

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'B' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA ACCOUNTANT MEMBER, AND
SMT BEENA A. PILLAI, JUDICIAL MEMBER

ITA No. 3376/DEL/2017
[Assessment Year: 2012-13]

M/s Celebi Delhi Cargo Management
India Pvt. Ltd
R. No. CE-05, First Floor, Import
Building - II, International Cargo
Terminal, IGI Airport, New Delhi

Vs.

The Pr.C.I.T-2
New Delhi

PAN : AADCC 6885 B

[Appellant]

[Respondent]

Date of Hearing : 13.02.2019
Date of Pronouncement : 18.02.2019

Assessee by : Shri Ronak Doshi, CA
Revenue by : Ms. Nidhi Srivastava, CIT- DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the correctness of the order of the ld. Pr. CIT, New Delhi - 2 dated 31.03.2017 pertaining to assessment year 2011-12.

2. The sum and substance of the grievance of the assessee is that the PCIT erred in invoking the provisions of section 263 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] by holding that the assessee failed to place on record, during the assessment proceedings, any such documentary evidence of substantive nature, to justify the deduction u/s 80IA of the Act.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

4. The Id. Representatives, in addition to their oral arguments, placed written synopsis for our consideration.

5. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below and gone through the written synopsis placed on record by both the sides.

6. Facts on record show that the appellant company has been set up with the primary objective of undertaking upgradation, modernization, financing, operation, maintenance and management of Cargo Terminal. The appellant company entered into Concessionaire Agreement with Delhi International Airport Private Limited (DIAL) which gives right to operate, maintain, develop, modernize and manage the cargo terminal for the period till March 2034.

7. The return was electronically filed on 30.11.2012 after availing the deduction u/s 80IA. However, tax was paid on book profits. Thereafter, the case was selected for scrutiny and, accordingly, statutory notices were issued and served upon the assessee. Assessment order was framed u/s 143(3) of the Act vide order dated 05.12.2014.

8. Subsequently, the assessee received a notice dated 07.03.2016 for revisionary proceedings to be initiated u/s 263 of the Act by the Principal Commissioner of Income-tax-2. The show cause notice reads as under:

"The Principal Officer,

M/s Celcbi Delhi Cargo Terminal
Management India Pvt. Ltd.,
Room No. 23, Import Building-3,
International Cargo Terminal,
IGI Airport, New Delhi-II0037

Sir,

Sub.: Show cause notice for proceedings u/s 263 of the I.T
Act, 1961 for the A.Y. 2012-13 reg.-

I draw your kind attention to the assessment proceeding u/s 143(3) of the I.T. Act, 1961 for the A.Y. 2012-13-dated 05.12.2014 of M/s Celebi Delhi Cargo Terminal Management India Pvt. Ltd.

The assessment order u/s 143(3) dated 05.12,2014 was framed by DCIT Circle 5(2), New Delhi wherein the A.O. referred to the income declared in the return filed digitally on 30.11.2012 declaring a income of Rs, 1,43,69,780/- and the deduction claimed u/s 80IA stood at Rs. 15,48,63,614/- In para 3 of the assessment order the A.O. has specified as under:-

"The assesses company is engaged in the business of Infrastructure Facilities Provider."

The A.O. had failed to discuss the nature of actual business activities conducted by the company during the Financial Year 2011-12. The return income of Rs. I, 43, 69,780/- was accepted as the income of the company for the year,

The disallowance made was for a sum of Rs. 2,07,83,557/- being an amount not added back by the company for the purpose of section 115JB of the J.T.Aet. The A.O. allowed the claim of the assessee for deduction u/s 801A at Rs. 15.49 crores without proper examinations of the facts of the income generated by the company and the admissibility of deduction u/s 801A against the income generated from occupation and or maintenance of Cargo Terminal. The assessee in his letter dated 114- File ID 277 has placed on assessment record the following facts:-

"Company is responsible to upgrade, modernize and finance the Cargo Terminal and operates, maintain and manage the Cargo Terminal (approximately 77,000 sq.mt area comprising of warehouses for handling export, import and perishable cargo) for a period of 25 years until 31 March 2034".

The above citation reveals that the company was operating as a contractor for its principal and has not undertaken any such activities within the ambit of section 80IA.

This office in receipt of a report u/s 263 of the I.T.Act, 1961 dated 03.03.2016 on the above issue. The assessment framed u/s 143(3) being erroneous and prejudicial to the interest of revenue hence to be reviewed in accordance with provision of section 263 of the I.T. Act, 1961.

In accordance with the section 263 of the Income Tax Act, 1961, I hereby require you to appear before the undersigned in Room No. 394, 3rd Floor, C.R. Building at 11 A.M. on 11.03.2016 and your reply on the issue on or before the said date.

Yours faithfully

(Pramod Kumar
Gupta) Pr.
Commissioner of
Income Tax Delhi-2,
New Delhi

PRAMOD KUMAR GUPTA
Pr. Commissioner of Income Tax
Delhi-02, New Delhi"

9. In reply to the aforesaid notice, the assessee filed a detailed reply. The ld. PCIT was not convinced with the reply of the assessee and held that the assessment order dated 05.12.2014 framed u/s 143(3) of the Act was erroneous in so far as it was prejudicial to the interest of the Revenue and accordingly set aside the assessment with a direction to pass an order afresh after taking into account all relevant facts and after making necessary enquiries and verification.

10. The Hon'ble Supreme Court in *Malabar Industrial Co. Ltd.*, 243 ITR 83, has laid down the following ratio:

"A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue--recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous ".

11. On 12.09.2014, the Assessing Officer issued notice u/s 142(1) of the Act which was a questionnaire having 36 questions. The relevant queries for our consideration read as under:

"1. Please furnish a detailed note on the business of the assessee giving the whole background of business since the incorporation of the company and various revenue streams of the assessee company.

2. Please furnish copies of ITR, computation of income, along with Audit Report and Annual Accounts for A.Y. 2012-13 and earlier 2 A.Y.s

5. Please justify the following items/information

- Large Deduction claimed under chapter VI-A

- High Ratio of Refund to -TDS -

-Large refund claim of Advance tax

-Depreciation claimed at higher rates / Higher additional Depreciation

8. Explain and justify the reasonableness of payment of Directors Remuneration. Please furnish copies of last 3 years assessment order u/s 143(3)/ 147, if any."

12. The assessee filed a detailed reply and submitted the documents with reference to the aforesaid questionnaire on 29.09.2014. At point No. 19, details of deduction claimed from the taxable income were furnished alongwith the following Note on the Business:

"The Airport Authority of India ("AAI"), an organization working under the Ministry of Civil Aviation that manages most of the airports in India, and Delhi International Airport Pvt. Ltd (DIAL}

entered into an Operation, Management and Development Agreement dated 4 April 2006 (the "OMDA") whereby AAI has granted to DIAL the exclusive right and authority during the term of the OMDA to operate, maintain, develop, design, construct, upgrade, modernize, finance and manage the Indira Gandhi International Airport at New Delhi, India.

Pursuant to the Concession Agreement dated 24 August 2009, DIAL granted Celebi Hava Servisi A.S ("Celebi") the rights for up gradation, modernization, financing, operation, maintenance and management of the cargo terminal at the airport for a term of 25 years.

Celebi was incorporated M/s Celebi Delhi Cargo Terminal Management India Private Limited (the Concessionaire) as a special purpose company for the sole purpose of implementing the Concession Agreement.

Pursuant to the Concession Agreement, Celebi is responsible to upgrade, modernize and finance the Cargo Terminal and operate, maintain and manage the Cargo Terminal (approximately 70,000 sq.mt area comprising of warehouses for handling export, import and perishable jcafgo) for a period of 25 years until 31 March 2034.

The company earns its revenue from warehouse management."

13. For further verification, the Assessing Officer again issued a notice dated 15.11.2014. Query No. 1 of the said notice reads as under:

"To.

The Principal Officer
M/s Celebi Delhi Cargo Terminal
Management India Pvt. Ltd.
Room No. CE-05, First Floor,
Import Building-II,
I SI Airport,
New Delhi

Sir/Madam,

- Sub:- 1) Scrutiny assessment Proceedings U/s 143(2) of
The I.T. Act, 1961 for the Ay. 2012-13-reg:-
2) Intimation of New Jurisdiction -reg-

In pursuance to cadre restructuring of the Income Tax Department Delhi Region, your present jurisdiction lies with Circle-5(2) [Room No. 390, 3rd Floor, C. R. Building, I.P. Estate, New Delhi-110002]. *In consequent to the change of jurisdiction, notice u/s 143(2) of the I. T. Act, 1961 is hereby enclosed herewith for assuming the jurisdiction over your case.*

New Circle	New Range	CIT Charge	CCIT Charge
Circle-5(2)	Range-5	Pr. CIT-II	CCIT-DELHI-II

In continuation of the pending assessment proceedings in your case, you are hereby accorded Last & Final Opportunity to file the following information/ details which are given as under

SI No. Details required	Remarks
Any pending details as per the questionnaire(s) issued with notice u/s 142(1) dated:- 12/09/2014.	
<p>Please justify the following expenses/items which are emanating from the return filed by you for the year under consideration.</p> <p>Large Deduction claimed under chapter VIA 2. High Ratio of Refund to TDS Large refund claim of Advance tax Depreciation claimed at higher rates / Higher additional depreciation</p>	Please also refer to Question No. 5 of Annexure (A) already sent.
3. Reconciliation of AIR information	Enclosed
"Detailed Trial Balance of all accounts <i>Opening balance - Dr - Cr - closing balance</i>	-

It is hereby conveyed that as per the principal of natural justice enough opportunities have already been given to you in the proceedings, You are hereby requested not to seek any further adjournment in the proceedings and the same shall not entertain under any circumstances.

In case of failure to submit the pending/requisite details by the said date, *adverse views may be taken in respect of issues not submitted by you.*

Your case is now fixed to 24/11/2014

Yours faithfully,

Encl.- Notice u/s 143(2)

(M.Logapaihi)
Deputy Commissioner of Income Tax
Circlef5(2), New Delhi

14. This specific query was replied by the assessee vide submission dated 24.11.2014.

24th November, 2014

"The Deputy Commissioner of Income Tax,
Circle 5(2). Room No. 390- B. 3rd Floor,
Central Revenue Building
IP, Estate
New Delhi-110001

Dear Sir,

Ref: Questionnaire u/s 143 (2) of the IT Act,1961 for the AY 2012-13 dated 15th Nov-14

This is in reference to above notice regarding assessment proceeding for AY 2012-13, we are herewith submitting the following: -

1. All the information required as per questionnaire issued with Notice u/s 142(1) dated 12th Sep- 14 has already been submitted.
2. The reason for large deduction under chapter VI-A is on account of availing the benefit u/s 80IA of the Income Tax Act 1961.

In anticipation of similar performance during FY 2011-12 (AY 2012-13) as compared to FY 2010-11 we have deposited the advance tax in the month of Jun-11 and Sep-11, amounting to Rs.1.31 cr and Rs.1.49 cr respectively, but in view of the

performance during the year the ratio of refund to TDS is high.

We have not claimed the depreciation at higher rates / higher additional depreciation

3. At the time of filing of ITR the Form 26AS was showing a balance of Rs.8,24,64,091/- which we have claimed (copy of first and last page is attached) and the variation is on account of revision in TDS returns by our customers.

4. The detailed Trail Balance is attached as Annexure 1
We trust you will find the aforesaid in order and shall be happy to provide further information as may be required in this regard."

15. From the above facts, it can be seen that not once, but three notices were issued by the Assessing Officer and in all the three replies, the assessee has furnished complete detail on the claim of deduction u/s 80IA of the Act alongwith detailed report in Form No. 10CCB.

16. The Revenue alleges that the assessment order is cryptic as the Assessing Officer has not given any clear finding on the claim of deduction u/s 80IA of the Act and, therefore, assessment order is

erroneous and in so far as it is prejudicial to the interest of the Revenue.

17. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

"The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered

according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the

quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. We, therefore, hold that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue

haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power.

It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority.

The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-

tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

18. The Hon'ble High Court of Gujarat in the case of [CIT vs. Nirma Chemical Works Ltd.](#) 309 ITR 67 has observed as under:

"if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing . A.Y. 2009-10 Officer issued a query memo to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-

Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the creditworthiness/capacity of the donors, the source from where these funds have come and also the creditworthiness/capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue cannot be accepted."

19. The Hon'ble jurisdictional High Court had also the occasion to consider a similar issue in the case of Ashish Rajpal 320 ITR 674 and held as under:

"The parameters and principles laid down by the Courts which govern the exercise power by the Commissioner under the provisions of [Section 263](#) of the Act are as follows:

(i) The power is supervisory in nature, whereby the Commissioner can call for and examine the assessment records.

(ii) The Commissioner can revise the assessment order if the twin conditions provided in the Act are fulfilled, that is, that

the assessment order is not only erroneous but is also prejudicial to the interest of the Revenue. The fulfilment of both the conditions is an essential prerequisite. [[See Malabar Industrial Co. Ltd vs CIT](#) (2000) 243 ITR 83(SC)]

(iii) An order is erroneous when it is contrary to law or proceeds on an incorrect assumption of facts or is in breach of principles of natural justice or is passed without application of mind, that is, is stereo-typed, in as much as, the Assessing Officer, accepts what is stated in the return of the assessee without making any enquiry called for in the circumstances of the case, that is, proceeds with „undue haste“. [[See Gee Vee Enterprises vs ACIT, Delhi-I & Ors.](#) (1975) 99 ITR 375]

(iv) The expression "prejudicial to the interest of the Revenue"

while not to be confused with the loss of tax will certainly include an erroneous order which results in a person not paying tax which is lawfully payable to the Revenue. [[See Malabar Industrial Co. Ltd.](#) (supra)].

(v) Every loss of tax to the Revenue cannot be treated as being "prejudicial to the interest of the Revenue". For example, when the Assessing Officer takes recourse to one of the two courses possible in law or where there are two views possible and the Commissioner does not agree with the view

taken by the Assessing Officer which has resulted in a loss.

[[See CIT vs Max India Ltd.](#) (2007) 295 ITR 282 (SC)]

(vi) There is no requirement of issuance of a notice before commencing proceedings under [Section 263](#) of the Act. What is required is adherence to the principles of natural justice by granting to the assessee an opportunity of being heard before passing an order under [Section 263](#). [See *Electro House* (supra)].

(vii) If the Assessing Officer acts in accordance with law his order cannot be termed as erroneous by the Commissioner, simply because according to him, the order should have been written „more elaborately“. Recourse cannot be taken to [Section 263](#) to substitute the view of the Assessing Officer with that of the Commissioner. [[See CIT vs Gabriel India Ltd](#) (1993) 203 ITR 108(Bom)]

(viii) The exercise of statutory power under [Section 263](#) of the Act is dependent on existence of objective facts ascertained from prima facie material on record. The evaluation of such material should show that tax which was lawfully exigible was not imposed. [See *Gabriel India Ltd* (supra)]

In the instant case, it was quite clear that after the assessee had filed his return on 31.10.2002, a notice under [Section](#)

[143\(2\)](#) of the Act was issued for the purposes of carrying out a scrutiny in respect of the return of income filed by the assessee. In the course of scrutiny, as indicated in the impugned judgment of the Tribunal, several communications were addressed by the assessee to the Assessing Officer whereby, the information, details and documents sought for, were adverted to and filed. The Tribunal in order to satisfy itself, as to whether the Assessing Officer had sought for details and carried out an enquiry in respect of transactions which were entered into by the assessee in the course of his business, called for the assessment record and scrutinized the same. The Tribunal returned a finding of fact that the assessee had submitted copies of documents and details with regard to various matters, including, in particular, with respect to the properties at Malviya Nagar as well as those located at Gitanjali Enclave and Defence Colony. The issue that has been raised before us is that, since the assessment order adverted to only Malviya Nagar property and was silent with respect to the properties located at Gitanjali Enclave and Defence Colony; on this short ground alone the Revisional order of Commissioner ought to be sustained. It would be important to remind ourselves that while the supervisory power of Commissioner is wide, it cannot be invoked to substitute the view of the Assessing Officer. If upon a perusal of the record filed with the authorities below the Tribunal formed a view that there had been an enquiry which

had not been conducted with „undue haste“ surely we would be slow to hold otherwise. More so when, this conclusion, the Tribunal had arrived at after examining the record which the assessee filed with the Assessing Officer during the course of scrutiny. The point to be noted is that on a perusal of the record the Tribunal observed, by reference to a general practice in vogue, that merely because the assessment order did not refer to the queries raised during the course of the scrutiny and the response of the assessee thereto, it could not be said that there was no enquiry and hence the assessment was erroneous and prejudicial to the interest of the Revenue. This observation of the Tribunal, according to us, deserves due weight, as in its vast experience it would have come across several such orders.

16. The fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee. The fact that there was an enquiry can also be demonstrated with the help of the material available on record with the Assessing Officer. The material, to which a reference has been made in the impugned judgment, would show that there was no „undue haste“ in examining the material prior to the passing of the

assessment order dated 24.03.2005. At least four letters dated 27.04.2004, 22.02.2005, 28.02.2005 and 18.03.2005 were addressed by the assessee to the Assessing Officer giving details, documents and information pertaining to various queries raised by the Assessing Officer. These have been examined by the Tribunal. We have no reason to believe that examination was less than exacting. Therefore, the conclusion of the Commissioner that there was "lack of proper" verification is unsustainable.

17. Further, the notice dated 11.05.2006 issued by the Commissioner before commencing the proceedings under [Section 263](#) of the Act referred to four issues, the final order dated 18/19.01.2007 passed referred to nine issues, some of which obviously did not find mention in the earlier notice and hence resulted in the proceedings being vitiated as a result of the breach of the principles of natural justice.

There is no requirement under [Section 263](#) of the Act to issue a notice before embarking upon a revisionary proceedings. To that extent the submission of the learned counsel for the Revenue Mr Sanjeev Sabharwal has to be accepted. What is mandated under [Section 263](#) of the Act is that once the Commissioner calls for and examines the record, pertaining to the assessee, and forms a prima facie

view that the order passed by the Assessing Officer is both erroneous and prejudicial to the interest of the Revenue, he is obliged to afford an opportunity to the assessee before passing an order, to the prejudice of the assessee. In the instant case, the Commissioner sought to accord such an opportunity to the assessee by putting him to notice as regards aspects which the Assessing Officer had failed to scrutinize. During the course of the revisionary proceedings this was conveyed to the assessee by way of a notice dated 11.05.2006. It is not disputed that in the order dated 18/19.01.2007 the Commissioner has referred to certain other issues which did not form part of the initial notice dated 11.05.2006. To our minds it was always open to the Commissioner to put such issues/discrepancies, found by him based on material on record, to the assessee. It is to be noted, however, that the learned counsel for the assessee vehemently denied that the assessee had been given any opportunity to meet issues other than those to which reference has been made in the Commissioner's notice dated 11.05.2006. For this purpose, the learned counsel for the assessee sought to place reliance on the impugned judgment passed by the Tribunal, wherein this aspect of the matter has been discussed elaborately. In order to satisfy ourselves we called upon learned counsel for the Revenue Mr Sanjeev Sabharwal to place on record any communication, order or any other document which would show that the assessee had been

given an opportunity to deal with those aspects which did not form part of the initial notice dated 11.05.2006, but were taken into account by the Commissioner while passing his order dated 18/19.01.2007. In this regard, the learned counsel for the Revenue placed on record order sheet entries of the proceedings conducted by the Commissioner. We have already extracted the order sheet entries commencing from 15.06.2005 to 28.06.2006. A perusal of those entries would clearly demonstrate that there is nothing on record which would show that the assessee was given an opportunity to respond to these discrepancies which formed part of the order-in-Revision dated 18/19.01.2007 but were not part of notice dated 11.05.2006. This was put to the learned counsel for the Revenue, who in response fairly conceded that there was nothing on record which would establish the contrary. It was, however, urged by the learned counsel for the Revenue Mr Sanjeev Sabharwal that the assessee would have his opportunity to give satisfactory replies to the discrepancies raised in the Revisional Order before the Assessing Officer and that such an opportunity would meet the requirements of the provision. We are afraid that that is not the position envisaged in law. If one were to permit correction of such a grievous error in the manner suggested it would tantamount to, in a manner of speaking, closing the stable doors after the horse has bolted. The assessments, unless reopened by paying faithful obeisance to statutory provisions and conditionalities

provided therein, attain finality on their conclusion. The provisions of [Section 263](#) mandate that an order for enhancing, or modifying the assessment, or cancelling the assessment and directing a fresh assessment can only be passed after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as is deemed necessary. The threshold condition for reopening the assessment is that before passing an order an opportunity has to be granted to the assessee and, such an opportunity granted to the assessee is a necessary concomitant of the enquiry the Commissioner is required to conduct to come to a conclusion that an order for either an enhancement or modification of the assessment or, as in the present case, an order for cancellation of the assessment is called for, with a direction to Assessing Officer to make a fresh assessment. This defect cannot be cured by first reopening the assessment and then granting an opportunity to the assessee to respond to the issues raised before Assessing Officer during the course of fresh assessment proceedings. To buttress his submission the learned counsel for the Revenue has relied upon the judgment of the Supreme Court in the case of [Rampyari Devi Saraogi vs CIT, West Bengal & Ors.](#) (1968) 67 ITR 84. This is a case in which, the order issued by the Commissioner, itself revealed that the assessment was being reopened based on an additional supporting material. The Supreme Court in such fact situation

thus ruled that non supply of additional supporting material would not effect the basic issue of assessment being carried out without adequate investigation. In the instant case the Order-in-Revision refers to issues and discrepancies which did not find mention in the initial notice dated 11.05.2006 and not to additional or supporting material as in the case of Rampyari Devi (supra). Therefore, to suggest that it would be sufficient compliance of the provisions of [Section 263](#) of the Act, if an opportunity to respond to the discrepancies mentioned in the Order-in-Revision is given to the assessee in reassessment proceedings before the Assessing Officer, is according to us is completely untenable. It is the requirement of [Section 263](#) of the Act that the assessee must have an opportunity of being heard in respect of those errors which the Commissioner proposes to revise. To accord an opportunity after setting aside the assessment order, would in our view not meet the mandate the [Section 263](#) of the Act. If such an interpretation is accepted it would make light of the finality accorded to an assessment order which cannot be reopened unless due adherence is made to the conditionalities incorporated in the provisions of the Act in respect of such powers vested in the Revenue.

18. In view of our discussion above, we are of the opinion that impugned judgment passed by the Tribunal deserves to be sustained. The findings returned by the Tribunal are pure

findings of fact. No substantial question of law has arisen for our consideration. Resultantly, the appeal is dismissed. No order as to cost."

20. The ld. DR strongly stated that the Assessing Officer has not examined the claim of deduction in detail, therefore, the ld. PCIT was justified in exercising the power conferred upon him by section 263 of the Act.

21. In our considered opinion, the ld. DR is given by the Hon'ble Jurisdictional High Court in the case of Sunbeam Auto Ltd 332 ITR 167 wherein the Hon'ble High Court was considering the aspect, when there is no proper or full verification and it has held as under:

"We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This

argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner."

22. Considering the three notices issued by the Assessing Officer and considering the detailed submissions filed by the assessee in response to each notice, it can be safely concluded that the Assessing Officer did raise queries which were complied by the assessee.

23. Considering these facts in totality, it can be safely concluded that the Assessing Officer did raise queries which were complied by the assessee. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 Taxmann.com 272 (Bombay)".

24. In view of the above discussion on the facts vis a vis the judicial pronouncements on the subject, we set aside the order of the Id. PCIT and restore that of the Assessing Officer dated 14.03.2014 framed u/s 143(3) of the Act.

25. Before closing, on identical set of facts, the Id. PCIT issued a similar notice u/s 263 of the Act as he found that the assessment order framed u/s 143(3) of the Act dated 14.03.2014 was erroneous, in as much as it was prejudicial to the interest of the revenue for at 2011-12. The Tribunal considered the issue in ITA No. 3182/DEL/2016 and set aside the order of the Id. PCIT and restored that of the Assessing Officer. We find that the facts of assessment year 2011-12 are same as the facts of the year under consideration except the claim of deduction under Chapter VI is different in value. Since the Tribunal has quashed the order framed u/s 263 of the Act, we are of the considered opinion that the claim of deduction in the initial assessment year i.e. 2011-12 was justified and, therefore, the same cannot be disturbed in the subsequent assessment year when the facts are identical and law has not changed.

26. Before parting, the ld. DR has also heavily relied upon Explanation 2 to section 263 of the Act. In our considered opinion, the said Explanation is applicable only when there is no enquiry made by the Assessing Officer whereas in the case in hand, as demonstrated elsewhere, the Assessing Officer had made ample enquiries before framing the order u/s 143(3) of the Act.

27. In the result, the appeal of the assessee in ITA No. 3376/DEL/2017 is allowed.

The order is pronounced in the open court on 18.02.2019.

Sd/-

**[BEENA PILLAI]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 18th February, 2019.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	