

आयकर अपीलिय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT-BENCH-SURAT

BEFORE SHRI AMARJIT SINGH, JUDICIAL MEMBER
& SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.1141/AHD/2016

निर्धारणवर्ष/Assessment Year:2011-12

M/s. Supreme Auto, Bilimora Road, National Highway No.8, Samroli, At Chikhli, Navsari - 396521. [PAN: AAMFS 3499 K]	बनाम Vs.	Principal Commissioner of Income-Tax- Valsad
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे / Assessee by	Shri Rasesh Shah, CA
राजस्वकीओरसे / Revenue by	Shri Prasenjit Singh, CIT(D.R.)
सुनवाईकीतारीख/ Date of hearing:	22.10.2019
उद्घोषणाकीतारीख/Pronouncement on	10.12.2019

आदेश / O R D E R

PER O. P. MEENA, AM:

This appeal filed by the assessee is directed against the order of Learned Principal Commissioner of Income-tax- Valsad [in short “the Pr. CIT ”] dated 22.03.2016 pertaining to Assessment Year 2011-12 passed under section 263 of Income Tax Act, 1961 (in short ‘the Act’).

2. *By way of Ground No. 1 to 4 of appeal, the assessee submitted that the Pr. CIT-Valsad has erred in law and on facts in passing the*

order under section 263 of the Act although the assessment order was passed under section 143 (3) was neither erroneous nor prejudicial to the interest of revenue and in setting aside the assessment by giving direction to make further, enquiries about veracity / correctness of the claim made by the assessee regarding brokerage / commission and unsecured loan and vehicle booking advance.

3. Succinctly, facts as culled out from the orders of lower authorities are that the assessee is authorized dealer of Hero Honda Company and engaged in trading of two-wheeler. The assessee has filed its return of income on 29 September 2011 declaring total income of Rs.33,61,760/- which was assessed at Rs.34,36,760/- vide order dated 30 September 2013 under section 143(3) of the Act. Subsequently, the ACIT-Circle-Navsari has sent a proposal for revision of said assessment under section 263 of the Act. On examination of proposal and records, the Pr. CIT noticed that the claim of brokerage/ commission at Rs.49,05,800 on turnover of Rs. 30.23 crores as against last year`s brokerage/ commission of Rs.22,41,050/- on turnover of Rs. 31.54 crores is not commensurate with the turnover of the assessee. Some of the parties are covered by the provisions of section 40A(2)(b) of the Act. Hence, the AO has not examined these parties which are also found to have advanced unsecured loan to the assessee-firm. The AO has also not examined creditworthiness

and genuineness of transaction unsecured loan from five parties namely Banu Memon for Rs.10,10,272/- Baya Kadar Memon Rs.6,20,464/- Famidaaribhai Memon Rs.6,20,464/- Arifbhai I. Memon Rs.9,07,318/- and Navinbhai Patel Rs.3,00,000/-. There are confirmations of four parties whereas unsecured loan have been taken from five parties. Further, the assessee has taken booking advance of Rs.1,75,20,679/- during the year under consideration as against Rs.17,45,611/- during immediate preceding year. In view of these facts, the Pr. CIT viewed that the assessment order is erroneous and prejudicial to the interest of the Revenue as the AO not having made minimum enquiries which were needed to be made in the facts and circumstances. Therefore, a show-cause notice under section 263 was issued on 01.02.2016 to the assessee to be replied by 12.02.2016. The assessee vide letter dated 11.02.2016 submitted the brokerage/commission expenses also include a sum of Rs.15,43,800/- charges/ brokerage for RTO services which were not provided to the customer last year. The assessee has paid a sum of Rs.15,43,800/- to person covered under section 40A(2)(b) against which income of Rs.31,11,127/- has been earned hence, brokerage/ commission paid is very reasonable and in same way brokerage is also paid to the other person not covered under section 40A(2)(b) of the Act. With regard to unsecured loan, it was submitted that these are old loan coming from last year, hence, no addition can be made during the year under consideration under section 68 of the Act. With regard to booking

advances, the assessee has given complete details and income of advance has been duly reflected in next year and only advance of Rs.8,97,889/- were returned to the customer against cancellation of booking. Further, explanation was called for which was replied which has been duly reproduced in order under section 263 passed by the Pr. Commissioner of Income-tax. However, the Pr. CIT observed that the amount of brokerage/commission claimed to have been paid to related parties of which details of the services rendered by these related parties have not been paid. The assessee, only filed a printout of the brokerage/commission account which, unless somebody cheques each and every bills and vouchers does not make much sense. Further, the entire additional commissions/brokerage of Rs.15,43,800/- paid to 5 parties which includes 3 females, wives of the partners for which the AO has not carried out any verification, not even on sample basis. Hence, the complete lack of enquiry/verification by the AO made the assessment order is erroneous as well as prejudicial to the interest of revenue on this count/issue. With regard to unsecured loan, no valid loan confirmations were filed before the AO in respect of any of the loan creditors, and no loan confirmation of whatever filed during the current proceedings. The question of addition or not addition in a particular year/years is none of the concern of the assessee. It is up to the AO to decide that you are addition/disallowance, if any, as warranted by the facts and circumstances, as found and establish after reification. Further, the

confirmation was filed in respect of the creditor, the inference that the AO failure to have obtained valid confirmations, leave alone carrying out that required verification. This failure of AO makes the assessment order is erroneous as well as prejudicial to the interest of the revenue on this count/issue. With regard to booking advance of Rs.1,75,20,679/- as against Rs.17,45,611/- during the preceding year, the PCIT observed that the claim made by the assessee that booking advance are part of trade advance and duly reflected in the books of accounts and such advance increased during the year because of introduction of the new bikes i.e. Splendor pro and Passion pro Hero Motocorp Company in this year. However, the fact remains that the AO has not made necessary enquiries about this unusual item as appearing in the return of income of the assessee. In view of these facts and after citing a sum judicial decision, the Pr. CIT held that the order of the AO is erroneous as well as prejudicial to the interest of revenue on account of lack of any enquiry about the claim made by the assessee regarding brokerage/commission, unsecured loans and vehicle booking advance. Therefore, the assessment was set-aside on all three issues which is to be made afresh after giving proper opportunity to the assessee.

4. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee vehemently contended that the AO has duly verified and applied his mind to issues under

consideration; therefore, the order of the AO is neither erroneous nor prejudicial to the interest of the revenue. The learned counsel for the assessee submitted that the Id. Pr.CIT can assume jurisdiction under section 263 of the Act only if the order of the AO is erroneous in so far as it is prejudicial to the interest of the revenue. Both the conditions have to be fulfilled before action under section 263 is initiated. The Id.Counsel for the assessee has drawn our attention to para No 5 of assessment order and submitted that the AO has duly made enquiry regarding brokerage expenses of Rs.49,05,800/- and discussed the same in the body of assessment order by mentioning that on verification of vouchers and bills relating to these expenses produce during the course of assessment proceedings, it is noted that certain vouchers were not properly filled in to show that expenses were incurred for the business of the assessee. Further, considering the quantum of brokerage expenses and vehicle sales (7507 Nos), it appears that the assessee has paid brokerage on each of vehicles of approximate Rs.650. When the assessee itself dealer, they need not to pay brokerage of each vehicle. Considering the circumstances and facts of the case, Rs.75,000/- was disallowed out of brokers expenses and added to the total income of the assessee. Thus, it was contended that the AO had duly made enquiries and applied his mind to the facts and made disallowance also.

5. The learned Counsel further submitted that out of 5 parties of unsecured loan, confirmations were duly submitted in respect of 4 parties. All the five unsecured loan are being old one and these are appearing as opening balance as on 01.04.2010 in the audited books of accounts. Therefore, even if the loans were unexplained, no addition could have been made for the assessment year under consideration. The learned Counsel pointed out paper book page number 57 to 59, which is copy of Ledger account and submitted that unsecured loan in respect of Banuben I. Menon is coming from 01.04.2009, which showed opening balance as on 01.04.2009 at Rs.9,11,798/- and closing balance as on 31.03.2010 at Rs.10,10,272/- . The assessee has paid Rs.3 Lakh during the year under consideration and closing balance as on 31.03.2011 was at Rs.8,05,712/-. Thus, it was contended that there was no new loan taken during the last two years and only payment has been made during these years leaving the closing balance at Rs.8,05,712/-. Similarly, in the case of Baya Kadar Memon, copy of acknowledgement of return of income was filed which is appearing at Paper Book Page No. 49-51 and confirmation at Paper Book Page No. 52. The copy of ledger account is appearing at Paper Book Page No. 60 to 62 which showed that unsecured loan were coming as opening balance as on 01.04.2009 at Rs.5,59,986/- was shown (PB-62) on which interest of Rs.67,198/- was credited in F.Y. 09-10 and opening balance as on 01.04.2010 is shown at Rs.6,20,464/- on which interest of Rs.55,469/- was credited the current year on which TDS was

also made and closing balance as on 31.03.2011 is shown at Rs.6,75,933/- (PB-60). Similarly, in the case of Femida Arifbhai Memon, the ledger account is appearing at Paper Book Page No. 63, which also showed opening balance of Rs.6,20,464/- as on 01.04.2010 and thus, this unsecured loan is old one, and after payment of Rs.3,75,000/- and credit of interest of Rs.55,469/- during year under consideration, closing balance as on 31.03.2011 is shown at Rs.2,95,386/- (PB-63) for which confirmation and contra confirmation has been filed. She is assessed to tax and copy of acknowledgement of return of income was filed which is appearing at Paper Book Page No. 45 to 48. Unsecured loan in the case of Arif I. Memon, copy of ledger account and confirmation filed which is appearing at Paper Book Page No. 65 to 67 and copy of acknowledgement of return of income placed at Paper Book Page No. 53-54 and contra confirmation at Paper Book Page No. 56. This shows that this loan is coming from 01.04.2009 at Rs.8,18,879/- and closing balance as on 31.03.2010 at Rs.9,07,318/- and closing balance 31.11.2011 is shown at Rs.10,16,196/-. Similarly, unsecured loan in respect of Navinbhai are also old one and opening balance as on 01.04.2010 is at Rs.3,00,000/- only.(PB-68). The AO vide notice under section 142(1) dated 31.07.2011 (PB-16-18) has called for details of unsecured loan vide point no. 3 of questionnaire of which reply was duly furnished by the assessee appearing at Paper Book Page No. 14-15. Thus, the AO has duly

examined the details of unsecured loan and no addition was made on this account.

6. Learned counsel submitted that reply of trade advance for booking of vehicle was filed before Pr. CIT appearing at Paper Book Page No. 8, which was supported by the receipts issued to the parties in current year, sales made in next year and sale bills issued in the next year. The learned counsel for the assessee submitted that total booking advance of Rs.1,75,20,679/- received during the year under consideration of which sales were recorded during next year and only an amount of Rs.8,97,889/- was returned back to the customers due to cancellation of bookings. The details of booking advance from 01.04.2010 to 31.03.2011 is appearing at Paper Book Page No. 69 to 79. Further, detailed statement of booking advance and sales against these advance in next year are appearing at Paper Book Page No. 80 to 100 in respect of 709 number of vehicles and only amount were returned back is at Rs.8,97,889/- due to cancellation. Thus, the income from booking advance has been duly accounted in next year and reflected in audited books of accounts. Learned counsel submits that booking advance increased during year as the assessee dealer company Hero MotoCorp Company had introduced new bike Splendor Pro & Passion Pro during the year under consideration and to get delivery the customers rushed with booking money by making advance payment. Thus, all the details are disclosed and the Pr. CIT has

not discussed as to how the assessment order passed by the AO is prejudicial to the interest of the Revenue. Learned Counsel placed reliance on the judgement of Hon`ble Rajasthan High Court in the case of CIT vs. Jain Construction [2013] 257 ITR 336 (Raj.)of which head notes reads as: Held, that safeguard provided to assessee in section 263 is that mere erroneous orders are not revisable but revisional authority has to further establish with material on record that such erroneous order is also prejudicial to the interest of revenue-twin conditions of assessment order being erroneous and it also being prejudicial to the interest of revenue, keeps initial burden on Commissioner, who invokes such jurisdiction- Premises for invoking the revisional jurisdiction on the ground that the Assessing Authority made insufficient inquiry or improper enquiry and paid to verify closing the stock in record of the assessee, before passing assessment order, falls flat by a bare perusal of assessment order itself-Thus, Tribunal was justified in holding that Commissioner was in error invoking revisional jurisdiction u/s. 263 - Mere alleged insufficiency of inquiry in of opinion of Commissioner By Assessing Authority, would not permit him to in walk revisional jurisdiction u/s.263. Therefore, essential twin condition for invoking revisional jurisdiction, were not satisfied - Order of tribunal upheld Revenue`s appeal dismissed. The details of vehicle advance were filed but the Pr.CIT has not given any finding as to how the order in prejudicial to the interest of the Revenue. The learned counsel for the assessee submitted

that though the Pr. CIT has not specifically invoked explanation 2 to section 263, still observed the section 263 can be invoked even where full facts are disclosed but the AO has not examined these details as per correct proposition of law. However, the learned counsel for the assessee submitted that no such addition have been made in subsequent assessment year in A.Y. 2011-12. Where two views are possible, even then revision jurisdiction cannot be invoked as held by the Hon`ble Supreme Court in the case of CIT vs. CIT v. Max India Ltd. [2007] 295 ITR 282 (SC) reiterated that the phrase "Prejudicial to the interests of the Revenue" as used in section 263(1) of the Act must be read in conjunction with the expression "erroneous" and unless the view taken by the Assessing Officer is found to be unsustainable in law, the powers under section 263 of the Act cannot be invoked.

7. Thus, the ld. Counsel for the assessee argued that this proves that the AO was alive to the proceedings and it was only after applying his mind to the facts of the case and therefore, such assessment order passed is not erroneous. The ld. Counsel for the assessee further submitted that the CIT in his notice himself mentioned that "from the assessment record" which means that the facts were on record and were examined by the AO. It was submitted that erroneous order means the assessment that deviate from law and not in accordance with law. If the

AO acting in accordance with law makes certain assessment the same cannot be termed as erroneous.

8. In support of his contentions, the ld. Counsel for the assessee relying on plethora of decisions, including the decisions of the Hon'ble Supreme Court in Malabar Industrial Co. Limited (243 ITR 83); and CIT V/s. Max India Ltd. 2007] 295 ITR 282 (SC), CIT vs. Amit Corporation [2012] 81 CCH 69 (Guj. HC), CIT V. Arvind Jewellers [2003] 259 ITR 502 (Gujarat), CIT Vs. Nirav Modi [2016] 71 taxmann.com 272 (Bombay) Pr. CIT v. Delhi Airport Metro Express Pvt. Ltd. [I.T.A.No. 705/2017 dtd.05.09.2017] of Hon`ble Delhi High Court, Pr. CIT v. Modicare Limited I.T.A.No. 759/2017 Delhi High Court, ITO V. DG Housing Projects Limited [2012] 343 ITR 329 (Del), CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Delhi) [2010] 189 Taxman 436 (Delhi) and CIT vs. Vikas Polymers [2012] 341 ITR 537 (Delhi) .The learned counsel for the assessee submitted as a settled position of law that when the assessing officer has taken a certain view on the basis of evidence before him, in the details of brokerage/ commission , confirmation of unsecured loan and details of booking advances from customers to enquiries made by the assessing officer, the Commissioner of Income-tax cannot seek to revise the assessment under Section 263 of the Act by taking a different view.

9. On the other hand, the Ld.CIT(DR) submitted this is a case of inadequate inquiry. The AO collected the information but did not apply

his mind nor made adequate discussion in the assessment order. In para 5 of assessment order, the AO discussed brokerage/ commission but didn't examine the details and new source. The decision of CIT vs. Jain Construction (supra) is not applicable as in said case decision is dated 24.12.2012 where Explanation 2 to section 263 was not available. The AO has not made proper inquiry as the booking advance was substantially increased during the year under consideration. The Ld. CIT (DR) further relied on his written submissions filed before bench and contended that the order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Hence, Pr.CIT has rightly assumed jurisdiction to set-aside the issue to the AO for fresh examination. The Ld. CIT (DR) also relied on in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC) : [2003] 183 CTR 228 (SC) : [2003] 131 Taxman 535 (SC) and Gee Vee Enterprises v. Addl. CIT [1975] 99 ITR 375 (Del).

10. We have heard the rival submissions of both the parties and perused the material available on record. We have gone through all the judgements cited by the parties before us. We note that section 263 of the Act enables supervisory jurisdiction to the Pr. CIT over the AO. The Pr. CIT is empowered to act u/s. 263 of the Act when he considers that AO's order is erroneous in so far as it is prejudicial to the interest of Revenue. It is a settled position of law that the aforesaid twin condition i.e. AO's order is erroneous and prejudicial to the interest of revenue is

sine qua non for assumption of revisionary jurisdiction by Pr.CIT. As per the scheme of the Act, AO has a dual role to discharge while assessing the income of an assessee. He is both an investigator as well as an adjudicator. If the AO fails in discharging any of the two said duties i.e. as an investigator or that of an independent/impartial adjudicator, the Pr. CIT's supervisory jurisdiction is attracted because the order of the AO would be erroneous for lack of inquiry. Thus if he does not investigate, it would be erroneous for failure of AO to adjudicate as an independent/impartial adjudicator which means that if the AO passes assessment order in violation of natural justice, or there is bias or arbitrariness etc. then also the order of AO would be erroneous. When we say that lack of inquiry makes an AO's order erroneous, one has to keep in mind the difference between lack of inquiry and inadequate inquiry. Lack of inquiry makes the AO's order erroneous, but inadequate inquiry does not make the order of AO erroneous.

11. Thus, in order to exercise the powers under section 263(1) of the Act, the Commissioner of Income tax must be satisfied that the assessment order made by the Assessing Officer was (a) erroneous; and (b) prejudicial to the interests of the Revenue. The learned counsel for the assessee submitted that the Id. CIT can assume jurisdiction under section 263 of the Act only if the order of the AO is erroneous in so far as it is prejudicial to the interest of the revenue. Both the conditions have

to be fulfilled before action under section 263 is initiated. The perusal of para No 5 of assessment order would show that the AO has duly made enquiry regarding brokerage expenses of Rs. 49, 05, 800 20 and discussed the same in the body of assessment order by mentioning that on verification of vouchers and bills relating to these expenses produce during the course of assessment proceedings, it is noted that certain vouchers were not properly filled in to show that expenses were incurred for the business of the assessee. Further, considering the quantum of brokerage expenses and vehicle sales (7507 Nos), it appears that the assessee has paid brokerage on each of vehicles of approximate Rs.650. When the assessee itself dealer, they need not to pay brokerage of each vehicle. Considering the circumstances and facts of the case, Rs.75,000/- was disallowed out of brokers expenses and added to the total income of the assessee. Thus, the AO had duly made enquiries and applied his mind to the facts and made disallowance also. Therefore, where the AO has taken a plausible view and where two views are possible, the order cannot be said to be erroneous and prejudicial to the interest of the Revenue. We observe that the Pr. CIT noted that the AO has not examined the unsecured loan obtained from five parties. However, it is seen that out of 5 parties of unsecured loan, confirmation were duly submitted in respect of 4 parties. All the five unsecured loan are being old one and these are appearing as opening balance as on 01.04.20010 in the audited books of accounts. Therefore, even if the loans were unexplained, no addition could have been made for the assessment year

under consideration. The perusal of paper book page number 57 to 59, which is copy of Ledger account and submitted that unsecured loan in respect of Banuben I. Menon is coming from 01.04.2009, which showed opening balance as on 01.04.2009 at Rs.9,11,798/- and closing balance as on 31.03.2010 at Rs.10,10,272/- . The assessee has paid Rs.3 Lakh during the year under consideration and closing balance as on 31.03.2011 was at Rs.8,05,712/-. Thus, there were no new unsecured loan taken during the last two years and only payment has been made during these years living the closing balance at Rs.8, 05, 712/-. Similarly, in the case of Baya Kadar Memon, copy of acknowledgement of return of income was filed which is appearing at Paper Book Page No. 49-51 and confirmation at Paper Book Page No. 52. The copy of ledger account is appearing at Paper Book Page No. 60 to 62 which showed that unsecured loan were coming as opening balance as on 01.04.2009 at Rs.5,59,986/- was shown (PB-62) on which interest of Rs.67,198/- was credited in F.Y. 09-10 and opening balance as on 01.04.2010 is shown at Rs.6,20,464/- on which interest of Rs.55,469/- was credited di current year on which TDS was also made and closing balance as on 31.03.2011 is shown at Rs.6,75,933/- (PB-60). Similarly, in the case of Femida Arifbhai Memon, the ledger account is appearing at Paper Book Page No. 63, which also showed opening balance of Rs.6,20,464/- as on 01.04.2010 and thus, this unsecured loan is old one, and after payment of Rs.3,75,000/- and credit of interest of Rs.55,469/- during year under consideration, closing balance as on 31.03.2011 is shown at Rs.2,95,386/-. (PB-63) for

confirmation and contra confirmation has been filed. She is assessed to tax and copy of acknowledgement of return of income was filed which is appearing at Paper Book Page No. 45 to 48. Unsecured loan in the case of Arif I. Memon, copy of ledger account and confirmation filed which is appearing at Paper Book Page No. 65 to 67 and copy of acknowledgement of return of income placed at Paper Book Page No. 53-54 and contra confirmation at Paper Book Page No. 56. This shows that this loan is coming from 01.04.2009 at Rs.8,18,879/- and closing balance as on 31.10.2010 at Rs.9,07,318/- and closing balance 31.11.2011 is shown at Rs.10,16,196/-. Similarly, unsecured loan in respect of Navinbhai are also old one and opening balance as on 01.04.2010 is at Rs.3,00,000/- only.(PB-68). We also find that the AO vide notice under section 142(1) dated 31.07.2011 (PB-16-18) has called for details of unsecured loan vide point no. 3 of questionnaire of which reply was duly furnished by the assessee appearing at Paper Book Page No. 14-15. Thus, the AO has duly examined the details of unsecured loan and no addition was made on this account. Therefore, the order passed by the AO on this score was neither erroneous nor prejudicial to the interest of revenue. With regard to advance for booking of vehicle, the submission of the assessee made before Pr. CIT is appearing at Paper Book Page No. 8, which was supported by the receipts issued to the parties in current year, sales made in next year and sale bills issued in the next year. It has been contended that total booking advance of Rs.1,75,20,679/- received during the year under consideration of which sales were recorded during

next year and only an amount of Rs.8,97,889/- was returned back to the customers due to cancellation of bookings. The details of booking advance from 01.04.2010 to 31.03.2011 is appearing at Paper Book Page No. 69 to 79. Further, detailed statement of booking advance and sales against these advance in next year are appearing at Paper Book Page No. 80 to 100 in respect of 709 number of vehicles and only amount were returned back is at Rs.8,97,889/- due to cancellation. Thus, the income from booking advance has been duly accounted in next year and reflected in audited books of accounts. The reason for increased of advance is also found is due to introduction of new bike by the Hero MotoCorp Company named as Splendor Pro & Passion Pro during the year under consideration and to get delivery the customers rushed with booking money by making advance payment. Thus, all the details are disclosed and the Pr. CIT has not discussed as to how the assessment order passed by the AO is prejudicial to the interest of the Revenue. The Hon`ble Rajasthan High Court in the case of CIT vs. Jain Construction [2013] 257 ITR 336 (Raj.) of which head notes reads as: ***Held, that safeguard provided to assessee in section 263 is that mere erroneous orders are not revisable but revisional authority has to further establish with material on record that such erroneous order is also prejudicial to the interest of revenue-twin conditions of assessment order being erroneous and it also being prejudicial to the interest of revenue, keeps initial burden on Commissioner, who invokes such jurisdiction- Premises for invoking the revisional jurisdiction on the***

ground that the Assessing Authority made insufficient inquiry or improper enquiry and failed to verify closing the stock in record of the assessee, before passing assessment order, falls flat by a bare perusal of assessment order itself-Thus, Tribunal was justified in holding that Commissioner was in error invoking revisional jurisdiction u/s. 263 - Mere alleged insufficiency of inquiry in opinion of Commissioner By Assessing Authority, would not permit him to invoke revisional jurisdiction u/s.263. Therefore, essential twin condition for invoking revisional jurisdiction, were not satisfied - Order of tribunal upheld Revenue's appeal dismissed. The details of vehicle advance were filed but the Pr. CIT has not given any finding as to how the order is prejudicial to the interest of the Revenue. We also note that the Pr. CIT has not specifically invoked explanation 2 to section 263. Further, such claim was found acceptable in next year. Where two views are possible, even then revision jurisdiction cannot be invoked as held by the Hon`ble Supreme Court in the case of CIT vs. CIT v. Max India Ltd. [2007] 295 ITR 282 (SC) reiterated that the phrase "prejudicial to the interests of the Revenue" as used in section 263(1) of the Act must be read in conjunction with the expression "erroneous" and unless the view taken by the Assessing Officer is found to be unsustainable in law, the powers under section 263 of the Act cannot be invoked.

12. The Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC) 109 Taxman 66 (SC) had interpreted the provisions

of section 263(1) in the following words :*"A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo-moto-moto 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. There can be no doubt that 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. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with*

which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law."

13. Following the aforesaid judgment, the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282(SC) reiterated that the phrase "prejudicial to the interests of the Revenue" as used in section 263(1) of the Act must be read in conjunction with the expression "erroneous" and unless the view taken by the Assessing Officer is found to be unsustainable in law, the powers under section 263 of the Act cannot be invoked.

14. The order passed by the AO, in our opinion, shall be deemed to be erroneous in so far as it prejudicial to the interest of the Revenue, if the Pr. CIT would have specifically pointed out which of inquiries or verification should have been carried out by the AO in this regard and the AO failed to carry out those inquiries and verification as desired by the Pr. Commissioner of Income-tax. Since the Pr. CIT has not suggested the basis of inquiry or verification to be carried out by the AO, the order passed by the AO cannot be deemed to be erroneous in so as far as it is prejudicial to the interest of the Revenue.

15. In the case of CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Delhi) [2010] 189 Taxman 436 (Delhi) it was held that if there is some enquiry by the Assessing Officer in the original proceedings, even if inadequate,

that cannot clothe the Commissioner with jurisdiction under section 263 merely because he can form another opinion. At the most, the case of the assessee can be regarded to be lack of inquiry in accordance with Commissioner of Income tax if he has different opinion how to proceed with assessment of the case.

16. In the light of the previously mentioned judicial precedents and facts of the present case, what has to be seen is whether the AO has made enquiries about brokerage/ commission, unsecured loan and booking advance. As we discussed in above para of this order would show that necessary enquiry was made and the AO duly applied his mind and reached a valid conclusion, which is supported by necessary evidence on record. Merely just because the view taken by the AO was not found acceptable does not mean that the AO has failed to make requisite enquiries. If the answer is affirmative then second question arises whether the acceptance of the claim by the AO was a plausible view or on the facts of the finding on the facts that the said finding of the AO can be termed as sustainable in law. We find that vide reply to questionnaire issue to it, the assessee furnished detail as required. In view of these facts and circumstances, we find that the AO has made due enquiries. Therefore, now we have to see whether the view taken by the AO was plausible view. Thus, the view taken by the AO was plausible view, which cannot be disturbed by the Ld. Pr. Commissioner of Income-tax. Therefore, we find that twin condition were not satisfied for invoking the

jurisdiction under section 263 of the Act. Therefore, in absence of the same the ld. CIT was not correct in exercise the jurisdiction under section 263 of the Act and set-aside the assessment and directing to be made after assessment. Accordingly, we quash the impugned order passed under section 263 of the Act and allow the appeal of the assessee.

17. In the result, the appeal of the assessee is allowed.

18. The order is pronounced by listing the case on the Notice Board under Rule 34(4) of Income Tax Appellate Tribunal Rules 1963.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER

Surat: Dated: 10th December, 2019/opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

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Assistant Registrar, Surat