# <u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,'ई',मुंबई।</u>

## IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES, 'E' MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री मनोज कुमार अग्रवाल, लेखा सदस्य**,** के समक्ष

**Before Shri Joginder Singh, Judicial Member, and Shri Manoj Kumar Aggarwal, Accountant Member**

**ITA No.2511/Mum/2014**
**Assessment Year: 2009-10**

| | | |
|---|---|---|
| M/s Saigal Sea Trade,<br>J.V. House, 02nd Floor, D.S. Babrekar Marg, Dadar (West), Mumbai-400028 | **<u>बनाम</u>**/<br>Vs. | CIT-18,<br>Piramal Chambers,<br>Mumbai |
| (निर्धारिती /Assessee) | | (राजस्व /Revenue) |
| **PAN. No. AAAFS6920K** | | |

| | |
|---|---|
| निर्धारिती **की ओर से /** Assessee by | Shri Jitendra Jain |
| राजस्व **की ओर से** / Revenue by | Shri Manjunatha Swamy-CIT |

| | |
|---|---|
| सुनवाई की तारीख **/ Date of Hearing:** | **07/05/2018** |
| **आदेश** की तारीख /**Date of Order:** | **07/05/2018** |

## आदेश / O R D E R

Per Joginder Singh(Judicial Member)

The assessee is aggrieved by the impugned order dated 13/01/2014 of the Ld. Commissioner of Income Tax, Mumbai, invoking revisional jurisdiction u/s 263 of the Income Tax Act, 1961 (hereinafter the Act).

2. During hearing, the Ld. counsel for the assessee, Shri Jitendra Jain, contended that the Ld. Commissioner wrongly invoked the revisional jurisdiction u/s 263 of the Act as the assessment order was passed on due application of mind and considering the reply of the assessee. It was contended that notice u/s 142(1) was issued which was replied by the Assessing Officer. Plea was also raised that the Ld. Commissioner of Income Tax (Appeal) accepted the version of the assessee on one item and did not accept the second one. It was also pleaded that the assessee while making the payment duly deducted the TDS. Plea was also raised that on the issue of commission, the Ld. Assessing Officer examined and allowed. It was fairly agreed by the Ld. counsel that both these issues were not discussed in the assessment order by the Ld. Assessing Officer but hastily

added that the assessment order was passed after examining the details filed by the assessee. Reliance was placed upon the following decisions:-

i. Narayan Tatu Rane vs Income Tax Officer (2016) 70 taxman.com 227 (Mum. ITAT),

ii. M/s Amira Enterprises Ltd. vs Pr. CIT (ITA No.3206/Del/2017)

iii. M/s Indus Best Hospitality vs Pr. CIT (ITA No.3125/Mum/2017)

iv. Metacaps Engineering & Mahindra Construction Company (J.V.) vs CIT (2017) 86 taxman.com 128 (Mum. Trib.)

2.1. So far as, the expenses are of the nature of Revenue or capital, the Ld. counsel relied upon the decisions in

i. R. B. BANSILAL ABIRCHAND SPINNING AND WEAVING MILLS vs.CIT 31 ITR 427 (Nagpur.)

ii. CIT *v.* Oxford University Press 108 ITR 166 (Bom.)

iii. CIT vs J.K. Industries Pvt. Ltd. 125 ITR 218 (Cal.) and

iv. CIT vs I.C.I. India Pvt. Ltd. 139 ITR 105 (Cal.)

2.2. On the other hand, the Ld. CIT-DR, Shri Manjunatha Swamy, defended the revisional order by contending that the assessment order is not speaking one and the details filed by the assessee are general, the ld.

Assessing Officer has not applied his mind and even did not any whisper in the assessment order with respect to these issues on the basis of which revisional jurisdiction was invoked. Plea was also raised that under the garb of repairs, the assessee has claimed huge expenses year after year. It was also pleaded that normally the tiles of the flooring are change every year and the claimed expenses, therefore, is of capital in nature. It was pleaded that necessary details were not called for and thus the genuineness of the payment of commission paid to Miss. Nivedita Singh was not examined by the ld. Assessing Officer and even no discussion was made. The Ld. CIT-DR relied upon the decision of the Tribunal in the case of Horizon Investment Company Ltd. vs CIT (ITA No.1593/Mum/2013), order dated 27/06/2014 and another decision of the Tribunal in Arvee International vs Addl. CIT (2006) 101 ITD 495; (2006) 8 SOT 452 (Mum. Trib.)

2.3. We have considered the rival submissions and perused the material available on record. Before adverting further, it is our bounded duty to examine section 263 of the

Act, which is reproduced hereunder for ready reference and analysis:-

> **"263.** (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
>
> [46][*Explanation 1*.]—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—
>
> (*a*) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—
>
> (*i*) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner undersection 144A;
>
> (*ii*) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;
>
> (*b*) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;
>
> (*c*) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to

have extended to such matters as had not been considered and decided in such appeal.

[47][*Explanation 2*.—For the purposes 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 interests 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;

(*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

*Explanation*.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

2.4. If the aforesaid section is analyzed, it speaks about the powers of the Ld. Pr. Commissioner or the Commissioner to consider whether the assessment order is erroneous in so far as prejudicial to the interest of Revenue

and after giving opportunity of being heard and he make such enquiry as he deems necessary and pass such order thereon as the circumstances of the case so justify including, enhance and modifying the assessment or canceling the assessment and directing a fresh assessment. It has been further explained with the insertion of Explanation-2 inserted by the Finance Act, 2015 w.e.f. 01/06/2015. Undisputedly, the Ld. Commissioner served upon the assessee a show cause notice dated 11/02/2013 issued u/s 263 of the Act and served upon the assessee, wherein, on various dates the assessee took adjournment. Before the Ld. Commissioner, the assessee submitted that the Ld. Assessing Officer duly examined the issue involved, raised appropriate queries, called for relevant details and on examination of such details allowed relief to the assessee. Identical plea was raised before this Tribunal.

2.5. Now, we shall deal with the cases cited from both sides along with the ratio laid down therein and also some other cases which are available on the issue in hand, so that we can reach to a justifiable conclusion. The first decision relied upon by the assessee is that of ACIT vs M.P.

Warehousing and Logistic Corporation Ltd. (2012) 21 taxman.com 322 (Indore), wherein with respect to repairs and insurance of machinery, plant and furniture, it was held that the expenditure must be incurred by the assessee to preserve and maintain existing asset and such expenditure must not bring into existence a new asset. This case may not help the assessee because the expense were incurred with respect to repair and maintenance of machinery, which is required for its smooth functioning, whereas, in the present appeal, the assessee incurring expenditure on renovation and even changed tiles every year, which seems to be quite unreasonable. Possibly, after few year, the tiles may be changed but not every year. It is also noted that the business of the assessee is broadly done on computer to know about the locations of the ship and it cannot be claimed that tiles are damaged every year. The business of the assessee are not of such nature, where heavy items are thrown on the tiles causing breakage and compulsorily the tiles are to be changed. The Ld. Assessing Officer has never examined the genuineness of such and its

necessity. Therefore, the order is erroneous as well as prejudicial to the interest of Revenue.

2.6. Another decision relied upon by the assessee is Narayn Tatu Rane vs Income Tax Officer (2016) 70 taxman.com 227 (Mum. Trib.). In this case, since, the commissioner had not brought any material on record to substantiate the inference and merely passed the revisional order only to carry out fishing and roving enquiries with objective of substituting his view with that of the Assessing Officer, in that situation the revisional order was held to be not justified. Whereas, it is not so in the present appeal.

2.7. In the case of M/a Amira Enterprises Ltd. vs Pr. CIT (ITA No.3206/Del./2017), the business of the assessee was trading of rice. It was found by the Tribunal that the principle CIT himself did not take any enquiry to reach to a conclusion that the assessment order is erroneous and prejudicial to the interest of Revenue. In that situation, a particular view was taken, therefore, this decision may not help the assessee.

2.8. Likewise, in the case of M/s Indus Best Hospitality vs Pr. CIT (ITA No.3125/Mum/2017), the bench relied upon the decision from Hon'ble jurisdictional High Court in the case of CIT vs Nirav Modi 390 ITR 292. The issue was whether the Ld. Assessing Officer examined the gift received by the assessee and accepted the same as genuine. No enquiry was caused by the ld. CIT to find out whether the Assessing Officer was satisfied with respect to correctness of the claim of the assessee whether erroneous. In that situation, the bank took a decision.

2.9. So far as, the case of Metacpas Engineering and Mahendra Construction COMPANY (J.V.) (2017) 86 taxman.com 128 (Mum. ITAT) is concerned, therein the assessee was awarded as civil construction contract of a project. As the assessee had insufficient capital and infrastructure, it sub-contratcted the project to sub-contractor 'Urja" on back to back basis. The entire responsibility and completion of contract was taken over by the sub-contractor. Revisional jurisdiction was invoked mainly on the ground of excessive expenses on labour payment, etc. In that situation, a particular view was taken.

3. Now, we shall deal with the cases relied upon by the Revenue like Arvee International vs Addl. CIT (2006) 8 SOT 452 (Mum. Trib.) , wherein, the assessment was framed without application of mind. It was held that mere allegation that Assessing Officer has taken a view in the matter will not put the matter beyond the purview of section 263 unless the view so taken by the Assessing Officer is a judicial view based on proper enquiry and legal aspect.

3.1. Another decision relied upon by the Ld. CIT-DR is of Horizon Investment Company Ltd. vs CIT (ITA No.1593/Mum/2013), wherein, it was clear that there was a lack/absence of enquiry by the Assessing Officer, therefore, the jurisdiction in relation to deduction of the said expenditure was held to be validly assumed.

4. So far as, whether the expenses are of revenue or capital in nature, the Ld. counsel for the assessee relied upon the decision in CIT vs I.C.I. India Pvt. Ltd. 139 ITR 105 (Cal.), wherein, it was held as under:-

> *"An expenditure may not be an allowable deduction under section 10(2)(v) of 1922 Act on the ground that the repairs are not*

*current repairs and yet, it may be allowed under section 10(2)(*xv*) of 1922 Act provided its conditions are fulfilled.*

*In the instant case, merely because some columns and beams were repaired by the company it did not necessarily follow that the expenditure incurred on it was in the nature of a capital expenditure.*

*That apart, it was not the finding of the Tribunal in the instant case that any structural alteration was made. By a mere patch work, the building would have lasted only for 5 to 10 years and the money that would have been spent in it would have been a complete waste. Therefore, plastering of certain portions of the concrete works with cement and some columns and beams by the process of guniting became absolutely essential. No doubt, that process had extended the life of the "building" by many more years, but not exceeding its original life. Further, the repairs had not improved in original condition.*

*It was an admitted fact that the building needed an extensive repair. The company had, no doubt, made extensive repairs by incurring a huge expenditure. But the magnitude of repair went with the magnitude of wear and tear, and not with the question as to whether the expenditure incurred in it was a capital or a revenue expenditure. The quantum of expenditure by itself was also not a determining factor.*

*Where a building needs repair, it is not for the taxing authorities but for its owner to decide how and in which manner, process or appliances it is to be carried out including the extent of its repair and the expenditure to be incurred on it. Even where structural repairs are carried out, the expenditure incurred on it is not necessarily a capital expenditure, for every repair, if properly done, must, as a matter of course, improve the condition of the building.*

*The object and the purpose of every repair is to improve the bad condition of the building, to prevent its further deterioration as far as possible and to keep it wind and water-tight. So long the repair does not bring into existence an additional advantage or benefit of an enduring nature or change the nature, character or the identity of the building itself, the expenditure must be regarded as a revenue expenditure. On the other hand, if it does, it will be in the nature of a capital expenditure. Guniting is nothing but a modern process of plastering by a machine. The company had used this modern process. The process of guniting had not improved the original condition of building nor had extended its original life. The finding of the Tribunal was that the object of the repairs was to maintain and preserve the building. The court also agreed with*

*the finding of the Tribunal, namely, that the process of guniting had not brought into existence any new benefit or advantage of enduring nature to the company. In view of aforesaid, it could be concluded that the entire repair expenditure incurred by the assessee on its office premises (building in question) was revenue expenditure and allowable as deduction.*

*Reference was answered in favour of the assessee.*

4.1. The another decision relied upon by the assessee is CIT *v.* Oxford University Press 108 ITR 166 (Bom.), wherein, the Hon'ble High Court held as under:-

*"This court held in the case of* Gulamhussein Ebrahim Matcheswalla *v.* CIT *[1974]* 97 ITR 24 *(Bom.), that the expression 'repair' must be understood in contradistinction to renewal or restoration and the test to be applied is to see whether as a result of the expenditure what is being done is to preserve and maintain an already existing asset. If the amount is spent for the purpose of bringing into existence a new asset or obtaining a new advantage then such an expenditure would not be revenue expenditure. The mere quantum of expenditure is not by itself decisive of the question whether it is of the nature of revenue or capital. A sum can be allowed as cost of repairs even though the expenditure in a particular year is heavy on account of the fact that it is undertaken to remedy the effect of several years of wear and tear or neglect and also in spite of the fact that such expenditure may not be necessary for several years to come after repairs have been effected. It is thus clear that what the court is required to find out is whether as a result of the expenditure a new asset or a new advantage is being brought into existence. The court will also have regard to the aspect as to whether as a result of the expenditure what is being done is to preserve and maintain an already existing asset.*

*In the instant case, it was clear as to why and in what circumstances the guniting work was undertaken by the assessee in relation to the building. In their letter, the architects of the assessee stated that during the inspection of the building, which was undertaken in January, 1961, it was observed that the reinforcement of the slabs had decayed and cracks were visible underside of the slab and on the floors and some of the steel reinforcement in the slab had little or no cover. Further, that the assessee had been spending good amounts on the repairs of such*

*cracks and plasterings of the slabs on which the reinforcements had disappeared but the amount spent for plaster patch work that was undertaken was a waste and that, therefore, since the plastering by means of an ordinary method was of no use, plastering by the process of guniting was advised. The nature of the guinting process was explained by the assessee. Having regard to the nature of the guniting process that was undertaken for carrying out the plastering and repair work to the building and the reasons and circumstances as to why the guniting process had been employed, it became very clear that by employing this method, which was nothing but an improved method of plastering and repairing work, all that the assessee had done was to preserve and maintain the already existing asset. No new asset or new advantage as such could be said to have been brought into existence by reason of expenditure incurred for doing the guinting work. As a result of guniting work done the assessee had not changed the nature of the asset,* viz., *the building as a whole, and the same in no way increased the accommodation or earning capacity of the building; in that sense no new advantage of enduring benefit had been brought into existence. The repairs also could not be regarded as heavy structural repairs, for, according to the assessee's architects, what could not be achieved by the ordinary method of plastering was achieved by a sophisticated method of process of guniting. In this view of the matter, it seemed very clear that the expenditure incurred for guniting work done as also the expenditure being the architects' fees paid in connection therewith would have to be regarded as expenditure of a revenue nature.*

*All that the assessee did in the instant case was to undertake the plaster repairing work out by adopting a new method called guniting process, and by incurring the expenditure by adopting such a process the assessee was merely maintaining and preserving an asset which it already possessed and thus though to some extent the life of the asset had been prolonged and the asset was made to give better service then it was doing in the past, the expenditure would have to be regarded as revenue expenditure.*

**II. Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of - Assessment year 1963-64 - During relevant assessment year, assessee-company paid certain amount to its deceased employee as gratuity, calculating quantum of 2 years' salary payable to deceased at time of his dealth - ITO disallowed assessee's claim in respect of aforesaid expenditure - AAC finding that gratuity fixed for non-covenanted staff was only 12 months' salary,**

**held that gratuity payment in excess of 12 months' salary was ex-gratia payment - He thus, allowed deduction of amount representing 12 months' salary as legitimate business expenditure and disallowed rest as being in nature of ex-gratia payment - Tribunal confirmed AAC's order - Whether, on facts, Tribunal rightly affirmed AAC's order, and therefore, order passed by Tribunal could not be interfered with - Held, yes**

**FACTS-II**

During the relevant assessment year, the assessee-company paid certain amount to its deceased employee as and by way of gratuity, roughly calculating the quantum of 2 years' salary payable to the deceased at the time of his death. The assessee claimed the said payment as an allowable expenditure in computing its assessable income. The ITO disallowed the claim on the ground that there was no contractual obligation to pay any gratuity and, therefore, the payment was an *ex-gratia* payment and not a legitimate business expenditure. On appeal, the AAC held that the gratuity paid to the deceased's heirs was equivalent to approximately 2 years' salary while the gratuity fixed for the non-covenanted staff was only 12 months' salary and in view of this he held that the gratuity payment in excess of 12 months' salary was an *ex-gratia* payment. In other words, he allowed a deduction of amount representing 12 months' salary as legitimate business expenditure but disallowed the rest as being in the nature of *ex-gratia* payment.

On cross appeals, the Tribunal upheld the order of the AAC.

On reference :

**HELD-II**

*In the instant case the AAC held that since the gratuity fixed for non-covenanted staff was subject to a maximum of 12 months' salary, in respect of covenanted staff the members thereof could at least expect that much gratuity if not more and, having regard to this aspect of the matter, the AAC held that part of the gratuity paid to the heirs of deceased to the extent of Rs. 24,000 being 12 months' salary could be regarded as proper and legitimate business expenditure while that part which was in excess of 12 months' salary was to be regarded as ex gratia payment and he, therefore, disallowed the excess amount. The matter was carried in further appeal to the Tribunal, the Tribunal had confirmed this finding of the AAC. In this view of the matter, it was held that the Tribunal was right in allowing a deduction of the expenditure only to the extent of Rs. 24,000 being the part of the gratuity amount paid by the assessee to the heirs of deceased."*

4.2. The Hon'ble Calcutta High Court in CIT vs J.K. Industries Pvt. Ltd. 125 ITR 218 (Cal.), relied upon by the assessee, held as under:

> *"It had been found by the Tribunal that with the capital borrowed the assessee had acquired a business asset for the purposes of its own business. Further finding was that it was the object of the assessee to house its own office as also the offices of the companies managed by it. The findings of the Tribunal had not been challenged nor was it contended at any stage that the housing of the offices of the managed companies was not a part of the business of the assessee. Had this point been mooted at the proper stage the agreements between the assessee and the managed companies could have been considered to ascertain whether the assessee was in any way liable to arrange for office of the managed companies. Following the decision of the Supreme Court in* CIT *v.* Kirkend Coal Co. *[1969] 74 ITR 67 the question which was neither raised nor argued before the Tribunal could not be raised at this stage.*
>
> *Even otherwise, it could not be said that it would not be conducive to the business of the assessee if all the companies managed by it were housed in the same building. It would lead to some economy and greater efficiency in management.*
>
> *In view of aforesaid, it could be concluded that amounts paid as interest and the municipal taxes were allowable as deduction.*
>
> *As regards renovation expenses for the assessment year 1961-62, the expenses in putting up the wooden panelling did not result in any enduring benefit to the assessee and, therefore, was deductible as a revenue expenditure. The revenue did not challenge the other expenses. Hence the entire expenditure on renovation was deductible."*

5. Now, we shall deal with certain other cases, which throws light on the issue in hand so that we can reach to a fair and justifiable conclusion. The Hon'ble Calcutta High Court in Rajmandir Estate Pvt. Ltd. vs Pr. CIT (2016) 70 taxman.com 124 (Calc.) order dated 13/05/2016 and the ratio laid down therein supports the case of the Revenue. It

is noteworthy that while coming to a particular conclusion, Hon'ble Calcutta High Court considered following judicial pronouncements:-

*i.* CIT *v.* Calcutta Discount Co. Ltd. *[1973] 91 ITR 8 (SC) (para 3),*

*ii.* Sumati Dayal *v.* CIT *[1995] 214 ITR 801/80 Taxman 89 (SC) (para 4),*

*iii.* CIT *v.* Nova Promoters & Finlease (P.) Ltd. *[2012] 342 ITR 169/206 Taxman 207/18 taxmann.com 217 (Delhi) (para 4),*

*iv.* CIT *v.* Durga Prasad More *[19711] 82 ITR 540 (SC) (para 6),*

*v.* CIT *v.* Precision Finance (P.) Ltd. *[1994] 208 ITR 465/[1995] 82 Taxman 31 (Cal.) (para 6),*

*vi.* ITO *v.* DG Housing Projects Ltd. *[2012] 343 ITR 329/212 Taxman 132 (Mag.)/[2012] 20 taxmann.com 587 (Delhi) (para 7),*

*vii.* DIT *v.* Jyoti Foundation *[2013] 35 ITR 388/219 Taxman 105/38 taxmann.com 180 (Delhi) (para 7),*

*viii.* CIT *v.* Steller Investment Ltd. *[1991] 192 ITR 287/59 Taxman 568 (Delhi) (para 8),*

*ix.* CIT *v.* Sophia Finance Ltd. *[1994] 205 ITR 98/70 Taxman 69 (Delhi) (FB) (para 8),*

*x.* CIT *v.* Divine Leasing & Finance Ltd. *[2008] 299 ITR 268/[2007] 158 Taxman 440 (Delhi)(para 8),*

*xi.* Lotus Capital Financial Services Ltd. *v.* ITO *[IT Appeal No. 479 (Kol.) of 2011] (para 8),*

*xii.* CIT *v.* Lotus Capital Financial Services (P.) Ltd. *[ITAT No. 125 of 2012] (para 8),*

*xiii.* CIT *v.* Dataware (P.) Ltd. *[ITAT No. 263 of 2011] (para 8),*

*xiv.* CIT *v.* Roseberry Mercantile (P.) Ltd. *[G.A. No. 3296 of 2010, dated 10-1-2011] (para 8),*

*xv.* CIT *v.* Sanchati Projects (P.) Ltd. *[ITAT No. 140 of 2011] (para 8),*

*xvi.* CIT *v.* Samir Bio-Tech. (P.) Ltd. *[2010] 325 ITR 294 (Delhi) (para 8),*

*xvii.* CIT *v.* Kamdhenu Steel & Alloys Ltd. *[2014] 361 ITR 220/[2012] 206 Taxman 254/19 taxmann.com 26 (Delhi) (para 8),*

*xviii.* CIT *v.* Dwarkadhish Capital (P.) Ltd. *[2011] 330 ITR 298/[2010] 194 Taxman 43 (Delhi) (paras 9, 10),*

*xix.* CIT *v.* Kinetic Capital Finance Ltd. *[2013] 354 ITR 296/[2011] 202 Taxman 548/14 taxmann.com 150 (Delhi) (paras 9, 10),*

*xx.* Zafa Ahmad & Co. *v.* CIT *[2013] 214 Taxman 440/30 taxmann.com 267 (All.) (paras 9, 10),*

*xxi.* Anil Rice Mills *v.* CIT *[2006] 282 ITR 236/[2005] 149 Taxman 313 (All.) (paras 9, 10),*

*xxii.* CIT *v.* Five Vision Promoters (P.) Ltd. *[2016] 380 ITR 289/236 Taxman 502/65 taxmann.com 71 (Delhi) (para 11),*

*xxiii.* CIT *v.* Gabriel India Ltd. *[1993] 203 ITR 108/71 Taxman 585 (Bom.) (para 12),*

*xxiv.* Hari Iron Trading Co. *v.* CIT *[2003] 263 ITR 437/131 Taxman 535 (Punj. & Har.) (para 12),*

*xxv.* CIT *v.* Leisure Wear Exports (P.) Ltd. *[2012] 341 ITR 166/[2011] 202 Taxman 130/11 taxmann.com 54 (Delhi) (para 13),*

*xxvi.* Omar Salay Mohamed Sait *v.* CIT *[1959] 37 ITR 151 (SC) (para 14),*

*xxvii.* Lalchand Bhagat Ambica Ram *v.* CIT *[1959] 37 ITR 288 (SC) (para 14),*

*xxviii.* Reliance Jute & Industries Ltd. *v.* CIT *[1979] 120 ITR 921/2 Taxman 417 (SC) (para 15),*

*xxix.* Karimtharuvi Tea Estate Ltd. *v.* State of Kerala *[1966] 60 ITR 262 (SC) (para 15),*

*xxx.* CIT *v.* Sunbeam Auto Ltd. *[2011] 332 ITR 167/[2010] 189 Taxman 436 (Delhi) (para 16),*

*xxxi.* Grindlays Bank Ltd. *v.* ITO *[1978] 115 ITR 799 (Cal.) (para 17),*

*xxxii.* Vijay Mallya *v.* Asstt. CIT *[2003] 131 Taxman 477 (Cal.) (para 17),*

*xxxiii.* CIT *v.* J.L. Morrison (India) Ltd. *[2014] 366 ITR 593/225 Taxman 17 (Mag.)/46 taxmann.com 215 (Cal.) (para 17),*

*xxxiv.* Malabar Industrial Co. Ltd. *v.* CIT *[2000] 243 ITR 83/109 Taxman 66 (SC) (para 18),*

*xxxv.* CIT *v.* Max India Ltd. *[2007] 295 ITR 282/166 Taxman 188 (SC) (para 18),*

*xxxvi.* CIT *v.* Maithan International *[2015] 375 ITR 123/231 Taxman 381/56 taxmann.com 283 (Cal.) (para 20),*

*xxxvii.* CIT *v.* Navodaya Castles (P.) Ltd. *[2014] 367 ITR 306/226 Taxman 190/50 taxmann.com 110 (Delhi) (para 20),*

*xxxviii.* CIT *v.* N.R. Portfolio (P.) Ltd. *[2013] 214 Taxman 408/29 taxmann.com 291 (Delhi) (para 20),*

*xxxix.* CIT *v.* Active Traders (P.) Ltd. *[1995] 214 ITR 583/[1993] 69 Taxman 281 (Cal.) (para 20),*

*xl.* CIT *v.* Jawahar Bhattacharjee *[2012] 341 ITR 434/209 Taxman 174/24 taxmann.com 215 (Gau.) (FB) (para 20) and*

xli. Smt. Tara Devi Aggarwal *v.* CIT *[1973] 88 ITR 323 (SC) (para 27).*

5.1. So far as, the cases relied upon by the assessee like CIT vs Fine Jewellery (India) Ltd. and CIT vs Nirav Modi ((supra)) are concerned, no doubt these cases throw light on

the issue but were decided by Hon'ble jurisdictional High Court to the peculiar facts of the case and on the basis of factual finding recorded by the Tribunal.

5.2. Admittedly, an incorrect assumption of fact or an incorrect application of law would satisfy the requirement of order being erroneous u/s. 263 of the Act. The phrase "prejudicial to the interest of the Revenue" u/s. 263, has to be read in conjunction with the expression "erroneous" order by the Assessing Officer. Every loss of Revenue as a consequence of assessment order cannot be termed as prejudicial to the interest of Revenue, meaning thereby, "prejudice" must be prejudice to the Revenue administration. At the same time, if another view is possible, revision is not permissible. Our view is fortified by the decision from Himachal Pradesh Financial Corp. (186 Taxmann 105)(HP), Bismillah Trading Co. (248 ITR 292)(Ker.) and CIT vs. Green World Corpn. (314 ITR 81)(SC). *For* invoking revisional jurisdiction u/s. 263 of the Act, the assessment order must contain grievous error which is subversive of the administration of Revenue. Further, exact error must be disclosed by the Commissioner as was held in

CIT vs. G.K. Kabra (211 ITR 336)(AP). Section 263 of the Act enables the Commissioner to have a re-look at the orders or proceedings of the lower authority to effect correction, if so needed, particularly, if the order is erroneous and prejudicial to the interest of the Revenue. The object of the provision is to raise revenue for the state and section 263 is enabling provision conferring jurisdiction upon the Commissioner to revise the order. The provision is intended to plug the leakage of the revenue by the erroneous and prejudicial order. Our view find support from the ratio laid down in following decisions:-

i. CIT vs Infosys Technologies ltd. (2012) 341 ITR 293 (Karn.),
ii. CIT vs Jawahar Bhattacharyaji (2012) 341 ITR 434 (Guwahati) (FB),
iii. CIT vs Leisure wear Exports Ltd. (2012) 341 ITR 166 (Del.),
iv. CIT vs Triveni Engineering Works Ltd. (2011) 336 ITR 366 (Del.),
v. R.A. Himmatsinghka & Company vs CIT (2012) 340 ITR 253 (Pat.)
vi. CIT vs Rajeev Agnihotri (2011) 332 ITR 608 (P & H),
vii. CIT vs DLF Ltd. (2013) 350 ITR 555 (Del.),
viii. CIT vs Gabreal India Ltd. (1993) 203 ITR 108, 114 (Bom.),
ix. Malabar Industrial Company Ltd. vs CIT (2000) 243 ITR 83 (SC),

x. Nabha Investments Pvt. ltd. vs UOI (2000) 246 ITR 41 (Del.),

xi. Bismillah Trading Company Ltd. vs IO (2001) 248 ITR 292, 308 (Kerala),

xii. Paul Mathews & Sons vs CIT (2003) 263 ITR 101, 113 (Kerala),

xiii. CIT vs Seshasayee Paper & Boards Ltd. (2000) 242 ITR 490, 500 (Mad.),

xiv. Rayon Silk Mills vs CIT 221 ITR 155 (Guj.)

5.3. If the aforesaid judicial pronouncements are kept in juxtaposition with the facts of the present appeal and analyzed, the ld. Assessing Officer while framing the assessment made no discussion with the claim of the assessee and simply framed the assessment in a slip shot manner. Such an approach of the Ld. Assessing Officer cannot be appreciated. Thus, it is clear that the assessment order was passed without verification, application of mind, consequently, it is erroneous as well as prejudicial to the interest of the Revenue, thus the revisional jurisdiction was rightly invoked. It is also noted that if the assessee is so clean in its claim then no prejudice will be caused to the assessee as the Ld. Pr. Commissioner has directed the Assessing Officer, in the

interest of justice, to provide opportunity of being heard to the assessee.

5.4. Our view is fortified by the decision in Indian Textile vs CIT (157 ITR 112) (Mad.), Gee Vee Enterprises vs Addl. CIT (99 ITR 375)(Del.), Thalibai F Jain vs ITO 101 ITR 1 (Karn.) and CIT vs HPFC 186 Taxman 105 (HP), CIT vs Pushpa Devi 164 ITR 639 (Patna). We are aware that before the Ld. Commissioner invokes the revisional jurisdiction u/s 263 of the Act, he should get satisfied that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Hon'ble Gujarat High Court in CIT vs M. M.Khambatbala 198 ITR 144 (Guj.) even went to the extent that revisional powers can be exercised even if the issue is debatable. The Hon'ble jurisdictional High Court in CIT vs Gabriel India Ltd. (1993) 203 ITR 108 (Bom.) concluded that powers u/s 263 cannot be exercised for starting fishing and roving enquiries. For making a valid order u/s 263(1), it is essential that the Commissioner has to record an express finding that prejudice has been caused to the interest of the Revenue. Our view find support from the ratio laid down in Bhargwa

Engineering Corporation vs CIT (1996) 134 taxation 493, 494 (All.), CIT vs Digvijay Traders (1997) 137 CTR (MP) 224, CIT vs Regional Agro Industrial Development Cooperative Society Ltd. (1998) 143 taxation 293 (Kerala), CIT vs Agarwal Enterprises (1998) 100 taxman 360 (All.) and CIT vs Kailash Apartment Pvt. Ltd. (200) 243 ITR 795 (Del.). Totality of facts, clearly indicates that the assessment order has been framed without full enquiries, therefore, the ld. Commissioner justifiably invoked revisional jurisdiction.

5.5. The Hon'ble Apex Court in Rajmandir Estates Pvt. Ltd. (2017) 77 taxman.com 285 (SC), wherein, there was lack of requisite enquiry into increase of share capital and non-application of mind, the Commissioner was held to be justified in invoking the revisional jurisdiction, which is reproduced hereunder:-

**"Section 68, read with section 263 of the Income-tax Act, 1961 - Cash credit (Share application money) - Assessment year 2009-10 - During relevant year, assessee-company had increased its share capital by issuing 7.93 lakhs shares of Rs.10 each at a premium of Rs.390 - Assessing Officer completed assessment without holding requisite investigation except for calling for records - Commissioner passed order under section 263 and opined that this could be a case of money laundering which went undetected due to lack of requisite enquiry into increase of share capital including premium received by assessee and non-**

**application of mind - High Court by impugned order held that since assessee with an authorised share capital of Rs.1.36 crores raised nearly a sum of Rs.32 crores on account of premium and chose not to go in for increase of authorised share capital merely to avoid payment of statutory fees was an important pointer necessitating investigation and thus, Commissioner was justified in treating assessment order erroneous and prejudicial to interest of revenue - Whether special leave petition filed against impugned order was to be dismissed - Held, yes [Para 2] [In favour of revenue]"**

5.6. The Hon'ble Apex Court in CIT vs Amitabh Bacchan (2016) 69 taxman.com 170 (SC) (order dated 11/05/2016) is held as under:-

**"2.** The appellant - Revenue seeks to challenge the order of the High Court dated 7th August, 2008 dismissing the appeal filed by it under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as '"the Act") and affirming the order of the Income Tax Appellate Tribunal, Mumbai Bench ("Tribunal" for short) dated 28th August, 2007 whereby the order dated 20th March, 2006 passed by the Commissioner of Income Tax-1, Mumbai ("C.I.T." for short) under Section 263 of the Act was reversed. The assessment year in question is 2001-2002 and the assessment order is dated 30th March, 2004.

**3.** After the assessment as above was finalized, a show cause notice dated 7th November, 2005 under Section 263 of the Act was issued by the learned C.I.T. detailing as many as eleven (11) issues/grounds on which the assessment order was proposed to be revised under Section 263 of the Act. The respondent - assessee filed his reply to the said show cause notice on consideration of which by order dated 20th March, 2006 the learned C.I.T. set aside the order of assessment dated 30th March, 2004 and directed a fresh assessment to be made. Aggrieved, the respondent – assessee challenged the said order before the learned Tribunal which was allowed by the order dated 28th August, 2007.

**4.** Aggrieved by the order dated 28th August, 2007 of the learned Tribunal, the Revenue filed an appeal under Section 260A of the Act before the High Court of Bombay. The aforesaid appeal i.e. ITA No. 293 of 2008 was summarily dismissed by the High Court by the impugned order dated 7th August, 2008 holding that as the C.I.T. had gone beyond the scope of the show cause notice dated 7th November, 2005 and had dealt with the issues not covered/mentioned in the said notice the

revisional order dated 20th March, 2006 was in violation of the principles of natural justice. So far as the question as to whether the Assessing Officer had made sufficient enquiries about the assessee's claim of expenses made in the re-revised return of income is concerned, which question was formulated as question No. 2 for the High Court's consideration, the High Court took the view that the said question raised pure questions of fact and, therefore, ought not to be examined under Section 260A of the Act. The appeal of the Revenue was consequently dismissed. Aggrieved, this appeal has been filed upon grant of leave under Article 136 of the Constitution of India.

**5.** We have heard Shri Ranjit Kumar, learned Solicitor General appearing for the appellant Revenue and Shri Shyam Divan, learned Senior Counsel appearing for the respondent – assessee.

**6.** The assessment in question was set aside by the learned C.I.T. by the order dated 20th March, 2006 on the principal ground that requisite and due enquiries were not made by the Assessing Officer prior to finalization of the assessment by order dated 30th March, 2004. In this connection, the learned C.I.T. on consideration of the facts of the case and the record of the proceedings came to the conclusion that in the course of the assessment proceedings despite several opportunities the assessee did not submit the requisite books of account and documents and deliberately dragged the matter leading to one adjournment after the other. Eventually, the Assessing Officer, to avoid the bar of limitation, had no option but to "hurriedly" finalize the assessment proceedings which on due and proper scrutiny disclosed that the necessary enquiries were not made. On the said basis the learned C.I.T. came to the conclusion that the assessment order in question was erroneous and prejudicial to the interests of the Revenue warranting exercise of power under Section 263 of the Act. Consequently, the assessment for the year 2001-2002 was set aside and a fresh assessment was ordered. At this stage, it must be noticed that in the order dated 20th March, 2006 the learned C.I.T. arrived at findings and conclusions in respect of issues which were not specifically mentioned in the show cause notice dated 7th November, 2005. In fact, on as many as seven/eight (07/08) issues mentioned in the said show cause notice the learned C.I.T. did not record any finding whereas conclusions adverse to the assessee were recorded on issues not specifically mentioned in the said notice before proceeding to hold that the assessment needs to be set aside. However, three (03) of the issues, details of which are noticed herein below, are common to the show cause notice as well as the revisional order of the learned C.I.T.

**7.** On appeal, the learned Tribunal took the view that the learned C.I.T. exercising powers under Section 263 of the Act could not have gone beyond the issues mentioned in the show cause notice dated 7th November, 2005. The learned Tribunal, therefore, thought it proper to

take the view that in respect of the issues not mentioned in the show cause notice the findings as recorded in the revisional order dated 20th March, 2006 have to be understood to be in breach of the principles of natural justice. The learned Tribunal also specifically considered the three (03) common issues mentioned above and on such consideration arrived at the conclusion that the reasons disclosed by the learned C.I.T. in the order dated 20th March, 2006 for holding the assessment to be liable for cancellation on that basis are not tenable. Accordingly, the learned Tribunal allowed the appeal of the assessee and reversed the order of the *suo motu* revision dated 20th March, 2006.

**8.** At this stage, it may be appropriate to reproduce hereunder the provisions of Section 263 of the Act to appreciate the arguments advanced and to understand the contours of the *suo motu* revisional power vested in the learned C.I.T. by the aforesaid provision of the Act.

"263 - Revision of orders prejudicial to revenue.—(1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

*Explanation*……..."

**9.** Under the Act different shades of power have been conferred on different authorities to deal with orders of assessment passed by the primary authority. While Section 147 confers power on the Assessing Authority itself to proceed against income escaping assessment, Section 154 of the Act empowers such authority to correct a mistake apparent on the face of the record. The power of appeal and revision is contained in Chapter XX of the Act which includes Section 263 that confer *suo motu* power of revision in the learned C.I.T. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of assessment, so far as the Revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under Section 147 and/or to revise the assessment order under Section 263 of the Act. The scope of the power/jurisdiction under the different provisions of the Act would naturally be different. The power and jurisdiction of the Revenue to deal with a concluded assessment, therefore, must be understood in the context of the

provisions of the relevant Sections noticed above. While doing so it must also be borne in mind that the legislature had not vested in the Revenue any specific power to question an order of assessment by means of an appeal.

**10.** Reverting to the specific provisions of Section 263 of the Act what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the Revenue is the basic pre-condition for exercise of jurisdiction under Section 263 of the Act. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the Section to give the assessee an opportunity of being heard. It is in the context of the above position that this Court has repeatedly held that unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed. Such a notice is not required. What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice. Reference in this regard may be illustratively made to the decisions of this Court in *Gita Devi Aggarwal* v. *CIT* [1970] 76 ITR 496 and in *CIT* v. *Electro House* [1971] 82 ITR 824 (SC). Paragraph 4 of the decision in *Electro House* (*supra*) being illumination of the issue indicated above may be usefully reproduced hereunder:

"This section unlike Section 34 does not prescribe any notice to be given. It only requires the Commissioner to give an opportunity to the assessee of being heard. The section does not speak of any notice. It is unfortunate that the High Court failed to notice the difference in language between Sections 33-B and 34. For the assumption of jurisdiction to proceed under Section 34, the notice as prescribed in that section is a condition precedent. But no such notice is contemplated by Section 33-B. The jurisdiction of the Commissioner to proceed under Section 33-B is not dependent on the fulfilment of any condition precedent. All that he is required to do before reaching his decision and not before commencing the enquiry, he must give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary. Those requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of

the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner. At present we are not called upon to consider whether the order made by the Commissioner is vitiated because of the contravention of any of the principles of natural justice. The scope of these appeals is very narrow. All that we have to see is whether before assuming jurisdiction the Commissioner was required to issue a notice and if he was so required what that notice should have contained? Our answer to that question has already been made clear. In our judgment no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed under Section 33-B. Therefore the question what that notice should contain does not arise for consideration. It is not necessary nor proper for us in this case to consider as to the nature of the enquiry to be held under Section 33-B. Therefore, we refrain from spelling out what principles of natural justice should be observed in an enquiry under Section 33-B. This Court in *Gita Devi Aggarwal* v. *CIT, West Bengal* ruled that Section 33-B does not in express terms require a notice to be served on the assessee as in the case of Section 34. Section 33-B merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice under Section 34 cannot, therefore, be applied to a proceeding under Section 33-B." (Page 827-828).

[Note: Section 33-B and Section 34 of the Income Tax Act, 1922 corresponds to Section 263 and Section 147 of the Income Tax Act, 1961]

**11.** It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to the status of a mandatory show cause notice affecting the initiation of the exercise in the absence thereof or to require the C.I.T. to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the C.I.T. is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the C.I.T. prior to the finalization of the decision.

**12.** In the present case, there is no dispute that in the order dated 20th March, 2006 passed by the learned C.I.T. under Section 263 of the Act findings have been recorded on issues that are not specifically mentioned in the show cause notice dated 7th November, 2005 though there are three (03) issues mentioned in the show cause notice dated 7th

November, 2005 which had specifically been dealt with in the order dated 20th March, 2006. The learned Tribunal in its order dated 28th August, 2007 put the aforesaid two features of the case into two different compartments. Insofar as the first question i.e. findings contained in the order of the learned C.I.T. dated 20th March, 2006 beyond the issues mentioned in the show cause notice is concerned the learned Tribunal taking note of the aforesaid admitted position held as follows:

"In the case on hand, the CIT has assumed jurisdiction by issuing show cause notice u/s 263 but while passing the final order he relied on various other grounds for coming to the final conclusion. This itself makes the revision order bad in law and also violative of principles of natural justice and thus not maintainable. If, during the course of revision proceedings the CIT was of the opinion that the order of the AO was erroneous on some other grounds also or on any additional grounds not mentioned in the show cause notice, he ought to have given another show cause notice to the assessee on those grounds and given him a reasonable opportunity of hearing before coming to the conclusion and passing the final revision order. In the case on hand, the CIT has not done so. Thus, the order u/s 263 is violative of principles of natural justice as far as the reasons, which formed the basis for the revision but were not part of the show cause notice issued u/s 263 are concerned. The order of the CIT passed u/s 263 is therefore liable to be quashed insofar as those grounds are concerned."

**13.** The above ground which had led the learned Tribunal to interfere with the order of the learned C.I.T. seems to be contrary to the settled position in law, as indicated above and the two decisions of this Court in *Gita Devi Aggarwal* (*supra*) and *Electro House* (*supra*). The learned Tribunal in its order dated 28th August, 2007 had not recorded any finding that in course of the *suo motu* revisional proceedings, hearing of which was spread over many days and attended to by the authorized representative of the assessee, opportunity of hearing was not afforded to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the learned C.I.T. had come to his conclusions as recorded in the order dated 20th March, 2006. Despite the absence of any such finding in the order of the learned Tribunal, before holding the same to be legally unsustainable the Court will have to be satisfied that in the course of the revisional proceeding the assessee, actually and really, did not have the opportunity to contest the facts on the basis of which the learned C.I.T. had concluded that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. The above is the question to which the Court, therefore, will have to turn to.

**14.** To determine the above question we have read and considered the order of the Assessing Officer dated 30th March, 2004; as well as the

order of the learned C.I.T. dated 20th March, 2006. From the above consideration, it appears that the learned C.I.T. in the course of the revisional proceedings had scrutinized the record of the proceedings before the Assessing Officer and noted the various dates on which opportunities to produce the books of account and other relevant documents were afforded to the assessee which requirement was not complied with by the assessee. In these circumstances, the revisional authority took the view that the Assessing Officer, after being compelled to adjourn the matter from time to time, had to hurriedly complete the assessment proceedings to avoid the same from becoming time barred. In the course of the revisional exercise relevant facts, documents, and books of account which were overlooked in the assessment proceedings were considered. On such re-scrutiny it was revealed that the original assessment order on several heads was erroneous and had the potential of causing loss of revenue to the State. It is on the aforesaid basis that the necessary satisfaction that the assessment order dated 30th March, 2004 was erroneous and prejudicial to the interests of the revenue was recorded by the learned C.I.T. At each stage of the revisional proceeding the authorized representative of the assessee had appeared and had full opportunity to contest the basis on which the revisional authority was proceeding/had proceeded in the matter. If the revisional authority had come to its conclusions in the matter on the basis of the record of the assessment proceedings which was open for scrutiny by the assessee and available to his authorized representative at all times it is difficult to see as to how the requirement of giving of a reasonable opportunity of being heard as contemplated by Section 263 of the Act had been breached in the present case. The order of the learned Tribunal insofar as the first issue i.e. the revisional order going beyond the show cause notice is concerned, therefore, cannot have our acceptance. The High Court having failed to fully deal with the matter in its cryptic order dated 7th August, 2008 we are of the view that the said orders are not tenable and are liable to be interfered with.

**15.** This will bring us to a consideration of the second limb of the case as dealt with by the learned Tribunal, namely, that tenability of the order of the learned C.I.T. on the three (03) issues mentioned in the show cause notice and also dealt with in the revisional order dated 20th March, 2006. The aforesaid three (03) issues are:

"(*i*) Assessee maintaining 5 bank accounts and AO not examining the 5th bank account, books of account and any other bank account where receipts related to KBC were banked.

(*ii*) Regarding claim of deposits of Rs. 52.06 lakhs in Special Bench A/c No.11155 under the head Receipts on behalf of Mrs. Jaya Bachchan and

(*iii*) Regarding the claim of additional expenses in the re-revised return."

**16.** On the above issues the learned Tribunal had given detailed reasons for not accepting the grounds cited in the revisional order for setting aside the assessment under Section 263 of the Act. The reasons cited by the learned Tribunal insofar as the first two issues are concerned may not justify a serious relook and hence need not be gone into. The third question would, however, require some detailed attention. The said question is with regard to the claim of additional expenses made by the assessee in its re-revised return which was subsequently withdrawn.

**17.** The assessee in the re-revised return dated 31st March, 2003 had made a claim of additional expenses of 30% of the gross professional receipts (Rs. 3.17 crores). It appears that the Assessing Officer required the assessee to file requisite details in this regard. The assessee responded by letter dated 13th February, 2004 stating as follows:

"With regard to the 30% estimated expenses claimed, we have to submit that these are the expenses which are spent for security purposes by employing certain Agencies, guards etc. for the personal safety of Shri Bachchan as he has to protect himself from various threats to his life received by him and to avoid extortion of money from gangsters. The names of such Agencies cannot be disclosed/divulged as there is a possibility of leakage of information of Agencies' names from the office staff, which will obviously be detrimental to the interests of Shri Bachchan. The payments have been made out of cash balances available and lot of outstanding expenses are to be paid which could not be paid for want of income."

**18.** Thereafter by letter dated 13th March, 2004 the assessee informed the learned C.I.T. that the claim was made on a belief that the same is allowable but as it will not be feasible for the assessee to substantiate the same, the re-revised return of income may be taken to the withdrawn. It appears that thereafter the Assessing Officer issued a notice to show cause as to why the provisions of Section 69C should not be invoked and the expenses claimed should not be treated as unexplained expenditure. In reply, the assessee by letter dated 24th March, 2004 submitted that the claim was made as a standard deduction and that the assessee had been wrongly advised to make the said claim and as the same has been withdrawn, Section 69-C will have no application. The record of the assessment proceedings disclose that the said stand was accepted by the Assessing Officer and the matter was not pursued any further.

**19.** The learned C.I.T. took the view that notwithstanding the withdrawal of the claim by the assessee, in view of the earlier stand taken that the said expenses were incurred for security purposes of the assessee, the Assessing Officer ought to have proceeded with the matter as the assessee was following the cash system of accounting and the filing of the re-revised return, *prima facie,* indicated that the additional expenses claimed had been incurred. In this regard, the following findings/reasons recorded by the learned C.I.T. in the order dated 20th March, 2006 would be of particular relevance:

"Withdrawal of claim by assessee can be for variety of reasons and this does not mean that Assessing Officer should abandon enquiries regarding sources for incurring expenses. Assessee follows cash system of accounting and the claim regarding additional expenses was made through duly verified revised return. The claim was pressed during assessment proceedings carried on by A.O. after filing revised return and it was specially stated in letter dated 13.02.2004 that expenses were for security purposes and that payments have been made out of cash balances available etc. Under the circumstances, the Assessing Officer was expected to examine the matter further to arrive at a definite finding whether assessee incurred expenses or not and in case, actually incurred, then what were sources for incurring these expenses. Assessing Officer was satisfied on withdrawal of the claim and in my view, his failure to decide the matter regarding actual incurring of additional expenses and sources thereof resulted into erroneous order which is prejudicial to the interest of revenue."

**20.** An argument has been made on behalf of the assessee that notice under Section 69-C was issued by the Assessing Officer and thereafter on withdrawal of the claim by the assessee the Assessing Officer thought that the matter ought not to be investigated any further. This, according to the learned counsel for the assessee, is a possible view and when two views are possible on an issue, exercise of revisional power under Section 263 would not be justified. Reliance in this regard has been placed on a judgment of this Court in *Malabar Industrial Co. Ltd.* v*. CIT* [2000] 243 ITR 83/109 Taxman 66 which has been approved in *CIT* v. *Max India Ltd.* [2007] 295 ITR 282/[2008] 166 Taxman 188 (SC)

**21.** There can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under Section 263 of the Act merely on the ground that there is another possible

view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from. However, the above is not the situation in the present case in view of the reasons stated by the learned C.I.T. on the basis of which the said authority felt that the matter needed further investigation, a view with which we wholly agree. Making a claim which would *prima facie* disclose that the expenses in respect of which deduction has been claimed has been incurred and thereafter abandoning/withdrawing the same gives rise to the necessity of further enquiry in the interest of the Revenue. The notice issued under Section 69-C of the Act could not have been simply dropped on the ground that the claim has been withdrawn. We, therefore, are of the opinion that the learned C.I.T. was perfectly justified in coming to his conclusions insofar as the issue No. (iii) is concerned and in passing the impugned order on that basis. The learned Tribunal as well as the High Court, therefore, ought not to have interfered with the said conclusion.

**22.** In the light of the discussions that have preceded and for the reasons alluded we are of the opinion that the present is a fit case for exercise of the *suo motu* revisional powers of the learned C.I.T. under Section 263 of the Act. The order of the learned C.I.T., therefore, is restored and those of the learned Tribunal dated 28th August, 2007 and the High Court dated 7th August, 2008 are set aside. The appeal of the Revenue is allowed.

*SLP(C) No.861 of 2013*

**23.** Leave granted.

**24.** Pursuant to the revisional order dated 20th March, 2006 under Section 263 of the Income Tax Act setting aside the assessment order for the assessment year 2001-2002 and directing fresh assessment, a fresh assessment had been made by the Assessing Officer by order dated 29th December, 2006. Against the said order the respondent assessee filed an appeal before the learned Commissioner of Income Tax (Appeals). By order dated 18th October, 2007 the learned Commissioner of Income Tax (Appeals) had set aside the assessment order dated 29th December, 2006 as in the meantime, by order dated 28th August, 2007 of the learned Income Tax Appellate Tribunal the revisional order dated 20th March, 2006 under Section 263 of the Act was set aside. The Revenue's appeal

> before the learned Tribunal against the order dated 18th October, 2007 was dismissed on 11th January, 2000 and by the High Court on 29th February, 2012. Against the aforesaid order of the High Court this appeal has been filed by the Revenue. As by the order passed today in the Civil Appeal arising out of Special Leave Petition (Civil) No.11621 of 2009 we have restored the *suo motu* revisional order dated 20th March, 2006 passed by the learned C.I.T., we allow this appeal filed by the Revenue and set aside the order dated 11th January, 2010 passed by the learned Tribunal and the order dated 29th February, 2012 passed by the High Court referred to above. However, we have to add that as the re-assessment order dated 29th December, 2006 had not been tested on merits the assessee would be free to do so, if he is so inclined and so advised.
>
> **25.** The appeals are disposed of in the above terms."

5.7. However, now, we shall examine, whether the assessment order is erroneous as well as prejudicial to the interest of Revenue. We find that while framing the assessment, the Ld. Assessing Officer no doubt issued notice u/s 143(2) and 142(1) asking the assessee to file details. The Ld. Assessing Officer in para-5 made discussion with respect to Short Term Capital Gain and in para-6 with respect to claimed depreciation on premises other than office, certain expenses were disallowed @ 5% on adhoc basis (para-7) for want of bills/vouchers and finally made computation of total income. No discussion has been made with respect to amount of Rs.15.99 lakhs incurred in connection of Indian design work of the office, which as per

the Revenue resulted in enduring benefit and the assessee did not adduce any evidence with respect to brokerage of 2.29 crores, which was erroneously accepted as genuine resulting into prejudicial to the interest of the Revenue. It is further noted that before passing the revisional order, a show cause notice u/s 263 dated 11/02/2013 was issued to the assessee, however, as is evident from para-4 of the impugned order, the assessee sought adjournment on various dates. Before us, also, the Ld. counsel for the assessee, took a plea that such expenses were allowed in earlier year also. This is beyond imagination of a reasonable person whether re-flooring , re-moulding of furniture, re-tiling are required to be laid every year, possibly 'No'. The Ld. Assessing Officer mechanically accepted the claim of the assessee and even did not bother to examine the genuineness of the claim. Even otherwise, in normal circumstances, the tiles of the flooring are never changed every year. We are not going in to the merits whether the expenditure was of revenue or capital in nature but certainly it was to be examined by the Ld. Assessing Officer before accepting the claim of the assessee mechanically. Such an

approach of the Assessing Officer cannot be said to be justified. If the revisional order is examined, the Ld. CIT in a justifiable manner considered the factual matrix and it is noted that in the case of receipt of brokerage of commission in the case of Mr. Gajanand Gokarn, the documents filed by the assessee were examined and accepted to be genuine by the Ld. CIT. However, with respect to Ms. Nivedita Singh, the claimed brokerage of Rs.23,27,500/- and its genuineness was not examined by the Ld. Assessing Officer during assessment. The decision from Hon'ble Rajasthan High Court in Shri Gyan chand Jain vs CIT (2013) 354 ITR 622 (Raj.) was considered. It is further noted that to be more fair, the Ld. Commissioner directed the Assessing Officer to verify/examine the genuineness of expenses/nature of services rendered in respect of brokerage/commission paid to Ms. Nivedita Singh. It is not the case that the Ld. CIT thrust upon his view to disallow the claim of the assessee. Even otherwise, as per mandate of Article 265 of Constitution of India, only due taxes have to be levied/collected. However, we direct that the ld. Assessing Officer to adjudicate the issues afresh in a detailed manner

with reasoning. The assessee is directed to furnish the necessary evidence in support of its claim. In view of this factual matrix, in principle, we affirm the stand of the ld. Commissioner, resultantly the appeal of the assessee is therefore having no merit, consequently, dismissed.

Finally, the appeal of the assessee is dismissed.

This Order was pronounced in the open court in the presence of Ld. representatives from both sides at the conclusion of hearing on 07/05/2018.

| **Sd/-** | **Sd/-** |
|---|---|
| (Manoj Kumar Aggarwal) | (Joginder Singh) |
| **लेखा सदस्य** / ACCOUNTANT MEMBER | **न्यायिक सदस्य** /JUDICIAL MEMBER |

मुंबई Mumbai; दिनांक Dated : 07/05/2018

*Shekhar, P.S.*/नि.स.

**<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :**

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

**आदेशानुसार/** BY ORDER,

सत्यापित प्रति //True Copy//

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

**आयकर अपीलीय अधिकरण,** मुंबई **/ ITAT, Mumbai**