IN THE INCOME TAX APPELLATE TRIBUNAL RAJKOT BENCH, RAJKOT

[Conducted through E-Court at Ahmedabad]

BEFORE, SHRI S. S. GODARA, JUDICIAL MEMBER
AND SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA Nos. 139 to 141/Rjt/2016
(Assessment Years: 2006-07 to 2008-09)

M/s. Panchnath Enterprise,
22, Vijay Plot Corner, Gondal Road,
Near Balashram, Rajkot — Appellant

Vs.

The Principal Commissioner of
Income Tax-1, Rajkot — Respondent

PAN: AACFP5192Q

आवेदक की ओर से/By Assessee	: Shri M. J. Ranpura, A.R.
राजस्व की ओर से/By Revenue	: Shri Jitender Kumar, CIT. D.R.
सुनवाई की तारीख/Date of Hearing	: 15.02.2018
घोषणा की तारीख/Date of Pronouncement	: 27.02.2018

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

These three assessee's appeals for assessment years 2006-07 to 2008-09 arise against the Pr.CIT-I, Rajkot's separate orders; all dated 29.02.2016, revising as many corresponding re-assessments framed on 26.02.2014 thereby directing the Assessing Officer to finalise the same afresh, in exercising revision jurisdiction u/s.263 of the Income Tax Act, 1961; in short "the Act".

Heard both the parties. Case files perused.

2. It emerges at the outset that learned Pr.CIT has passed his all three orders on identical set of facts whilst exercising revision jurisdiction vested u/s.263 of the Act. Both the parties also pinpoint similarity of all the facts as well as the issue(s) involved in the instant three cases. We thus take up ITA No.139/Rjt/2016 pertaining to first assessment year 2006-07 as the lead case.

3. The assessee is stated to be a firm engaged in commission agency in cheque / demand draft issuing and discounting business. It filed its return on 27.09.2006 stating loss of Rs.68,247/-. The same stood processed u/s.143(1) of the Act. The Assessing Officer thereafter formed reasons to believe that assessee's income liable to be taxed had escaped assessment. The said belief was based on DDIT(Investment)'s correspondence dated 04.03.2013 quoting Director General Central Excise Intelligence "DGCEI" hereinafter, Zonal Unit, Ahmedabad' letter having investigated under valuation and clandestine manufacture, clearance of Ceramic Glaz Mixture (Frit) by frit manufacturers in Gujarat state. He further noticed on the basis of the said correspondence between direct and indirect tax investigation wings that the assessee firm was doing shroff business. It had deposited huge cash sums in its bank account(s) whose source required to be verified. The Assessing Officer therefore was of the view that assessee's income/gains chargeable to tax had escaped assessment to the extent of cash deposits amounting to Rs.5,83,90,297/-. He thus issued Section 148 notice dated 15.03.2013. The assessee filed its letter dated 19.03.2013 seeking to treat its original return declaring loss of Rs.68,250/- as the one in furtherance to the above section 148 notice. The Assessing Officer thereafter framed the re-assessment in question on 26.02.2014 accepting the said loss.

4. Case files suggest that the Pr.CIT thereafter issued Section 263 show cause notice dated 07.10.2015 proposing to revise the above re-assessment for the following reasons:

> *"3. During the assessment proceedings, the AO, vide notice u/s.142(1) of the Act dated 08/08/2013 had called for explanation for cash deposited in Bank*

accounts alongwith necessary evidences and cash book & Bank Book. From the records it is seen that your firm made a submission dated 23/08/2013 stating that- "Firm is engaged in the business of cheque/DD issuing & discounting business" and earned commission income from the said business activities. We received the fund from the customers and deposit the same in bank accounts and out of which we issue cheques/DD in their favour. Regarding sources of cash deposit cash book for the year under consideration will be produce in due course".

4. However, perusal of the order sheet shows that the books of accounts including cash book were neither produced/nor verified by the AO before considering the cash deposits as explained. Thus the AO did not verify the nature of the bank transactions, source of cash deposited and creditworthiness of the source of cash. Besides, you disowned account No. 80605004905 with ICICI Bank. However, the AO did not make any effort to find out correct account number from the Authority concerned who gave such account number to the AO. Thus, without necessary verification and investigation, acceptance of cash deposits in the bank account as explained makes the assessment order erroneous and prejudicial to the interests of the revenue.

5. It is further seen that your receipts from cheque/DD issue commission was only Rs. 2,16,320/-. However, your bank charges expenses alone were Rs. 3,89,430/-, which; is ;abnormally high considering your relevant receipts. Moreover, perusal of your submission dated 25/02/2014 shows that your firm is charging Rs. 0.50 per Rs. 1000/- for cheque/DD discounting and Rs. 0.30 to Rs.1 per Rs. 1000/- for cheque/DD issuance. Normally ICICI Bank is charging about Rs. 3 per Rs. 1000/- for issuance of DD. Hence your firm is charging Rs. 0.30 to Rs. 1 per Rs. 1000/- which is, much lower than the DD charges actually paid by your firm or charged by the banks as per prevailing rates. The same is quite strange. However, the AO did not call for details of your receipts and expenses on account of Bank charges, DD issue expenses and did not verify genuineness of the receipts and expenditure."

5. The assessee has filed a detailed reply/written submissions dated 06.11.2015 strongly contesting the above three folded reasons. The Pr.CIT's order under challenge has declined the said explanation in his order under challenge as follows:

"8.3 In para 7.0 of the submission the assessee has reproduced the notice n/s. 142(1) dated 08.08.2013 issued by the AO during the reassessment proceedings. It is stated that in compliance to the same reply dated 08.08.2013 was filed by the assessee and a copy of the reply is also enclosed with this submission. This contention of the assessee is not ratable as nowhere it was pointed that notice u/s. 142(1) was not issued by the AO. In fact, in the show cause notice u/s. 263 of the Act dated 07.10.2015, there is a mention of the notice u/s. 142(1) dated 08.08.2013 also of the assessee's reply dated 23.08.2013. The issue show caused in notice u/s.263 of the Act dated 07.10.2015 was with regard to the prudency behind the assessee charging nominal commission and getting DD issued on behalf of its customers as the prevailing commission charges of the banks was much more than what the assessee was apparently charging.

8.4 In para 8.0 of the submission the assessee has submitted point wise explanation to the issues show caused in the show cause notice u/s. 263 of the Act dated 07.10.2015. This part of the assessee's submission is reproduced hereunder:

Sr. No.	***Hon'ble CIT's observation.***	***Explanation***
(I)	*Books of accounts including cash book were neither produced/nor verified by AO before considering the cash deposits as explained.*	*i) Consequent to the proceedings that took place on 02.09.2013, the AO further issued a notice u/s 142(1) on 13.01.2014 calling the details of Bank accounts No.624805009255 & 80605004905 fixing hearing on 20.01.2014.* *ii) The AR attended on 20.01.2014 and furnished the reply and* *iii) The AR vide para 1 of letter dated 25.02.2014 has explained the deposits made in the bank account specifically on following manner:* *As regard the business activities, it is submitted that ours is a Partnership Firm (hereinafter referred as "Firm") situated at Rajkot engaged in business as commission agent in Cheque/DD issuing & discounting business and earned commission income from the said business activities.* ***Firm received the fund from the customers and deposit the same in bank accounts and out of which it issues cheques/DD in their favour. Firm only earned commission income against cheques/DD discounting/issuing. Thus, the Firm is working as a commission agent.*** *iv) The above clarification related to the deposits made in the bank account is confirmed by the AO at para 3 of the assessment order stating that ;* ***On 25.02.2014, Advocate Shri Ajay Anandpara from M/s Ranpura Desai & Co, has attended the hearing and filed the required details which is verified and kept on record".*** *v) This clearly shows that the AO has verified the cash book along with other records and found nothing adverse in respect of deposits made in the bank account as explained at para 1 of letter dated 25.02.2014.*

		vi) Thus, there is not even a procedural lapse on the part of AO to attract any action u/s 263 of the Act on the issue. *vii) However, in order to avoid long drawn litigation, the assessee will produces all the books of accounts including the cash book and allied records for verification on the date given by your honour.*
(II)	*The assessee has disowned bank account No. 80605004905 with ICICI Bank. The AO did not make any effort to find out correct account number from the authority concerned who gave such account number to AO. Thus, without necessary verification and investigation, acceptance of cash deposits in the bank account as explained makes the assessment order erroneous and prejudicial to the interest of revenue.*	*i) In the course of assessment proceedings the issue was raised by the AO and the same was explained at para 3 of reply dated 25.02.2014. In order to verify the correctness of assessee's contention, the AO carried out the inquiries with the bank and found that no such account bearing No. 80605004905 is held by the assessee with ICICI Bank.* *ii) As regards your honour's observation that the AO did not make any effort to find out correct account number from the authority concerned who gave such account number to AO and on such observation to treat the assessment as erroneous and prejudicial to the interest of revenue is rather misplaced. If such proposition is allowed to be put in to action, then there would be no finality to any proceedings under the Act.* *iii) It may not be out of place to mention here that on presumption, no order can be held to be erroneous or prejudicial to the interest of revenue. Thus, the AO had carried out necessary inquiry on the issue and nothing was left behind. The deposit of cash and issue of cheque/DD is explained at (a) above. As stated above, the Investigation Wing also did not find any objectionable material. To put the matter straight this can be get ascertained from the Wing to lay the issue at rest.*
(III)	*As against the commission receipts of Rs. 2,16,320/- bank charges expenses were Rs. 3,89,430/- which is abnormally high as compared to commission receipts.* *[In fact the assessee has received chq/DD issue commission of Rs. 2,16,320/-and*	*i) This is the matter of factual event that took place in the course of business. The assessee vide para 2 of letter dated 25.02.2014 explained the rate of charging for commission and discounting.*

	other commission on discounting at Rs. 1891227-totaling to Rs. 4,05,442/-].	*ii) The assessee is a partnership firm and runs the business on small scale with minimum requirement of place, employees and the capital. Considering the limited overhead expenses as compared to the nationalized and scheduled bank, and the competition in the business, the charged were kept at lower rate at par with the other such business entities. As regards the expense on bank charges, the same are in actual and duly supported.*
(IV)	*The assessee charges discounting charges @ Rs. 0.50 per 1000 rupees and for issuance of cheque/DD at Rs. 0.30 to Re. 1 per Rs. 1000/-where as the ICICI bank charges Rs. 3/- for issuance. This is quite strange. The AO did not call for the details of the receipts of the assessee and expenses on account of bank charges and did not verify the genuineness of receipts and expenses.*	*i) The facts have duly been verified as explained at para 1 of letter dated 25.02.2014 wherein the procedure of receipt of funds from the customers, its deposit in bank account and issuance of cheque/DD was explained.* *ii) As stated supra, the assessee has to incur very limited expenses for running of business; hence as compared to the Bank they are able to keep the charges at lower rate as in this line all the business entities are charging more or less at the same rates. There is nothing strange in this regard as alleged and that cannot be a reason to attract the provisions of section 263 of the Act. The AO has verified all the expanses as stated in the body of the assessment order.*

8.5 The assessee has contended in explanation to ground no. (I) that books of accounts were produced on 20.01.2014. However, as per the records, is no written submission whereby the books of accounts were produced. Further, it is stated that the firm was engaged in the business of commission agent from cheque/DDD issuing and discounting. It is further suited that this clarification was confirmed by the AO in the assessment by mentioning that the assessee's representative attended the hearing filed the required details which is kept on record. The assessee's contention herein is not tenable as no where it is mentioned that the details for were not filed by the assessee. The revision of the order is because the source of the cash was not properly verified. As can from the record no inquiry has been made from the persons who as per the assessee's claim had given the cash. The AO ought to have made inquiry by ensuring that the identity of the persons was identified, confirmation was obtained and any further inquiry depending on the nature of entry which, has not been done.

8.6 With regard to the issue show caused in respect of the ICICI bank Account No. 80605004905, the assessee has contended that the AO had carried out

inquiries with the bank and found that no such account bearing No. 80605004905 is held by the assessee with ICICI Bank.

The AO had called for information from the ICICI Bank Ltd., Jaihind Press Branch, Rajkot vide letter u/s. 133(6) of the Act dated 13.01.2014. In compliance to the same, ICICI Bank Limited's branch/office situated at 433, Nalanda Society, Kalawad Road, Rajkot-360005, vide letter dated 12.02.2014, has replied that "based on information furnished by your office, we are unable to trace the details desired by your office for account no 10605004905. In view of the same kindly furnish us with more details such as correct account no. etc. to enable us to verify our records and revert to your office". The bank's reply is not clear with regard to whether no such account existed with that particular branch or with any of the country wide tranches of ICICI Bank Limited. However, the AO has not pursued the matter.

Considering that information was received in this case from the), Ahmedabad and also considering that as per the information huge amount of cash aggregating to Rs.5,01,39,964/- has been deposited the period of 08.08.2005 to 19.01.2008, the AO ought to have pursued with the Bank's Regional or Head office to categorically state that /account existed. It is however seen that the AO has satisfied himself reply dated 13.01.2014 submitted by the ICICI Bank, Kalawad Road Rajkot. Also the AO has not confirmed from office of the DDIT(Inv)-II(1), Ahmedabad for providing more details in respect to the branch or correctness of the account number.

8.7 In the explanation submitted in respect of Ground No. (III) & (IV) of the show cause letter, the assessee has not been able to justify the prudency behind charging nominal commission for rendering cheque/DD issuing services to the persons and itself paying more commission to the bank. It was specifically pointed out in the notice u/s. 263 of the Act dated 07.10.2015 that the prevailing bank charges for Demand Draft was much •ore than what the assessee charged. In this regard in its submission the assessee has given reference of para 2 of its letter dated 25.02.2014 submitted during the assessment proceedings. As regards the assessee's letter dated 25.02.2014, a perusal of para no. 2.0 states "As regards details of commission charge, it is submitted that Firm charges commission of 0.50 paise per Rs. 1,000/- on cheques/DD discounting and 0.30 paise to 1.00 per Rs.1000 on cheques/DD issuing". Neither in the submissions made during the reassessment proceedings nor in reply to the show cause notice u/s. 263 of the Act has the assessee been able to justify the prudency behind charging less than commission than it itself had to pay to the bank. The assessee ought to have Explained the prudency behind such activity but has failed to do so.

9. It would also be very pertinent to mention here that if it is to be believed that the cash of Rs.58,39,02,978/- received from various persons during the period of 10.02.2005 to 31.03.2008 pertained to the assessee firm's business of cheque discounting, then as per Gujarat Money Lenders Act, the assessee was required to get its accounts audited by a Chartered Accountant. The assessee has not done so.

10. As per the facts discussed above, it is noticed that the assessee's source from which cash totaling to Rs.58,39,02,978/- was received by the assessee during

the period of 10.02.2005 to 31.03.2008 and deposited in the bank accounts as discussed above which includes cash received and deposited in bank during the financial year 2005-06 relevant to the A.Y. 2006-07. In this regard cash book needs to be verified and each entry needs to be pursued so that at least genuineness of the transaction is verified.

11. A conclusive reply needs to be obtained from 1CIC1 bank in respect of the bank account number 80605004905. The assessee's commission business receipts and expenses needs to be verified vis a vis the commission chargeable on cash received and commission payable to bank against DD purchased as per the rate prevailing at that time.

12. In para no. 9 of the submission the assessee has cited Hon'ble Supreme Court's decision in the case of CUT Vs. Lucas T.V.S. Ltd. which is in respect of reopening of the assessment. In para nos. 10 to 15 of the submission, the assessee has challenged the proceedings initiated u/s. 263 of Act. The assessee has also cited various decisions objecting to initiating of proceedings 263 of the Act. In this case, the notice u/s. 263 of the Act was issued because after examining the records the order u/s. 143(3) r.w.s. 147 of the Act passed by the AO on 26.02.2014 was found to be erroneous and also prejudicial to the interests of the revenue. The issues on which the AO's order was found to be erroneous and prejudicial to the interests of the revenue was pointed out in the show cause notice u/s. 263 of the Act dated 07,10,2015 and an opportunity of being heard was given to the assessee.

13. Further, as per Explanation 2 to section 263 which was inserted w.e.f. by 01.06.2015 by the Finance Act, 2015, an order would be deemed to be erroneous if the AO has not made proper verification or has not conducted proper inquiries. The relevant part of the Explanation is reproduced hereunder:

> *"Explanation 2*
> *For the purpose of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, -*
>
> *(a) The order is passed without making inquiries or verification which should have been made;*
> *(b) The order is passed allowing any relief without inquiring into the claim;*
> *……."*

The proceedings u/s. 263 of the Act is covered by the Explanation inserted by the Finance Act, 2015. In my opinion the order u/s. 143(3) r.w.s. 147 of the Act in this case was passed without making proper inquiries or verification with regard to issues discussed in this order.

14. Due to the above mentioned reasons, the assessment order passed u/s, 143(3)r.w.s.147 of the Act 26.02.2014 for the A.Y. 2006-07 is held as erroneous and prejudicial to the interest of the revenue. Therefore, by virtue of the powers vested in me u/s. 263 of the I T Act, I cancel the order u/s. 143(3) r.w.s. 147 of the Act dated 26.02.2014 and direct the Assessing Officer make a fresh assessment as per law after allowing assessee opportunity of being heard."

6. We have heard rival submissions and relevant records perused. There can hardly be any dispute about the settled law in hon'ble apex court's landmark judgment in Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC) that an assessment or re-assessment; whatever the case may be, has to be both erroneous as well as prejudicial to the interest of the Revenue simultaneously before the impugned Section 263 jurisdiction is set into motion. Their lordships reiterate the same in a recent judgment reported as (2017) 395 ITR 1(SC) CIT v. Kwality Steel Suppliers Complex that if the Assessing Officer has taken one of the two possible views in framing the assessment or re-assessment in issue, the impugned jurisdiction u/s.263 of the Act is not sustainable. Then comes hon'ble Delhi high court's judgment in ITO vs. DG Housing Projects Limited (2012) 343 ITR 329 (Delhi) defining ambit and scope of revisions proceedings u/s.263 of the Act as under:

> *"10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression „prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term „erroneous" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.*
>
> *11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word „erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.*
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> *12. Delhi High Court in Gee Vee Enterprises vs. Additional Commission of Income-Tax, Delhi-I & Ors.,(1975) 99 ITR 375, has observed as under:-*
>
> > *"The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He*

cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

13. In the said judgment, Delhi High Court had referred to earlier decisions of the Supreme Court in Rampyari Devi Sarogi vs. CIT (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal vs. CIT (1973) 88 ITR 323 (SC), wherein it has been held that where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. After reference to these two decisions, the Delhi High Court observed:-

"These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return."

14. The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry.

15. In the case of Commissioner of Income Tax vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del), Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held as under:-

"We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue

expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between " lack of inquiry" and " inadequate inquiry" . If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113):

" . . . From a rending of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is „erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well- accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See

Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC) at page 10) . . .

From the aforesaid definitions 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 visualise 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. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion . . . There must be some prima facie material on record to show that

tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed . . .

We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be „ erroneous" simply because in his order he did not make an elaborate discussion in that regard."

16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time

when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT vs. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

18. It is in this context that the Supreme Court in Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax, (2000) 243 ITR 83 (SC), had observed that the phrase „prejudicial to the interest of Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue.

19. In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondents computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

7. We keep in mind the above settled legal principles to revert back to relevant facts of the instant case. Both parties reiterate their respective stands against and in support of learned Pr.CIT's order under challenge directing the Assessing Officer to frame afresh assessments after verifying source of assessee's cash deposits alleging that the same had not been examined during re-assessment in question. Learned

Pr.CIT inter alia observes in his order that the assessee incurred bank charges expenses of Rs.3,89,430/- as against cheque deposit/demand draft issue receipts of Rs.2,63,320/- only. Coupled with this, he directs the Assessing Officer to carry out necessary inquiry/verification qua assessee's ICICI bank account as well. All this makes learned Pr.CIT to conclude that the re-assessment in question completed on 26.02.2014 is both erroneous as well as prejudicial to the interest of the Revenue since suffering from lack of proper inquiry r.w.s. 263 explanation (2) applicable w.e.f. 01.06.2015. Learned Departmental Representative vehemently contends during the course of hearing that the Assessing Officer's re-assessment hereinabove suffers from error and it also causes prejudice to the Revenue's interest making it a fit case for invoking Section 263 jurisdiction. We see no merit either of the above arguments as well as learned Pr.CIT's multifolded reasoning. The first question before us is as to whether the Assessing Officer had actually examined source of assessee's cash deposits or not whilst framing the above re-assessment. We observe first of all that this issue of source of cash deposit is no more res integra in view of the fact that Revenue's another arm i.e. "DGCEI' (supra) has already conducted a thorough investigation in coming to conclusion that the assessee firm engaged in shroff business had deposited cash sums forming undisclosed and unaccounted production / sale of frit manufacturers in Gujarat. The said authority forwarded the necessary report/documents to the DDIT as well for initiation of appropriate proceedings under the income tax law. The said "DDIT" therefore directed the Assessing Officer to reopen the assessments in assessee's case on 04.03.2013 alongwith Annexure A (assessee's name indicating the relevant accounting period, bank account details, amount of cash deposits, PAN numbers and jurisdiction mentioned therein) as follows:

"No. DDlT/lnv/Ahd/REIC/12-13 *Date:04.03.13*
CONFIDENTIAL-URGENT-TIME BARRING

To,
The Income Tax Officer,
Ward-5(2) Income Tax Office,
Aayakar Bhavan, Race Course Road,
Rajkot,

Sub: Cases discussed in REIC Meeting held on 26/08/10- Search operations conducted by DGCEI against Tiles Manufacturers.

****

Please refer to the above

2. The Office of DGCEI, Zonal Unit, Ahmedabad had investigated under-valuation and clandestine manufacture/clearance of Ceramic Glaze Mixture (Frit) by Manufactures of Frit in Gujarat. During the course of investigation, the DGCEI came across certain bank accounts operated by Shroffs in which huge cash was deposited. The details of such bank accounts held ***in ICICI Bank*** *is enclosed as* ***Annexure-A*** *along with this letter. Since the* ***jurisdiction*** *in these cases lies with your office, you are requested to re-open the case u/s 148 of the IT Act for examining the source of cash deposited in the said accounts and other necessary action at your end. In case the jurisdiction does not lie with your office, you are requested to forward this letter to concerned Assessing Officer for reopening the case U/s 148 of the I.T. Act as* ***the matter is getting barred by limitation on 31/03/13.***

Yours Faithfully

End: As above

(HIMANSHU SHARMA)
Deputy Director of Income-tax
(Inv) Unit-ll(l), Ahmedabad

Copy to: The Addl. D1T (Inv), Unit-11, Ahmedabad for kind information. The Addl. CIT , Range-5, Rajkot.

Deputy Director of Income-tax
(Inv) Unit-II(1), Ahmedabad"

8. All this material leaves no doubt that the Assessing Officer initiated re-assessment in assessee's case. We therefore do not agree with Revenue's approach in first quoting the direct as well as indirect tax arms' detailed inquiry indicating the assessee to have deposited frit manufacturers unaccounted money for cash in lieu of issuing them cheques/demand drafts and later on alleging that the source of the very cash deposit was not explained. Now the department seeks to shift the onus on the assessee that it must explain the source of the cash deposits since not verified in the above re-assessment proceedings. We directed the Revenue to produce the original case records before us. Learned CIT.DR. has been very prompt in sending the entire original records pertaining to the instant cases before us within 24 hours. It emerges therefrom that the assessee's stand throughout was that it had obtained cash sums

and issued cheques/demand drafts to the concerned parties. All of its relevant books/capital accounts, bank statement formed part of record during re-assessments. It had duly responded to Assessing Officer's notices u/s.131/133C in giving all details of the concerned parties. One of such notice dated 20.01.2015 indicates that the Assessing Officer had asked the assessee to furnish all relevant particulars of the parties named therein. We make it clear that this is not an isolated case. Records reveal many such notices and reply(ies) at assessee's behest followed by similar reopening initiated against the concerned parties. We observe in these facts that the Assessing Officer had very well examined and accepted assessee's case that it had deposited cash sum in shroff business in lieu of charging minimal commission(supra) for the purpose of issuing cheque/demand draft to the very parties against whom the ITO, Ward-1(1)(4) set into motion similar Section 148 proceedings. We thus are of the opinion that the Assessing Officer had found the assessee to be in shroff business in tune with the above two investigation wings' inquiries in order to frame the consequential re-assessment(s) accordingly. We thus conclude that the said re-assessment framed on the basis of investigation wing's observations and after application of mind, is neither erroneous nor prejudicial to the interest of the Revenue so far as the instant first question of non-examination of the source of cash deposits is concerned. We further make it clear that the Assessing Officer had initiated Section 148 proceedings only for limited purpose of assessment of assessee's taxable income escaping from being assessed than a regular scrutiny statement involving very wide scope. We thus accept assessee's arguments qua learned Pr.CIT's main reason that the Assessing Officer had not examined source of assessee's cash deposits after due verification. This reason is accordingly held to be not sustainable in given facts and circumstances of the case.

9. Next come rival contentions qua learned Pr.CIT's second reason for exercising his revision jurisdiction that the Assessing Officer did not make any effort to find correct account of ICICI bank account no.80605004905. It emerges from the case file that the Assessing Officer had taken all steps to verify the said bank account with Standard Chartered Bank and ICICI bank on 27.06.2016 and 04/08/2016; respectively. These two banks denied to have any such account

maintained with them. The assessee's case throughout is also that it had not opened the said account. There is no other evidence on record that the assessee had maintained the said bank account. It thus emerges that there is no material available with the department so as to take us a conclusion that the said account in fact belongs to the assessee. We thus are of the view that the Assessing Officer had rightly not added the corresponding cash deposits in assessee's hands in absence of any concrete evidence. We therefore observe that there is neither any error nor consequential prejudice caused to the Revenue's interest in these facts and circumstances so far as the above bank account is concerned.

10. Third line of arguments between the parties is that the assessee has paid much more bank charges than its commission income. Learned Pr.CIT is of the view that the Assessing Officer therefore needs to examine the entire issue afresh in consequential proceedings. We find no reason to express our concurrence with such a course of action adopted in revision proceedings u/s.263 of the Act. This is because of the fact that neither assessee's commission income nor the relevant bank charges are in dispute which has ultimately resulted in consequential business loss accepted in the impugned re-assessment. There is no material other than assessee's commission income to be less than its expenses which could take us to a conclusion that genuineness of both these amounts is in dispute. We thus accept assessee's arguments qua this third issue as well.

11. We now advert to both parties' rival contentions qua the assessee's non registration under the state money lending law (supra). The Revenue's case is that the assessee ought to have got its accounts audited by a Chartered Accountant. We see no justification in the instant reason as this may be a sufficient cause for rejecting its books in regular scrutiny proceedings but there is no supportive reason to initiate the impugned revision proceedings u/s.263 of the Act. We repeat that the department itself has been assessing the instant tax payer as engaged in shroff business.

12. Lastly come learned Pr.CIT's reason in exercising his revision jurisdiction that the Assessing Officer did not conduct sufficient inquiry making him to invoke Section 263 Explanation (2) of the Act applicable w.e.f. 01.06.2016. We reiterate here that our detailed adjudication in preceding paragraphs has already held the Assessing Officer to have taken the only possible view in accepting source of assessee's cash deposits from various parties in lieu of issuing them cheques and demand drafts. We thus find support from a co-ordinate bench's order in Narayan Tatu Rane vs. ITO (2016) 70 taxmann.com 227 (Mumbai – Trib.) propounding reasonableness and prudence test in such facts and circumstances as under:

> *"19. The law interpreted by the High Courts makes it clear that the Ld Pr. CIT, before holding an order to be erroneous, should have conducted necessary enquiries or verification in order to show that the finding given by the assessing officer is erroneous, the Ld Pr. CIT should have shown that the view taken by the AO is unsustainable in law. In the instant case, the Ld Pr. CIT has failed to do so and has simply expressed the view that the assessing officer should have conducted enquiry in a particular manner as desired by him. Such a course of action of the Ld Pr. CIT is not in accordance with the mandate of the provisions of sec. 263 of the Act. The Ld Pr. CIT has taken support of the newly inserted Explanation 2(a) to sec. 263 of the Act. Even though there is a doubt as to whether the said explanation, which was inserted by Finance Act 2015 w.e.f. 1.4.2015, would be applicable to the year under consideration, yet we are of the view that the said Explanation cannot be said to have over ridden the law interpreted by Hon'ble Delhi High Court, referred above. If that be the case, then the Ld Pr. CIT can find fault with each and every assessment order, without conducting any enquiry or verification in order to establish that the assessment order is not sustainable in law and order for revision. He can also force the AO to conduct the enquiries in the manner preferred by Ld Pr. CIT, thus prejudicing the independent application of mind of the AO. Definitely, that could not be the intention of the legislature in inserting Explanation 2 to sec. 263 of the Act, since it would lead to unending litigations and there would not be any point of finality in the legal proceedings. The Hon'ble Supreme Court has held in the case of Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 that there must be a point of finality in all legal proceedings and the stale issues should not be reactivated beyond a particular stage and the lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.*
>
> *20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-a-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that*

the enquiries or verification conducted by the AO was not in accordance with the enquries or verification that would have been carried out by a prudent officer. Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant."

We thus conclude that the impugned re-assessment sought to be revised in given facts and circumstances of the instance case is neither erroneous nor does it cause any prejudice to the interest of the Revenue. Learned Pr.CIT's order under challenge directing the Assessing Officer to frame afresh assessment therefore is accordingly held to be not sustainable. The same stands reversed. We accordingly reverse the same to restore the re-assessment in question dated 26.02.2014.

13. Same order to follow in assessee's next two appeals ITA Nos. 140 & 141/Rjt/2016 as it has already come on record that the same contain identical facts as well as issue as already adjudicated against the Revenue in the lead case. We direct the Registry before parting to return the relevant original record back to the learned CIT.D.R.

14. These three assessee's appeals are allowed.

[Pronounced in the open Court on this the 27th day of February, 2018.]

Sd/-	Sd/-
(PRADIP KUMAR KEDIA)	(S. S. GODARA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 27/02/2018

True Copy

S.K.SINHA

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT, Rajkot