IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ñCòBENCH

Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member

ITA No. 1357/Ahd/2017 **Assessment Year 2012-13**

Mr. Pranjal Patel, 5, Navavas, Sabarmati, Ahmedabad PAN: AQAPP5238P (Appellant)	Vs	The Pr. CIT, Ahmedabad (Respondent)

Revenue by: **Shri Krishna Murari, CIT-D.R.**
Assessee by: **Shri S.H. Talati, A.R.**

Date of hearing : 28-09-2018
Date of pronouncement : 07-12-2018

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assesseeôs appeal for A.Y. 2012-13, arises from order of the CIT-2, Ahmedabad dated 28-03-2017, in proceedings under section 263 of the Income Tax Act, 1961; in short ñthe Actò

2. The assessee has raised following grounds of appeal:-

"(1) The learned Pr. C.I.T.-2, Ahmedabad erred in passing the order u/s 263 dated 28-03-2017 on the ground that the order passed u/s. 143(3) dated 10-02-2015 by learned A.C.I.T. Circle-2, Ahmedabad was erroneous and prejudicial to the Interest of revenue. Your appellant submits that the order u/s 143(3) dated 10-02-2015 passed by learned A.C.I.T. Circle-2 as per the provisions of I.T. Law and said order is neither erroneous nor prejucial to the interest of revenue. Your appellant submits that the learned Pr. C.I.T.-2 is not justified in invoking the provision of section 263 and issue notice u/s 263 dated 09-03-2017 and passing the order u/s 263 dated 28-03-2017. Your appellant therefore submits

that the notice u/s 263 and order passed u/s 263 are bad in law and both should be cancelled.
(2) Without prejudice to above, your appellant submits that the learned Pr.C.I.T.-2 passed an order u/s. 263 without personally verified the I.T. Records and the details and explanations were submitted etc. as well as applying various sections etc. whether applicable or not merely on assumption or presumption without applying the mind. Your appellant therefore submits that the notice u/s. 263 dated 09-03-2017 and order passed u/s. 263 dated 28-03-2017 are bad in law and the same should be cancelled."

3. In this case, return of income declaring income of Rs. 38,95,570/- was filed on 28th March, 2013. Subsequently, the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 23rd Sep, 2013. The assessing officer has finalized the assessment u/s 143(3) at the return of income at Rs. 38,95,570/-. Thereafter, the ld. CIT has passed order u/s. 263 of the act on 28th March, 2017 holding that assessment made by the assessing officer u/s. 143(3) of the act was erroneous and prejudicial to the interest of revenue. Therefore, the assessment was set aside and assessing officer was directed to reframe the assessment afresh. During the course of 263 proceeding, the ld. CIT has stated that on perusal of the case record and the detail filed at the time of assessment, it was noticed that assessing officer had not properly invested/scrutinized the case with reference to the following issues :-

"The assessee received remuneration of Rs. 1,63,738/- from partnership firm "SG EVENTS". The assessee had claimed expenses of Rs.1,22,269/- against this income. Further, the assessee had shown interest income of Rs. 1,04,672/- from partnership firm "Savita Greens" against which the assessee had claimed expenses of Rs.1,00,000/-. The above expenses were allowed by the Assessing Officer without calling for any details from the assessee. The assessee claimed interest payment of Rs.32,706/- to partnership firm "Krishna Reality". This was adjusted against remuneration & interest received from other two firms.

The above expenditures were allowed by the Assessing Officer without verification of any details rendering the assessment erroneous and prejudicial to the interest of the Revenue.
The assessee had purchased the land at survey No.265/1 at Chandkheda, measuring 3642 sq. mt. for Rs. 26,22,000/- vide registered deed on 21/05/2011. Stamp duty of Rs. 1,71,400/- and registration fees of Rs. 26,220/- was a/so paid. Earlier, the assessee had entered into a registered agreement dated 05/01/2011 to purchase the said land for consideration of Rs. 24 Lakh. On perusal of the records it was noticed that the assessee had sold the said land after converting the same to NA residential land. While computing the capital gain on this land, the assessee has stated cost of land at Rs. 1,09,37,000/- and showed STCG of only Rs. 1,63,000/-.
While furnishing details of cost of acquisition, the assessee has paid Rs. 26,22,400/- inclusive of premium of Rs. 20,97,600/- charged by government. Further, the assessee

has made expenditure in the form of land development and improvement, stamp duty, legal and brokerage fees aggregating to Rs.59,15,000/- including an amount of Rs.36.75 lakh paid to 20 persons as compensation on 30/11/2011 as per ledger account furnished by the assessee.

Further on perusal of the details filed by the assessee it is noticed that the above persons were returned the booking amount along with compensation in cash. The confirmation of few persons attached showed that compensation has been given @50 percent of booked amount. As such, the assessee has paid total Rs. 1,09,75,000/- (Rs.73 Lakh +Rs.36.75 Lakh) in cash to these persons.

During the course of assessment proceedings, the assessee has neither furnished cash book nor does the bank statement exhibit such huge withdrawal in cash. Thus this amount of Rs. 1,09,7,000/- was required to be treated as unexplained cash credit u/s. 68 of the I.T. Act and should be added to the total income of the assessee.

Further, the assessee has not furnished copy of agreement vide which said alleged booking was done. The compensation expenditure of Rs.36.75 Lakh was required to be disallowed while computing STCG, as the genuineness was not established.

The fact remained that the amount was paid on fixed return of 50 percent. As per the admission it was noticed that the assessee was not involved in any business/trading activities. Hence, purchase and sale of land was investment in nature and hence it was crystal clear that amount received in cash was deposits/ loans which was to be returned with fixed additional amount. As such, acceptance and repayment of this amount in cash has rendered the assessee liable for penalty u/s. 271D and 271E of the Act for violation of provisions of section 269SS and 2697T.

In view of the above facts as the order passed by the AO on 10/02/2015 was erroneous and prejudicial to the interest of revenue, a notice u/s.263 of the Act dated 09/03/2017 was issued intimating the above grounds, and calling upon the assessee to show cause as to why appropriate order u/s. 263 of the Act should not be passed."

The assessee responded that the order u/s. 143(3) passed by the assessing officer was neither erroneous nor prejudicial to the interest of revenue and provisions of section 263 was not applicable. The submission of the assessee is reproduced as under:-

"3. In response to the above notice, Shri Suresh R. Shah, C.A. and authorized representative of the assessee attended on 23/03/2017 and requested for adjournment for a day and the case was adjourned for final hearing on 25/03/2017. On 28/03/2017 the Authorised Representative attended and filed its submission dated 25/03/2017, which is as under.-

I refer your honour's notice u/s 263 dated 09-03-2017 fixing the date of hearing on 20-03-2017. As the above notice was served on me only on 15-03-2017, it was not possible for me to prepare and submit the required details and/or explanations etc within a short time of five days. On 20-03-2017, the assistant of my CA personally attended with an application for a fortnight time. Your honour have rejected the said request and adjourned the hearing on 23-03-2017.

(a) Your honour have proposed the action u/s. 263 of I.T. Act on the grounds that the Asst. Order passed u/s. 143(3) dated 10-02-2015 by learned ACIT of the year on the ground that the said order passed is erroneous and prejudicial to the interest of revenue. In this respect I have to submit that the said order was passed after calling all require details of income shown and expenses claimed. All income shown and expenses claimed. The expenses claimed and allowed by learned A.O. are admissible and sustainable in law. Hence when two views are there the provisions of Section 263 is not

applicable. The reliance are placed on decision of Malabar Industrial Coal Ltd VS CIT (2000) Taxman 66 (SC) and Haryana State Co-operative Supply and Marketing Federation Co Ltd VS CIT (2004) 90 ITD 551 (Chd) etc.

(b) The action proposed in your notice u/s. 263, in order passed u/s. 143(3) dated 10-02-2015, there are two conditions as under:

(i) The order passed by the A.O. is erroneous and

(ii) The error must be such that it is prejudicial to the interest of revenue.

Hence for invoking the provision of Section 263 both the above condition should be fulfilled.

In my case the order passed u/s. 143(3) by learned A.O. is neither erroneous nor there is any error which is prejudicial to the interest of revenue. The assessment order passed as per the provision of I.T. Law. Hence both the conditions are not prevailing in my case the provision of Section 263 is not applicable in my case. The reliance is placed on following decisions:

Both the above requisite conditions are not there in my case and therefore your honour is not justified in invoking the provision of Section 263. If any of the condition mentioned above is missing, the provision of Section 263 cannot be invoked. Reliance placed on decision of: a. HH Maharaja Raja Devdas vs C.I.T. (1982) 138 ITR 518 (M.P.) b. Malabar Industrial Co. Ltd. vs C.I.T. (2000) 109 Taxman 66 (SC)

Wherein it was held that in first case that the order is erroneous but not prejudicial to interest of revenue, the C.I.T. cannot exercise the action u/s 263. In second case, if the order is not erroneous but it is prejudicial to the revenue the C.I.T. cannot take action u/s 263.

(c) Further ongoing through your notice u/s. 263 it is evident that your honour have personally not examine the assessment records as the notice u/s. 263 was issued hardly before 15 days from the time barring on 31st March, 2017. Moreover the notice issued on the basis Audit objection and merely because of different views can be taken, are not enough to show that the order of A.O. is erroneous or prejudicial to the interest of revenue. The reliance is placed on case of CIT VS Sohana Woolen Mills (2007) 207 ITR CTR (Punjab and Haryana) 178.

In view of above I have to state that the action taken u/s. 263 is arbitrary, unwarranted and bad in law. The same should be cancelled.

As desired by your honour, I submit the following details, submission and explanations in the matter:

1. The assessment order for A.Y. 2012-13 passed u/s 143(3) dated 10-02-2015 was passed by learned A.C.I.T Circle 2(2) in accordance with I.T. Law, is neither erroneous nor prejudice to the interest of revenue. The learned A. O. during the course of hearing had called for all of income and expenses claimed, have been submitted. The learned A.O. has also verified all such income shown and expenditure claimed. The said details, explanations and evidences were submitted since 13-08-2014 to 10-02-2015 and the case was also discussed during the above period. Again, this being not the case that assessment order, was passed in haste or hurry that the learned A.O. had no sufficient time to go through all the details were required to be examined or to be called. The learned A.O. had sufficient time up to 31st March 2015 to go through the entire details called and submitted till 10-02-15 as well as to call any further details by 31-03-2015. Hence the learned A.O. was fully satisfied with the details of expenses claimed and therefore passed the asst. order u/s. 143(3) on 10-02-2015. Hence there is no possibility of any error, hence order passed u/s. 143(3) is neither the erroneous nor prejudicial to the interest of revenue.

Subject to above, I give below the details and explanations regarding facts mentioned in your Notice u/s 263:-

In Para 1 & 2. It is alleged that no details were furnished of expenses of Rs.1,22,269/- claimed from remuneration received from partnership firm M/s S.G. Events of

Rs.1,63,738/- and in S. No. 2 being, the expense of Rs.1,00,000/- claiming out of interest income received frbm partnership firm M/s Savita Green ofRs.1,04,672/. The said allegation is not correct. I draw the kind attention of your honour to my submissions dated 08-10-2014 and 14-10-2014, wherein I have given the details of expenses claimed.

(a) Bank charges *Rs.19,269/-*

(b) Legal charges *Rs.5,000/-*

(c) Interest paid on borrowing to:

(i) Kailashben M Patel	*Rs.72,000/-*
(ii) Harshad Patel	*Rs.1,26,000/-*
	Rs.1,98,000/-
	Rs.2,22,269/-

The learned A.O. thereafter asked to submit the confirmation, PAN and bank details of both the depositors. The said details I had submitted with my submission dated 14-10-2014. The learned A. O. verified the same and accepted.

3. Interest paid Rs.32,706/- to partnership firm M/s Krishna Reality, wherein I am Partner. As there was my debit balance for my capital A/c with the said firm, the said firm charged interest of Rs.32,706/-. As I am entitled to receive the interest on my credit balance with partnership firm, then I am also supposed to pay the interest on debit balance with partnership firm. The copy of my said capital A/c with firm M/s Krishna reality was filed. The learned A.O. verified the same. In fact there is nothing wrong on such interest payment on debit balance with firm, which is according to I. T. Law.

4. It is alleged that the above expenditure have been erroneously allowed without verification of details/evidences. It is not correct. The details of all expenses were given with evidences and the learned A.O. has only verified the same. The details and evidences of all such expenses, confirmations, and copies of capital A/c etc were submitted and are on records of learned A.O. file. It seems the above allegation is made without verification of file record of learned A.O. Please verify the same and do the needful. I claimed the following expenses from income shown from partnership firms:

Bank charges Rs.19,269/-: I have submitted my bank statement of Amarnath Co-operative bank A/c, wherein the bank charges were debited. The learned A.O. verified the bank A/c and thereafter allowed the bank charges.

(a) Legal charges Rs.5,000/-: I have paid Rs.5,000/- to advocate in connection with land purchased and/or sold.

(b) Interest paid: I have paid interest on loans and deposits taken from the following persons:-

(i) Kailashben M Patel	*Rs. 72,000/-*
(ii)HarshadkumarAPatel	*Rs. 1,26,000/-*
TOTAL	*Rs.1,98,000/-*

I have submitted the copy of account of the above persons, alongwith confirmation, PAN and copy of their bank A/c, which were duly verified by A.O. I paid the above interest by cheques only. After verification of all above evidences, the learned A. O. has allowed the above expenses. The expenses claimed are admissible expenses as per I.T. Law and the same

cannot be said that the above expenses are erroneously allowed. The same cannot be disallowed.

5. The Short Term Capital Gain of Rs.1.63,000/- on sale of land bearing S.No. 265/1 qt Chandkheda, A'bad: It is alleged by your honour that the cost of above land was of a sum of Rs. 1,09,37,000/- and only a Short Term Capital Gain of Rs. 1,63, 000/- is shown in the return of income. This allegation is not correct. In fact, I have shown the

Short Term Capital Gain of Rs.16,63,000/-. Please verify the same. Hence, invoking the provisions of Section 263, considering very low income is bad in law and Short Term Capital Gain of Rs.16,63,000/- be considered as against Rs. 1,63,000/- mentioned in notice.

Without prejudice to the above, I have to submit that the total cost of plot including various expenditure, were genuine expenses. All necessary details, evidences and original bills were produced at the time of assessment. All such evidences were verified by the learned A.O. and thereafter allowed all such expenditure claimed from sales value of such plot. The said land originally was an agricultural land required to be converted as non agricultural land. The purchased land was converted as non agricultural land. After converting into non agricultural land, the total cost of the plot was as follows:-

Cost of Plot as per an agreement to sale (Banakhat) on 05-01-2011
Rs. 24,00, 000/-
Further cost of Plot as per Sale deed dated 21-05-2011 Rs. 26,22,000/- [This includes an amount paid to Govt. of Gujarat (Mamlatdar) Rs. 20,97,600/- being the amount raised by Mamlatdar being a premium on the land to be sold] Hence, total cost of Plot was of
Rs. 50,22,000/-
The following was the cost of land to me:

PARTICULARS	*Rs.*	*Rs.*	*Rs.*
Cost of land as mentioned above			*50,22,000/-*
ADD: *1. Cost of N. A. permission* *2. Brokerage on sale and purchase to a. Devendra Pate b. Navinbhai Patel* *3. Stamp Duty and registration fees* *4. Advocate fees 5. Consultation fees for title of land*	*1,15,000/-* *75,000/-* *1, 25, 000/-* *2,05,000/-15,000/-* *3,40,000/-*	*8,75,000/-*	
Development and Improvement Cost		*11,24,800/-*	
Compensation payable to plot booking made		*38,15,000/-*	*59,15,000/-*
Total Cost of Plot			*1,09,37,000/-*

The details and explanations of above were submitted to learned A.O. at the time of assessment and also explained the necessity and reasons for incurring such expenses. All such expenses claimed were necessary to avoid the loss or nominal profit instead of S.T. Gain earned of Rs.16,63,000/- and shown in return. Hence the total expenses incurred of Rs.1,09,37,000- including cost of land, stamp and registration expenses, Brokerage, Land development expense and compensation paid to plot holder to vacate

the plot booked were necessary to avoid the loss. All such expenses were verified by learned A.O. and of the view that the same genuine expenses allowable under the I. T. Act and allowed as such. There is no error in allowing such expense.

6. In Para 8 of your notice, your honour have mentioned that neither the cash book nor does the bank statement exhibit such huge withdrawls in cash. Sir, this being not the correct fact. I have shown the cash receipts by way of gin received from relatives in cash as well as cash received from booking of Plots, cash withdraw! from bank and some cash received on account of land sold. During the course of hearing, I submitted the confirmation as well as copies of A/c etc of relatives from whom I received the gift in cash as well as confirmation of the person who booked the plot and gave me cash for booking the plot. I have also submitted the copies of bank statement from where my withdrawls were made. The withdrawls were more than the deposits. All of such substantial cash was available with me. All such cash receipts and cash payment are reflected in cash flow statement. All these evidences etc are on record of learned A.O. Please verify the same. In view of above, all cash receipts are genuine receipts and learned A.O. verified the same and obtained confirmation etc and thereafter accepted.

7. Your honour have mentioned that why the total cost of land claimed of Rs. 1,09,75,000/-should not be treated as unaccounted income u/s. 68 of Income Tax Act. In this respect I have to state that the cost of land of Rs. 50,22,000/- is as per purchase deed and most of the expenses were incurred by cheque then how your honour can consider the entire cost of Rs. 1,09,75,000/- as unaccounted income u/s. 68 of Income Tax Act. Moreover I have also submitted the confirmation copies of account of the person from whom I have received the advance against sale of plot. The learned A.O. verified all such details and thereafter he accepted the same. I therefore strongly object your action of invoking the provisions of Section 68.

8. In Para- 9 of your notice, Your honour have mentioned that no copy of agreement was furnished for booking of plots and therefore why the claim of expenses of Rs.36,75,000/-should not be disallowed. In this respect I have to submit that in real estate transaction while booking the plot, no agreement is required to be executed. At the time of booking the plot only, the receipt of amount received is given. The confirmations etc. from said persons were also submitted stating that they have booked the plot in my plot scheme in land of S.No.265/1. The learned A.O. verified all such evidences etc. and thereafter he accepted the receipt of cash of Rs. 36,75,000/-. Hence, your honour is not justified in disallowing the expenses of Rs.36,75,000/-.

9. In Para 9 and 10, your honour mentioned that as per your admission you are not involved in any business/trading activities, hence purchases and sales of land is investment in nature. Therefore it is clear that amount received in cash was deposits/loans accepted and repayments made are covered u/s. 269SS and 269TT respectively. Sir, in fact if I was carrying any business or trading activity, then the provision of Section 269SS or 269TT would have been applicable to me. In case of purchases and sale of land, both provisions are not applicable in real estate transaction. In this respect, I have to submit that the advance money received towards the sale of plot is not a loan or deposit but advance towards the purchases/sales of plot of land. The amount received on booking of plot of land is neither loan nor deposit within the meaning of Section 269SS and 269TT and therefore, your honour is not justified in invoking the provision of Section 269SS and 269TT in real estate transaction. Hence, amount received in cash against purchases/sales plot of land is neither loan nor deposit and therefore the provision of Section 269SS and 269 IT as alleged by your honour is not justifiable.

In view of above, I have to submit that the assessment order passed u/s 143(3) on 10-02-2015 by learned A.C.I.T. is neither erroneous nor there is any error which is prejudicial to the interest of revenue, as such type of expenses are admissible expense in

> *the transaction of real estate. Both the above requisite conditions are not there in my case and therefore the provision of Section 263 is not applicable to me.*
>
> *In view of above I have to submit that the action taken u/s 263 is totally arbitrary, unwarranted and bad in law, the same should be dropped and oblige."*

4. The ld. CIT has not accepted the explanation of the assessee and referred to the explanation 2 to section 263 inserted w.e.f. 1st June, 2015 which is reproduced as under :-

> *"4.2 As per Explanation 2 to Sec. 263 inserted w.e.f. 01.6.2015, orders passed by the Assessing Officer shall be deemed to be erroneous and prejudicial to the interest of revenue, if, in the opinion of the Pr. Commissioner or Commissioner :-*
> *(a) the order is passed without making inquiries or verification 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 case of the assessee or any other person."*

After perusal of the material on record, ld. CIT observed that assessing officer has not conducted proper inquiry with regard to claim of the assessee as elaborated in the show cause notice supra in this order. Regarding the claim of the assessee that the advances had been received against booking amount and some of the booking amount along with compensation had been paid to few persons in cash it was stated that neither the assessee had furnished the cash book nor the bank statement exhibiting huge withdrawal in cash for returning the booking amount along with compensation. It is also stated that assessee has not given any evidence substantiating that the amount returned back was in fact the booking amount received by him, the amount received by him and returned by him was indeed the deposit/loans .The assessee's acceptance and repayment of the amount in cash has violated the provisions of section 269SS and 269TT of the act rendering the assessee liable for penalty proceedings u/s. 271D and 271E of the act. The assessing officer has not followed the law and procedure laid down in the act. The CIT has also observed that assessing officer has failed to conduct proper inquiry and verification and placed reliance on a number

of judicial pronouncements mentioned at para 4.4 and 4.5 of order u/s 263 of the act stating that where inquiry or verification is warranted but not done, it would certainly cause prejudice to revenue and the commissioner shall be justified in remanding the matter back to the assessing officer for verification. In this connection, the relevant part of the finding of the ld. CIT is reproduced as under:-

> *"4.4 In this connection, it is very much pertinent to mention herewith that the major issue in this revisional proceedings u/s 263 of Income Tax Act, 1961 is that assessment on the issues raised in the show-cause notice was made without proper examination, enquiry and verification. It has been held in the following cases that revisional jurisdiction u/s 263 by the Commissioner is warranted in a case where assessments have been made without enquiry or verification:-*
> *(i) Assessment originally made without enquiry - Can it be revised - Failure of the Assessing Officer to make an enquiry before granting deduction would render the assessment erroneous and prejudicial to the interest of Revenue - C/T VS Seshasayee Paper & Boards Ltd. [2000J 108 Taxman 464/242 ITR 490 (Mad.).*
> *(ii) Where the Assessing Officer had accepted entry in the statement of accounted by the assessee showing certain income as agricultural income, without making any enquiry, the exercise of jurisdiction by the Commissioner u/s 263(1) would be justified- Ma/abar Industrial Co. Ltd. Vs CIT [2000] 109 Taxman 66/243 ITR 89 (SC).*
> *Where the Assessing Officer completed assessment proceedings under section 143(3) and admitted that he could not make proper enquiries as assessment was becoming time-barred, there is valid assumption of jurisdiction under section 263 by the Commissioner, in setting aside the assessment and directing the Assessing Officer to make a fresh assessment: Jagdish Kumar Gulati Vs. CIT [2014] 139 Taxman 369 (All.).*
>
> *(iv) Assessments made in undue haste or without enquiry, are prejudicial - Assessments made in undue haste and without an enquiry whether the income offered was that of the assessee or someone else, are prejudicial to the interests of the revenue, and what is prejudicial to the interests of the revenue must be held to be erroneous though the converse may not always be true - Thalibai F. Jain Vs ITO [1975] 101 ITR 1 (Kar).*
> *(v) Non-enquiry into source of capital is an error - Enquiry into the source of the initial capita! is crucial for the ITO. If that is not done, the assessment is bound to be erroneous and hence prejudicial to the revenue - CIT Vs Pushpa Devi [1987] 164 ITR 639 (Pat).*
> *(vi) Omission to make further enquiries is an error - The Commissioner can regard the ITO's order as erroneous on the ground that in the circumstances of the case the ITO should have made further enquiries before accepting the statements made by the assessee in his return - Gee Vee Enterprises Vs Addl. CIT [1975] 99 ITR 375 (Delhi).*
> *(vii) Not holding an enquiry as is normal and not applying mind to the relevant material would certainly be 'erroneous' assessment warranting exercise of revisional jurisdiction.*
> *CIT v. Jawahar Bhattacharjee (2012) 20 taxmann.com 652/342 ITR 74/249 CTR 529 (Gau.)*
> *(viii) Even where prejudice to revenue may not be inferable, non-enquiry is certainly erroneous, so as to require interference on the part of the Commissioner. Revisional order in such circumstances is valid for lack of enquiry, where enquiry is warranted. Renu Gupta Vs CIT (2008) 301 ITR 45 (Raj.).*
> *(ix) Where the Assessing Officer failed to call for and make enquiries in a matter where prima facie application of section 14A was involved, such lack of enquiry would warrant the Commissioner to set aside the assessment and direct a fresh assessment. But where no disallowance would have been warranted against exempt income, the*

exercise of jurisdiction under section 263 cannot be justified. Centra/ Warehousing Corporation Vs CIT (2008) 307 ITR (AT) 52 (Del).
(x) Where enquiry is warranted but not made, it would certainly constitute prejudice to revenue, so that jurisdiction for the Commissioner is available for remanding the matter for such enquiry. CIT Vs Raja Industries (2012) 340 ITR 344 (P&H)."

5. During the course of appellate proceedings before us the Ld. Counsel has submitted paper book containing details of information submitted before the assessing officer and ld.CIT(A) at the time of assessment proceeding and appellate proceeding. The Ld. Counsel has contended that ld. Commissioner of income tax has erred in passing the order under section 263 of the act as the order under section 143(3) of the act passed by the assessing officer was neither erroneous nor prejudicial to the interest of the revenue. He has also submitted a paper book containing a number of judicial pronouncement against invoking of provision of section 263 of the act. On the other hand ld. Department d representative has vehemently contended that the order passed by the assessing officer was erroneous and prejudicial to the interest of revenue therefore Ld. Commissioner of income tax has rightly invoked the provision of section 263 of the act.

6. We have hard both the sides and perused used the material on record carefully. We observe that facts of the case of the assessee are distinguishable from the judicial pronouncements referred in the paper book. The brief in nutshell of such cases referred by the assessee is given as under:-

1. 138 ITR 0518 (MP) of Hon'ble High Court Madhya Pradesh related to not compliance with section 144B of the act by the assessing officer.

2. 109 Taxmann 66 (SC):- This case of Malabar Industrial Co. Ltd. is pertained to fact when there was no material to support the claim of the assesee.

3. 91 TTJ 658 (Chd. Tribunal):- It is pertained to allowing deduction u/s 80P(2)(e) on the baiss of evidence and material on record.

4. 207 CTR 0178 (PHHC):- It is pertained to taking view on mere audit objection.

5. 277 CTR 0354 (J &K):- It is pertained to the issue that CIT(A)'s observation would not make order erroneous.

6. 387 ITR 0114 (Gujarat):- It is pertained to the issue that even if two views were possibly, the power /s. 263 could not and ought not to have been exercised.

7. 289 CTR 550 (Karnatka):- As per the material on record the assessing officer, has applied his mind before accepting the figure declared by the assessee in the work-in-progress report.

8. 164 TTJ (Patna) (UO) 13:- In this case, nothing has been brought on record by the CIT and no material has been referred by the CIT which is not warranted ether in law or on facts.

9. 214 CTR 348 (Allahabad):- It is related to the fact of not establishing with the specific instances that the assessment order passed u/s. 143(3) was erroneous and prejudicial to the interest of revenue.

10. 262 CTR 604 (Delhi):- The issue is related to deduction u/s. 80HHC and the assessee has submitted evidence in support of export/transmission.

11. 77 ITR 107 (SC):- Nothing has been brought on record by the ld. CIT(A) or no material has been referred by the ld. CIT which is not warranted either in law or on facts.

12. 74 TTJ 007 (Allahabad Bench):- It is related to the expression record as used in section 263(1) to include the whole record of evidences on which the order to be revised was based.

13. 77 ITR 006 (SC):- It is pertained to the issue that the power of revision under s. 25 conferred on the CWT is not administrative and it is quasi-judicial.

14. 77 CCH 0449 ISCC:- It is pertained to the section 150 for re-opening of the proceedings in terms of section 147 and 148 and for that purpose the records of the provisions must be examined.

15. 86 Taxman 543 (M.P.):- This is pertained to the issue of directing the ITO to decide in a particular manner that ITO must reject the petition of the assessee by a separate order to be passed u/s. 154.

The facts of the case of the assessee are distinguishable as demonstrated in this order.

The return of income declaring income of Rs.38,95,570 was filed on the 20 March 2013. The assessing officer's has assessed the income under section 143(3) of the act on 10/02/ 2015 by accepting the total income as declared in the return of income filed by the assessee. The assessment order u/s 143(3) passed by the assessing officer is reproduced as under:-

> *"In this case, the assessee was filed return of income on 28.03 .2013 declaring total income of Rs.38,95,570/-. The said return was processed u/"s. 143(1) of the Income-tax Act. 1961, (hereinafter referred to as "the Act'). The case was selected for scrutiny. Notice u/s. 143(2) was issued on. 23.09.2013 which was duly served upon the assessee through Registered Post A.D. Subsequently, due to change in incumbency, notice u/s 143(2) r.vv.s. 129 and notices u/S 142(1) of the Act were issued on 24.12.2014 asking the assessee to furnish details mentioned therein.*
>
> *2. In response to these notices issued, Shri Suresh R. Shah, C.A., authorized representative of the assessee attended on various dates and furnished the required details time to time. The case was discussed with him.*

3. Subject to the above remarks and data made available, the total income of the assessee is computed as under:-

Total income as per return of income	*Rs. 38,95,570/-*
Total income assessed	*Rs 38,95,5707-*

Agricultural income for rate purposes: nil

4. Assessed u/s. 143(3) of the Act. Calculate tax. Give credit for prepaid taxes, if any, after due verification. Charge interest as per law. Issue demand notice and challan/RO accordingly.

Date : 10/02/2015
Place : Ahmedabad *Sd/-*

(PRASHANT KUMAR JAIN) *Assistant Commissioner of Income Tax Circle-2(2), Ahmedabad"*

On perusal of the assessment order it is noticed that assessing officer has not elaborated any kind of finding in the assessment order to demonstrate that the relevant issues have been verified and examined before making the assessment. Subsequently the learned principle Commissioner of income tax-2 Ahmedabad has passed order under section 263 of the act on 28th of March 2017 holding that the assessment order passed by the assessing officer under section 143(3) of the act on 10/02/ 2015 was erroneous and prejudicial to the interest of revenue. There by invoking the provision of section 263 of income tax act the learned principle Commissioner of income tax has set aside the assessment proceeding with the direction to the assessing officer to frame the assessment a fresh after thorough verification on the issues cited in the order passed by him under section 263 of the act.

With the assistance of the Ld. Counsel, we have gone through the paper book submitted by the ld.counsel during the course of appellant proceeding before us It is noticed that the assessee vide letter dated 8th October 2014 has

submitted detail of expenses of Rs.2,00,289 and copies of purchase and sale deed of land. It is also noticed that vide letter dated 6/2/2015 the assessee has furnished detail of purchase and sale of lands, AIR details and explanation etc.

After considering the detail and submission the relevant issues are considered as under:-

1. **Verification of expenditures against income earned from the partnership firm**

The Ld. Commissioner of income tax stated that assessee has claimed interest expenses of Rs.1,22,269 against income of Rs.1,63,738 from partnership firm "SG EVENTS". It is also pointed out that the assessee had shown interest income of Rs.1,04 672 from partnership Savita Greens against which the assessee had claimed expenses of Rs.1,00000. The Ld. CIT was of the view that the above expenses have been allowed by the assessing officer without calling any details from the assessee.

In this connection, we observe that assessee vide letter dated 5 September 2014 has submitted copies of his capital account in the aforesaid partnership firms and vide letter dated 8th October 2014 also submitted the details of expenses of Rs.2,22,289 claimed from business income.

In view of the above facts, we consider that these specific information were available in the assessment record of the assessee therefore, we are not inclined to uphold the decision of the Ld. Pr. Commissioner of Income Tax u/s 263 relating to the issue of verification of expenditures against income earned from the partnership firm.

2. **Issue of Short term capital gain on sale of land**

Regarding short term capital gain of Rs.16,63,000 which was inadvertently stated by the learned Commissioner of income tax as Rs.1,63,000, the learner Commissioner of income tax noticed that the assessee has made expenditure of Rs.1,09,75,000 in the form of land development and improvement and an

amount of Rs.36.75 lakh was paid to 20 persons as compensation. As such the assessee has paid total amount of Rs.1,09,75,000 in cash (Rs.73 lakh+36.75 lakh) but during the assessment proceedings the assessee has neither furnished cash book nor does the bank statement exhibiting such huge withdrawal in cash. Regarding short term capital gain of Rs.16,63,000 on sale of land bearing survey no.265/1 for Rs.1,26,00000 after deduction of the total cost of the plot of Rs.1,09,37,000 it is noticed that the cost of the land include substantial amount comprising stamp duties, registration expenses, advocate fees, legal expenses, brokerage, land development exp. and improvement charges etc.

It is observed that as per record there was no specific information/supporting material particularly pertaining to the claim of Rs.10,93,7,000 as cost of sold land of survey number 265/1. It is also noticed that there was no specific details which can demonstrate returning of Rs.1,097,5,000/ booking amount and compensation to the different persons. It is also observed there was no relevant material to substantiate the different elements of the cost of impugned land sold by the assessee and also there was no particular supporting materials to substantiate the cash transactions in respect of receiving of booking amount and payment of compensation on cancellation of the booking of plots. We consider there is no detail/information available as per material on record about any verification made by the assessing officer relating to the above issue.

We therefore hold that to the extent of the issue pertaining to short term capital gain in respect of sale of land of survey no. 265/1 and payment of compensation on cancellation of allotment of plots and receiving of booking of plots of land in cash was not verified or inquired into, while finalizing the assessment, the order of the Assessing Officer is erroneous as well as prejudicial to the interest of the revenue and the Assessing Officer is directed to complete the assessment after examination of this issue as per the provision of law. It is clear from the facts and findings that there is no discussion or any query and certainly it is an issue for which the assessment order can be said to be erroneous to the extent of first issue as discussed supra in this order. We

therefore uphold the order of the Ld. Pr. Commissioner of Income Tax to the extent of this issue only.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 07-12-2018

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 07/12/2018

आदेश क□□ित□लिप **अ**े□षित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलय आ□धकरण,
अहमदाबाद