shares by way of gift which is essential requirement of

gift Under the transfer of property act, 1882 as the value of gift are higher than the minimum void Under the transfer of property act

- gift of shares of the company is in the nature of distribution of assets by way of dividend and the transaction is a colourable device for avoidance of tax
- various requirement of the companies act, 2013 allegedly essential for transfer by way of gift for have not been fulfilled
- the appellant being the artificial person there cannot be any question of natural love and affection are prime requirement of the
- the transaction is dubious at that avoid tax and colourable device lacking any commercial substance
- the transaction is not a legitimate transaction and is a credit in the books of accounts of the appellant without matters of the same being established

11) erred in observing that since the instant case the shares were transferred in the name of Themisto trustee Co private limited, the same should be offered to tax by Themisto , without appreciating that the same is no implication on the taxability of receipt of shares in the hence of the appellant as same is not taxable u/s 56 (2)(viiia) of the act.

03. Brief facts of the case shows that assessee is a partnership firm engaged in the business of investment, consultant and acquired shares and other securities. For AY 2015-16, it filed return of income on 31-08-2015 declaring total income of Rs. 1,15,06,850/-. Ld AO picked up case of the assessee for scrutiny. After

examination of the details and considering the submissions of the assessee, the total income of the assessee was assessed at returned income of Rs. 1,15,06,850/- by order under section 143(3) of the Act passed on 06/23/3027.

04. The learned PCIT examined the case records wherein he found that the assessee has received 6,58,97,757 shares of Wockhardt Limited of face value of Rs. 5/- each amounting to Rs. 32,94,88,785/- as gift from three different companies. Assessee claims that it is not chargeable to tax under section 56(2) (viiia) of the Income-tax Act, 1961. On these shares, assessee has disclosed dividend income of Rs. 131,79,55,140/-. He noted that
- (i) demat account evidencing transfer of shares of the donors is not available on record.
 - (ii) there is no evidence on record that shares were actually transferred to the assessee.
 - (iii) there is no evidence of acceptance of the gift by the recipient and transfer of shares from donor.
 - (iv) as company is not a living person, whether it can give gift and assessee being a firm can receive the gift, was not examined by the assessing officer.

Therefore, according to him, the learned assessing officer has accepted the gift of Rs. 32,94,88,785/- and dividend income of Rs. 1,31,79,55,140/- without proper verification. Thus, he was of the view that the order passed by the assessing officer is prima facie erroneous insofar as it is prejudicial to the interest of the revenue. Accordingly, he issued notice under section 263 of the Act on 30/08/2019.

05. Assessee submitted replies on 10/10/2019, 26/02/2020 and 05/03/2020. The main contention of the assessee was that there is no indication in the notice that how the order passed by the learned assessing officer is erroneous so far as it is prejudicial to the interest of the revenue. It was also submitted that during assessment proceedings, assessee has contended that the share of Wokhardt Ltd were not taxable under section 56(2) (viiia) of the Act as it is a share of a listed company i.e. company in which public are substantially interested. It was further submitted that the issue has been examined in the assessment proceedings wherein assessee submitted information vide letters dated 11/08/2017, 26/09/2017, 17/11/2017 and 07/12/2017. Vide these letters; the assessee has submitted

- (i) details of equity shares received from group companies as gift,
- (ii) Minutes of the meeting of the Board of Directors of the donor companies.
- (iii) Legal arguments on non-taxability of the gift received from the above companies.
- (iv) Proof of dividend received and name of the trustee company in whose name the shares were held as the assessee being a partnership firm, it cannot be registered as shareholder in shareholder register of Wokhardt Ltd.

It was, therefore, stated that during assessment proceedings learned assessing officer has raised specific queries on these issues and assessment order has been passed after considering arguments of the assessee, and therefore, it cannot be held to be erroneous. Assessee further stated that where two views are possible, the adoption of one view by the assessing officer does not

make the order erroneous. Assessee further submitted that the company can give gift and assessee being a partnership firm can receive the gift. It also referred to the provisions of section 122 of the Transfer of Property Act and relied upon several judicial precedents wherein the gift of shares by a company has been held to be a valid gift and transactions are held to be non taxable. Assessee further referred the provisions of section 56(2) (viiia) of the Act and submitted that Wokhardt Ltd whose shares are received as a gift is a company in which public is substantially interested. Therefore, the provision of this section does not cover the transaction. Assessee further stated that as assessee is a partnership firm, it cannot be entered into register of share of the company and, therefore, those shares are held in the name of Thermisto Trustee Company on behalf of Habil khorakiwala Trust which is a partner in the assessee firm and, therefore, the dividend, etc. have been received in the name of that company which has been offered by the assessee in its profit and loss account and the dividend has been received in the bank account of the assessee. Therefore, assessee submitted that the order passed by the assessing officer was after making due enquiries and even otherwise it is neither erroneous nor prejudicial to the interest of the revenue.

06. Before the learned Principal Commissioner of Income-tax assessee also submitted a copy of delivery instructions for transfer of shares in the name of assessee, declaration filed with SEBI on 30th July, 2004 regarding the gift of shares and copy of the demat statement of the assessee.
07. On perusal of the replies of assessee, Ld. PCIT held that there is a lack of enquiry by the assessing officer on the issues raised in the

notice issued under section 263 of the Act and thus failure on the part of the assessing officer to conduct necessary enquiries makes the assessment order erroneous and prejudicial to the interest of the revenue. The Ld. PCIT further referred to sub clause (a) to Explanation (2) of section 263 introduced with effect from 01/06/2015 that the assessment order passed without making enquiries or verification which should have been made into the claim of the assessee, is deemed to be erroneous and prejudicial to the interest of the revenue. Though the assessment year involved in this appeal is 2015-16, he relying upon decision of the co-ordinate bench in Crompton Greaves Ltd vs CIT TS 66 ITAT-20, held that the above amendment is declaratory and clarificatory in nature, and therefore, applies to the impugned assessment year.

08. On merits of the case, he held that the claim of gift of shares should have been assessed in accordance with (i) willingness of the owner; (ii) acceptance of gift; (iii) transfer of assets. He held that in the present case, the third condition of the proper transfer of assets from donor to donee is not fulfilled. He further held that the distribution of assets by the company by way of gift is in the nature of distribution through dividend and, therefore, these transactions are clearly colourable device for avoidance of tax. He thereafter referred to the provisions of the Companies' Act, 2013 and held that the requisite conditions of the transfers have not been fulfilled. He further held that the transactions clearly intended to benefit the assessee without any commercial reason and while deciding whether a transaction is genuine or a colourable device; it is open for the tax authorities to go behind the transaction and examine the substance and not the form only. He further relied upon the decision of the co-ordinate bench in case of Gagan Infraenergy Ltd 65 ITR 514 (Del)(Trib) as well as the

Authority for Advance Ruling in case of Orient Power Pte Ltd. He further held that the taxpayer's articles of association do also not support the transaction. He further noted that the shares are transferred in the name of Thermisto Trustee Company Pvt Ltd on behalf of Habil Khorakiwala trust, which is a partner in the assessee firm. Therefore, why the assessee firm has taken exemption of the above gift received and instead Thermisto Trustee Company Pvt Ltd should offer it as income for respective financial year. Therefore, according to him, it is clearly a pass through transaction intended to benefit the directors and promoters of Wokhardt Ltd. He further held that assessee has also not provided evidence of registration of gift deeds and further no agreements were executed showing that it is part of arrangement between group entities. Thus, he held that the order passed by the assessing officer is erroneous and prejudicial to the interest of the revenue. Therefore, he set aside the assessment order and directed the learned assessing officer to pass fresh assessment order after examining the issue of receipt of gift and the claim of the same being exempt with respect to various issues raised in the notice issued under section 263 of the Act. He further directed ld AO to consider applicability of section 68 of the Act, if the transaction is not found to be a valid gift. Therefore, he directed the assessing officer to make a fresh assessment after giving an opportunity to the assessee and examination of the evidence submitted in the claim. Thus, order under section 263 of the Act was passed on 09/03/2021. The assessee is aggrieved with that and has preferred this appeal raising 11 grounds of appeal.

09. Learned authorized representative drew our attention to the paper book filed by the assessee containing 123 pages. Stating the facts of the case, he submitted that the assessee has shown a

miscellaneous income of Rs. 3/- which was disclosed in the computation of total income and further, a dividend income of Rs. 131.79.55.140/- was shown as dividend income and exemption under section 10(34) of the Act was claimed. He further referred to the statement of P&L account for the impugned year where there is recording of dividend income and miscellaneous income. He further referred to the Note No. 4 showing the investment of 6,58,97,757 equity shares of Wokhardt Ltd of Rs. 5 each fully paid up at Rs. 3/-. He thereafter referred to the assessment order passed under section 143(3) of the Act to show that the income of the assessee is assessed at returned income.

10. With respect to the enquiries made by the learned assessing officer, during the course of assessment proceedings, he referred to several correspondences.

- i. He first referred to the letter dated 28/09/2017 wherein the brief introductory details of the assessee and the nature of activities along with deed of partnership dated 30th day of April, 2014 were submitted.
- ii. He thereafter referred to letter dated 26/09/2017 wherein the details of gift of above equity shares stating the name of the donors, addresses and their permanent account numbers along with number of equity shares donated by each of them are mentioned. It is also supported by the extracts of the minutes of the meetings of the board of directors of donor companies. It was also stated that the gift received by the assessee is a 'capital receipt' and not chargeable to tax as per the provisions of the Income-tax Act.

- iii. He further referred to letter dated 17/11/2017 wherein the assessee explains to the assessing officer the applicability of section 56(2)(viia) with regard to the taxability of the above gift. The assessee submitted that Wokhardt Ltd is a company listed on National Stock Exchange and Bombay Stock Exchange in which public are substantially interested and, therefore, the provisions of section 56(2)(viia) does not apply.
 - iv. He further referred to a letter dated 7th December 2017 wherein the assessee submitted the details of the partners of the assessee firm and the proof of dividend received by the assessee, which is received in the bank account of the assessee, but the name of the holder of the shares is Thermisto Trustee Company Pvt Ltd. To show this, assessee submitted the email dated 25th November 2014 received from the share transfer agent of Wokhardt Ltd.
11. He also submitted that before the Id Principal CIT, vide letter dated 10/10/2019, demat account of all the donor companies were also submitted evidencing the above transfer. In view of this, his argument was that the assessee made full and complete statement of the facts based on the enquiries made by the learned assessing officer during assessment proceedings and therefore, no further enquiries were left to be done by the assessing officer. On the basis of the submission of above details, the learned assessing officer was completely satisfied and took a view that provisions of section 56(2)(viia) are not applicable.
12. Thereafter, the learned authorized representative referred to the show cause notice issued by the learned Principal CIT on 30th August, 2019 and referred to the reply dated 19/09/2019

submitted by the assessee. He submitted that the issue has been completely enquired by the learned assessing officer and further, the issue of gift of shares and dividend received thereon is not chargeable to tax in the hands of the assessee under section 56(2)(viia) because of the reason that it is the transfer of the shares from one person to another person and same has been transferred from the demat account of the donors to the demat account of the donee, therefore, there is a complete evidence of transfer of shares in the name of the assessee. Further, the impugned asset transferred is 'shares' of a company in which public are substantially interested and, therefore, the provisions of section 56(2) (viia) do not apply and further transactions are made in dematerialise form and no transfer deed is required. He further referred page no 76 of the paper book where demat account of Thermisto Trustee Company Pvt Ltd with IL&FS Securities Ltd in whose name the shares are held. He further referred to the reply submitted on 26/02/2020 before the Principal CIT and letter dated 05/03/2020 to show that there is a transfer of the asset from the donor to the donee, which is a valid transfer. He further referred to the letter dated 25/02/2021 wherein at pages 114 to 116, the assessee placed the disclosure before the Securities and Exchange Board of India under Regulation 10(7) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 dated 30/7/2014 in respect of acquisition of equity shares of Wokhardt Ltd . He further referred to the details of acquisition of the shares acquired by gift by the assessee and the share holding of the assessee before and after acquisition of the shares. He further referred to Note No.1 attached to disclosure wherein it was mentioned that in view of intra group re-structuring on 07/07/2014, assessee acquired by way of gift 6,58,97,757 equity

shares of the face value of Rs. 5/- each of target company, i.e. Wokhardt Ltd constituting 59.90% of paid up equity share capital from three existing promoter companies. In that note, the details of the partners of the assessee and trustees as well as the partners of the LLP were also disclosed. It also states that as assessee being a partnership firm, the equity shares are held in the name of Thermisto Trustee Company Pvt Ltd as a first holder being trustee of Habil Khorakiwala Trust, which is holding 97% of the shares in the assessee company, and a second and third holder are other partners of the assessee. The learned authorized representative also took us through the delivery instructions by the donor to their depository for transfer of the shares in favour of the assessee. Thus, the argument of the learned AR is that the order of the learned assessing officer was passed after making complete enquiries relevant to transaction and, therefore, the clause (a) of Explanation 2 of section 263 of the Act does not apply. He submitted that there is no meaningful enquiry left to be done by the assessing officer and even the Principal CIT has also not shown any indication that what are those enquiries which should have been made by the ld assessing officer and which he has failed to make. He, therefore, submitted that the present case is not at all covered by the provisions of the amended section with effect from 01/06/2015.

13. With respect to the finding of the learned PCIT that the Explanation 2(a) of section 263 is clarificatory in nature by relying on the decision of coordinate bench in case of Crompton Greaves Ltd, he submitted that the above order of the co-ordinate bench has been recalled and further, in case of that assessee, the co-ordinate bench vide order dated 28/02/2019, decided on the merits of the case quashing the order passed by the learned CIT

under section 263 of the Act. He, therefore, submitted that the provisions are not clarificatory and retrospective in nature.

14. The ld AR further relied on several judicial precedents.

- a. He first referred to the decision of the co-ordinate bench in DP World Pvt Ltd vs DCIT [140 ITD 694]. Referring to para 13 of that order wherein it has been held that the Transfer of Property Act does not restrict the transfer of shares by way of gift by the company. It is also held therein that company is permitted to transfer in terms of section 82 of the Companies' Act, 1956 where the shares constitute a movable property and can be transferred in the manner provided in the Articles of Association of the company. He further referred to paragraph 22 stating that where there is a gift, it is a capital receipt and not taxable under the provisions of the Income-tax Act. He further referred to para 41 of that judgement stating that the provisions of section 56(2) (viia) and 56(2) (viib) where the shares are transferred as a gift of the company in which the public are not substantially interested, is not chargeable to tax. It is also stated that assessee could have received gifts from companies. It further held that Transfer of Property Act is clear on the issue that companies can receive and make gifts. It further held that the Income-tax Act itself provides that the gifts of certain kind of shares are also taxable in the hands of certain companies. Based on the above decision, he submitted that the

(1) Company can give the gift

(2) Transfer of Property Act does not prohibit the gift by the companies and

(3) Further, the Income-tax Act itself recognizes such transactions under the provisions of section 56(2) of the Act.

He, therefore, submitted that the transactions entered into by the assessee is in order and cannot be challenged.

- b. Further, coming to the provisions of section 263 of the Act, he referred to the decision of the Hon'ble Bombay High Court in case of Gabriel India Ltd 203 ITR 110(Bom). He further submitted that in order to hold that the order is erroneous and prejudicial to the interest of the revenue, there must be some material before the learned CIT. He further submitted that the Hon'ble High Court has held that simply because in his order the assessing officer did not make an elaborate discussion, such order cannot be held to be an erroneous order. He further stated that the Hon'ble Bombay High Court has held that the direction of the learned PCIT to the Income-tax Officer to re-examine the matter without having any material and for the reason that the order of the learned assessing officer did not discuss the issue, the action under section 263 is not permissible.
- c. He then referred to the order of the Hon'ble Supreme Court in case of Malabar Industrial Company Ltd vs CIT 243 ITR 83 (SC) and referred to para 9 where the Hon'ble Supreme Court has held that when assessing officer has adopted one of the course permissible in law even though

it results in loss of revenue, the provisions of section 263 are not satisfied, unless the view taken by the ITO is unsustainable in law. He submitted that in the impugned appeal, view taken by the assessing officer is completely in accordance with the law and the learned PCIT has failed to show that how the order of the learned assessing officer is unsustainable.

- d. He thereafter referred to the decision of the Hon'ble Bombay High Court in case of CIT vs Nirav Modi 390 ITR 392 (Bom) and referred to paras 6 to 12 of that order and submitted that when the assessment order is passed, learned AO is not required to record the reasons in the assessment order that why the claim of the assessee is accepted. He further stated that there is no need on record to show that the evidence produced were reliable. Thus in the present case the ld PCIT did not record reasons how and why the order is erroneous. He, therefore, submitted that case in the present appeal is neither a case of the 'lack of enquiry' nor 'inadequate enquiry', which gives an authority to the learned PCIT to revise the order.
- e. He further referred to the decision of the Hon'ble Delhi High Court in ITO vs DG Housing Project Ltd 343 ITR 329 (Del) and referring to paragraphs 16 & 17 of that order that the matter cannot be remitted for a fresh decision to the AO to conduct further enquiries without finding that the order is erroneous. He submitted that at least LD PCIT should have stated that those are the LD AO has not made the inquiries, which are relevant to the issues. He further stated that the Hon'ble High Court has held that

in most cases of inadequate enquiries it will be difficult to hold the order of the assessing officer, who had conducted enquiries and acted as an investigator is erroneous without PCIT conducting verification and further enquiries. He submitted that in the present case, there is no enquiry conducted by the learned PCIT and there is no finding that how the order of the Assessing Officer is erroneous.

- f. He thereafter referred to the decision of Hon'ble Delhi High Court in DIT vs Jyoti Foundation 357 ITR 388 (Del) wherein at para 5 where the Hon'ble High Court held that it is mandatory for the PCIT to have conducted further enquiries or calling of the details before holding that the order is erroneous. It was, therefore, stated that in the present case there are no enquiries conducted by the learned PCIT before holding that the order is erroneous.

- 15. He further submitted that the learned PCIT has directed the assessing officer to examine the provisions of section 68 of the Act in the case if the transactions are found to be non-genuine. His argument was that learned PCIT has not given any opportunity to the assessee with respect to the applicability of section 68 of the Act. He submitted that in the present case, the assessee has received gift of shares and not any 'sum'. Therefore, the provisions of section 68 as such do not apply.
- 16. He submitted that even otherwise, without putting assessee to the question, the learned PCIT should not have given the direction. He referred to paragraph 6.3 of the decision of the co-ordinate bench in case of Damodar Valley Corporation vs DCIT, Kolkatta Road (2016) 72 taxman.com 7 (Kol). Therefore, his argument is that without giving any opportunity to the assessee by the way either of

notice or during the course of revisionary proceedings, the learned PCIT could not have directed the assessing officer to investigate the provisions of section 68 of the Act. He further referred to the decision of Hon'ble Delhi High Court in 399 ITR 228 (Del) in BSES Rajdhani Power Ltd vs PCIT wherein at paragraph 16, the principles of natural justice of giving an opportunity of hearing to the assessee was referred. He, therefore, stated that in absence of any opportunity to the assessee with respect to the applicability of section 68 of the Income-tax Act, the direction of the learned PCIT is not sustainable. He further referred to para 17 of that order to support his contentions.

17. With respect to the applicability of Explanation 2 to section 263 introduced with effect from 01/06/2015, he referred to the decision of the Hon'ble Gujarat High Court in PCIT vs Sreeji Prints Pvt Ltd Tax Appeal No.828 of 2019 dated 03rd February, 2020 against which the Special Leave Petition preferred by revenue is dismissed vide 130 taxman.com 294, wherein the amendment was considered. He submitted that when the due enquiries are made by the learned assessing officer and the learned PCIT could not show what further enquiry should have been made, the Explanation 2(a) cannot be applied to invoke the jurisdiction under section 263 of the Act. He submitted that during the course of assessment proceedings, the assessing officer made detailed enquiry and further accepted the contentions of the assessee that the gift received by the assessee is not chargeable to income-tax being capital receipt in nature and further, the provisions of section 56(2) (viia) also does not apply. Thus, the order passed by the learned PCIT holding that assessment order is erroneous and prejudicial to the interest of the revenue cannot be sustained. He further referred to the decision of the co-ordinate bench in case of

Torrent Pharmaceuticals ltd vs DCIT (2018) 97 taxman.com 671 (Ahd) wherein it has been held that what enquiry should have been made by the learned assessing officer should be contested on the antecedent of reasonableness and rationality in approach. It further held that inadequacy in enquiry ought to be of cardinal nature to recognize the patent powers of review. The contention of the learned AR is that if the interpretation of Explanation 2 is made in that manner, then any enquiry, even if extensively made by the assessing officer can be found fault with by revisionary powers. He submitted that the inadequate enquiry could only be shown if the assessing officer does not make any relevant and meaningful enquiries. He submitted that in the present case, the assessing officer has made all enquiries, which could have been possibly made by any person of reasonable prudence could have been expected. He thereafter referred to the decision of the co-ordinate bench in case of Rallis India Ltd vs DCIT [ITA No. 3564/Mum/2016 dated 13/04/2017] wherein para 9 onwards the co-ordinate bench has considered the Explanation 2 to section 263 can be invoked only when an assessing officer fails to make an enquiry which he is reasonably expected to make. Thereafter he referred to the decision of the co-ordinate bench in case of JRD Tata Trust vs DCIT in 122 taxman.com 275 wherein it has been held that the assessing officer should have failed to make an enquiry in the ordinary course of performance of his duties of a prudent, judicious and responsible public servant which assessing officer is expected to be, then only the Explanation 2 to section 263 could be invoked.

18. In view of the above, his argument was that the order passed by the learned PCIT under section 263 of the Income-tax Act is not sustainable in law for the reason that

- i. The learned assessing officer has made complete enquiry.
- ii. The learned assessing officer has reached a conclusion, which is the only conclusion possible, on the facts and circumstances of the case, which could have been arrived on application of law and facts of the present case.
- iii. The revisionary order does not show what the meaningful and relevant enquiries further are to be made which AO failed to make.
- iv. The order of the assessing officer is neither erroneous nor prejudicial to the interest of revenue.

19. The learned departmental representative referring to the facts of the case submitted that the Finance Act has inserted Explanation 2 to section 263 of the Income-tax Act with effect from 01/06/2015 which holds that the order passed by the learned assessing officer can be deemed to be erroneous and prejudicial to the interest of the revenue if the learned assessing officer fails to make enquiries which he should have made. He submitted that the order passed by the learned assessing officer falls in the category of clause (a) of the above Explanation and, therefore, all the judicial precedents cited by the learned authorized representative which are prior to the introduction of above Explanation does not apply. Even otherwise, he stated that in the present case, the assessment order was passed on 06/12/2017. He referred to pages 7 to 11 of the paper book submitted by the assessee. Thereafter he referred to the paper book pages 30 to 47 where the assessee has submitted certain details vide letter dated 7th December 2017. He, therefore, submitted that the details submitted by the assessee vide letter dated 07/12/2017 could not have been considered by the assessing officer at the time of passing an order under section 143(3) of the Act on 06/12/2017 and therefore, the details filed by

the AR could not have been before the assessing officer and, therefore, such details could not have been enquired into by the assessing officer and, therefore, the issues which were never examined by the assessing officer makes the order passed by the learned assessing officer as erroneous and prejudicial to the interest of the revenue falling into the mischief of Explanation 2 to section 263 of the Act. The learned DR further submitted that the provisions of section 263 could not have been invoked if there are two views possible on the facts of the case. He submitted that when the adequate details itself was not available before the assessing officer as demonstrated in absence of requisite details and, therefore, in absence of examination, the argument of the learned AR of existence of two possible views is devoid of merit. He further referred to para 5 of the order of the learned PCIT under section 263 of the Act and stated that the order of the learned assessing officer was set aside for the reason that no enquiry was made by the learned assessing officer and therefore, after such enquiries, the facts need to be verified. He, therefore, submitted that there is no infirmity in the order of the learned PCIT in holding that the assessment order passed by the learned assessing officer is erroneous and insofar as prejudicial to the interest of the revenue.

20. The learned authorized representative in rejoinder submitted
- a) Letter submitted on 07th December 2017 before the assessing officer was as asked by the learned assessing officer in hearing on 21-11-2017. The details were with respect to the partners of the assessee firm and the proof of dividend received by the assessee. He submitted that the income received as dividend was already available with the assessing officer and it was not new information. He further

referred to earlier letters submitted before LD AO and submitted that as such, the information was completely contained in those two letters and the legal aspects were explained. He otherwise submitted that the assessee received the assessment order only on 13th December 2017 and though the order might have been passed on 06th December 2017, the information was submitted personally to the assessing officer on 07th December 2017. He submitted that even otherwise the details contained in that letter do not affect the issue.

- b) With respect to the argument of the learned DR on judicial precedents cited by the learned AR that those are not applicable as they were prior to the introduction of Explanation 2 to section 263 of the Act, He submitted that all these judgements are on the aspects of matter under section 263 of the Act. He further stated that the decision of the Hon'ble Delhi High Court in case of Jyoti Foundation (supra) para 5 clearly shows that when the provisions of section 263 could be invoked. He further referred to the decision of Hon'ble Gujarat High Court in case of Shreeji Prints Ltd (supra) where the Special Leave Petition of the revenue is dismissed against the order of the Hon'ble Gujarat High Court wherein the implication of Explanation 2 to section 263 of the Act was discussed. He, therefore, submitted that all these decisions apply to the facts of the present case.
- c) With respect to the argument that the order of the assessing officer did not mention the facts of the gift as well as the order also did not show that the assessing officer has taken a view, he submitted that the assessee has furnished the

complete details before him which were examined by the assessing officer, all possible questions were raised which were explained by the assessee and thereafter if the assessing officer agrees with the argument of the learned AR, naturally, he could not have mentioned anything on that issue. Had he disagreed with the assessee, of course, he would have mentioned it and made an addition to the income of the assessee. He also submitted that the assessee could not enforce the assessing officer to write the order in a particular manner. Further, the manner of writing of an order cannot be used against the assessee to invoke the provisions of section 263 of the Act. In view of this, he submitted that the order passed by the learned PCIT deserves to be quashed.

21. We have carefully considered the rival contentions, order passed by the learned PCIT under section 263 of the Act, order passed by the assessing officer under section 143(3) of the Act as well as the various correspondences and judicial precedents placed before us by the rival parties. Facts of the case show that assessee is a partnership firm wherein Habil Khorakiwala Trust holds 97% partnership share and 1% share each is held by three different LLPs in assessee firm. Trustee of Habil Khorakiwala Trust is Thermisto Trustee Company Pvt Ltd. In the trustee company, Dr. Habil Khorakiwala and Nafisa Khorakiwala are the directors. In view of 'intra group restructuring' on 7th July 2014, three companies, viz. (1) Khorakiwala Holding Company and Investments Pvt Ltd; (2) Palanpur Holdings Investments Pvt Ltd and (3) Dartmour Holdings Pvt Ltd transferred 6,58,97,757 equity shares of face value of Rs. 5/- each of Wokhardt Ltd as gift to the assessee firm. As shares were received as gift without paying any

consideration to the donors, assessee recorded the above shares in its books of account under head 'Investment' at cost at Rs. 3/- only. Simultaneous credit was also given to P & L Account showing miscellaneous income of Rs. 3/-. This miscellaneous income was reduced from taxable income. Thus, it is apparent that shares were recorded at Rs 3/- only for identification in books of accounts of assessee firm. Dividend income was also received on these shares, which is also shown as dividend income in the statement of P & L Account. At the time of filing of the return of income in the statement of computation assessee reduced the miscellaneous income of Rs. 3 from the taxable income and further claimed exemption under section 10(34) of the Act with respect to the dividend income. The return of income was filed for impugned assessment year on 31/08/2015 at a total income of Rs. 1,15,06,850/-. The case of the assessee was taken up for scrutiny. On 18/09/2017, the assessee submitted a letter along with partnership deed showing nature of business of assessee as investment in shares and securities. Above letter also showed that major source of income of the assessee is dividend income from the shares of Wokhardt Ltd and interest on FDRs. Assessee also submitted annual accounts along with computation of income. Subsequently on 26/09/2017, the assessee submitted in furtherance to its discussion on 18/09/2017 that assessee has received a gift of 6,58,97,707 equity shares of Wokhardt Ltd from three different companies, as under:-

- | | | |
|----|--|------------------|
| 1. | Palanpur Holdings Investments Pvt Ltd | 31,53,300 |
| 2. | Dartmour Holdings Pvt Ltd | 68,28,325 |
| 3. | Khorakiwala Holdings Investments Pvt Ltd | <u>55,91,132</u> |

6,58,97,757

Assessee also submitted that above gift is supported by the mandates of the board of directors in form of resolutions passed at their board meetings of those donor companies. The assessee claimed that the above gift of shares from three different companies as capital receipt and is not chargeable to tax as per the provisions of the Act. Assessee also submitted vide letter dated 17/11/2017 with respect to the query regarding the applicability of provision of section 2(24) (xv) Vis a Vis section 56 (2) (viiia) to gift of shares. The assessee explained in detail, the provisions of section 2(24) (xv) as well as section 56(2) (viiia) to the assessing officer. It was further submitted that the Wokhardt Ltd is a company listed on National Stock Exchange and Bombay Stock Exchange. Therefore, in terms of the provisions of section 2(18) of the Income-tax Act, 1961, it is a company 'in which public are substantially interested' and hence, when the shares of a listed entity are received as gift by a partnership firm, the provisions of section 56(2) (viiia) do not trigger. Therefore, before the assessing officer, the assessee submitted the details of the complete transactions. The learned assessing officer enquired and was explained about the source of the shares, the transfer of the shares and consequent dividend received by the assessee as well as the argument of taxability of those shares under section 56(2)(viiia) of the Act. Based on the above explanation, the leaned assessing officer accepted the contentions of the assessee that the above gift was a capital receipt and is not chargeable to tax in the hands of the assessee. The above is the complete spectrum of enquiries made by the assessing officer during the course of assessment proceedings.

22. The learned PCIT held that the assessing office has not made enquiries with respect to transfer of the assets, i.e. shares of Wokhardt Ltd from the donor to the recipients. In fact, assessee has shown in the annual accounts receipt of donation and consequently investment in its balance sheet. Assessee has also submitted the details of the bank account to the assessing officer. The dividend income was also shown in the computation of the total income and further assessee has clearly stated at para one of letter dated 18/09/2017 that the major source of income of the assessee is dividend income from the shares of Wokhardt Ltd. This was the first year of the assessee as it was formed only on 30/04/2014 and therefore, there was no question of having any shares acquired earlier. Further, the proof of dividend received by the assessee communicated by depository was also submitted. The transfer of assets i.e. shares from the donors to the assessee were also depicted in the board resolutions of the donor companies. Further, finding of the learned PCIT that the company could not have given a gift is also not in accordance with law as the co-ordinate bench in DP World Pvt Ltd vs DCIT (supra) vide order dated 12th October, 2012 decided this issue after considering the provisions of section 5 and section 122 of the Transfer of Property Act and section 82 of the Companies' Act, 1956. The co-ordinate bench has held that company can give gift and such gift is a capital receipt not taxable under the alleged provisions of the Act. Further, the co-ordinate bench in case of DCIT vs KDA Enterprises Pvt Ltd (supra) decided on 11th March 2015, company could give gift, also took the similar view. Above decision also examine the taxability of gift under section 56(2) (viiia) of the Act. However, in that case, the gift was received not of the share, but of the sum. Even otherwise provision of section 56 (2)

(viia) itself provides about taxability of receipts of assets without consideration or with inadequate consideration in the hands of certain companies. Therefore, the finding of the 1d PCIT that a company cannot make gift is devoid of any merit and we are not shown that it is supported with any provisions of law. In view of overwhelming judicial precedents cited before us, we are of the view that there is no bar against the company giving its properties as Gift.

23. Now the issue comes with respect to the taxability of the above sum under section 56(2) (viia) of the Act. The provisions of section 56(2)(viia) provides as under :-

(viia) where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June, 2010 2355[but before the 1st day of April, 2017], any property, being shares of a company not being a company in which the public are substantially interested,—

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration:

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.

Explanation.—For the purposes of this clause, "fair market value" of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);]

24. Thus, it specifically deals with receipt by a firm or a private company of any property being shares of a 'company in which the public are not substantially interested'. No doubt, in case the recipient is a partnership firm of the property, but the property involved is a share of Wokhardt Ltd, which is a listed company in which the public are substantially interested.
25. According to provision of section 2 (18) of the Act,
(18) "Company in which the public are substantially interested"—a company is said to be a company in which the public are substantially interested
- [(b) if it is a company which is not a private company as defined in the Companies Act, 1956 (1 of 1956), and the conditions specified either in item (A) or in item (B) are fulfilled, namely:—
- (A) shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) were, as on the last day of the relevant previous year, listed in a recognised stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and any rules made thereunder;
26. It is not the case of the learned PCIT that Wokhardt Ltd is not covered by the provisions of section 2(18) of the Income-tax Act as the facts clearly shows that shares of that company are listed on NSE and BSE. Shares of such company are not the subject matter of taxability as shares of companies in which public is substantially interest is excluded.
27. Undoubtedly, as the assessee is a partnership firm, it cannot be registered as a shareholder in the shareholder register of Wokhardt Ltd and, therefore, naturally those were to be held in the name of one of the partners. Further, in case of the assessee, the structure of partnership was that it is a partnership between one trust and three LLPs. Therefore, the shares were registered in the name of

trustee of Habil Khorakiwala Trust, viz. Thermisto Trustee Company Pvt Ltd. This is also in accordance with the provisions of the Companies Act. The demat account in the name of Thermisto Trustee Company Pvt Ltd having client ID no. 11769646 with the depository IL&FS Securities Services Ltd clearly shows that the shares were held in the name of the trustee. Further, the assessee also filed a declaration on 30/07/2014 with SEBI (Substantial Acquisition of Shares & Takeovers Regulations) Act, 2011 stating complete details of the nature of the transfer, i.e. (1) Intra group re-structuring, (2) holding of the shares in the name of trustee of one of the partners (3) details of the donors. In view of the above facts, we are of the opinion that the learned assessing officer has made all relevant and due enquiries during the course of assessment proceedings. Further, there is no error by the ld AO in holding that

- a) The company can give gift
- b) Gift received by the assessee from the companies are not chargeable to tax as income of the assessee u/s 56(2) (viiia) of the act as those shares were of company in which public are substantially interested.

28. Further, with respect to the Explanation 2 to section 263 of the Act which has been inserted with effect from 01/06/2015 provides that any order passed by the assessing officer shall be deemed to be erroneous as insofar as it is prejudicial to the interest of the revenue, if in the opinion of the PCIT, the assessing officer passed the order without making enquiries or verification which should have been made. Therefore, to satisfy the above clause, the learned PCIT should clearly show that relevant to the impugned order, assessing officer should have made enquiries and if the assessing officer does not make those enquiries or those are

shown to be inadequate, then naturally, the order is erroneous and prejudicial to the interest of the revenue, as per the deeming provisions. Naturally, the ld AO officer has a mandate of law to pass an assessment order after making due inquiries. Further, the mandate of law does not entrust AO with powers to making roving and fishing inquiries. Thus, it is clear that for examining taxability of a transaction assessing officer is duty bound to make inquiries which are relevant, meaningful and pertinent. Thus, enquiry should have been made by the learned assessing officer, which are relevant, and with aspect to examine taxability of the subject matter, which should have been made by an assessing officer acting with prudence and judicious approach. If he fails to fulfil his this duty, explanation (2) to section 263 of the act deems such orders passed as erroneous and so far as prejudicial to the interest of revenue. Therefore to invoke above explanation for making revision, the ld Revisionary authority is duty bound to show what meaningful, pertinent and relevant inquiries have not been made by the ld AO to assume revisionary powers. Thus Revisionary authority can exercise this power if and only if, it is demonstrated that Assessing authorities have failed to carry out meaningful, pertinent, relevant inquiries in a judicious manner. There cannot be any other interpretation of the above explanation. If the above Explanation is interpreted otherwise, then each order could be found fault with and any small, futile or irrelevant enquiries which assessing officer fails to do, in the opinion of the revisionary authorities would automatically become an order passed erroneously insofar as it is prejudicial to the interest of the revenue. Therefore, the opinion of the Principal Chief Commissioner as embodied in Explanation 2 has also to be prudent, judicious and reasonable. As the provisions under

section 263 of the Act are one of the lethal provisions to pluck the leakage of the revenue, it itself is saddled with utmost responsibility on the part of the revisionary authority, that only in the case of orders where claims of the assessee are accepted without an inquiry or where inquires, though made are irrelevant and not due.

29. Therefore, it is necessary to examine the inquires made by the ld AO to see whether those are relevant, due and pertinent or not. We find that the assessing officer enquired about (1) nature of business, (2) details of the partners, (3) property transferred, (4) income arising from that property in the hands of the assessee, (5) facts of gift from companies (6) confirmations of the donors in the form of the resolution passed by Board of Directors of the donor companies, (7) transfer of the shares in the demat account of one of the trustees of the partner trust and (8) taxability of the above gift in the hands of the assessee with respect to relevant provision of law. This is also coupled with the fact that in the investment schedule, the above shares with its quantity and method of valuation was also disclosed. Further, the transfer of shares of a company made through the demat account of the donors by debit and credit in the demat account on behalf of the assessee firm clearly shows the evidence of the transfer. Based on this inquiry, he ultimately reached to a conclusion or agreed with the submissions of the assessee that the impugned transaction is not chargeable to tax. We do not find any reason that when the donors say that those companies have gifted the shares speaking through their Board resolutions and the donee says so, through its demat account, annual accounts that the transfer of shares are on account of gift, we do not find anything else is required to be examined so far as the aspect of gift is concerned. Unless there are

other contrary evidences shown, we do not find any reason to hold above gifts as not a valid gift. The learned PCIT relying upon the decision of the co-ordinate bench in case of Gagan Infraenergy Ltd 65 ITR 514 (Del)(Trib) held that the taxpayer has to establish the factum, genuineness and bona fide nature of such transaction, especially when revenue challenges its genuineness. We find that the factum of the gift was shown with respect to the donee and donors, genuineness and the bonafide of transaction is stated to be intra group restructuring which is not challenged by revenue. The learned PCIT also held that it is clearly a pass-through transaction intended to benefit the directors and promoters of Wokhardt Ltd. No doubt, the transaction results into increase in holding by the promoters' quota of the shares, but how that impacts the above transaction as taxable income in the hands of the assessee is not shown. The breach has to be shown by the revenue with respect to the chargeability of any income in the hands of the impugned assessee and not with respect to any benefit to others,

30. Vide para no 5 , the learned PCIT has set aside the order and the assessing officer is directed to pass the fresh assessment order after examining the issue of receipt of gift and the claim of the same being exempt considering the issue raised in the notice under section 263 of the Act. We find that there is no mention in the revisionary order that what are the provisions of law other than those considered by the assessing officer and what are the further facts that the assessing officer should look into, which originally he has not looked into. Unless it is shown that, what further enquiries LD AO, which he has not made earlier, should make, the order of the learned PCIT does not hold any water.

31. The further issue that arise is that at para 5 of the order, the learned PCIT has directed the assessing officer to examine the

applicability of section 68 of the Income-tax Act, if the transaction is not found to be a valid gift. The claim of the assessee is that the learned PCIT neither mentioned any applicability of section 68 in the show cause notice issued or during the course of revisionary proceedings before him. We find that the provisions of section 263 gives power to the revisionary authority to revise the order after giving the assessee an opportunity of being heard and after making or causing to be made such enquiries as he deems necessary. Therefore, the law clearly mandates that the issue of revision could only be decided after the assessee is heard on the matter. In the present case, we do not find that the issue of taxability of above gift u/s 68 of the act was at any time put to the notice of the assessee. Even otherwise, we find that the provisions of section 68 applies where 'any sum' is found credited in the books of the assessee. In the present case, these are the shares, which are received by the assessee. The learned PCIT in whole of his order did not mention and deal with the applicability of section 68, but in the finding mentioned merely a line without giving assessee an opportunity for putting its case before him, directed the assessing officer to apply the provisions of section 68 of the Act. Ld PCIT has also not held that how the provision of section 68 applies in the facts of the case. This is not correct in view of several judicial precedents cited before us.

32. Now we come to the argument of the learned DR that letter dated 07th December, 2017 could not have been examined by the assessing officer as he has already passed the order on 06/12/2017. On careful examination of that letter, it shows that assessee submitted by that letter details of the partners of the assessee firm and the details of the dividend received. The content of the letter as such do not make any difference with respect to the

examination of taxability of gift of shares in the hands of the assessee.

33. In view of above facts, we hold that

- a) the learned assessing officer has passed the order under section 143(3) of the Act after carrying out necessary and relevant enquiries as warranted by the facts of the case and
- b) the learned PCIT could not show that what further enquiry should have been made,
- c) Order of the learned assessing officer cannot be deemed erroneous as well as prejudicial to the interest of the revenue with respect to Explanation 2 to section 263 of the Act.
- d) The order of ld AO is not erroneous as Gift of shares of the Wockhardt Limited are not chargeable to tax in the hands of the assessee firm u/s 56 (2) (viia) of the Act , as assessee has received gift of shares of a company in which public are substantially interested which could not have been taxed under section 56(2)(viia) of the Act,

34. Accordingly, for the above reasons, we allow grounds against revisionary order passed u/s 263 of the act vide serial no 1 to 8 and against taxability of shares received as gift vide ground no 9 to 11 of the appeal of the assessee and quash the order passed by the Ld PCIT dated 09th March 2021 passed u/s 263 of the Act.

35. Accordingly, appeal filed by the assessee is allowed.

S.A. no. 162/Mum/2021

36. In view our decision in the appeal filed by the assessee, the stay application no. 162/Mum/2021 becomes infructuous and hence, dismissed.

37. In the result, appeal filed by the assessee is allowed and the stay application filed by the assessee is dismissed.

Order pronounced in open court on 07/01/2022

Sd/-

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Mumbai,

Date : 07/01/2022

Pavanan

Copy to :

1. Appellant
 2. Respondent
 3. The CIT concerned
 4. The CIT(A)
 5. The DR, ITAT, Mumbai
 6. Guard File
- /True copy/

By Order

Asstt. Registrar, ITAT, Mumbai