

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C": NEW DELHI  
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 931/Del/2017  
(Assessment Year: 2009-10)

Late Smt. Giriraj Kaur, C/o. L/H Sri Ravinder Gill, 861, Mangal Bhawan, Bhopa Road, Muzaffarnagar PAN: DTPPK0005J	Vs.	ITO, Ward-1(2), Muzaffarnagar
(Appellant)		(Respondent)

Assessee by :	Smt Prem Lata Bansal, Sr. Adv Shri Ram Avatar Bansal, Adv Shri Ydhvir Dalal, Adv
Revenue by:	Shri Sanjit Singh, CIT Dr
Date of Hearing	26/03/2018
Date of pronouncement	18/06/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id Pr. Commissioner of Income Tax, Muzaffarnagar passed order u/s 263 of the Act on 05.01.2017 for the Assessment Year 2009-10, holding that assessment order passed by the Id AO u/s 263 of the Act on 20.03.2015 is erroneous and prejudicial to the interest of the revenue. The assessee has raised nine grounds of appeal as under:-
2. The assessee has raised the following grounds of appeal:-
  - "1. *That on facts and in the circumstances of the case and in law the Ld. Pr. CIT erred in revising the assessment order passed by Ld. Income Tax Officer u/s 143(3)/147 on 20.03.2015.*
  2. *That the Ld. Pr. CIT has erred in acquiring jurisdiction u/s 263 to revise the assessment order which was subjected to appeal filed by assessee, and was fixed for hearing for 04.05.2016. During the course of hearing the assessee (appellant) expired on 30.04.2016 cremated on 01.05.2016 and Ld. AR has withdrawn his Power of Attorney due to death as well as the appeal..*

3. *That the Ld. Pr. CIT has erred in acquiring jurisdiction u/s 263 on the basis mentioned in notice as -  
"The valuation of property as on 01.04.1981 has been adopted by the A.O. without considering the report of Valuation Officer, Meerut".  
The Ld. Pr. Commissioner has erred in invoking provision-of section 263, on the basis of Valuation Report of DVO, Meerut under section 55A of the Act, when no reference is made by assessing officer and the valuation report was not the part of records of assessment till the completion of assessment.*
4. *That the Ld Pr. CIT has erred in taking into consideration the valuation report, which was not referred by the assessing officer for valuation to Valuation Officer, Meerut under section 55A of the Act. No reference is placed on records of assessment. The assessment is completed on the basis of valuation report of Govt, approved valuer and valuation given by Tehsildar, Muzaffarnagar as on 01.04.1981. Therefore the reason mentioned in the notice to invoke section 263 is not relevant to the case of Late Smt. Giri Raj Kaur (appellant).*
5. *That the reference is made by ITO, Ward 2(1) Muzaffarnagar in the case of Sri Narendra Kumar Gill for the property sold by other co-owner (Naredra Kumar Gill) without acquiring jurisdiction under section 55A by the assessing officer cannot be used against the appellant. So the Ld. Pr. CIT has exceeded jurisdiction in invoking section 263 in the case of appellant on the basis of valuation report of other assessee.*
6. *That the Ld. Pr. CIT has erred in not appraising the facts and documents placed on records of assessment and has wrongly held that assessing officer has not made detailed enquiry in making assessment.*
7. *That the provision of section 55A(a) authorise the assessing officer to refer for valuation only when the value as claimed is less than its "fair market value". The provision prior to amendment on 01.07.2012 is relevant to assessment year 2009-10. Ld. Pr. CIT has erred in holding that amended provisions will apply on the assessments which are pending on the date of amendment and section 55A of the Act lays down the procedure and erred in holding that amended provisions are applicable on the assessment proceedings for year 2009-10 in spite of the amendment on 01.07.2012.*
8. *That the reference to Valuation Officer by Assessing officer of co-owner of the property sold in the year 2009-10 for determination of fair market value as on 01.04.198 is illegal, beyond the preview of section 55A and the valuation report is not applicable for the year 2009-10 due to relevant time provision which are amended subsequently from 01.07.2012.*

9. *That the power of revision cannot be invoked by Ld. Pr. CIT on a new material which was not before the assessing authority. There is no reference or the valuation report is the part of records of assessment. The material (Valuation Report) which were not in existence at the time the assessment was made but afterwards came into existence in the case of Co-owner (Narendra Kumar Gill) cannot form part of the record of the proceeding of Ld. ITO at the time he passes the order and, accordingly, it cannot be taken into consideration by the, Ld. Pr. CIT for the purposes of invoking his jurisdiction under this section and has exceeded the revisional jurisdiction in passing the impugned order."*

3. Brief facts of the case shows that the assessee is an individual who sold jointly with four others an immovable property whose value as per stamp duty rate is Rs. 1.93 crores at Muzaffarnagar during the Financial Year 2008-09. Therefore, notice u/s 148 was issued on 18.03.2014. In response to which the assessee filed a return of income on 12.01.2015 declaring income of Rs. 12500/- only. As the assessment was reopened to determine the long term capital gain the Id AO made an addition of Rs. 136036/- as per working given by assessee to the total income of the assessee as chargeable to capital gains. As assessee has also claimed deduction of expenditure of Rs. 246000/- for improvement of the asset for which no details were produced, the Id AO did not allow 50% of such cost of improvement expenditure. The assessment was passed u/s 143(3) read with section 147 of the Act on 20.03.2015 determining total income of the assessee of Rs. 271536/-. Subsequently, the Id CIT u/s 263 of the Act issued notice to the assessee on 05.12.2016 holding that Id AO has accepted the unsubstantiated claim of the assessee and therefore, the order passed by the Id AO is erroneous and prejudicial to the interest of the revenue as under:-

*"An assessment order for assessment year 2009-10 was passed u/s 143(3)/147 of the Income Tax Act, 1961 on 20.03.2015 by the ITO, Ward-1 (2). Muzaffarnagar in your case.*

2. *On examination of the records, it has been noticed that:*

*i. The valuation of property as on 01.04.1981 has been adopted by the A.O. without considering the report of Valuation Officer, Meerut.*

3. In view of para 2 above, the assessment order passed by the ITO, Ward-1(2), Muzaffarnagar is erroneous and prejudicial to the interest of revenue since the AO has not examined the above mentioned issue and assessed the income at lower amount.

4. You are hereby called upon to show cause as to why an appropriate order u/s 263 of the Income Tax Act, 1961 may not be passed in your case. You may attend my office and furnish your explanation on 14.12.2016 at 11:15 AM either in person or through an authorized representative with documentary evidences in support of your contention alongwith complete books of accounts, bill, vouchers, registers & copies of bank statements etc. as maintained by you."

filed written submission as under:-

"The applicant is served with the notice u/s 263 to revise the assessment order passed by ITO, Ward-1(2'), Muzaffarnagar u/s 143/147 dated 20.03.2015 on the basis and reason mentioned as:-

"The valuation of property as on 01.04.1981 has been adopted by the A.O. without considering the report of valuation officer, Meerut"

In this reference the applicant submits following objections:-

1. The assessing officer has not referred for valuation to valuation officer, Meerut under section 55A of the Act. No reference is placed on records of assessment. The assessment is completed on the basis of valuation report of Govt, approved valuer and valuation given by Tehsildar, Muzaffarnagar as on 01.04.1981. Therefore the reason mentioned in the notice is not relevant to the case of Smt. Giri Raj Kaur.

2. The reference is made by ITO, Ward 2(1) Muzaffarnagar in the case of Sri Narendra Kumar Gill without acquiring jurisdiction under section 55A by the assessing officer or Narendra Kumar Gill. The provision of section 55A(a) authorize the assessing officer to refer for valuation only when the value as claimed is less than its fair market value. The provision of relevant to assessment year 2009-10 is referred as under-

Reference to Valuation Officer.

55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer-

(a) In a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of opinion that the value so claimed is less than its fair market value;

of

b) In any other case, if the Assessing Officer is of opinion-

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do.

and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A clauses (ha) and (i) of sub-section (1) and sub-section (3A) and (4) of section 23, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-Tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of the Act.

*Explanation*-In this section, "Valuation Officer" has the same meaning, as in clause (e) of section 2 of section 2 of the Wealth Tax Act, 1957 (27 of 1957).

In the case of Narendra Kumar Gill, the 1TO, Ward 2(1), Muzaffarnagar, who is not the assessing officer in the case of Late Smt. Giri Raj Kaur has referred for valuation to reduce the value claimed by Narendra Kumar Gill on the basis of valuation report submitted by him. Therefore, his reference to Valuation Officer is illegal, beyond the preview of section 55A and the valuation report is not applicable for the year 2009-10 due to relevant time provision which are amended subsequently from 01.07.2012.

3. That the claim of Narendra Kumar Gill (assessee of ITO, Ward 2(1) on the basis of valuation report of Govt. Approved Valuer can not be disallowed by making reference under section 55A (a) which can not be made by assessing officer. "

4. The Id CIT decided the issue vide order dated 05.01.2017 as under:

"4. As mentioned in notice issued u/s 263 for the year under consideration, it is obvious that the A.O. has not taken due cognizance of the reason for which the action u/s 147 was initiated. The explanation submitted by the assessee is not found satisfactory as in section 55 A, as amended w.e.f. 01.07.2012, there is no mention of assessment year for which it is applicable. Therefore, the A.O. was empowered to refer the matter of valuation to the DVO by exercising the powers given to him under section 55A, as

amended, in all such cases where assessment proceedings were pending as on the date of amendment and also in the cases selected for assessment under scrutiny thereafter. Further, section 55A of the Income Tax Act, 1961 lays down the procedure for determining the fair market value of capital asset. The counsel of the assessee has also relied upon the number of judgments of different Courts, which are not applicable in the case of the assessee as fact of the case of the assessee are different. Hence, the A.O. wflSTmmg-HV applying the cost of acquisition of the property sold by the assessee, as on 1.4.1981, determined by the Registered Valuer.

5. Thus, by accepting the unsubstantiated, varying and disjointed claims of the assessee, failing to conduct detailed and legitimate inquiries, the AO utterly failed to conduct meaningful investigation essential to determine the total income of the assessee. Hence, when the AO has failed to take notice of all the relevant facts and has failed to examine the correctness or otherwise of the claims and assertions by the assessee, it is evident that he has failed to apply his mind and discharge his duty as an assessing officer during the scrutiny proceedings u/s 143(3)/147 of the Income Tax Act, 1961. Consequently, the assessment order, passed by the AO on 20.03.2015, is rendered erroneous in so far as it is prejudicial to the interest of the revenue.

5.1 It is beyond dispute that, under section 263, the Commissioner does have the power to set aside the assessment order and send the matter for a fresh assessment if he is satisfied that further enquiry is necessary, and that the order of the AO is prejudicial to the interest of the Revenue [Swarup Vegetable Products Industries Ltd. vs. CIT, (1991) 187 ITR 412, 415-

In that case, in exercise of its power under section 263, the Commissioner set aside the assessment order as the same was erroneous and prejudicial to the interests of the revenue because the claim of the assessee was accepted without proper enquiries. The action of the Commissioner was upheld by the High Court. In the facts of Umushankur Rice Mill vs. CIT (1991) 187 ITR 638-39 (Ori), the Tribunal was held justified in upholding the revision order of the Commissioner which was passed by the Commissioner who felt that there should be a further enquiry. Reliance is further placed on the following judgments:

i. Jagdish Kumar Gulati vs. CIT, 269 ITR 71 (AH.) in which it is held that while framing the assessment under section 143(3), it is expected from the AO that he will make a detailed inquiry to find out correct income of the assessee and not blindly rely upon the facts placed by the assessee on their face value. W.Gee Vee Enterprises vs. AddLCIT, 99 ITR 375 (Del.) in which it was held that it is not necessary for the Commissioner to make further inquiries before canceling 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 assessed in his return.*

5.2 The Hon'ble Court has further 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 contract. 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."*

6. On the facts of the present case, it is evident that the AO accepted the version of the assessee without making any inquiry or verification, whereas it is a well settled law that mere failure to make inquiries makes an order erroneous. In order that the Commissioner may consider an order to be "erroneous" for the purposes of section 263, the error of law may not be apparent on the fact of the order. The Commissioner may consider an order of the AO to be erroneous not only if it contains some apparent error of reasoning or of law or of fact on the face of it but also because it is a stereo-typed order which simply accepts what the assessee has stated in his return and fails to make enquiries which are called for in the circumstances of the case [*Rampyari Devi Saraogi vs. CIT (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal vs. CIT, (1973), 88 ITR 323 (SC).*]

6.1. Reliance is also placed on the following case laws:-

- (i) *Duggal & Co. vs. CIT, (1996) 220 ITR 456, 459 (Del.)*
- (ii) *Shri Virendra Kumar Gupta Vs CIT in ITA No 2595/D/2009 dated 21/01/2011 (ITAT, Delhi)*

7. Thus, after careful consideration of assessee's submissions dated 26.12.2016 vis a vis records and in view of the above discussions I am of the view that the AO failed to examine the case properly on the issue for which the notice u/s 148 was issued and other issues also which renders the assessment order erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, assessment order passed by the Income Tax Officer, Ward-1(2), Muzaffarnagar is set aside with directions to pass fresh assessment order in accordance with provisions of law."

5. Therefore, the assessee aggrieved with the order of the Id CIT has preferred this appeal before us.

6. The Id AR submitted a written submission as under:-

- "a) Assessee has raised various grounds in this appeal, however the basic ground is regarding challenging the validity of order-dated^ 05.01.2017 passed by Pr. CIT u/s 263 of the Act.
- b) Ld. Pr. CIT has invoked the power u/s 263 of the Act on the following grounds :
- i) AO failed to conduct meaningful investigation to determine the total income of the assessee.
- ii) AO has simply accepted what the assessee had stated in his return.
- iii) AO failed to examine the case properly on the issue for which the notice u/s 148 was issued and other issues also which renders the assessment order erroneous in so far as it is prejudicial to the interest of revenue.
- c) In so far as inquiry by the AO is concerned, it is submitted that the AO had made the inquiries in respect of issue for which 148 notice had been issued.
- d) Reasons are at page 109 which states that as per the information available, assessee had sold an immovable property at a sale consideration of Rs. 50,00,000/- whereas stamp duty had been paid on circle rate at Rs. 1,93,93,650/-. Hence the difference of Rs. 35,98,412/- is taxable u/s 50C of the Income Tax Act. As per sale deed, assessee had 1 /4th share in the property. Hence, assessee had income chargeable to tax of Rs. 35,98,412/- for which it is necessary to issue notice u/s 148 of the Act.
- e) During the assessment proceeding u/s 143(3) r/w section 147, assessee had produced sale deed and purchase deed.
- f) Thereafter, AO had issued a notice-dated 13.10.2014 u/s 142(1) alongwith a long questionnaire, requiring the assessee to show-

cause as to why capital gain be not taken as per provisions of section 50C of the income Tax Act.

- g) *In compliance thereto, assessee contended that there was no capital gain.*
- h) *Thereafter, assessee filed the report from registered valuer valuing the property at Rs. 1.81 crores (1.69 crores towards land and Rs. 12,07,0171- towards improvement of land & construction of building). For arriving at the value of cost the registered valuer took the rate at Rs. 24,500/- sq mtr as specified in the circle rate. The said rate was prescribed as the rate for commercial property on GT Road by the relevant authorities.*
- i) *That during the proceeding, AO sent a letter to the Tehsildar of the Area for inquiring about the commercial rate of the property as on 01.04.1981.*
- j) *The Tehsildar of the area, vide his letter-dated 02.02.2015 informed that in the year 1981, circle rate of the commercial property was not determined. As per the rate list, the rate of the area was Rs. 100/- per sq yd however, as per the inquiry made from the neighbour, it was gathered that the commercial rate of the area was Rs. 2,000-Rs. 3,000/- per sq yd approx.*
- k) *On the basis of report from Tehsildar, assessee made the computation and vide letter-dated 10.02.2015, explained that the capital gain will arrive at Rs. 9,656/-, however, the AO did not satisfy with the same. Accordingly assessee again made the computation taking the value of building as per the registered valuer and computed the capital gain at Rs. 1,36,036/-, which was accepted by the AO who framed the assessment vide order-dated 20.03.2015 making addition of Rs. 2,71,536/- (addition of Rs. 1,36,036/- on account of capital gain and addition of Rs. 1,23,000/- by disallowing 50% of the expenses claimed by the assessee for construction of pit and front nala).*
- l) *Aggrieved by this order, assessee filed an appeal before CIT(A). However, on 01.05.2016 assessee expired and therefore, the AR withdrew his Vakalatnama and thus appeal was withdrawn.*
- m) *Thereafter, Ld. Pr. CIT issued a show-cause notice-dated 05.12.2016 requiring the assessee to show-cause as to why an order u/s 263 be not passed in his case.*
- n) *The assessee objected to proceeding u/s 263 of the Act and requested to drop the proceeding. However, the Ld. Pr. CIT passed the order-dated 05.01.2017 u/s 263 of the Act, validity of which is under challenge in the present appeal.*

## CONTENTIONS

- a) *That the Ld. CIT has erred in invoking the jurisdiction u/s 263 of the Act.*
- b) *That infact during the assessment proceeding u/s 147 of the Act, AO had made full inquiry in respect of sale consideration as well as cost as on 01.04.1981 and thereafter had framed the assessment. Therefore, no jurisdiction u/s 263 can be invoked by the Pr. CIT.*
- c) *Ld. Pr. CIT has alleged that the Assessing Officer had adopted the valuation of property as on 01.04.1981 without considering the report of Valuation Officer, Meerut.*
- d) *It is submitted that when the assessment order was passed in the case of assessee, valuation report was not existing. Infact, in the case of co-owner i.e. Shri Narendra Kumar Gill, his AO had referred the valuation to 29.03.2015 whereas assessment in the case of assessee had been framed on 20.03.2015. DVO had filed the report on 08.01.2016. Thus the Valuation report of the DVO Meerut did not constitute part of record of the assessee's case.*
- e) *That the Ld. Pr. CIT has alleged that the AO had completed the assessment without examining the reason for which notice u/s 148 was issued. Infact, AO had made the detailed inquiry in r/o circle rate as on date of sale as well as cost as on 01.04.1981 and thereafter had arrived at a figure of capital gain. For determining fair market value as on 01.04.1981, AO had made inquiry from the area Tehsildar, who vide letter-dated 02.02.2015 had informed that the commercial rate of the area was not available, however on inquiry from the neighbours it was gathered that the commercial rate of the area was Rs. 2,000/- to Rs. 3,000/- per sq yd as on 01.04.1981. Thus after considering the details, the AO had framed the assessment.*
- f) *The DVO in the case of co-owner, had taken the value of land as on 01.01.1981 at 100/- per sq yd and was adjusted at 140% per sq mtr. The Ld. Pr. CIT did not apply his mind that the value adopted by DVO did not suggest the commercial rate of the property. It was the rate of the residential area Mohalla Rampuri whereas the property of the assessee existed on GT Road.*
- g) *When the sale consideration is taken at Rs. 24,500/- per sq mtr which was commercial rate of the area then the cost is also to be taken at the commercial rate and that too of the proper area. Even in the year 1970, commercial rate of the area was Rs. 400/- and the assessee had produced the registry for the neighboring area before the Assessing Officer. The Ld. CIT has not taken into consideration all these facts and simply invoked the power u/s 263 stating that no proper inquiry had been made by the AO.*
- h) *During the proceeding, assessee had explained that the circle rate of the commercial property and the residential property were different as is evident from the rate list which shows that the rate*

of Rs. 7,000/- was for residential "Srea and--. Rs. 50,000/- for commercial area. On 01.04.2008 the rate of residential area Wa\$~-?19,000/- whereas the commercial rate was Rs. 24,500/-.

- i) *Ld. Pr. CIT did not consider that even the reference in the case of co-owner, u/s 55A was not valid as the reference could not have been made u/s 55A of the Act as the value declared by the assessee was not lesser than fair market value. Assessee also contended before the Ld. CIT that the amendment in section 55A w.e.f. 01.07.2012 was not applicable to the present case as it pertains to 2009-10.*
- j) *That the Ld. Pr. CIT has misdirected herself in ignoring the material fact that all possible inquiries had been made by the AO during the assessment proceeding and thereafter had framed the assessment. In such circumstances invoking the powers u/s 263 of the Act is nothing but a change of opinion. There is no error of law or fact in the assessment order which can be revised by the Ld. Pr. CIT by invoking powers u/s 263 of the Act.*
- k) *That a bare reading of section 263 makes it clear that the pre-requisite for exercise of jurisdiction u/s 263 by the CIT, suo moto, is that the order of the Assessing Officer is erroneous in so far as it is prejudicial to the interest of Revenue. The Commissioner has to satisfy himself with twin conditions namely the order of the Assessing Officer sought to be revised is erroneous and ii) it is prejudicial to the interest of Revenue. If one of them is absent, recourse cannot be had to section 263(1) of the Act.*
- I) *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 e.g. when an Assessing Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it 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.*
- m) *That this is not the case where no inquiry had been made by the Assessing Officer. The grievance of the CIT u/s 263 of the Act is that no proper inquiry had been made by the Assessing Officer in respect of the issues stated in the notice. There is a distinction between lack of inquiry and inadequate inquiry. The former confer power on the CIT to invoke jurisdiction u/s 263 but not the later.*
- n) *That the Hon'ble Supreme Court in Malabar Industrial Company Ltd. vs CIT (243 ITR 83)(SC) have held that the Commissioner has to satisfy himself of both the conditions, order being erroneous and*

*prejudicial to the interest of revenue. It is also held that the provisions cannot be invoked to correct each and every type of mistake or error committed by the AO, it is only when an order is erroneous that the section will be attracted. The phrase "prejudicial to the interest of Revenue" is not an expression of Art and is not defined in the Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax. The said phrase has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as consequence of an order of the Assessing Officer, cannot be treated prejudicial to the interest of revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of revenue unless the view taken by the Income Tax Officer is unsustainable in law.*

*In the present case, after considering all the details filed by the assessee, the Assessing Officer has taken a view which is permissible in law and therefore, the Ld. CIT cannot substitute his own view treating the view taken by the Assessing Officer as erroneous.*

- o) A bald statement that the Assessment Order is erroneous in so far as it is prejudicial to interest of revenue, without giving any reason is not sufficient to invoke the powers u/s 263 of the Act.*
- p) The Ld. CIT had not considered the fact that the reference in the case of co-owner itself is incorrect. The reference was made for determination of the fair market value of the property at Mohalla Rampuri, Roorkee Road, Muzaffarnagar, as on 01.04.1981 and the valuer had picked up the value of the residential area at rupees 100 per sq. yard. Whereas, the property was a commercial property and the AO of the assessee had correctly asked the Tehsildar to inform the commercial rate of property situated at GT Road.*

*The AO had already examined this aspect but the Commissioner had directed a re-inquiry for merely a change of opinion which is impermissible u/s 263 of the Act. CIT was required to arrive at a definite conclusion as is held by the Hon'ble Delhi High Court in CIT v. International Travel House Ltd. Even otherwise Hon'ble Supreme Court in ACIT v. Dharia Construction Co., (2010) 328 ITR 515 have held that the opinion of DVO is not an information on the basis of which the assessment can be reopened.*

- q) Lack of inquiry and inadequate inquiry*

*It is the lack of inquiry on the part of Assessing Officer which confers jurisdiction on the CIT to assume jurisdiction u/s 263 of the Act. Following cases are relied upon :*

*(2010) 320 ITR 674 (Del)*

*CIT vs Ashish Rajpal*

*Hon'ble Jurisdictional High Court in this case have held that where the Assessing Officer during the scrutiny assessment proceeding raised a query which was answered by the assessee to the satisfaction of the Assessing Officer but the same was not reflected in the assessment order by him, a conclusion cannot be drawn by the Commissioner that no proper inquiry with respect to the issue was made by the Assessing Officer, and enable him to assume jurisdiction under section 263 of the Act.*

*(2012) 343 ITR 329 (Del)*

*Income Tax Officer vs D G Housing Projects Ltd*

*Hon'ble Jurisdictional High Court in this case, after considering various judgements on this subject have held that in cases where tjagp Jj\ inadequate inquiry but not lack of inquiry, the CIT must give and;^6ud.a / finding that the order / inquiry made is erroneous. In the 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 inquiry, if required, before the order under section 263 is passed.*

*ITA No.267/2013 decided on 09.07.2013 DIT vs Jyoti Foundation*

*Hon'ble Jurisdictional High Court has relied upon its "own judgement in the case of D G Housing Project Ltd. and held that in case of inadequate inquiry, the inquiry should have been conducted by the CIT himself to record the finding that assessment order was erroneous. He should not have set aside the order and directed the Assessing Officer to conduct the said inquiry. The present case may be the case of inadequate inquiry but not a case of lack of inquiry.*

*(2013) 39 Taxmann.com 135 (Del)*

*CIT Delhi-V vs New Delhi Television Ltd.*

*In this case, assessee, producer of television news and program was also engaged in the business of limited transfer / export of news items and television programmes owned by it. It claimed deduction u/s 80HH. Assessing Officer delved deep into question of deduction, conducted investigation and accepted claim of assessee on being satisfied that conditions stipulated in section 80HHF were fulfilled. Hon'ble Jurisdictional High Court held that once assessee's claim u/s 80HHF was considered and examined by AO, Commissioner cannot set aside order without recording contrary finding. It is not the case of "no investigation". Commissioner in his order, has been tentative and hesitant and did not decide whether the claim u/s 80HHF had been rightly allowed by the Assessing Officer. He has noted the stand of the assessee, before him and*

*before AO, but refrained from forming any opinion as to whether the acceptance of the claim by the AO was erroneous or not. Power of review u/s 263 can be invoked only if the order is erroneous and for this the Commissioner must record the reason that the order was erroneous and the claim u/s 80HHF was wrongly allowed.*

*(2014) 41 Taxmann.com 34 (Del)*

*CIT vs Galileo India (P) Ltd.*

*In this case, assessee, after netting interest paid on loan obtained against interest earned from deposits, offered T94,47,712/- as disallowance u/s 14A. Question was whether a higher disallowance of more than T94 lac would have been made. Assessing Officer had conducted inquiry and accepted disallowance which was surrendered by the assessee. vyho/e Commissioner had not given or formed any opinion as to whether or not said disallowance was satisfactory or not, though Assessing Officer had applied his mind and accepted offer made by the assessee, section 263 would not be invoked by the Commissioner for initiating revision proceeding.*

*r) Lack of discussion in the assessment order*

*It is submitted that where the Assessing Officer had made a query which had been duly explained by the assessee to the satisfaction of Assessing Officer then no revision is permissible by the CIT on the ground that there is no discussion on the issue in the assessment order which lead to assumption that Assessing Officer did not apply his mind.*

*(2013) 212 Taxmann 184 (Del), 1 ITR - OL 526 (Del)*

*CIT vs Vodafone Essar South Ltd.*

*Hon'ble Jurisdictional High Court in this case have held that where Assessing Officer after detailed inquiry and considering amesms's disclosures, had allowed deduction, it is not a case of no inquiry: TTie (acfe of any discussion on the issue cannot lead to the assumption that the Assessing Officer did not apply his mind. Hence no revision is permissible under section 263 of the Act.*

*194 Taxmann 57 (Del) CIT vs Vikas Polymers (341 ITR 537)*

*In this case also, the Jurisdictional High Court have held that the bare reading of section 263 makes it clear that the CIT has to be satisfied of twin conditions.*

*As regards the scope and ambit of expression "erroneous", Hon'ble Court has relied upon the judgement of Bombay High Court in CIT vs Gabriel India Ltd. (1993) 203 ITR 108, wherein, after discussing the dictionary meaning of the term "erroneous" have held that it is clear that an order cannot be termed as an "erroneous" unless it is not in accordance with law. If an ITO, acting in accordance with*

*law, makes certain assessment, the same cannot be branded as erroneous by the Commissioner, simply because, according to him, the order should have been written differently or more elaborately. The section does not visualize the substitution of the judgement of the Commissioner for that of the ITO, who passed the order unless the decision is not in accordance with law.*

*Hon'ble Court have also discussed the meaning of the term "prejudicial to the interest of Revenue" as that the order of assessment challenged is such as is not in accordance with law, in consequence whereof the lawful revenue due to the state has not been realized or cannot be realized.*

*Hon'ble Court have also held that it is trite law that it is quasi-judicial power hedged in with limitation and not an unbridled and unchartered arbitrary power. The exercise of the power is limited to cases where the Commissioner on examining the records comes to the conclusion that the earlier finding of the ITO was erroneous and prejudicial to the interest of revenue and that fresh determination of the case is warranted.*

*It is further held that it is also trite that there is a fine, though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in case of lack of inquiry the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceeding under the Act and passing orders thereon.*

*The powers under section 263 cannot be invoked for making roving and fishing inquiry. Hon'ble Court have held that during the proceeding under section 263, the assessee must be called, his explanation sought for and examined by the Commissioner and thereafter if the Commissioner still feels that the order is erroneous and prejudicial to the interest of revenue, he may pass revisional orders. If, on the other hand, the Commissioner is satisfied after hearing the assessee that the orders are not erroneous and prejudicial to the interest of the revenue, he may choose not to exercise his power of revision. This is for the reason that if a query was raised during the course of scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the Assessing Officer is called for interference and revision.*

*s) That these principles are again reiterated by the ITAT Delhi Bench in the case of Technic UK Ltd. vs DIT International Taxation in (2017) 81 Taxmann.com 311 (Del). ITAT have held that in the instant case, Assessing Officer, after considering the various submissions made by the assessee from time to time has taken a possible view, merely because the Director did not agree with the opinion of the Assessing Officer, he cannot invoke the provision of*

section 263 to substitute his own opinion. It has further been held in several decisions that when the Assessing Officer has made inquiry to his satisfaction and it is not a case of no inquiry and the DIT / Commissioner wants that the case could have been investigated / probed in a particular manner, he cannot assume jurisdiction u/s 263. Hence the assumption of jurisdiction by the Director u/s 263 was not in accordance with law.

t) That Hon'ble Supreme Court in CIT vs Kwalify Steel Suppliers Complex (2017) 84 Taxmann.com 234 (SC) have held that as is clear from the language of section 263, there has to be a proper application of mind by the Commissioner to come to a firm conclusion that the order of the Assessing Officer is erroneous and prejudicial to the interest of Revenue. Thus two conditions need to be satisfied for invoking such a power by the Commissioner which are (i) the order of the Assessing Officer sought to be revised is erroneous and (ii) it is prejudicial to the interest of Revenue.

It is clear from the above that where two views are possible and the Assessing Officer has taken one view and the Commissioner again revised the said order on the ground that he does not agree with the view taken by the Assessing Officer, in such circumstances the assessment order cannot be treated as an order erroneous or prejudicial to the interest of Revenue. Reason is simple. While exercising the revisionary jurisdiction, the Commissioner is not sitting in appeal. This has been eloquently explained by the Supreme Court in the case of Malabar Industrial Company Ltd.

u) In Amira Pure Foods Pvt. Ltd. vs the Pr. CIT, ITA No.3205/Del/2017 decided on 29.11.2017, ITAT has discussed the law on section 263 r/w explanation to newly inserted by the Finance Act 2015 w.e.f. 01.06.2015. After discussing the law pronounced by the Jurisdictional High Court in the case of PCIT vs Delhi Airport Metro Express Pvt. Ltd. (ITA No.705 of 2017 decided on 05.09.2015) and ITO vs DG Housing Project Ltd. (343 ITR 329), it was held that if the Ld. PCIT is of the view that AO did not undertake any inquiry, it becomes incumbent on the Ld. PCIT to conduct such inquiry. Similar view has been taken by the Jurisdictional High Court in the case of Pr. CIT vs Modicare Ltd. (ITA No.759 of 2016 decided on 14.09.2017) and have held that the exercise u/s 263 could not have been outsourced by the CIT to the AO. CIT has himself to undertake a minimal inquiry and give reasons for coming to the conclusion that the assessment order was erroneous and prejudicial to the interest of Revenue.

v) The order in the case of Smt. Sangeeta Jain v. PCIT, (ITA No. 3888/Del/2017 decided on 15.02.2018) is squarely applicable to the present case. In this case also the certificate from the Tehsildar was relied upon. The 'G' Bench of this Hon'ble Tribunal has quashed the order of CIT u/s 263 of the Act holding that certificate issued by the public officers are generally to be believed by the other officers,

*unless there is some material which suggest that the certificate has been obtained under fraud etc.*

*In the present case, the Ld. Pr. CIT has not made any inquiry by himself and has set aside the order passed by Ld. AO, merely on the ground that the AO had failed to examine the case properly on the issue for which the notice u/s 148 was issued and other issues also. It is not made clear as to what those other issues were. Such an order directing for making roving and fishing inquiries is not sustainable in law. Hence the order passed by Pr. CIT u/s 263 is liable to be set aside in the interest of justice."*

7. The Id DR vehemently supported the order of the Id CIT and submitted when the assessment order is passed without adequate enquiry the Id CIT is correct in assuming the jurisdiction u/s 263 of the Act. He also supported the order on the facts. The Id DR further stated that when the Id AO was supposed to do certain enquiries, his failure to make such enquiry makes the order erroneous. The Id CIT DR relied on the decision of Gee Vee Enterprises Vs. Addl. CIT 99 ITR 375 (Del).
8. The Id AR in rejoinder relied upon the decision of Hon'ble Delhi High Court in case of CIT Vs. Vikash Polymers 341 ITR 537 and also the decision of the Hon'ble Delhi High Court in CIT Vs. Gabriel India 203 ITR 108. He further relied upon the decision of the coordinate bench in case of Smt Sangita Jain Vs. Pr CIT and submitted that on identical facts the 263 proceedings were quashed.
9. We have carefully considered the rival contentions and perused the orders of the lower authorities. The brief facts of the case is that reopening of the assessment was made u/s 148 of the Act stating the reason that as per information available with the Id AO, the assessee has sold an immovable property in the joint name of three persons situated at Muzaffarnagar admeasuring 689.70 sq meter during the FY 2008-09 at sale consideration of Rs. 50 lacs whereas the stamp duty has been paid on the circle rate at Rs. 19393650/- and there is a difference in consideration of Rs. 3598412/- to the extent to the share of the assessee (1/4<sup>th</sup>) taxable under the provisions of section 50C of the Act. Therefore, the Id AO had a reason to believe that assessee has income chargeable to tax of Rs. 3598412/- . Hence, such reasons were recorded on 14.03.2013

and notice u/s 148 was issued. The Id Assessing Officer completed the assessment by obtaining certificate from Tehsildar of the Circle rate of the property as at 01.04.1981 granted the assessee the deduction of cost of acquisition for indexation purposes. The Id AO obtained such letter on 02.02.2015. Based on it the Id Assessing Officer completed the long term capital gain u/s 50C of Rs. 136036/-. The Id Assessing Officer further disallowed the expenses for improvement of Rs. 123000/-. The computation of the capital gain provided by the assessee as placed at page No. 90 of the paper book shows that assessee has taken sale proceeds of Rs. 19393650/- u/s 50C of the Act. Further, the value of land as on 01.04.1981 was considered at Rs. 2484000/- and cost of improvement as on 01.04.1981 was considered at Rs. 754747/-. Accordingly, the cost of acquisition as on 01.04.1981 was derived at Rs. 3238747/- which was indexed at Rs. 18849508/- resulting into the net capital gain of Rs. 544142/-. 25% thereof i.e. Rs. 136036/- was offered by the assessee as his share which was accepted by the Id AO. The Id Assessing Officer made addition of Rs. 123000/- as per para No. 5 of his order in a casual manner. The Id CIT noted that AO has accepted the valuation of the property as on 01.04.1981 without considering the report of the DVO. The Id AO relied upon the valuation given by the Tehsildar for the circle rate. Such certificate is available at Page No. 83 to 87 of the paper book. In fact the Id CIT has noted that Id AO should have used the valuation report of District Valuation Officer for arriving at fair market value as at 01.04.1981. We are afraid that Id AO could have done that legally u/s 55A of the Act. The reference to the department valuer can only be made if the AO was of the opinion that valuation shown by the assessee is less than fair market value. The amendment in Section 55A(a) replacing "is less than its fair market value" with "as at variance with its fair market value" is by the Finance Act, 2012 with effect from 01.07.2012. It does not apply retrospectively also. We draw support from decision of Hon'ble Bombay High Court in case of CIT Vs. Puja Prints 360 ITR 697. In view of this the Id AO did not have any power to refer the matter to DVO or apply the rates determined by the DVO in case of joint

owners. Further, Id AO did examine from Tehsildar about the rates prevailing at that time. Though, Tehsildar may not be the competent authority for determining the fair market value of property, but he suggested some rate as per government records. Therefore, Id AO has conducted inquiries which he could have probably done. At the time of assessment proceedings, he also did not have benefit of the assessment orders in case of other co-owners and FMV taken therein as at 01.04.1981 of the impugned property. While at the time of examination of records by the Id CIT, the above information was available. But that does not make the order of the Id AO erroneous and prejudicial to the interest of revenue. Perhaps that could have given an option to the Id AO to reopen the proceedings u/s 147 of the Act as there was some tangible material. But certainly the revision u/s 263 of the Act is not legally sustainable. As the Id AO has made inquiry about the fair market value of property as at 01.04.1981, it cannot be said that he has not made any inquiry. The order of the Id CIT also does not suggest what further inquiry the Id AO should have done. The nature of enquiry suggested by the Id CIT is also not legally sustainable in view of the decision of several courts. Further, introduction of explanation 2 to section 263 of the Act introduced w.e.f. 01.06.2015 also does not come to the help of the revenue because it could not be shown that the order is passed without making enquiries or verification which should have been made. In the order of the Id CIT there is no legally sustainable suggestion about what enquiry or verification AO should have made. The relief granted to the assessee is also after making some enquiry into the claim of the assessee. Therefore, we do not have any hesitation in holding that order passed by the Id CIT u/s 263 of the Act is not sustainable and hence, quashed.

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

Order pronounced in the open court on 18/06/2018.

-Sd/-

(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 18/06/2018