आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL INDORE BENCH, INDORE

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.318/Ind/2015
Assessment Year: 2010-11**

Smt. Annapurna Mishra W/o Shri Kailash Mishra H.No.27, Shaheed Nagar Karbala, Bhopal	बनाम/ Vs.	CIT-1 Bhopal
(Appellant)		(Revenue)
P.A. No.ALIPM1854D		

Appellant by	Shri Prakash Jain & Miss Shreya Jain, A.Rs
Respondent by	Smt. Ashima Gupta, DR
Date of Hearing:	**13.11.2019**
Date of Pronouncement:	**17.01.2020**

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the assessee is directed order of the CIT-1, Bhopal dated 31.3.2015 for the assessment year

2010-11. The assessee has raised following grounds of appeal:

1. *That on the facts and circumstances of the case the order passed by the Ld. CIT u/s 263 of the Act is bad in law and is liable to be quashed.*
2. *That on the facts and circumstances of the case the Ld. CIT was not justified in initiating proceedings u/s 263 of the I.T. Act, 1961.*
3. *That on the facts and circumstances of the case the Ld. CIT was not justified in initiating proceedings u/s 263 of the I.T. Act,1961 on the basis of audit objection.*
4. *That the Ld. CIT erred in exercising the power of revision for the purpose of directing the A.O. to hold another investigation when the order of the A.O. was neither erroneous prejudicial to the interest of the revenue.*
5. *That the appellant prays that the order passed by the Ld. CIT u/s 263 of the Act may kindly be quashed.*

2. The only effective ground is against invoking the principles of section 263 of the Income Tax Act, 1961 (hereinafter called as 'the Act') dated 27.6.2012.

3. The facts giving rise to the present appeal are that in this case the assessment was framed u/s 143(3) of the Act vide order dated 27.6.2012, thereby the A.O. made addition

of Rs.43,923/- in respect of the low housing withdrawal and the disallowance of interest on agricultural land. Thereafter, the Ld. CIT-1 Bhopal issued a notice u/s 263 of the Act on the ground that the assessee had sold agricultural land admeasuring 14.70 acres and a house constructed thereon situated in village Raslakhedi, Bhopal. The assessee had not offered any income under the head "long term capital gains' on transfer of this land. Ld. CIT observed that during the course of assessment proceedings, the A.O. has not obtained details of acquisition of immovable property and the cost of construction of house on such house which was sold later on. The A.O. has merely accepted the contention of the assessee ignoring the fact that the assessee has not furnished any evidence to establish that the land was acquired through adverse possession and did not incur any expenses to acquire the land and the cost of construction

of house on such land. He observed that as per para 10 appearing at page 7 of the transfer deed mentioned that a house is constructed on the land which is also included in the property transferred by the assessee. In response to the notice, a written reply was filed on behalf of the assessee and the authorised representative also attended the proceedings. However, the Ld. CIT set aside the assessment order and directed the A.O. to frame assessment de-novo after obtaining evidence of acquisition of land, expenses incurred on the house construction on such land and legal/other expenses incurred to acquire such land & building and charged long term capital gain in accordance with the provisions of the Act.

4. Aggrieved against this, the assessee is in present appeal. Ld. Counsel for the assessee Shri Prakash Jain vehemently argued that the Ld. CIT was not justified in invoking the provisions of section 263 of the Act. He contended that the A.O. has duly examined all the aspects

of the case. He submitted that the revenue has not brought any material even no material was before Ld. CIT to rebut the contention that the subject land was not acquired by way of adverse possession. Ld. Counsel further reiterated the submissions as made in the written submissions. The submissions of the assessee are as under:

1] The appellant is derive income from house property , business , bank interest and Agricultural for the assessment year in question the appellant filed return of income declaring taxable income of Rs. 6,70,860 and agricultural income of Rs. 3,32,760. Apart from it the appellant has also sold agricultural land along with construction of small house to be used for storage purpose and keeping the agricultural equipment, for the consideration of Rs. 4,41,00,000, which were acquired by the appellant by adverse possession, hence it is claimed exempt being out of perview of section 55(2) of the Income Tax Act and as such not shown in return of income.

2] On the basis of AIR information the case was selected under scrutiny accordingly notice issued u/s 143(2) and 142(1) along with the detail questionnaire. The assessee filed reply of the questionnaire along with necessary proof and supporting. The Ld. A.O. after examining all the documents including reply filed by the assessee ,RIN Pustika for the financial year 1994-95 and 2000-01, P-I & P-II Khasra for the financial year 2008-09, Registered Sale Deed wherein on page 4 it is clearly mentioned that land is acquired by adverse possession by applying his mind and after satisfied reached on the conclusion that land along with house was acquired by adverse possession. Thus he held that income earned on sale of agricultural land along with small house sold for consideration of Rs. 4,41,00,000 is out of perview of section 55(2) and not liable to tax. By making following observation:-

Page 1 para 3

"निर्धारिती द्वारा कर निर्धारण वर्ष 2010–11 के दौरान कृषि भुमि का विक्रय रू. 4,41,00,000/– मे किया गया है । निर्धारिती द्वारा उक्त भुमि के विक्रय पर पूजीगत लाभ को अपनी आयकर विवरणी मे नही दर्शाया है , जिसके सम्बन्ध मे उनका कथन है कि उक्त भूमि कब्जे के माध्यम से प्राप्त की गई है एवं उसकी लागत मूल्य निर्धारिती के हाथ मे शून्य है ऐसी अचल संम्पत्ति के विक्रय से प्राप्त राशि NIL है एवं उसके विक्रय पर किसी भी प्रकार का पूंजीगत लाभ अर्जित नही होता है । अपनी कथन के सम्बन्ध मे उन्होने Deputy Commissioner of Income Tax V/s STAR CHEMICALS (BOM) (P) LTD. (2007) 110 TTJ (Mumbai) 753 एवं CIT V/s B.C. Sainivasa Setty (1981) 21 CTR (SC) 138 ने दिये गये निर्णयो का उल्लेख किया गया एवं आयकर अधिनियम की धारा 55(2) का हवाला देकर यह कथन किया कि उक्त धारा के अंतर्गत कब्जे मे प्राप्त की गई अचल संपत्ति को शामिल नही किया गया है । अतः उक्त अचल संपति के व्रिकय पर किसी भी प्रकार का पूंजीगत लाभ अर्जित नही होता है एवं पूंजीगत लाभ कर लागू नही होता है ।

निर्धारिती के उपरोक्त कथन की संपूर्ण जांच प्रस्तुत दस्तावेजो एवं आयकर अधिनियम की धारा 55(2) एवं प्रस्तुत निर्णयो के आधार पर विवेकानुसार की गई और उनके कथन को स्वीकार किया गया ।

3] From the above remark it is clear that the Ld. Assessing Officer after examining various documents filed before him reached on the following conclusion :-

(i) That the assessee is holding land prior to financial year 1994 by adverse possession which will be clear from the copy of Rin Pustika and Suit file by the assessee for removing the word from ceiling and so also from the page 4 para 2 of the sale deed which is on compilation page 29.

(ii) That Ld. A.O. also satisfied with the fact that the house i.e. storage for keeping equipment , crops etc .was already exist on the land from the compilation page 35 being page 7 para 11 of the sale deed . And only after examining the said fact he used in the assessment order word " Immovable Property" and not land, kindly refer page 2 para 1 of the assessment order refer page 15 of the compilation

(iii) The Assessing Officer in the assessment order also referred the decision in the case of CIT V/s Star Chemicals Pvt Ltd and CIT V/s B.C. Shriniwasan Shetty in support of his contention that the immovable property in question is out of perview of section 55(2) the same will be more clear from the following observation of the Ld.A.O. on page 2 para 2 of the assessment order :-

निर्धारिती के उपरोक्त कथन की संपूर्ण जांच प्रस्तुत दस्तावेजो एवं आयकर अधिनियम की धारा 55(2) एवं प्रस्तुत निर्णयो के आधार पर विवेकानुसार की गई और उनके कथन को स्वीकार किया गया ।

Thus the Ld.A.O. has passed the order after collecting all the information and examining the document , statement filed before him and after satisfying and applying his mind accepted the assessee's contention that the Land along with storage house is acquired by adverse possession.

3] After the completion of assessment the income tax officer raised an audit objection which is on page 45 & 46 of the compilation. The Ld.A.O. provided the copy of audit objection to the assessee and assessee filed its reply vide letter dated 12.02.2015.

4] On the basis of audit objection the Ld. Commissioner of Income Tax-1, Bhopal issued a show cause notice u/s 263 dated 26.03.2015. A copy of which is enclosed on compilation PB 48 to 50 which is duly replied by the assessee vide his letter dated 30.09.2015.

5] After receiving the reply of the assessee the Ld. Commissioner of Income Tax-1,Bhopal set aside the assessment to the Ld. A.O. u/s 263 with the direction to denovo after obtaining the evidence of acquisition of land, expenses incurred on house construction on such land and legal/other expenses incurred to acquire such land and building and charge long term capital gain in accordance with the provisions of the Income Tax Act, 1961.

Aggrieved by the above order passed by the Ld.CIT-1,Bhopal u/s 263 the assessee preferred present appeal. Now our ground submission before your honours are as under :-

Ground No. 1

It is general in nature.

Ground No. 3.

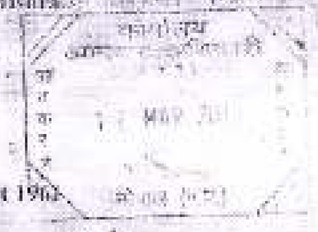
The said ground relates to initiating proceeding u/s 263 of the I.T.Act on the basis of Audit Objection.

1] In this regard it is submitted that the Ld.Commissioner of Income Tax initiated proceeding u/s 263 merely on the basis of Audit Objection which will be clear to your honours from the Audit Objection and notice u/s 263 copy paste herein below:-

(45)

OFFICE OF THE INCOME TAX OFFICER (IAP)
AAYAKAR BHAWAN, HOSHANGABAD ROAD, BHOPAL

Name of the Assessee	:	Smt. Annapurna Mishra
PAN	:	AUIPM1854D
Status	:	Individual
Assessment Year	:	2010-11
Date of assessment Order	:	27.06.2012
Returned Income	:	6,92,538/-
Income assessed u/s 143(3)	:	7,14,790/-
Section under which order passed	:	143(3) of the IT Act 1961
Name of the Assessing Officer	:	ITO 3(1), Bhopal



AUDIT OBJECTION

In this case return of income was filed on 15.10.2010 showing income of Rs. 6,92,535/-. Case was selected for scrutiny assessment by the Computer Assisted Scrutiny Selection (CASS). The assessment order was passed u/s 143(3) on 27.06.2012 determining income of the assessee at Rs. 7,14,790/-.

During the period under consideration, the assessee has offered income from the construction business and rent from tower. She has disclosed net profit of Rs. 7,41,810/- on total sales of 41,14,000/- and tower rent of Rs. 1,64,250/- shown in the P&L Account. It has been noticed from the record that the assessee has sold agricultural land admeasuring 14.70 acres and a house constructed on such land situated in Village Raslakhedi, Bhopal to P.C.H. International Pvt. Ltd. through registered sale deed dated 02.02.2010 for a total consideration of Rs. 4,41,00,000/-. The stamp duty authority has also determined market value of the property on the date of transfer as Rs. 4,41,00,000/-. The assessee has not offered any income under the head of Long Term Capital Gain on transfer of this land. During the course of the assessment proceedings, the AO has asked the assessee to furnish details of sale of immovable property which was reported through AIR Information.

In response to the query raised by the AO, the assessee has submitted copy of the registered sale deed as mentioned above and has claimed that no capital gain was offered in view of the fact that the land was acquired by adverse possession and thus had no cost of acquisition. The assessee has relied upon the decision in the case of DCIT Vs. Star Chemicals (Bom) P. Ltd. Wherein it has been held that no capital gain can be levied in case of transfer of a capital asset acquired without any consideration through adverse possession.

The AO has accepted the contention of the assessee ignoring the fact that the assessee has not filed any evidence to establish that the land was acquired through adverse possession. **Here, it is important to mention that Para No. 10 appearing at Page No. 7 of the transfer deed clearly mention that a house is constructed on the said land which is also included in the property transferred by the assessee.** The assessee has not furnished any details regarding the construction of the house on the land. The house cannot be acquired through adverse possession and hence in these circumstances, cost of construction of the house constitutes the cost of acquisition of the property sold by the assessee even if the contention of the assessee regarding the acquisition of land by adverse possession is accepted. Hence, in these circumstances, the AO was required to determine LTCG by taking cost of construction of the house plus cost of acquisition of the land, if any, as the cost of acquisition of the property sold (land and house constructed thereupon). Ratio of the decision in the case DCIT Vs. Star Chemicals (Bom) P. Ltd. Cannot be applied in view of the facts of the case discussed above as the cost of acquisition of the entire property cannot be accepted as nil

(96)

In view of the non-availability of the details of cost of acquisition of the property in the case record of the assessee, it is not possible to determine the actual LTCG on sale of property.

Thus there is under assessment is Rs. [illegible]41,00,000/- and consequent *short levy of tax & interest of Rs.* *which may kindly be looked into.*

Rs. [illegible]/-

(G.S. Raghav)
Income tax Officer (IAP)
Bhopal

Bhopal dated:28.02.2013

Copy to:

1. The Commissioner of Income tax (Audit), Bhopal, for information.
2. The Commissioner of Income tax, Bhopal, for information.
3. The Jt. Commissioner of Income tax (Audit), Bhopal, for information.
4. The Addl. Commissioner of Income tax - Range-3, Bhopal, for information.
5. The Income Tax Officer 3(1), Bhopal for information.

Income tax Officer (IAP)
Bhopal

(98)

Govt. of India, Ministry of Finance
Office of the Commissioner of Income Tax-1
Aayakar Bhawan, Hoshangabad Road, Bhopal

F.No.CIT 1/BPL/Admn./263/2014-15 Dated: 26/03/2015

To, PAN: ALIPM1854D

Smt. Annupurna Mishra,
W/o Shri Kailash Mishra,
H.No. 27, Shaheed Nagar,
Karbala Road,
Bhopal-462001

Sir,

Sub: Notice U/s 263 of the Income Tax Act, 1961—A.Y. 2010-11 Show Cause-regarding-

Please refer to the order u/s 143(3) of the Income Tax Act, 1961 dated 27/06/2012 passed by the ITO- Ward 3(1), Bhopal for the A.Y. 2010-11.

2. The order u/s 143(3) dated 27/06/2012 passed by the Assessing Officer is considered as erroneous and prejudicial to the interests of revenue as during the course of assessment proceedings it was observed that

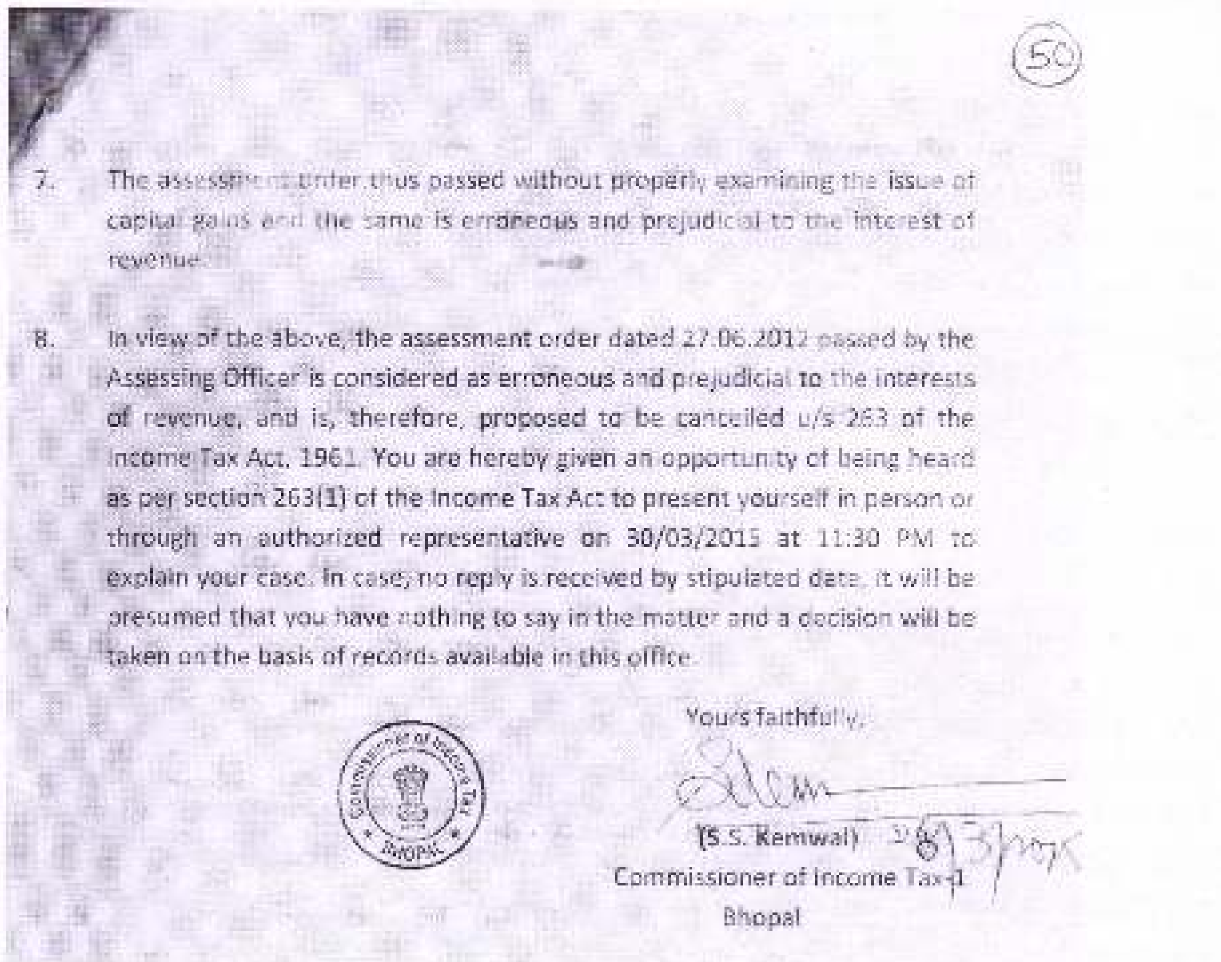
3. The Assessment order u/s 143(3) dated 27/06/2012 has been passed without properly examining the claim of the assessee that the land is acquired through adverse possession, hence the cost of acquisition of the said land is NIL and as per provisions of section 55(2) the Income Tax Act, the assessee is not liable for any capital gains tax.

(49)

4. It has been noticed from the record that the assessee has sold agricultural land admeasuring 14.70 acres and a house constructed on such land situated in Village- Raslakhedi, Bhopal to P.G.H. International Pvt. Ltd. through registered sale deed dated 02/02/2010 for a total consideration of Rs. 4,41,00,000/-. The stamp duty authority has also determined market value of the property on the date of transfer as Rs. 4,41,00,000/-. The assesssee has not offered any income under the head of **Long Term Capital Gain** on transfer of this land. During the course of the assessment proceedings, the AO has not obtained details of acquisition of immovable property which was sold lateron.

5. The AO has accepted the contention of the assessee ignoring the fact that the assessee has not filed any evidence to establish that the land was acquired through adverse possession. Here, it is important to mention that Para No.10 appearing at page No. 7 of the transfer deed clearly mention that a house is constructed on the said land which is also included in the property transferred by the assesssee. The assessee has not furnished any details regarding the construction of the house on the land. The house can not be acquired through adverse possession and hence in these circumstances, cost of construction of the house constitutes the cost of acquisition of the property sold by the assessee even if the contention of the assessee regarding the acquisition of land by adverse possession is accepted. Hence, in these circumstances, the AO was required to determine LTCG by taking cost of construction of the house plus cost of acquisition of the land, if any, as the cost of acquisition of the property sold (land and house constructed thereupon) and to determine the LTCG on the sale the land in question.

6. The Assessing Officer has failed to obtained the details of cost of acquisition of the property in the case record of the assessee and without which, it is not possible to determine the actual LCG on sale of property. Thus, there is under assessment is Rs.4,41,00,000/- and consequent short levy of tax & interest of Rs. 1,15,20,002/-.



(50)

7. The assessment order thus passed without properly examining the issue of capital gains and the same is erroneous and prejudicial to the interest of revenue.

8. In view of the above, the assessment order dated 27.06.2012 passed by the Assessing Officer is considered as erroneous and prejudicial to the interests of revenue, and is, therefore, proposed to be cancelled u/s 263 of the Income Tax Act, 1961. You are hereby given an opportunity of being heard as per section 263(1) of the Income Tax Act to present yourself in person or through an authorized representative on 30/03/2015 at 11:30 PM to explain your case. In case, no reply is received by stipulated date, it will be presumed that you have nothing to say in the matter and a decision will be taken on the basis of records available in this office.

Yours faithfully,

(S.S. Kemwal)
Commissioner of Income Tax-1
Bhopal

2] If your honours will go through the Audit Objection and the language use in the show cause notice issued by the Ld.CIT -1,Bhopal for initiating revision proceedings u/s 263 you will find that the language of both are same which will clear that in audit objection as well as show cause notice copy paste hereinabove we have marked the same by underline. Thus the Ld. Commissioner of Income Tax in proceeding u/s 263 raised only those grounds which are raised in the audit objection and both are in the similar language and same worded . Moreover after filing of the reply of audit objection the Ld.A.O. has not taken any adverse view against the assessee. These facts clearly shown that Ld. CIT influenced by the audit objection raised by the Internal Audit Party for initiating proceedings u/s 263 which is not permissible under the law in view of the following decisions:-

(i) CIT V/s Sohan Wollen Mills (2008) 296 ITR 238 (P& H) it the instant case

Page 241 para 7

7. A reference to the provisions of s. 263 of the Act shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation.

(ii) In the case of SEL Mfg Co. Ltd V/s The Addl.CIT , ITA No. 409 & 410 /CHD/2014 order dated 18.11.2015 held as under:-

Page 35 & 36 , Para 27 & 28

27. Considering the audit object ions on record on these issues under reference and replies of the assessee, clearly support the submissions of the assessee that initiation of the proceedings under sect ion 263 were bad in law. We may also note here that replies of the assessee to the audit object ions were supported by the complete data supplied by assessee as well as complete details on elect ronicinstallation which are part of the plant and machinery and deduct ion under sect ion 14A was also supported by complete details. Therefore,these facts would clear ly prove that when after raising
audit object ions by the Revenue Department and replies filed by assessee to the same could not be considered adverse in nature by the Assessing Officer , the present proceedings under sect ion 263 have been initiated to thwart the provisions of law. Considering the above discussion, we are of the view that initiation of proceedings under sect ion 263 in the facts and circumstances of the case, was wholly unjustified. The order of the Assessing Officer , thus, could not be said to be erroneous in so far as pre judicial to the interest of revenue. The decisions relied upon by ld. DR would not support the case of the revenue. In view of the above discussion, we do not subscribe to the view of Ld. CIT in passing the impugned order under sect ion 263 of the Act .

28. We, accordingly, set aside the impugned order under sect ion 2623 of the Act and quash the same.
Resultantly, the original assessment order is restored.

(iii) In the case of Satya Prakash Gupta V/s ITO ITA No.2730/Del/2013 order dated. 07.03.2014

3] As per the provision of section 263 it is the Commissioner of Income Tax who has to examine the records and thereafter form an independent opinion that the order passed by the Assessing Officer is erroneous in so far as it prejudicial to the interest of revenue. In the present case from the audit objection and show cause notice issued u/s 263 it is clear that the Commissioner of Income Tax has not exercised his independent judgment for invoking revisional powers, because audit objection and so also notice u/s 263 is same worded , from this fact it is clear that the Ld. Commissioner has neither examined the record nor make any independent opinion for issue of notice u/s 263.

4] A perusal of the impugned order shows, that the Commissioner of Income Tax in the instant case has merely reproduced the deficiencies pointed out by the Dy. Commissioner of Income Tax in the assessment order. The Commissioner of Income Tax has not given the reasons as to how the findings of the Assessing Officer are erroneous in so far as prejudicial to the interest of revenue. The contention of the assessee is that all the relevant documents were placed on record by the assessee during the course of assessment proceedings. The Assessing Officer has passed the order after considering the same. The duty of the assessee is bring all the relevant documents before the Assessing Officer. The manner in which the order is to be passed is the prerogative of the Assessing Officer.

5] The order of the Assessing Officer may be brief and cryptic but that by itself is not sufficient reason to hold that the assessment order is erroneous and prejudicial to the interest of revenue. It is for the Commissioner to point out as to what error was committed by the Assessing Officer in taking a particular view. In the case in hand, the Commissioner of Income Tax has failed to point out error in the assessment order. For invoking revisionary powers the Commissioner of Income Tax has to exercise his own discretion and judgment. Here the Commissioner of Income Tax has invoked the provisions of section 263 at the mere suggestion of the Internal Audit Party without exercising his own discretion and judgment. Thus the order passed by the Ld.CIT is illegal in view of the following decisions :-

Hon'ble Supreme Court

(i) In the case of Malabar Industrial Co. Ltd. v CIT 243 ITR 83 (SC) held as under :

"Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated asprejudicial 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."

(ii) Hon'ble Bombay High Court in the case of CIT V Gabriel India Ltd. 203 ITR 108 held as under :

Held, that 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 a detailed explanation in that regard by a letter in writing. Al l these were 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. This decision of the Income- tax Officer could not 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 was not permissible. The Tribunal was justifies in setting aside the order passed by the Commissioner of Income- tax under section 263."

(iii) Hon'ble Delhi High Cour t in the case of CIT V Anil Kumar Sharma 335 ITR 83 held as under :

"There is a 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 Income-tax 1961, merely because he has a different opinion in the matter :

Held, dismissing the appeal, that the present case would not be one of "lack of inquiry" even if the inquiry was termed inadequate. The Tribunal found that complete details were filed before the Assessing Officer and that he applied his mind to the relevant material and facts, although such application of mind was not discernible from the assessment order. The Tribunal held that the commissioner in proceedings under section 263 also had all these details and material available before him, but had not been able to point out defects conclusively in the material for arriving at a conclusion that particular income had escaped assessment on account of non-application of mind by the Assessing Officer. The Tribunal was right and the order of revision was not valid."

(iv) Hon'ble Delhi High Court in the case of CIT V Hindustan Marketing & Advertising Co. Ltd. 341 ITR 180 held as under :

"Revision – Powers of Commissioner-Assessment after enquiry – No error in order – Order cannot be revised on ground enquiry should have been more detailed – Income-tax Act, 1961, s. 263."

(v) Hon'ble Delhi High Court in the case of CIT V Sunbeam Auto Ltd. 332 ITR 167 held as under :

"Held, dismissing the appeal (i) that the Assessing Officer allowed the claim on being satisfied with the explanation of the assessee. Such decision of the Assessing Officer could not be held to be erroneous simply because in his order he did not make an elaborate discussion in that regard. The Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. This fact was conceded by the Commissioner himself in his order. This showed that the Assessing Officer had undertaken the exercise of examining as to whether the expenditure incurred by the assessee in the replacement of dies and tools was to be treated as revenue expenditure or not. Therefore, it could not be said that it was a case of lack of inquiry. The accounting practice followed for a number of years had the approval of the income- tax authorities. Even for future assessment years, the very same accounting practice was accepted.

(ii) That the dies were components of the machines. They needed constant replacement, as their life was not more than a year. The assessee also explained that since the parts were manufactured for the automobile industry, which had to work on complete accuracy at high speed for a longer period, replacement of the parts at short intervals becomes imperative to retain the accuracy. With the replacement of tools

and dies no new asset comes into existence nor was their benefit of enduring nature. They did not even enhance the life of the existing machine of which the tools and dies were only parts. Therefore, the view taken by the Assessing Officer was one of the possible views and the assessment order passed by him could not be held to be prejudicial to the interests of the Revenue. The opinion of the Assessing Officer in treating the expenditure as revenue expenditure was plausible and thus there was no material before the Commissioner to vary that opinion and ask for fresh inquiry"

(vi) Hon'ble Punjab & Haryana High Court in the case of CIT V Deepak Mital 324 ITR 411 held as under:

Change of opinion by reappraising the evidence is not within the para-meters of revisional jurisdiction of the Commissioner under section 263 of the : Act, 1961.

Held, dismissing the appeal, that the Tribunal had found that the Assessing Officer had given a categorical finding that the assessee was engaged in the process of manufacturing of products and accordingly he had granted concession under section 80-IB. The claim of the assessee had been found to be genuine. The Assessing Officer had also examined the various workers of the assessee and then recorded the finding. The Assessing Officer was justified in granting the special deduction under section 80-IB. The order of revision disallowing the special deduction was not valid."

(vii) Hon'ble Guj rat High Court in the case of CIT V Amit Corporation 21 Taxman.com 64 held, "Where Assessing Officer after detailed verification on record and making enquiries had framed assessment, the CIT could not revise the same under sect ion 263 of the Income Tax Act " .

In view of above facts it is prayed that the order passed by the Ld.CIT (A) is without examining the record , without making independent judgment for invoking the revisional power issued notice u/s 263 merely on the basis of audit objection thus it is requested to quashed the same.

Ground No. 4

On this ground we have to submit that the order passed by the Ld. CIT(A) has passed revisional order u/s 263 by holding following :-

1] The assessee has not filed any evidence to establish that the land was acquired to adverse possession and did not incurred any expenses to acquire the land and cost of construction of house on such land .

In this regard we have to submit as under:-

(i) That page 4 para 2 of the registered sale deed filed before the Ld. A.O. during the course of assessment proceedings reads as under:-

" यह कि उपरोक्त वर्णित संपत्ति संपूर्ण भूमि विकेता के स्वत्व, स्वामित्व एवं आधिपत्य की भूमि है और इस सम्पूर्ण भूमि पर उनका एवं उनके परिवार का कई वर्षो से आधिपत्य बगैर किसी विवाद के चला आ रहा है । उक्त संपूर्ण भूमि का नामांतरण तहसील एवं राजस्व अभिपलेखो मे विकेता के नाम पर हो चुका है जिसका नामांतरण पंजी कमांक 20 आदेश दिनांक 12.06.2000 है तथा वर्तमान चालू वर्ष के खसरा में भी यह भूमि उनके नाम पर दर्ज है । विकेता के नाम पर भू –अधिकार एवं त्रण पुस्तिका भाग–1 बनी हुई है जिसका कमांक एम 23662 है । इस प्रकार उक्त संपूर्ण भूमि विकेता के स्वत्व, स्वामित्व एवं आधिपत्य में बगैर किसी विवाद के आज दिनांक तक चली आ रही है और उन्हे बिकित भूमि पर वे समस्त अधिकार प्राप्त है जो कि एक विकेता को प्राप्त होना चाहिए और इसी आधार पर वे उपरोक्त भूमि संपूर्ण रकबा 5.951 हेक्टर अर्थात 14.70 एकड़ जिसका उल्लेख पूर्ण विवरण सहित तृतीय पृष्ठ पर दर्शाया गया है , को केता के पक्ष मे सदैव के लिये सर्वाधिकार सहित विकय कर रही है और इस दस्तावेज का निष्पादन उनके पक्ष मे इस प्रकार कर दे रही है :–

(ii) From the above it is clear that the assessee acquired the land in question along with house constructed thereon i.e. godown by adverse possession otherwise in the sale deed instead of that following words was written :-
" That the seller purchased the land along with house from Shri…………. vide registered sale deed no. ……….. dated…………. .

(iii) The registered sale deed itself proves that the assessee acquired the property in question by adverse possession.

(iv) That the assessee is filing her income tax return from last so many years and showing Agricultural Income thereon. In the balance sheet filed with the return of income the said land was not appearing as same was acquired by adverse possession and its cost is NIL. However the income of the same was regularly shown in the returns .This fact itself proves that the appellant was having adverse possession on the property.

(v) It is undisputed that the assessee did have ownership of the property in question and by virtue of that he has been able to successfully sale the right for enormous price. Which is evident from the fact that the price received by the assessee is more than the circle rate fixed by the stamp authority.

(vi) The assessee is enjoying peaceful possession of the property since 1995 which is evident from the Rin Pustika.

(vii) That the assecesee has also filed proof before the Competent Authority to release the land from the acquisition.

From all above facts which are on record it is proved that the assessee was having adverse possession on land and the Ld.CIT failed to examined the same as he has not verified the record and the notice was given merely on the basis of audit objection.

2] The contention of the Ld. Commissioner of Income Tax that the house cannot be acquired through adverse possession This contention of the Ld. CIT is wrong and without any basis , because any property i.e. assets can be acquired by adverse possession which will be clear from the following decision :-

(i) Yashoda Deora & Shri Pradeep Kumar Deora V/s ITO 30 (3) & DCIT (Central Cricle) ITA No. 835/Kol/2008 & 281 /Kol/2013 in the instant case it was held that :-

In the instant case ,We find that AO has made the protective assessment in the hands of husband-and-wife with a view to avoid the loss to the Revenue which may occur in future and AO has held the compensation received by assessee as the relinquishment of right of the property and Ld. CIT(A) has confirmed the action of AO by observing that in case it is not such a transaction which is to be taxed under the head "capital gains" but definitely income as per the provision of "income from other source" and which is chargeable to tax. However, we find that this ITAT Mumbai of "E" Bench has decided the matter in favour of assessee which was involving the same facts of the present case and the relevant extract of the ITAT Mumbai para-7-8 in ITA No. 807/Mum/2013 dated 11.09.2015 is reproduced below:-

"7. We have considered the rival contentions. We find that the issue is covered in favour of the assessee by a number of decisions of the Hon'ble Supreme Court as well as various High Courts of the country. The base decision is income CIT v. B.C. Srinivasa Shetty *(1981) 128 ITR 294; (1981) 2 SCC 460 wherein the Hon'ble Supreme Court has held that all transactions encompassed by section 45 must fall within the computation provisions of section 48. If the computation as provided under section 48 could not be applied to a particular transaction. it must be regarded as* "never intended by section 45 to be the subject of the charge". *The Hon'ble Supreme Court in the case of* "PNB Finance Ltd. vs. CIT (2008) 307 ITR 75' *has reiterated the above proposition of law. In the case of CIT v. B.C. Srinivasa Shetty (supra) the court was considering whether a firm was liable to pay capital gains on the sale of its goodwill to*

another firm The court found that the consideration received for the sale of goodwill could not be subjected to capital gains because the cost of its acquisition was inherently incapable of being determined. The principle propounded in B.C. Srinivas Shetty (1981) 128 ITR has been followed by several High Courts with reference to the consideration received on surrender of inter alia tenancy rights sale of Good Will etc. It was to meet the situation created by the decision in B.C. Srinivas Shetty (1981) 128 ITR 294 (SC) and the subsequent decisions of the High Courts that vide Finance Act. 1994, Section 55(2) was amended to provide that the cost of acquisition of, inter alia, a tenancy right, good will etc. would be taken as nil. 8. Thus, it may be noted that after the amendment of 1995, certain assets like goodwill, tenancy rights etc. have been charged to tax by specifically providing that if there is cost incurred by the assessee in this respect, the cost shall be taken as nil. However, we find that vide amendment, particular asses like goodwill, tenancy rights, trade mark etc. have been brought into the ambit of charging section. However, the rights obtained by way of adverse possession have not been included in the provision neither in the charging section 45 nor in the section 48 which provides mode of computation. Here is no any provision regarding the charging of capital gains tax on an asset title to which has been acquired in recognition of rights of adverse possession. Even u/s. 49, the cost of the asset with regard to certain mode of acquisition, such as by way of gift or will, by succession, inheritance or devolution or on any distribution of assts on the dissolution of a firm, body of AOP or liquidation of company etc.; the rights attained in an asset on account of adverse possession have not been included. Though the Parliament has made an amendment that in certain type of assets like goodwill, tenancy rights etc., the cost of acquisition would be taken as actual cost incurred and if no cost incurred, the same be taken at nil, however the said deeming section is applicable to the assets which have been specifically brought within the purview of the said provision. The assets or the rights which do not find mention in the relevant provision, cannot be brought within the ambit of charging section, in the light of the decision of the Hon'ble Supreme Court. We further find that the issue is now squarely covered by the direct decision of the Hon'ble Bombay High Court in the case of CIT vs. Star Chemicals(Bombay) Pvt. Ltd. (**Income Tax Appeal No. 1110 of 2009 & Income Tax Appeal No. 1153 of 2009,** *dated 14th August, 2009) wherein the Hon'ble court while answering the question of chargeability of capital gains in relation to an asset/title which was acquired by way of adverse possession, has held that the Tribunal was right in holding that for want of acquisition cost, capital gains tax would not arise. Since a direct decision of the Hon'ble jurisdictional court tin relation to the chargeability of capital gain on asset acquired by way of adverse possession is available, hence, the*

same is binding upon this Tribunal. We therefore hold that no capital gain are chargeable to tax in relation to the asset acquired by way of adverse possession. Appeal of the assessee is allowed and order of the lower authorities is set aside."

In view of the above, we find that there was no tenancy right available with the assessee which is, in fact, chargeable under the Income Tax Act under the head "income from capital gains". However, in the present case, assessee was having adverse charge on the property and charge of tax on such transaction has nowhere been definite under the Act. Therefore, we are holding that this transaction out of purview of tax. In our considered view, we reverse the orders of authorities below and delete the addition made by Assessing Officer and subsequently confirmed by Ld. CIT(A). This ground raised by assessee is allowed.

10. In the result, assessee's appeal is allowed.**Coming to assessee's appeal in ITA No.835/Kol/2008.**

11. Since the issue is common in assessee's appeal in **ITA No. 281/Kol/13** and taking a consistent view we allow assessee's appeal and this ground raised by assessee is allowed.

12. **In combine result, both the appeal of assessee are allowed.**

Thanking You,

Submitted by,

Place: Indore
Date: 9th July, 2016

5. On the contrary, Ld. D.R. opposed these submissions and also filed written synopsis which is reproduced as under:

The gist of decisions in favour of revenue on section 263 of IT Act 1961.

1. A number of decisions of hon'ble apex court, high Courts, and Tribunals have been relied upon and the copies of said decisions have been filed with the Hon'ble bench which support the view of the department that lack of inquiry, inadequate inquiry, admission of claim without supporting material and no discussion in the assessment order are sufficient and good reasons for invoking section 263 of IT Act 1961 by the CIT. The list of cases along with the gist of decisions relied upon are hereby filed.

S. No.	CASE LAW	Reported
1	Malabar Industrial Co. Ltd. V/s Commissioner of Income Tax	243 ITR 83 (SC)
2.	Smt. Taradevi Aggrawal V/s Commissioner of Income Tax	88 ITR 323 (SC)
3	Rampyaridevi Saraogi V/s Commissioner of Income Tax	67 ITR 84 (SC)
4	Commissioner of Income Tax V/s Nagesh Knitwears Pvt. Ltd	345 ITR 135 (Delhi HC)
5	Gee Vee Enterprises V/s Addl. Commissioner of Income Tax	99 ITR 375 (Delhi HC)
6	Bhushan Steel Ltd. V/s Asstt. Commissioner of Income Tax	ITAT A Bench Delhi
7.	Commissioner of Income-tax v.Deepak Kumar Garg	299 ITR 435 (Madhya Pradesh)
8.	Commissioner of Income-tax v. Mahavar Traders	220 ITR 167 (Madhya Pradesh)
9.	Smt. Renu Gupta v. Commissioner of Income-tax	301 ITR 45 (Rajasthan)
10.	PT. Lashkari Ram v. Commissioner of Income-tax	272 ITR 309 (Allahabad)
11.	Commissioner of Income-tax, Patiala v. Himachal Pradesh Financial Corpn.	186 Taxman 105 (Himachal Pradesh)
12	Commissioner of income tax V/s Prafulla C.Pant And Dharam Veer JJ	176 Taxman 184 (Uttrakhand)
13	Mofussil Warehouse & Trading Co.Ltd.V/s Commissioner Of Income tax	238 ITR 867 (Madras)
14	Durgalal & Co. V/s Commissioner Of Income tax	220 ITR 456(Delhi)
15	Commissioner Of Income tax V/s Active Traders (P) Ltd.	214 ITR583 (Calcutta)

[illegible]	Addl .Commissioner Of Income tax V/s Mukur Corporation	111 ITR 312 (Gujarat)

2. Further reliance is here by placed on following decisions of Supreme Court High, Courts and Tribunal, the list and gist of decisions are submitted now.

S. No.	CASE LAW	Reported
1	CIT V/s Amitabh Bachan, Mumbai	Civil Appeal No. 5009 of 2016 (SC)
2	CIT V/s Bhagwan Das	272 ITR 367 (Allahabad)
3	Shubhlakshmi Vanijya (P) Ltd. V/s CIT-1	172 TTJ 721 (Kalkata)
4	Jubilee Commitrade (P) Ltd. Kalkata v/s CIT-3	(ITA No 1179/Kal/2016) 'D' Bench Kalkata
5	Novapan India Ltd., Hyderabad vs Collector of Central Excise	3556 of 1984 (SC)
6	Rajmandir Esates Pvt. Ltd. vs PCIT-III	GA No 509 of 2016 (HC) Kalkata
7	1. P.G. Infrastructure & Service Pvt. Ltd. 2. S.N. Vijaywargiya 3. People's Internationsl Service P. Ltd. Bhopal	ITA No 607 to 609 (Indore)
8	M/s Crompton Greaves V/s CIT-6 Mumbai	ITAT C Bench Mumbai

Note: The case laws at serial no. 5 and 8 have been relied upon for invoking exception/exemption and retrospective application of Explanation 2 to section 263 of IT Act 1961.

3. In the case of **Malabar Industrial Co. Ltd., Hon'ble Supreme Court (243 ITR 83- SC)** held that where A.O. had accepted the entry in the statement of account in the absence of supporting material, without making any inquiry, the exercise of jurisdiction by CIT under section 263(1) was justified. In this case the damages received by the appellate in lieu of agricultural income was wrongly allowed by the A.O. as agricultural income when the same was finally treated as income from other source. The operative part of decision is as under.

> ***In the instant case, the Commissioner noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appeared that the resolution***

passed by the board of the appellant- company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the ITO was erroneous was irresistible. Therefore, the High Court had rightly held that the exercise of the jurisdiction by the Commissioner under section 263(1) was justified.

It was shown at any stage of the proceedings that the amount in question was fixed or quantified as loss of agricultural income and, admittedly, it was not so found by the Tribunal. The further question whether it would be agricultural income within the meaning of section 2 (1A) did not arise for consideration. It was evident from the order of the High Court that the findings recorded by the Tribunal that the appellant stopped agricultural operation in November 1982 and the receipt under consideration did not relate to any agricultural operation carried on by the appellant, were not questioned before it. Thought the High Court was not correct in holding that the amount was paid for breach of contract as indeed it was paid in modification/relaxation of the terms of the contract, it was to be held that the High Court was justified in concluding that the said amount was a taxable receipt under the head 'Income from other sources'.

4. In a recent decision of **Hon'ble Apex court in the case Shri Amitabh Bachchan, (CIVIL APPEAL NO.5009 OF 2016 [Arising out of S.L.P.(C) No.11621 of 2009])** while dealing with issue of requirement of issuing specific notice u/s 263 of I.T. Act, the hon'ble apex court has comprehensively dealt with this issue of "lack of inquiry" and "inadequate inquiry" by the A.O. and held that CIT was perfectly justified in invoking section 263 of Income Tax Act when A.O. had dropped the inquiries once the additional expenses claimed in the revised ROI were withdrawn despite issue of notice u/s 69C of Income Tax Act. It was contended on behalf of Mr. Bachchan that the A.O. had taken the possible view and CIT was not supposed to substitute his view particularly in view of the facts that the additional expenses claimed through revised ROI were withdrawn. It was held by the Hon'ble Apex Court that making claim and subsequently withdrawing the same gives rise to necessity of further inquiry. In the instant case under consideration, the A.O. has ommited to take note of vital

facts like abnormal increase in sale price of land, agricultural activity, agricultural Income, nature of business and legality of maintaining two portfolios and allowed the exemption claimed by the appellant without application of mind. The gist of decision of Hon'ble Supreme court in the case of Shri Amitabh Bacchan is as under:-

> ***There can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under Section 263 of the Act merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from. However, the above is not the situation in the present case in view of the reasons stated by the learned C.I.T. on the 3 (2000) 243 ITR 83 (SC) 4 (2007) 295 ITR 282 (SC) 22 basis of which the said authority felt that the matter needed further investigation, a view with which we wholly agree. Making a claim which would prima facie disclose that the expenses in respect of which deduction has been claimed has been incurred and thereafter abandoning/withdrawing the same gives rise to the necessity of further enquiry in the interest of the Revenue. The notice issued under Section 69-C of the Act could not have been simply dropped on the ground that the claim has been withdrawn. We, therefore, are of the opinion that the learned C.I.T. was perfectly justified in coming to his conclusions insofar as the issue No.(iii) is concerned and in passing the impugned order on that basis. The learned Tribunal as well as the High Court, therefore, ought not to have interfered with the said conclusion.***
>
> ***In the light of the discussions that have preceded and for the reasons alluded we are of the opinion that the present is a fit case for exercise of the suo motu revisional powers of the learned C.I.T. under Section 263 of the Act. The order of the learned C.I.T., therefore, is restored and those of the learned Tribunal dated 28th August, 2007 and the High 23 Court dated 7th August, 2008 are set aside. The appeal of the Revenue is allowed.***

5. In the case of **Rampyari Devi Saraogi, Hon'ble Supreme court, (67 ITR 84 SC)** held that CIT was justified in invoking section 263 of I.T. Act 1961 as the ITO had accepted the initial capital, ornaments and presents received at the time of marriage and other gifts from father-in-law without making any inquiry. Further it was held that it was not necessary to further detail the reasons given by the CIT because on the facts of record, the orders were prejudicial to the interest of revenue. The decision of Hon'ble High Court dismissing the WP filed by the assessee against the order of CIT was dismissed. The relevant part of decision is as under:-

> ***The High Court was right in overruling the contention of the assessee. The order of the Commissioner was a detailed order. There was no doubt that he did mention some facts which were not indicated or communicated to the assessee and which the assessee had had no opportunity of meeting.***
>
> ***The High Court was right in holding that all this material was supporting material and did not constitute the basis grounds on which the orders under section 33B were passed by the Commissioner. There was ample material to show that the ITO made the assessments in undue hurry. The assessee was a new assessee and filed voluntary returns in respect of a number of years, i.e. , from assessment years 1952-53 to 1960-61. The return for the assessment year 1953-54 was undated. The returns for the assessment years 1952-53 and 1957-58 was dated 21.03.1961 , and those for the assessment years 1958-59 to 1960-61, were dated 26.04.1961. On 21.03.1961, the assessee made a declaration giving the facts regarding initial capital, the ornaments and presents received at the time of marriage, other gifts received from her father-in-law, etc., which should have any ITO on his guard. But the ITO without making any enquiries to satisfy himself passed the assessment order on30.03.1961, for assessment years 1952-53 to 1957-58, and on 26.04.1961, for the assessment years 1958-59 to 1960-61. No bank account or any proper books of account were maintained by the assessee or produced before the ITO. A short stereotyped assessment order was made for each assessment year. Profit from speculation was shown as Rs. 3,085 and interest Rs. 600, and Rs. 500 was added for want of books of account and evidence. No evidence whatsoever was produced in respect of the money-tending business done and interest income shown to have been received by the assessee. No names were given as to the parties to whom the loans were advanced, with amounts and rate of interest and as to when the interest income was received.***
>
> ***It was not necessary to further detail the reasons given by the Commissioner because on the face of the record the orders were prejudicial to interest of the revenue, and even if the facts which the Commissioner introduced regarding the enquiries made by him had been indicated to the assessee, the***

> ***result would have been the same. The assessee, had not in any way suffered from the failure of the Commissioner to indicate the results of the enquiries. Moreover, the assessee would have full opportunity of showing to the ITO whether he had jurisdiction or not and whether the income assessed in the assessment orders which were originally passed was correct or not.***
>
> ***The appeal was liable to be dismissed and decision of High Court was to be affirmed.***

6. The jurisdictional **MP High Court, in the case of Mahaver Trader, (220 ITR 167 Madhya Pradesh)** while setting aside the order of ITAT held that ITO had not examined the issue of allowability of deduction u/s 80HH and 80J in the light of conditions laid down for grant of relief under said sections. Further, it was observed by the Hon'ble court that the Tribunal instead of approaching the matter in the proper perspective had on their own started making enquiries and found that order passed by A.O. was correct which was not warranted at all. The operative part of decision is reproduced here under:-

> ***Tribunal, instead of approaching the matter in the proper perspective, have on their own started making enquiries and found that the order passed by the Income-tax Officer is correct. This approach of the Tribunal was not warranted at all, After going through the order of the Income-tax Officer, it appears that the Income-tax Officer has not examined the matter in the light of the conditions laid down for grant of relief under sections 80HH and 80J. Certain conditions have been laid down in both the sections and the Income-tax Officer should have examined the assessee on the basis of the conditions and thereafter recorded the finding whether they are entitled to the benefit of section 80HH or 80J. But, instead of this, the Income-tax Officer only proceeded to assess the liability of the assessee and that was not the correct approach. The Income-tax Officer should have examined the matter in the light of the conditions mentioned in both the sections before granting relief. We are of the opinion that the Commissioner of Income-tax has not given any finding, but only remanded the case back to the Income-tax Officer for reassessment after complying with the conditions laid down for grant of benefit under sections 80HH and 80J. Therefore, the finding recorded by the Tribunal appears to be not correct because all the materials which ought to have been utilised by the Income-tax Officer were not there and it is not understandable that how the Tribunal have on their own, assessed the situation. Therefore, we are of the opinion that the view taken by the Tribunal is not correct and we answer the aforesaid question in favour of the Revenue and against the assessee. The Income-tax Officer may examine the***

> *matter afresh in the light of the decision of the Commissioner of Income-tax without taking notice of any adverse observations, if any, made by the Commissioner of Income-tax.*

7. Similarly, Hon'ble jurisdictional **MP High Court in the case of Deepak Kumar Garg (299 ITR 435 Madhya Pradesh)** upheld the order of CIT passed under section 263 of Income Tax Act 1961, for the reasons that the A.O. had done semblance of inquiry that too in snap-shod manner and accepted the version of assessee without proper inquiry causing loss of substantial taxable income. The gist of decision is reproduced as under :-

> *In the case in hand, after hearing the authorised representative, the Commissioner has recorded a clear finding that the order of the Assessing Officer was erroneous as well as prejudicial to the interests of the Revenue. From the order of the Assessing Officer, it is clear that for want of time, the Assessing Officer had done only a semblance of enquiry and that too, in a very slipshod manner, as is clear from the post script in the order of the Assessing Officer. The Assessing Officer accepted the version of the assessee without proper enquiry and as a result a substantial amount of taxable income was not brought to tax. In such a case the assessment order would be erroneous and prejudicial to the interests of the Revenue because law enjoins upon the Assessing Officer to make the assessment order bringing all taxable income to tax. The enquiry held in a perfunctory manner could not be said to be a proper enquiry before passing the assessment order. This cannot be a ground to shut out the jurisdiction of the Commissioner of Income-tax that an adequate enquiry was conducted by the Assessing Officer. We may clarify that the order of the Commissioner of Income-tax is in two parts. Part one consists of reasons for issuing the show-cause notice, and the later part deals with findings recorded by the Commissioner after affording opportunity of hearing to the assessee. As stated above, the Commissioner of Income-tax has recorded a categorical finding that the order of the Assessing Officer for want of adequate enquiry, was erroneous and prejudicial to the interests of the Revenue and after setting aside the assessment order, remanded the matter to the Assessing Officer for fresh assessment on the merits. The Commissioner of Income-tax also directed the Assessing Officer to observe rules of natural justice and to provide opportunity of hearing to the assessee before making fresh assessment order on the merits. This adequately safeguards the interest of the assessee and would cause no prejudice. It seems that the Income-tax Appellate Tribunal was carried away by the first part of the order of the Commissioner of*

Income-tax as a result the later part of the order escaped from the notice of the Tribunal and the Income-tax Appellate Tribunal branded the order of the Commissioner of Income-tax as based upon probabilities, surmises and conjectures.

8. In a recent decision, in the case of **Rajmandir Estate Pvt. Ltd., Hon'ble Kolkata High Court, (GA No. 509 of 2016 with ITAT No. 113 of 2016)** had upheld the order of CIT passed u/s 263 of Income tax Act. In this case, the AO had passed the assessment order u/s 143(3) read with section 148 of income tax Act 1961. There was a huge increase in share capital by way of share premium. The AO had called for various details pertaining to increase in share capital and reserve and surpluses on account of issue of 7,92,737 shares of Rs. 10 each at a premium of Rs. 390/-. The AO had also conducted the enquiries from share subscribers u/s 133(6) of Income tax Act 1961 and most of the 39 applicants responded and the appellant had even filed complete details and sources of these companies for making share subscription. However the CIT had invoked the section 263 of Income Tax Act 1961 for the reasons that the AO had not conducted the requisite enquiry and had not applied mind. Therefore the order of AO was considered as erroneous and prejudicial to the interest of revenue. The Hon'ble Tribunal confirmed the view of CIT in setting aside the order of AO. The appellant preferred in appeal before Hon'ble Kolkata High Court wherein the following question were found arising in the appeal.

(a) Whether in the light of the views expressed in the case of Lovely Exports (supra) & Steller Investment (supra) the order under section 263 directing further investigation is legal?

(b) Whether the order passed by the assessing officer under section 143(3) /147 of the Income Tax Act is erroneous and also prejudicial to the interest of the revenue?

Both the above mentioned question were answered in affirmative by Hon'ble Court and held as under:-

" The assessee with an authorised share capital of Rs.1.36 crores raised nearly a sum of Rs.32 crores on account of premium and chose not to go in for increase of authorised share capital merely to avoid payment of statutory fees is an important pointer necessitating investigation. Money allegedly received on account of share application can be roped in under Section 68 of the Income Tax Act if the source of the receipt is not satisfactorily established by the assessee. Reference in this regard may be made to the judgement in the case of Sumati Dayal -Vs- CIT (supra) wherein Their Lordships held that

any sum "found credited in the books of the assessee for any previous year, the same may be charged to income tax....". We are unable to accept the submission that any further investigation is futile because the money was received on capital account. The Special Bench in the case of Sophia Finance Ltd. (supra) opined that "the use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine as was held in the case of CIT -Vs- Nova Promoters and Finlease (P) Ltd. (supra). Similar views were expressed by this Court in the case of CIT -Vs- Precision Finance Pvt. Ltd. (supra). We need not decide in this case as to whether the proviso to Section 68 of the Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd. (supra) held that "the ITO may even be justified in trying to ascertain the source of depositor". Therefore, the submission that the source of source is not a relevant enquiry does not appear to be correct. We find no substance in the submission that the exercise of power under Section 263 by the Commissioner was an act of reactivating stale issues. In the case of Gabriel India Ltd. (supra) the CIT was unable to point out any error in the explanation furnished by the assessee. Whereas in the present case we have tabulated the evidence which was before the assessing officer which should have provoked him to make further investigation. The assessing officer did not attach any importance to that aspect of the matter as discussed above by us. The judgement in the case of Leisure Wear Exports Pvt. Ltd. (supra) relied upon by Mr. Poddar has no applicability because the evidence furnished by the assessee in this case does suggest a cover up. We also have held prima facie that neither the transaction appears to be genuine nor are the applicants of share are creditworthy.

The judgement in the case of Omar Salay Mohamed Sait (supra) cited by Mr. Poddar has no application for reasons already discussed. It is not true that the Commissioner in this case has merely on the basis of suspicion held that this was or could be a case of money laundering. We as a matter of fact have discussed this issue in great detail and need not reiterate the same. The order passed by the Commissioner is by no means an act of substituting his own views to that of the assessing officer. It is true that the assessing officer had requisitioned the necessary details by his notice u/s.142(1) but he thereafter did not apply his mind thereto. The judgement in the case of J. L. Morrison (India) Ltd. has no manner of application because in that case the question essentially was whether the receipt was of a capital or revenue nature. The facts and circumstances were not in dispute. Moreover the view taken by the assessing officer was not shown nor was held by the Court to be an erroneous

view. Whereas in this case we have demonstrated in some detail as to why is the order of the assessing officer erroneous and prejudicial to the revenue."

9. **The High Court of Allahabad, in the case of Bhagwan Das (272 ITR 367- Allahabad)** has held that where the A.O. has not examined the agricultural income and its exemption, the order has been passed without application of mind and **when there was no discussion of relevant issue in the assessment order**, the CIT was held justified in setting aside the order of A.O. for granting exemption to the assessee without application of mind. It was held as under:-

> *Having heard the learned counsel for the revenue, we find that in the assessment order, there is no discussion regarding the question as to whether the amount of income shown by the assessee which is being claimed to be exempt has actually been earned by him or not and, further, whether the entire amount of income from Agriculture and Poultry farming is exempt from tax. The Commissioner of Income-tax has rightly initiated proceedings under section 263 of the Act as exemption has been granted without any application of mind. The Apex Court in the case of Malabar Indus trial Co. Ltd. (supra) while interpreting section 263 of the Act held as follows :—*
>
> *"A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous insofar 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." [Emphasis supplied] (p. 87)*
>
> *Thus an order, which has been passed without application of mind, will also fall under the expression erroneous and prejudicial to the interest*

> *of Revenue. Since the Income-tax Officer has granted exemption to the assessee in respect of income from agriculture and poultry farming without any discussion and with out any application of mind, respectfully following the aforesaid decision, we are of the opinion that the Tribunal had committed error in holding that the assessment ordering so far as it grant ed exemption to income from Agriculture and Poultry farming was not erroneous or prejudicial to the interest of Revenue. We, therefore, answer the question referred to us in the negative, i.e., in favour of the Revenue and against the assessee. Since nobody has put in appearance on behalf of the assessee, there shall be no order as to costs.*

10. In case of **Bhushan Steel, Hon'ble ITAT A Bench Delhi, (ITA No 1641 to 1646/Del/2014)** observed that CIT was within his powers to set aside the order of A.O. where the A.O. had allowed the expenses debited to P & L account without proper inquiries although during the course of search in Bhushan group and survey in other cases, it was noticed that Bhushan group has been inflating expenses and various parties were used for the said purpose. It has been held as under:-

> *In view of foregoing discussions, we are inclined to hold that the present case is squarely covered in favour of the revenue by the decisions of Hon'ble Jurisdictional High Court of Delhi in the case of Gee Vee Enterprises vs ACIT (supra) and CIT vs Nagesh Knitwears P. Ltd. (supra) as in the present case, the AO did not raise any query or make any inquiry pertaining to the claim of expenses submitted by the assessee in its books and statements of accounts submitted along with return and this is a clear case of "lack of inquiry". We may also point out that if the AO fails to conduct the said investigation, he commits the error and the word "erroneous" includes failure to make inquiry. In such cases, the order becomes erroneous because necessary inquiry or verification has not been made and not because a wrong order has been passed on merits. We further hold that if from the detailed investigation conducted by ITA No. 1641 to 1646/Del/2014 AY: 2006-07 to 2010-11 the Investigation Wing of the department, it is revealed that the bogus expenses have been claimed by the assessee with the intention to reduce its tax liability, then the order is also prejudicial to the interest of revenue. The argument of the ld. Counsel of the assessee about revenue neutrality is not applicable to the facts and circumstances of the present case.*

In the case of ITO vs Ch. Atchaiah (1996) 218 ITR 239(SC), speaking for Hon'ble Apex Court their lordships held as follows:- "In our opinion, the contention urged by Dr. Gauri Shankar merits acceptance. We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By "right person", we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression "wrong person" is obviously used as the opposite of the expression "right person". Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. This Bhushan Steel Ltd., New Delhi vs Assessee on 30 March, 2015 Indian Kanoon - http://indiankanoon.org/doc/164679238/ 11 is so irrespective of the fact which course is more beneficial to the Revenue. In our opinion, the language of the relevant provisions of the present Act is quite clear and unambiguous. Section 183 shows that where Parliament intended to provide an option, it provided so expressly. Where a person is taxed wrongfully, he is no doubt entitled to be relieved of it in accordance with law, but that is a different matter altogether. The person lawfully liable to be taxed can claim no immunity because the Assessing Officer (Income Tax Officer) has taxed the said income in the hands of another person contrary to law." ITA No. 1641 to 1646/Del/2014 AY: 2006-07 to 2010-11.

Therefore, it is well-settled principle that the Revenue authorities are duty bound to tax right person and right person alone. By "right person" is meant the person who is liable to be taxed, according to law, with respect to a particular income. The meaning of "wrong person" is obviously used as the opposite of the expression "right person". In our humble understanding, the ratio of this decision clarifies that merely because of a wrong person is taxed with respect to a particular income, the AO is not precluded from taxing the right person with respect to that income. Same is the case here when assessee company made a bogus claim of expenditure then the assessee cannot avail immunity from tax liability by stating that the impugned amount of expenditure claim has been taxed in the hands of respective payee companies

11. In a landmark decision in the case **of Subhlakshmi Vanijya (P) Ltd. B Bench of Kalkata ITAT. (60 taxmann.com 60 (Kolkata - Trib.),** the decision of CIT in setting aside the order of A.O. was upheld. In this case, the appellant issued fresh share capital of 14.72 Lakhs at a premium of 7.21 crores. The A.O.

obtained all the required documents and issued notices to 8 subscribes out of 21parties u/s 133(6) of IT Act 1961 and on the basis of details filed and confirmations received from subscribers, the A.O. proceeded to accept the explanation of assessee and completed the assessment with nominal addition of Rs. 28,049/- . The CIT invoked the section 263 of IT Act 1961 and set aside the order for the reasons that proper enquiry was not carried out by the A.O. and directed the A.O. to make fresh assessment after conducting independent, detailed and complete inquiries of subscription and share premium. The Hon'ble ITAT confirmed the decision of CIT with the observation that **"inadequate inquiry" falls in the category of "No inquiry"** which results in to making the order us erroneous and prejudicial to the interest of revenue. The relevant part of decision is as under:-

"Whether the enquiry conducted by the Assessing Officer in such cases can be as a proper enquiry?

Though the Assessing Officer issued notices under section133(6) but it failed to comprehend the rationale or logic behind issuing shares at such a high premium, nor to examine any of the directors of the companies which were subscribers to share capital. It is highly improbable for any person having sound mind to purchase at arm's length the shares of a private limited company, hardly having any worth, with face value of Rs.10 at a premium of Rs.190. This mere fact should have been cornerstone for the Assessing Officer to embark upon further enquiry to unearth the truth. The genuineness of transactions of issue of share at such hefty premium in this background of the matter was under dark cloud and it skipped the attention of the Assessing Officer. [Para 17.c.]

Upon analysis of the business model of the assessee it was noted that shareholder companies of one company become investee companies of other companies and in turn, such later company, whose shares are purchased, further invest in the shares of other companies, so on and so forth. This is a striking example of circulation of capital from one company to another and the rotation is continuing in all the companies under consideration. It cannot be a sheer coincidence that hundreds of companies brought into existence, having link with each other and none of them doing any worthwhile business activity, come together to issue shares at such a huge premium. At best, this argument could have been taken into consideration if these companies had issued shares to its related companies at premium and

invested the proceeds in some other business activity and not purchasing the shares of other related companies through such a circular route. This shows that the transactions of issuing shares at a premium to related companies and then purchasing the shares of other related companies at a huge market price and none of the companies has any worthwhile business activity, when considered on an overall basis, is nothing but a smokescreen. [Para 17.f.]

There remains no doubt whatsoever that in the given circumstances, the Assessing Officer conducted half-baked enquiry ignoring vital aspects which were required to be examined. If a company recently incorporated without carrying out any worthwhile business activity issues shares with face value of Rs.10 at a premium of Rs.190, the immediate concern of the Assessing Officer ought to have been to find out as to whether the receipt of such a premium was justified and whether the parameters of section 68 stood complied with. In the instant case, the Assessing Officer merely issued notices under section 133(6) to some of the shareholders whose replies, indicating that they overtly purchased the shares at Rs.200 each, were kept on record. Putting a lid at the matter at that stage only, the Assessing Officer did not consider it prudent to examine such shareholders as to their capacity and genuineness of the transactions. Confronted with such peculiar and hair-raising circumstances, the Assessing Officer should have got alerted and dug the matter deep for unearthing the reality of the transaction. Unfortunately, nothing of this sort was done by him. It is a perfect citation for a complete non-application of mind by the Assessing Officer and of passing the assessment order in undue haste. [Para 17.h.]

Thus, there can be no escape from an axiomatic conclusion that in all these cases the enquiry conducted by the Assessing Officer's is exceedingly inadequate and hence fall in the category of 'no enquiry' conducted by the Assessing Officer, what to talk of charactering it as an 'inadequate enquiry'. The highly inadequate enquiry conducted by the Assessing Officer resulting in drawing incorrect assumption of facts, makes the orders erroneous and prejudicial to the interests of the revenue. [Para 17.i.]

Whether Commissioner can set aside the assessment order and direct the Assessing Officer to conduct a thorough enquiry, thereby interfering with the jurisdiction of the Assessing Officer conferred on him in terms of sections 142(1) and 143(2) of the Act?

A careful perusal of the provisions of section 142(1)/143(2) unveils that it is the prerogative of the Assessing Officer to require the information

'on such points or matters' as he may require. Ordinarily it is not possible for the Assessing Officer to inquire into each and every entry recorded in the books of account of the assessee. He has to exercise his acumen in extracting out the relevant points or matters on which he wants to concentrate. But, what is important in this regard is that the operation of section 142(1)/143(2) comes to an end when an assessment is completed after examining such point or matters which the Assessing Officer feels to inquire before finalizing the assessment. It is only thereafter that the revisional powers of the Commissioner under section 263 can come into play for ascertaining if the Assessing Officer examined all the relevant points, which ought to have been examined. If the Commissioner, on examination of records of assessment, comes to the conclusion that the Assessing Officer failed to enquire into certain other relevant aspects which, in fact, necessitated thorough investigation, then he has all the power to revise the assessment order. In the instant case, the assessment already stands finalized and now the Commissioner is examining whether the Assessing Officer properly examined the facts of the case. In such circumstances, it is impermissible to have a recourse to the provisions of sections 142(1) and 143(2) for demolishing the order under section 263. [Para 18.b.]

Whether inadequate inquiry conducted by the Assessing Officer empowers the Commissioner to revise the assessment order?

It is imperative for the Assessing Officer to conduct enquiry to satisfy himself about the genuineness of transactions. Scope of the term 'enquiry' can be diverse in different circumstances. There cannot be straitjacket formula to positively conclude as to conducting or non-conducting of 'enquiry' by the Assessing Officer. It depends on the facts and circumstances of each case. Where the facts are just ordinary and prima facie there is nothing untoward the recorded transaction, in such circumstances, the obtaining of the documents and the application of mind thereon, without a further outside enquiry, may mean that the Assessing Officer did conduct enquiry, leaving the question open as to whether it was a proper or an improper enquiry. But, where the factual scenario of a case prima facie indicates abnormalities and cry for looking deep into it, then a mere collection of documents cannot be held as conducting enquiry, leave aside, adequate or inadequate. In such later cases, only when the Assessing Officer, after collection of the initial documents, embarks upon further investigation, that it can be said that he initiated enquiry. Where the facts of a particular transaction cry hoarse about its non-genuineness and even a casual look at such facts, prima facie, divulges foul play, then the alarm bell

must ring in the mind of the Assessing Officer for making further examination. Collection of papers on record in such circumstances cannot be construed as conducting a proper enquiry. If in such circumstances, the Assessing Officer simply gathers documents and keeps them on record, then such nominal enquiry falls within the overall category of 'no enquiry' because of the inaction on the part of the Assessing Officer to read a writing on the wall. [Para 19.a.]

Thus, the instant case is a glaring example of not making relevant enquiry, which amounts to 'no enquiry' and hence it becomes a case of non-application of mind by the Assessing Officer. [Para 19.e.]

If the Assessing Officer has taken a possible view, can still the revision be ordered?

Where the Assessing Officer fails to conduct an enquiry or proper enquiry, which is called for in the given circumstances, the Commissioner is empowered to set aside the assessment order by treating it as erroneous and prejudicial to the interests of the revenue. In such circumstances, the Assessing Officer can't be said to have taken a possible view and it is not further required on the part of the Commissioner to expressly show where the assessment order went wrong. The very fact that no enquiry was conducted or no proper enquiry was conducted in the required circumstances, is sufficient in itself to invoke the provisions of section 263. [Para 21.g.]

From an overview of the above discussed judgments, it is crystal clear that where the AO fails to conduct an enquiry or proper enquiry, which is called for in the given circumstances, the CIT is empowered to set aside the assessment order by treating it as erroneous and prejudicial to the interests of the revenue. In such circumstances, it is not further required on the part of the CIT to expressly show where the assessment order went wrong. The very fact that no enquiry was conducted or no proper enquiry was conducted in the required circumstances, is sufficient in itself to invoke the provisions of section 263.

We, therefore, answer all the five aspects discussed above by holding that : i) the enquiry conducted by the AO in such cases can't be construed as a proper enquiry; ii) CIT u/s 263 can set aside the assessment order and direct the AO to conduct a thorough enquiry, notwithstanding the jurisdiction of the AO in making enquiries on the issues or matters as he considers fit in terms of section 142(1) and 143(2) of the Act, which is

relevant only up to the completion of assessment ; iii) Inadequate inquiry conducted by the AO in the given circumstances is as good as no enquiry and as such the CIT was empowered to revise the assessment order ; iv) The order of the CIT is not based on irrelevant considerations and further in the present circumstances, he was not obliged to positively indicate the deficiencies in the assessment order on merits on the question of issue of share capital at a huge premium ; v) the AO in the given circumstances can't be said to have taken a possible view as the revision is sought to be done on the premise that the AO did not make enquiry thereby rendering the assessment order erroneous and prejudicial to the interest of the revenue on that score itself."

12. In a recent decision of **D. Bench of Hon'ble Kalkata ITAT in the case of Jubilee Commitrade (P) Ltd. Kalkata (ITA No 1179/Kal/2016)**, the hon'ble bench has confirmed the order of CIT setting aside the order of A.O. In this case, the Hon'ble Bench has relied upon the order of B-Bench of Kolkata ITAT in the case of Subhlakshmi Vanijya (P) Ltd. The CIT had invoked the section 263 of IT Act-1961 for the reasons that the A.O. had failed to examine the capacity of subscribers of shares capital although most of the details and confirmations were duly called for and filed. It was held by the bench:-

"We have considered his submissions and are of the view that as was done in the similar group of cases which was considered by this Tribunal and in which the lead order was passed in the case of Subhlakshimi Vanijay Pvt. Ltd. (supra), the CIT ought to have set aside the order of AO and direct the AO to make fresh enquiry with regard to the receipt of share capital and share premium by the assessee during the previous year. As rightly pointed out by the Ld. Counsel for the assessee, since the proceedings u/s 263 of the Act were concluded ex-parte, the Assessee had no occasion to place material to satisfactorily explain the receipt of share capital and share premium by the Assessee. There was however no material on the basis of which the CIT could have come to the conclusion that the receipt of share capital and share premium was not satisfactorily explained by the assessee. As rightly contended by the Ld. Counsel for the assessee, the CIT ought to have set aside the order of the AO and directed the AO to conduct fresh enquiry on the lines indicated in the order of this Tribunal in the case of Subhlakshmi Vanijya Pvt. Ltd. (supra). We therefore modify the order of CIT and direct the AO to make fresh enquiry with regard to the receipt of share capital and share premium during the previous year after affording Assessee opportunity of being heard. With these observations the appeal of the assessee is treated as partly allowed."

13. The jurisdictional **Indore Bench of ITAT,** in a recent decision dated 21.11.2016, in the cases of **(1) P.G. Infrastructure & Service Pvt. Ltd. Bhopal, (2) S.N. Vijaywargiya, Bhopal, (3) People's International Services P. Ltd., Bhopal, (ITA No. 607 to 609/Ind/2016)** has confirmed the order of PCIT, Bhopal passed under section 263 of Income Tax Act. 1961 on the ground that the A.O. has not been in a position to conduct proper inquiry. Although in these cases, the jurisdiction of the cases were transferred to the Assessing Officer at the fag end of the year due to unpleasant event of CBI raid on the earlier Assessing Officer. However the basic principle which has been confirmed by the bench was **lack of inquiry and inadequate inquiry** conducted by the Assessing Officer. Therefore, these decisions are applicable on the present case also. The Hon'ble bench has also placed reliance on almost all the case laws relied upon by us in this case. The operative part of order of this Hon'ble bench is reproduced here under:-

> ***"We have carefully heard the rival contentions of the parties. We find that in similar type of cases in ITA Nos. 467/Ind/2016, 275/Ind/2016, 341/Ind/2016 etc. etc. this Bench of the Tribunal vide its order dated 14th July, 2016 has held as under :-***
>
> ***"5. After hearing both the parties and perusing the material available on record and keeping in view the peculiar facts and circumstances of these cases, we are of the considered view that in short time from 29.03.2014 to 30.03.2014, it was practically impossible for the Assessing Officer to have examined the returns of the assessee vis-à-vis the details and particulars filed in support of the returns and form an opinion and frame a detailed assessment order on the issues in the returns of income.***
>
> ***Therefore, we have no hesitation in accepting the arguments of the ld. Departmental Representative and upholding the present orders passed u/s 263 of the Income-tax Act, 1961, by the Commissioner of Income-tax. Thus grounds of appeal in all the appeals under consideration are dismissed."***
> ***Respectfully following the above decisions, we are of the view that there was no occasion for the Assessing Officer to make any inquiry and the Assessing Officer accepted the return without proper inquiry as a result of which substantial amount of taxable income was not brought to tax. <u>We also hold that no rule of universal application can be laid down for exercise of revisional powers u/s 263 of the act.</u> It will depend on the facts of each and every case but the Commissioner of Income Tax must be satisfied of existence of twin conditions that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. We also get support from the following judgments :-***

(i) Ram Pyari devi Saraogi vs. CIT; 67 ITR 84(SC)

(ii) CIT vs. Seshasayee Paper & Boards Ltd.; 242 ITR 490 (Mad.)

(iii) CIT vs. Bhagwandas; 272 ITR 367 (All) PG Infrastructure ITA Nos. 607,608 & 609/Ind/2016 15

(iv) Pratap Footwear vs. ACIT; (2003) SOT 638 (Jabalpur)(Tri)

(v) CIT vs. Amitabh Bachan (supra); Civil Appeal No.5009 of 2016 (SC)

We further find that the Hon'ble jurisdictional High Court in the case of CIT vs. CIT vs. Deepak Kumar Garg; 299 ITR 435 has categorically held as under :-

"Held, that from the order of the Assessing Officer, it was clear that for want of time, the Assessing Officer had done only a semblance of enquiry and that too, in a very slip-shod manner. The Assessing Officer accepted the version of the assessee without proper enquiry and as a result a substantial amount of taxable income was not brought to tax. The Commissioner of Income tax had recorded a categorical finding that the order of the Assessing Officer for want of adequate enquiry was erroneous and prejudicial to the interests of the revenue and after setting aside the assessment order, remanded the matter to the Assessing Officer for fresh assessment on the merits. The learned CIT also directed the Assessing Officer to observe the rules of natural justice and to provide opportunity of hearing to the assessee before making a fresh assessment order on the merits. This would adequately safeguard the interest of the assessee and would cause no prejudice. The order of revision was valid."

Thus, respectfully following the above judgment of the Hon'ble jurisdictional High Court, these appeals of the assessee are dismissed."

14. **Reliance is also placed hereby on Explanation -2 to section 263 of IT Act 1961 inserted by finance Act 2015 w.e.f. 01.06.2015 considering the same as having retrospective effect.** It is a settled rule of construction that every statue is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. Ordinarily the court are required to gather the intention of the legislature from the overt language of the provision as to whether it has been made prospective or retrospective, and if retrospective, then from which date. However, some times what happens is that the substantive provision, as originally enacted or later amended, fails to clarify the intention of the legislature. In such a situation if subsequently some amendment is carried out to clarify the real intent, such amendment has to be considered as retrospective from the date when the earlier provision was made

effective. Such clarificatory or explanatory amendment is declaratory. As the later amendment clarifies the real intent and declares the position as was originally intended, it takes retroactive effect from the date when the original provision was made effective. Normally such clarificatory amendment is made retrospectively effective from the earlier date. It may also happen that the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, the judicial or quasi judicial authorities, on a challenge made to it, can justifiably hold such amendment to be retrospective. The justification behind giving retrospective effect to such amendment is to apply the real intention of the legislature from the date such provision was initially introduced. the intention of the legislature while introducing the provision is gathered, inter alia, from the finance bill, Memorandum explaining the provision of the finance bill etc. Reliance is placed on the decision of **"B" bench of Hon'ble ITAT Kolkata in the case of Shubhlakshmi Vanijya Pvt. Ltd. 60 taxmann.com 60 wherein Hon'ble ITAT,** while examining the retrospective applicability of proviso to section 68 of IT Act 1961 has beautifully analyzed the issue of applicability of amendments and laid down the above principles while examining the issue. Therefore it is imperative to examine the applicability of Explanation 2 to section 263 of IT Act 1961 in the light of principles laid down in the decision as discussed supra. The existing provisions of the Act after the insertion of explanation 2 stands as under:

"E.—Revision by the [Principal Commissioner or] Commissioner

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

[Explanation 1.]—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—

(i) an order of assessment made by the Assistant Commissioner 2 [or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;

(b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]

[Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

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

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

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

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

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

The explanation 2 has been inserted in section 263 w.e.f. from 1st June, 2015 by Finance Bill 2015 to declare the law which reads as under:-

" [Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

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

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

It is profitable at this stage to refer to the Memorandum to Finance Bill 2015 and notes to clauses to Finance Bill, 2015 which are as under:

Further, it is essential to refer to the memorandum to finance bill 2015 and notes to clause so as to understand the real intention of the legislature in inserting Explanation 2 to section 263 of IT Act 1961 which is reproduced here under for ready reference:

"MEMORANDUM TO FINANCE BILL 2015

"The existing provisions contained in sub-section (1) of section 263 of the Incometax Act provides that if the Principal Commissioner or Commissioner considers that any order passed by the assessing officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry pass an order modifying the assessment made by the assessing officer or cancelling the assessment and directing fresh assessment.

The interpretation of expression "erroneous in so far as it is prejudicial to the interests of the revenue" has been a contentious one. **In order to provide clarity on the issue it is proposed to provide that an order passed by the Assessing** ***Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—***

(a) the order is passed without making inquiries or verification which, should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

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

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

This amendment will take effect from 1st day of June, 2015."

"NOTES ON CLAUSES FINANCE BILL 2015

Clause 65 of the Bill seeks to amend section 263 of the Income-tax Act relating to revision of orders prejudicial to revenue.

The existing provisions contained in sub-section (1) of section 263 provide that if the Principal Commissioner or Commissioner considers that any order passed by the assessing officer is erroneous in so far as it is prejudicial to the interest of revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made an enquiry, as he deems necessary, pass an order modifying the assessment made by the assessing officer or cancelling the assessment and directing fresh assessment.

It is proposed to amend sub-section (1) of the aforesaid section to insert an Explanation so as to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

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

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person. This amendment will take effect from 1st June, 2015."

The plain reading of existing provisions of section 263 of IT Act 1961, the memorandum to finance bill 2015 and notes on clauses of finance bill 2015 as reproduced above makes it evidently clear that said Explanation 2 to section 263 of IT Act 1961 was brought in just as clarificatory or explanatory to the original intent of section 263 of IT Act 1961. The intention of legislature has been to explain and clarify the originally enacted statue so as to declare the position as was originally intended. The language of the Explanation 2 starts as **"for the purpose of this section, it is here by declared that the order by……"** which goes to prove that the relevant insertion of explanation has been declaratory. Therefore, taking support from decision of Hon'ble B bench of ITAT Kolkata on the principles of applicability of amendments in the case of

Shubhlakshi Vanijya Pvt. Ltd., as discussed supra, the insertion of Explanation 2 to section 263 of IT Act 1961 has to be considered as having retrospective effect. Therefore, it was mandated on the part of Assessing Officer not to pass the assessment order without making inquiries or verification which should have been made and allow the relief without inquiring into the claim which in the instant case, the AO has omitted to follow the express provisions of the Act. Further reliance can be placed on the decision of **Hon'ble C Bench of ITAT Mumbai in the case of M/s Crompton and Greaves Ltd. in ITA No. 1994/Mum/2013 and ITA No. 2836/Mum/2014 dated 01.02.2016** wherein after examining the issue of applicability of insertion of Explanation 2 to section 263 of IT Act 1961 in detail, it has been held that such insertion of Explanation 2 has been declaratory and clarificatory in nature to provide clarity to the existing provision. Therefore, held that the order passed by AO shall be liable to be revised by the Pr. CIT/CIT if the AO has not followed the terms of Explanation 2 (a) and (b) of section 263(1) of IT Act 1961. The relevant part of decision of Hon'ble Bench is reproduced here under:

> *Now, as can be seen above , the amendment to section 263 of the Act by insertion of Explanation 2 to Section 263 of the Act is declaratory & clarificatory in nature and is inserted to provide clarity on the issue as to which orders passed by the AO shall constitute erroneous and prejudicial to the interest of Revenue ,it is , inter-alia, provided that if the order is passed without making inquiries or verifications by AO which, should have been made or the order is passed allowing any relief without inquiring into the claim; the order shall be deemed to be erroneous and prejudicial to the interest of Revenue. The Hon'ble Supreme Court in the case of Malabar Industrial Company Limited v. CIT (2000)109 Taxman 66 (SC) held that if the AO has accepted the entry in the statement of account filed by the taxpayer without making enquiry , the said order of the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the Revenue. In our considered opinion, the facts of the case of the assessee company are similar to the facts in the case of Malabar Industrial Co. Limited(supra) whereby no enquiry/verification is made by the AO whatsoever with respect to claim of deduction of Rs. 17.72 crores with respect to the provisions for warranty, excise duty , sales tax and liquidated damages. Moreover, now Explanation 2 to Section 263 of the Act is inserted in the statute which is declaratory and claraficatory in nature to declare the law and provide clarity on the issue whereby if the A.O. failed to make any enquiry or necessary verification which should have been made, the order becomes erroneous in*

so far as it is prejudicial to the interest of revenue. A proviso added from 01-04-1988 to Section 43B of the Act from 01-04-1984 came up for consideration in Allied Motors Private Limited v. CIT (1997) 91 taxman 205(SC) before Hon'ble Supreme Court and it was given retrospective effect from the inception of the section on the reasoning that the proviso was added to remedy http://www.itatonline.org 18 ITA 1994Mum/13 & ITA 2836/Mum/14 unintended consequences and supply an obvious omission so that the section may be given a reasonable interpretation and that in fact the amendment to insert the proviso would not serve its object unless it is construed as retrospective . In CIT v. Podar Cement Pvt. Limited (1997) 92 Taxman 541(SC) , the Hon'ble Supreme Court held that amendment introduced by the Finance Act,1987 in so far the related to Section 27(iii) ,(iiia) and (iiib) which redefined the expression 'owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective. Similarly , in Brij Mohan Das Laxman Das v. CIT (1997) 90 Taxman 41(SC), explanation 2 added to section 40 of the Act was held to be declaratory in nature and , therefore , retrospective.(Reference Page 569-570,Principles of Statutory Interpretation by Justice G.P.Singh ,13th Ed.). In our considered view, the CIT has rightly invoked the provisions of section 263 of the Act as the A.O. failed to make proper enquiry, examination and verifications as warranted for the proper completion of the assessment, with respect to claim of deduction of Rs.17.72 crores with respect to the provisions for warranty, excise duy,sales tax and liquidated damages. Regarding the contentions of the assessee company that the CIT should have set aside the orders passed by the AO after giving appeal effect to the orders of the tribunal in the first round has to be rejected as the basic facts remains that the AO has not made any enquiry, examination or verification of the claim of the assessee company with respect to claim of deduction of provision of Rs 17.72 crores with respect to provisions for warranty, sales tax, excise duty and liquidated damages , the order of the Tribunal would have adjudicated issues arising out of the orders of the authorities below whereby the facts still remains that the AO has not made any enquiry, examination or verification of the claim of the assessee company with respect to claim of deduction of provision of Rs 17.72 crores with respect to provisions for warranty, sales tax, excise duty and liquidated damages. The order of the Tribunal in the first round of litigation has not been incidentally enclosed by the assessee company in the documents/paper book filed with the Tribunal. It is an established principle under the Act that provisions and contingent expenses are not allowed as deduction while computing the income of the assessee. It

computing the income of the assessee. It is only an ascertained liability which has crystallized during the year and which is wholly and exclusively incurred for the purpose of business of the assessee company , is allowed as deduction while computing income under the Act. The A.O. was under duty to make necessary and proper enquiry, examination and verification's with respect to Provisions of Rs. 17.72 crores with respect to the claim of deduction of the assessee company for provisions for liquidity damages, warranty, sales tax and excise duty, while on perusal of the assessment orders u/s 143(3) of the Act dated 28.12.2010 and other documents filed before us, we have observed that the AO has not made any enquiry whatsoever with respect to the claim of deduction of expenses of Rs.17.72 crores towards Provision for Warranty, Sales tax and excise duty and liquidated damages claimed by the assessee company while computing the income of the assessee company and the claim of the assessee company was accepted without any inquiry, examination or verification whatsoever by the AO and In the absence thereof of enquiry, examination and verification of the claim of the asssesee company for deduction of provisions for Warranty, Sales tax and excise duty and liquidated damages amounting to Rs.17.72 crores , we find no infirmity in the order dated 06.02.2013 of the CIT passed u/s 263 of the Act setting aside the assessment order dated 28.12.10 passed u/s 143(3) of the Act as erroneous in so far as prejudicial to the interest of the Revenue and directing the AO to assess the income of the assessee company after making necessary enquiries, examination and verifications , which order of the CIT dated 06.02.2013 , we uphold . We order accordingly."

6. We have heard the rival submissions and perused the materials available on record and gone through the orders of the authorities below. The assessee has assailed the impugned order on the ground that assessing officer had examined all the aspects of the matter and the invoking of the provisions u/s 263 of the Act is bad in law

as same has been invoked on the basis of audit objection, which is not permissible under law. It is contended that the assessee has been holding land prior to financial year 1994 by adverse possession, which is evident from the "Rin Pustika" filed by the assessee. It is the contention that the language of the audit objection and the notice issued by the Ld. CIT-1 Bhopal both are same. The Ld. Counsel in support of this contention has placed reliance on the judgement of the Hon'ble High Court of Punjab & Haryana rendered in the case of CIT Vs. Sohan Woolen Mills (2008) 296 ITR 238 (P&H). Further reliance is placed on the coordinate bench of this Tribunal in the case of SEL Mfg. Co. Ltd. Vs. The Addl. CIT in ITA Nos.409 & 410/CHD/2014 dated 18.11.2015. The reliance is also placed on the judgement of the Hon'ble Bombay High Court in the case of CIT Vs. Gabriel India Ltd. 203 ITR 108 and also the decision of the Hon'ble Delhi High Court in the

case of CIT Vs. Anil Kumar Sharma 335 ITR 83. Further reliance is placed on the judgement in the case of CIT Vs. Hindustan Marketing & Advertising Company Ltd. 341 ITR 180. Further submission is that the A.O. has made enquiries. There was no basis for the Ld. CIT to revise the order.

7. Revenue has opposed these submissions and also placed reliance on following case laws:-

Sl.No.	Case Law	Reported
1	Malabar Industrial Co. Ltd. Vs. CIT	243 ITR 83 (SC)
2	Smt. Taradevi Aggrawal Vs. CIT`	88 ITR 323 (SC)
3	Rampyaridevi Saraogi Vs. CIT	67 ITR 84 (SC)
4	CIT Vs. Nagesh Knitwears Pvt. Ltd.	345 ITR 135 (Delhi HC)
5	Gee Vee Enterprises Vs. Addl. CIT	99 ITR 375 (Delhi HC)
6	Bhushan Steel Ltd. Vs. ACIT	ITAT A Bench Delhi
7	CIT Vs. Deepak Kumar Garg	299 ITR 435 (MP)
8	CIT Vs. Mahavar Traders	220 ITR 167 (MP)
9	Smt. Renu Gupta Vs. CIT	301 ITR 45 (Rajasthan)
10.	PT. Lashkari Ram Vs. CIT`	272 ITR 309 (Allahabad)
11.	CIT Patiala Vs. Himachal Pradesh Financial Corpn.	186 Taxman 105 (Himachal Pradesh)
12.	CIT Vs. Prafulla C. Pant and Dharam Veer JJ	176 Taxman 184 (Uttarakhand)
13.	Mofussil Ware House & Trading Co. Ltd. Vs. CIT	238 ITR 867 (Madras)
14.	Durgalal & Co. Vs. CIT	220 ITR 456 (Delhi)
15.	CIT Vs. Active Traders (P) Ltd.	214 ITR 583 (Calcutta)
16.	Addl. CIT Vs. Mukur Corporation	111 ITR 312 (Gujarat)
17.	CIT Vs. Amitabh Bachan, Mumbai	Civil Appeal No.5009 of 2016 (SC)

18.	CIT Vs. Bhagwan Das	272 ITR 376 (Allahabad)
19.	Shubhalakshmi Vanijya (P) Ltd. Vs. CIT-1	172 TTJ 721 (Kolkata)
20.	Jubilee Commitrade (P) Ltd. Kolkata Vs. CIT 3	ITA No.1179/Kal/2016 'D' Bench Kolkata
21.	Novapan India Ltd. Hyderabad Vs. Collector of Central Excise	3556 of 1984 (SC)
22.	Rajmandir Estates Pvt. Ltd. Vs. PCIT-III	GA No.509 of 2016 (HC) Kolkata
23.	1.P.G. Infrastructure & Service Pvt. Ltd. 2. S.N. Vijaywargiya 3. People's International Service Pvt. Ltd. Bhopal	ITA No.607 to 609 (Indore)
24.	M/s. Crompton Greaves Vs. CIT-6 Mumbai	ITAT Bench Mumbai

8. We have given our thoughtful consideration to the rival submissions. Ld. Pr. CIT revised order on the ground that the Assessing Officer accepted the contention of the assessee ignoring the fact that the assessee did not file any evidence to establish that land was acquired through adverse possession and did not incur any expenses to acquire the land and cost of construction of house on such land. The contention of the assessee is that this aspect was duly examined by the AO. In support of this contention Ld. counsel for the assessee has taken us through the assessment order wherein the assessing officer has

recorded a finding regarding the claim of the assessee that land was acquired by way of adverse possession and/same was accepted after making complete enquiry qua the document so furnished and considering case laws related to section 55(2) of the Act. Ld. counsel has placed on record documents in the form Rin Pustika and five year Khasra in form No.II which is enclosed at P.B. pages 17 to 22. The revenue record suggests that land in question was acquired through adverse possession. No other document is placed on record by the Revenue to rebut this contention. We find that the reason for invoking provision by the Ld. CIT is twofold, firstly, that the AO has not conducted any inquiry regarding land was acquired by way of adverse possession and secondly, house property constructed thereon could not have been acquired by way of adverse possession.

9. Under these facts let us examine whether the assessing officer has made any enquiry. As per the notice dated 28.05.2012 issued u/s 142(1)(ii). The AO directed the assessee to furnish complete details of sale of immovable property as per AIR. In response thereto, it was stated before the assessing officer that the assessee sold agricultural land obtained under adverse possession for a sale of consideration of Rs.4,41,000/- on 02.02.2010. It was further contended that since cost of acquisition of the said agricultural land is nil in the hands of the assessee no capital gain was offered considering provision of section 55(2) of the Act as well as decision of the Tribunal rendered in the case of DCIT vs. Star Chemicals (Bom)Pvt. Ltd. (2007) and the judgment of Hon'ble Supreme Court in the case of *CIT vs. B.C. Srinivasa Setty & Ors. (1981) 21 CTR (SC) 138*. It was also stated that provisions of section 55(2) as applicable to A.Y. 2010-11 do not cover immovable

property acquired by way of adverse possession. In support of this contention the assessee furnished copy of sale deed and other revenue records pertaining to the land in question. Hence it is not the case where no enquiry was made. The Ld. counsel for the assessee has placed reliance on the judgment of the Hon'ble Supreme Court rendered in the case of *CIT vs. B.C. Srinivasa Setty & Ors.* (Supra) wherein the Hon'ble Supreme Court held as under:

> *10. Section.45 charges the profits or gains arising from the transfer of a capital asset to income-tax. The asset must be one which falls within the contemplation of the section. It must bear that quality which brings s. 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head, "Capital gains". Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income-tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income*

subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head.

11. The point to consider then is whether if the expression "asset" in s. 45 is construed as including the goodwill of a new business, it is possible to apply the computation sections for quantifying the profits and gains on its transfer.

The mode of computation and deductions set forth in s. 48 provide the principal basis for quantifying the income chargeable under the head "Capital gains". The section provides that the income chargeable under that had shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset:

"(ii) the cost of acquisition of the capital asset..."

12. What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses

the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class it may, on the facts of a certain case, be acquired without the payment of money. That kind of case is covered by s. 49 and its cost, for the purpose of s. 48 is determined in accordance with those provisions. There are other provisions which indicate that s. 48 is concerned with an asset capable of acquisition at the cost. s. 50 is one such provision. So also is sub-section (2) of s. 55. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at an can be conceived. Yet there are assets which are acquired by way of production in which no cost element can be identified or envisaged. From what has gone before, it is apparent that the goodwill generated in a new business has been so regarded. The elements which create it have already been detailed. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain.

13. In the case of goodwill generated in a new business there is the further circumstance that it is not possible to determine the date when it comes into existence. The date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gains. It is possible to say that the "cost of acquisition" mentioned in s. 48 implies a date of acquisition, and that inference is strengthened by the provisions of ss. 49 and 50 as well as sub-section (2) of s. 55.

14. It may also be noted that if the goodwill generated in a new business is regarded as acquired at a cost and subsequently posses to an assessee in any of the modes specified in sub-section (1) of s. 49, it will become necessary to determine the cost of acquisition to the previous owner. Having regard to the nature of the asset, it will be impossible to determine such cost of acquisition Nor call sub-section (3) of s. 55 be invoked, because the date of acquisition by the previous owner will remain unknown.

15. We are of opinion that the goodwill generated in a newly commenced business cannot be described as an "asset" within the terms of s. 45 and therefore its transfer is not subject to income-tax under the head "Capital gain".

10. The issue before the Hon'ble Court was regarding taxability of the amount received on transfer of goodwill. The Hon'ble Supreme Court held that goodwill as business asset and ruled that the goodwill generated in a newly commenced business cannot be described as an asset. It is also held that there are other provision that indicate section 48 is concerned with an asset which is capable of acquisition at cost. In the present case, we are concerned with the taxability of sale consideration of immovable property claimed to be acquired through adverse possession. The conditions where it can be inferred that the immovable property is acquired by way of adverse possession have been examined in a catena of judgments. In the case of Karnataka Board of Wakf vs. Govt. of India

(2204) 10 SCC 779 at para 11 the Hon'ble Supreme Court observed as under:

> *In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.*

11. It is pertinent to note that the assessee has furnished the documents which suggests that title of the immovable property has been transferred unto the assessee by way of adverse possession. Ld. counsel has relied upon the decision of Coordinate Bench of this Tribunal rendered in the case of Smt. Yashod Deora vs. ITO in ITANO.835/Kol/2008. The Tribunal has held as under:

"8. We have heard rival contentions of both the parties and perused the materials available. Ld. AR submitted written submissions along with paper book running pages from 1 to 28 and stated that it is clear case of adverse possession of the disputed flat by Mr & Mrs. Deora. None of them was having the right of possession of the flat neither as a Director or employee of M/s Mahavir Leather Board Pvt. Ltd. In fact the husband was allowed to reside in the flat on account of his directorship in Kedia Distilleries Ltd. The assessee and her husband have no knowledge regarding the arrangement between M/s Mahavir Leather Board Pvt. Ltd. and M/s Kedia Distilleries Ltd., Ld. AR further stated that it is correct that as his wife, the assessee was also co-occupying the said flat but she never had any legal right therein. Ld. AR submitted that so far as in the present case the assessee as alleged by AO (although without adducing any evidence in support of his claim), obtained rightful possessions of the flat concerned as a licensee holds no merit. Indeed, the purchaser of the flat viz., M/s Pecept Advertising Lt., had to bring a legal action by way o making an application before a judicial body viz., the Competent Authority, ITA No.835/Kol/08 & 281/Kol/13 A.Y. 2003-04 Smt. Yashod Deora Sri Pradeep Kumar Deora Page 8 Konkan Division, Mumbai, for recovering the said possession from the assessee. As per the true facts of the case also, the husband of the assessee had acquired the right to possess the property as a director of M/s Kedia Distilleris Ltd., and the wife acquired the right to reside in the flat on account of being her husband. Therefore, this was a valuable right acquired and also enjoyed by her which required a legal action by km/s percept Advertising Ltd., to take away the right. Finally, both the parties arrived at a mutual settlement for delivery of the possession by the assessee on payment of a sum of Rs.55 lakhs to the husband of the assessee by the other party. This settlement was also approved of and ratified by the Competent Authority. Hence, it can be seen that the right of possession of the flat was a legal right which had to be extinguished by not only a process of law but also substantial payment by the other party. Hence, it must be held that the said right of possessions was not only a 'property' as enunciated in

the various judicial decisions cited above but it was also a valuable property having a substantial money value. Therefore, the right of possession must be considered to be a 'capital asset' for the purpose of Income Tax Act and especially for section 45 of the Act. Even the AO has treated the said right as a capital asset and has charged the amount received by the husband of the assessee as capital gains in the hands of the assessee. It can also be seen that under the settlement arrived at with the purchaser company, the assessee and her husband relinquished their above right of possessions of the disputed flat. There was also an extinguishment of the said right. Hence, in accordance with the different clauses of Sec.2(47) of the Act, there was a 'transfer' of the capital asset of the assessee during the year under consideration. Any profit or gain arising out of this transfer is, thus, liable to be assessed to tax under the head 'capital gains' as has been done by the AO. However, this capital gain is required to be computed for tax purpose in accordance with the computation provisions of Sec. 48 of the Act. It may, however, be clearly seen that there was no cost of acquisition of the right of possessions of the said disputed flat, as the assessee did not spend anything for obtaining the said possession. Hence, the mechanism for ITA No.835/Kol/08 & 281/Kol/13 A.Y. 2003-04 Smt. Yashod Deora Sri Pradeep Kumar Deora Page 9 Computation of capital gain with reference to 'cost of acquisition' of the asset transferred cleaerlyfails. The ultimate result is, thus, that the above mentioned 'capital gains' is not exigible to income tax, as has been held by the Hon'ble Supreme Court in the case of Srinivasa Setty (B.C) 128 ITR 294 (SC) and repeated by the Hon'ble Supreme Court in case of PNB Finance Ltd. 220 CTR

110. On the other hand, Ld. DR vehemently relied on the orders of authorities below.

9. We find that AO has made the protective assessment in the hands of husband-and-wife with a view to avoid the loss to the Revenue which may occur in future and AO has held the compensation received by assessee as the relinquishment of

right of the property and Ld. CIT(A) has confirmed the action of AO by observing that in case it is not such a transaction which is to be taxed under the head "capital gains" but definitely income as per the provision of "income from other source" and which is chargeable to tax. However, we find that this ITAT Mumbai of "E" Bench has decided the matter in favour of assessee which was involving the same facts of the present case and the relevant extract of the ITAT Mumbai para-7-8 in ITA No. 807/Mum/2013 dated 11.09.2015 is reproduced below:-

"7. We have considered the rival contentions. We find that the issue is covered in favour of the assessee by a number of decisions of the Hon'ble Supreme Court as well as various High Courts of the country. The base decision is income CIT v. B.C. Srinivasa Shetty (1981) 128 ITR 294; (1981) 2 SCC 460 wherein the Hon'ble Supreme Court has held that all transactions encompassed by section 45 must fall within the computation provisions of section 48. If the computation as provided under section 48 could not be applied to a particular transaction, it must be regarded as "never intended by section 45 to be the subject of the charge". The Hon'ble Supreme Court in the case of "PNB Finance Ltd. vs. CIT (2008) 307 ITR 75' has reiterated the above proposition of law.

In the case of CIT v. B.C. Srinivasa Shetty (supra) the court was considering whether a firm was liable to pay capital gains on the sale of its goodwill to another firm The court found that the consideration received for the sale of goodwill could not be subjected to capital gains because the cost of its acquisition was inherently incapable of being determined. The principle propounded in B.C. Srinivas Shetty (1981) 128 ITR has been followed by several High Courts with reference to the ITA No.835/Kol/08 & 281/Kol/13 A.Y. 2003-04 Smt. Yashod Deora Sri Pradeep Kumar Deora Page 10 consideration received on surrender of inter alia tenancy rights sale of Good Will etc. It was to meet the situation created by the decision in B.C. Srinivas Shetty (1981) 128 ITR 294 (SC) and the subsequent

decisions of the High Courts that vide Finance Act, 1994, Section 55(2) was amended to provide that the cost of acquisition of, inter alia, a tenancy right, good will etc. would be taken as nil.

8. Thus, it may be noted that after the amendment of 1995, certain assets like goodwill, tenancy rights etc. have been charged to tax by specifically providing that if there is cost incurred by the assessee in this respect, the cost shall be taken as nil. However, we find that vide amendment, particular asses like goodwill, tenancy rights, trade mark etc. have been brought into the ambit of charging section. However, the rights obtained by way of adverse possession have not been included in the provision neither in the charging section 45 nor in the section 48 which provides mode of computation. Here is no any provision regarding the charging of capital gains tax on an asset title to which has been acquired in recognition of rights of adverse possession. Even u/s. 49, the cost of the asset with regard to certain mode of acquisition, such as by way of gift or will, by succession, inheritance or devolution or on any distribution of assts on the dissolution of a firm, body of AOP or liquidation of company etc.; the rights attained in an asset on account of adverse possession have not been included. Though the Parliament has made an amendment that in certain type of assets like goodwill, tenancy rights etc., the cost of acquisition would be taken as actual cost incurred and if no cost incurred, the same be taken at nil, however the said deeming section is applicable to the assets which have been specifically brought within the purview of the said provision. The assets or the rights which do not find mention in the relevant provision, cannot be brought within the ambit of charging section, in the light of the decision of the Hon'ble Supreme Court. We further find that the issue is now squarely covered by the direct decision of the Hon'ble Bombay High Court in the case of CIT vs. Star Chemicals(Bombay) Pvt. Ltd. (Income Tax Appeal No. 1110 of 2009 & Income Tax Appeal No. 1153 of 2009, dated 14th August, 2009) wherein the Hon'ble court while answering the question of chargeability of capital gains in relation to an

asset/ title which was acquired by way of adverse possession, has held that the Tribunal was right in holding that for want of acquisition cost, capital gains tax would not arise. Since a direct decision of the Hon'ble jurisdictional court tin relation to the chargeability of capital gain on asset acquired by way of adverse possession is available, hence, the same is binding upon this Tribunal. We therefore hold that no capital gain are chargeable to tax in relation to the asset acquired by way of adverse possession. Appeal of the assessee is allowed and order of the lower authorities is set aside."

12. The Tribunal has relied upon the two judgment of the Hon'ble Supreme Court rendered in the case of CIT vs. B.C. Srinivas Setty (supra) and PNB Finance Ltd. vs. CIT (2008) 307 ITR 75. In the light of the above decision of the Tribunal it can be very well gathered that no capital gain would be chargeable, in relation to the asset acquired by way of adverse possession. We find that Ld. CIT(A) has revised the order by observing as under:

"I have carefully gone through the issue raise by the Income Tax Officer -3(1), Bhopal and the submission of the assessee. The assessee has not filed any evidence to establish that the land was acquired through adverse possession and did not incur any expenses to acquire the land and the cost of construction of house on such land. Here, it is important to mention that para No.10 appearing at page No.7 of the transfer deed clearly

mention that a house is constructed on the said land which is also included in the property transferred by the assessee. The assessee has not furnished any details regarding the construction of the house of the land. The house cannot be acquired through adverse possession and hence in these circumstances, cost of construction of the house constitutes the cost of acquisition of the property sold by the assessee even if the contention of the assessee regarding the acquisition of land by adverse possession. Hence, in these circumstances, the Assessing Officer was required to determine Long Term Capital Gain by taking cost of construction of the house plus cost of acquisition of the land, expenses incurred on litigation, filing application, acquiring land revenue records, etc. if any, as the cost of acquisition of the property sold (land and house constructed thereupon) and to determine the Long Term Capital Gain on the sale the land in question. Therefore, the sale proceeds of such property attract capital gain in view of the provision of the Income Tax Act 1961.

13. For taxing the gain arising out of transfer of capital asset the first condition as held by the Hon'ble Supreme Court in *CIT vs. B.C. Srinivasa Setty & Ors.* (Supra) is that such capital asset is capable of acquisition at cost. Let us examine whether this condition is satisfied in the present case. We find that Ld. CIT has taken the cost of acquisition as the expenses incurred by the assessee in respect of litigation and construction of house property. The revenue

has not brought any material on record that the house was constructed by the assessee after possession was acquired by the assessee on the basis of adverse possession. Therefore, it cannot be concluded that the assessing officer has erred in accepting the contention of the assessee that since the land was acquired through adverse possession no capital gain tax is payable. Another objection regarding invoking the provision of section 263 is that the Ld. CIT has invoked the provision of section 263 on the basis of audit objection in support of this contention the assessee has placed on record the audit copy to the audit objection. It is noticed that the wording of the audit objection which is enclosed at paper book page 45 reads as under:

> *"The AO has accepted the contention of the assessee ignoring the fact that the assessee has not filed any evidence to establish that the land was acquired through adverse possession. Here, it is important to mention that Para No.10 appearing at page No.7 of the transfer deed clearly mention that a house is constructed on the said land which is also included in the property transferred by the assessee. The assessee has not furnished any details regarding the construction of the*

house on the land. The House cannot be acquired through adverse possession and hence in these circumstances, cost of construction of the house constitutes the cost of acquisition of the property sold by the assessee even if the contention of the assessee regarding the acquisition of land by adverse possession is accepted. Hence, in these circumstances, the AO was required to determine LTCG by taking cost of construction of the house plus cost of acquisition of the land, if any as the cost of acquisition of the property sold (land and house constructed thereupon). Ratio of the decision in the case DCIT vs. Star Chemicals (Bom) P. Ltd. cannot be applied in view of the facts of the case discussed above as the cost of acquisition of the entire property cannot be accepted as nil.
In view of the non-availability of the details of cost of acquisition of the property in the case record of the assessee it is not possible to determine the actual LTCG on sale of property."

14. From above it is evident that the Ld. CIT-I, Bhopal, in the notice dated 26.03.2015 has taken the same basis which was pointed out by the auditors the reasoning of invoking provision of section 263 is stated as under:

"The AO has accepted the contention of the assessee ignoring the fact that the assessee has not filed any evidence to establish that the land was acquired through adverse possession. Here, it is important to mention that Para No.10 appearing at page No.7 of the transfer deed clearly mention that a house is constructed on the said land which is also included in the property transferred by the assessee. The assessee has not furnished any details regarding the construction of the house on the land. The House cannot be acquired through adverse possession and hence in these circumstances, cost of construction of the house constitutes the cost of acquisition of

the property sold by the assessee even if the contention of the assessee regarding the acquisition of land by adverse possession is accepted. Hence, in these circumstances, the AO was required to determine LTCG by taking cost of construction of the house plus cost of acquisition of the land, if any as the cost of acquisition of the property sold (land and house constructed thereupon) and to determine the LTCG on the sale of land in question.

15. Ld. counsel for the assessee has vehemently argued that the ld. CIT ought not to have invoked the provision of section 263, merely, on the basis of the audit objection, he submitted that the ld. Pr. CIT should have applied independent mind. The Ld. counsel has relied upon the decision of Coordinate Bench of this Tribunal rendered in the case of Shri Satya Prakash Gupta vs. ITO in ITANo.2730/Del/2013 held has under:

5.5. It will be desirable to adjudicate the legal issues first. In this case there are two incumbent CITs who have examined the 263 proceedings. First incumbent corresponded with AO ; CIT(Audit); considered record; assessee's explanation and audit correspondence. Based on the entirety of facts on record he held the assessee's explanation to be satisfactory and thereafter returned the record to AO. This clearly demonstrates that first CIT concluded the 263 proceedings requiring no further intervention and returned the record accordingly. In our

considered view ld. successor CIT 28 ITA 2730/Del/2013 Satya Prakash Gupta Vs. ITO cannot take up the closed 263 proceedings on the same issues and review the order of her predecessor on same issues. Thus looking at the language of sec. 263 and catena of judgments cited, successor CIT becomes functus officio in this regard after the exercise conducted by predecessor CIT. . Therefore we have no hesitation to hold that the 263 order is not sustainable on these legal counts.

16. Ld. counsel has also placed reliance on the decision of Coordinate Bench of this Tribunal in the case of Shri Jaswinder Singh vs. CIT in ITANo.690/Chd/2010 held as under:

19. Our attention was drawn by the learned A.R. for the assessee to the audit objection raised in the present case and the main contention of the assessee was that there was no independent application of mind by the Commissioner of Income Tax. Second plea of the assessee in this regard was that the audit objections were not "record" for invoking jurisdiction under section 263 of the Act. The Commissioner of In come Tax while exercising his jurisdiction under section 263 of the Act is empowered to call for and examine the record of any proceedings under the Act and where he thinks that the order passed by the Assessing Officer was both erroneous and prejudicial to the interest of Revenue, he may after giving an opportunity of hearing to the assessee and after making enquiries, pass such orders, which deem necessary in the circumstances of the case. In the present set of facts and circumstances, the Commissioner of Income Tax has issued the show cause notice under section 263 of the Act on account of the audit objection raised in the present case.

20. We find that similar issue of exercise of revisionary powers by the Commissioner of Income Tax on the basis of audit objections arose before the Hon'ble Punjab & Haryana High Court in CIT vs. Sohana Woollen Mills (supra) and it was held that mere audit objection and the fact that a different view could be taken, were not enough to say that the order of Assessing Officer was erroneous or prejudicial to the interests of Revenue. The Hon'ble Court further held that "whether satisfaction of the Commissioner for exercising jurisdiction was called for or not, has to be decided having regard to the given fact situation".

21. The Hon'ble Gauhati High Court in B & A Plantation & Industries Ltd. & Another Vs. CIT & Others (supra) has laid down the difference between revisionary, rectification and re-assessment proceedings. The fact situation before the Hon'ble Guahati High Court that rectification proceedings were initiated on the basis of audit objections, which were dropped subsequently and notice under section 263 of the Act was issued by the Commissioner of Income Tax on the basis of same audit objections and the Hon'ble Court held that there was no independent application of mind by the Commissioner of Income Tax and the revision proceedings were held to be not valid. The Hon'ble Gauhati High Court observed as under:

"In the case at hand, the order, initiating rectification proceedings under section 154, as well as the order revising the assessment under section 263, were passed on the basis of one and the same audit objection. While exercising revisional jurisdiction, the revisional authority must bear in mind that the principles of natural justice do not permit the decision of a quasi-judicial authority, such as a Commissioner of Income-tax, to be influenced by any other authority. Thus, the Commissioner, in the present case, could not have initiated a suo motu revisional proceeding on the basis of the said audit report.
Had, on the basis of the audit report, the Commissioner came to his own finding that the assessing authority, while making the assessment, or the authority empowered to rectify a turnover,

which had escaped assessment, has acted without jurisdiction, revisional jurisdiction could have been exercised. Emphasised the Supreme Court, in the case of Sirpur Paper Mill Ltd. v. CWT [1970] 77 ITR 6 , that while exercising power, the Commissioner must have an unbiased mind and decide the dispute according to the procedure which is consistent with the principles of natural justice and cannot permit his mind to be influenced by the dictation of another authority. The relevant observations made by a three-judge Bench of the Supreme Court, in the case of Sirpur Paper Mill Ltd. [1970] 77 ITR 6, read as follows (page 7):

"In exercise of the power the Commissioner must bring to bear and unbiased mind, consider impartially the objections raised by the aggrieved party, and decide the dispute according to procedure consistent with the principles of natural justice ; he cannot permit his judgment to be influenced by matters not disclosed to the assessee, nor by dictation of another authority."

22. Similar view has been taken by the Calcutta High Court in Jeewan Lal (1929) Ltd. Vs. Addl.CIT & Others (supra) that notice issued b y the Commissioner of Income Tax at the suggestion of the Audit Department without applying his mind could not be sustained in law.

23. In the back drop of the above said settled legal precedents, we find that the Commissioner of Income Tax in the present case had also initiated the proceedings under section 263 of the Act on the basis of the audit objections. Show cause notice was issued in the present case for non-deduction of tax at source, out of certain expenses incurred by the assessee and order passed by the Commissioner of Income Tax under section 263 of the Act directing the Assessing Officer to re-determine the income of the assessee by applying the rate other than the rate applied by the Assessing Officer, being without jurisdiction, is not tenable in law. We find no merit in the plea of the learned D.R. for the Revenue that the source of information in the present case was audit objection, but there was independent application of mind by the Commissioner of Income Tax. The

provisions of section 263 of the Act are clear and absolute that the power is to be exercised by the Commissioner of Income Tax from the examination of the records of the proceedings under the Act. The explanation under section 263 of the Act defines 'records' as all records relating to any proceedings under the Act available at the time of examination by the Commissioner. The audit objections under no circumstances can be called as record empowering the Commissioner of Income Tax to exercise jurisdiction under section 263 of the Act. Further it is apparent that the Commissioner of Income Tax has initiated the revision proceedings only on the basis of Audit Objection. Such exercise of power under section 263 of the Act is not tenable in law. Accordingly, we set aside the order passed by the Commissioner of Income Tax under section 263 of the Act. The grounds of appeal raised by the assessee are thus allowed.

17. In the present case also looking to the audit objection and the notice issued by the Ld. CIT, it can be inferred that Ld. Pr. CIT has not applied independent mind on the facts of the present case. Moreover, the audit objection is on the ground that the house cannot be acquired through adverse possession. This opinion of the auditor is fallacious as there is no such distinction under the law that the house property cannot be acquired through adverse possession. The only requirement is that the title ought to have been

perfected through adverse possession. The ld. CIT has not given any finding regarding as to why the property in question cannot be treated to have been acquired through adverse possession. However, Ld. CIT in fact concurred the view of the auditor another aspect of the matter is that the order sought to be revised can be treated as erroneous if the assessing officer fails to carry out any inquiry. It is true that assessing officer in the present case made some enquiry and in response thereto the assessee explained about acquisition of the property in question though adverse possession. The assessing officer accepted the claim of the assessee considering the material placed before him and case laws cited by the assessee. We are conscious of fact that section 263 which empowers the Ld. CIT for revising the assessment has undergone some change as Explanation 2 has been inserted w.e.f. 01.06.2015 to section 263(1) of the Act. The explanation speaks as under:

"Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

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

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

18. We are concerned with assessment year 2010-11, therefore, this change into law would not help the Revenue. Hon'ble Delhi High Court has examined the entire law related to exercise of power u/s 263 in the judgment rendered in the case of ITO vs. D.G. Housing Projects in ITANo. 179/2011. The Hon'ble High Court has taken note of the judgments of the Hon'ble Apex Court and the Hon'ble Delhi High Court. The Hon'ble High Court adverting to the

observation of Hon'ble Delhi High Court in the case of *Gee Vee Enterprises vs. ACIT and others (1975) 99 ITR 375 (Delhi)* that the Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return, the Hon'ble Court held that the aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. It was observed by the Hon'ble High Court that in those cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry. The Hon'ble High

Court further held that in cases of wrong opinion or finding on merits, the Ld. CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order u/s. 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. The Ld. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the Ld. CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Ld. CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in law. In some cases possibly though rarely, the Ld. CIT can also show and establish that the

facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction u/s 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the Ld. CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

19. In the present case the ld. CIT-1 was of the opinion that assessment order dated 27.06.2012 passed by the

assessing officer is erroneous and prejudicial to the interest of the revenue. As during the course of assessment proceedings, the assessing officer has wrongly accepted the contention of the assessee ignoring the fact that the assessee has not filed any evidence to establish that the land was acquired through adverse possession. Therefore, the assessment order passed by the Assessing Officer was *set aside* to frame the assessment *denovo* after obtaining the evidences of acquisition of land, expenses incurred on house construction on such land and legal/other expenses incurred to acquire such land and building and charge Long Term Capital Gain in accordance with the provision of the Income Tax Act, 1961, after affording opportunity of being heard to the assessee.

20. In our considered view the impugned order fails the test prescribed by the judgment of Hon'ble Delhi High Court, as

in the present case the assessing officer has made some enquiry and collected certain evidences further in the light of the judgment of Hon'ble Supreme Court and the decision of the Tribunal the assessing officer accepted the claim that the land was acquired through adverse possession. If this finding of the assessing officer in the opinion of the Ld. CIT was erroneous he should have himself carried out further enquiries as held by the Hon'ble High Court in the case of *ITO vs. D.G. Housing Projects (supra).* Merely, setting aside the assessment order for framing of *denovo* assessment is contrary to the ratio laid down by the Hon'ble Delhi High Court. We, therefore, respectfully following the ratio laid down by the Hon'ble Delhi High court in the case of *ITO vs. D.G. Housing Projects (supra) set aside* the order of the Ld. CIT and allow the grounds of appeal of the assessee.

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

Order was pronounced in the open court on 17 .01.2020.

Sd/-	Sd/-
(MANISH BORAD)	(KUL BHARAT)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Indore; दिनांक Dated : 17/01/2020
Patel/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore