

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT
MEMBER

ITA.No.632/Ind/2019
Assessment Year 2014-15

Shri Aditya Mundra,
24-HIG, Vijay Nagar,
Dewas

PAN : AAQPM9678N : Appellant

V/s
PCIT,
Ujjain

: Revenue

ITA No.634/Ind/2019
Assessment Year 2014-15

Shri Govind Das Mundra,
CG-16, Scheme No.74,
Vijay Nagar,Indore

PAN : AFZPM7956B : Appellant

V/s
PCIT,
Ujjain

: Revenue

ITA No.635/Ind/2019
Assessment Year 2014-15

Shri Manish Mundra,
104/B, Pathar Godown Road,
New Siyaganj,Indore

PAN : AAQPM9678N : Appellant

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ITA No.632, 634,635 & 637, 517 & 750/Ind/2019

V/s
PCIT,
Ujjain : Revenue

ITA No.637/Ind/2019
Assessment Year 2014-15

Shri Manoj Mundra,
104/B, Pathar Godown Road,
New Siyaganj,Indore
PAN : AFZPM7957A : Appellant

V/s
PCIT,
Ujjain : Revenue

ITA No.750/Ind/2019
Assessment Year 2014-15

M/s Dhirendra International Pvt. Ltd,
Industrial Area, Kanawati,
Behind Mahaveer Warehouse,
Kanawati, Neemuch
PAN : AADCD4424B : Appellant

V/s
PCIT,
Ujjain : Revenue

ITA No.517/Ind/2019
Assessment Year 2014-15

M/s Charitra Gold Pvt. Ltd,
97 Chandni Chowk,
Ratlam (M.P)
PAN : AAEC7978D : Appellant

V/s
PCIT,
Ujjain : Revenue

Revenue by	Shri S.S. Mantri, CIT
Assessee by	Shri S.S. Deshpande, CA
Date of Hearing	05.01.2021
Date of Pronouncement	13.01.2021

ORDER

PER MANISH BORAD, A.M

The above captioned six appeals filed at the instance of the assessee(s) pertaining to Assessment Year 2014-15 are directed against the orders of Ld. Pr. Commissioner of Income Tax, Ujjain (in short 'Ld. PCIT], Ujjain dated 19.03.2019, 20.13.2019 &25.03.2019 respectively u/s 263 of the Act.

2. As the common issues raised by respective assessee(s) in all these bunch of six appeals is challenging the order of Ld. PCIT for wrongly assuming the jurisdiction u/s 263 of the Act and also wrongly treating the assessment orders as erroneous and prejudicial to the interest of revenue to the extent of not examining some issues. As agreed by both the parties we are disposing off all these appeals through this common order for sake of convenience and brevity.

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3. With regard to ITA. No.632, 634, 635 and 637/Ind/2019 similar grounds are raised by the four assessee(s) and therefore the grounds raised by Shri Aditya Mundra in ITA. No.632/Ind/2019 are reproduced below:-

1. The order passed by the Ld. PCIT is illegal and bad in law and hence be set aside.

The Ld. PCIT has erred in passing the order u/s 263 on the ground that the order passed by the Ld. AI.O. is erroneous and prejudicial to the interest of the revenue.

It was proved before the Ld. PCI'T that the assessment was framed after due scrutiny of facts and after verification of the details. In para 3 the Ld. A.O. discussed about the long term capital gains and observed that after taking into consideration the details submitted by the assessee and the explanations offered the assessment is completed. Complete papers with the details of sale/purchase of shares with copy of the brokers account were furnished. After verification and detailed scrutiny the Ld. A.O. framed the assessment and as such the same cannot be treated as erroneous and prejudicial and as such action u/s 263 is bad in law.

4. The order passed by the Ld. PCIT be quashed.

4. With regard to ITA. No.750/Ind/2019, M/s Dhirendra International Pvt. Ltd for Assessment Year 2014-15 assessee has raised following grounds of appeal:-

1. That on the facts and in the circumstances of the case, Ld. Pr. CIT erred in holding that the assessment order is erroneous and prejudicial to the

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interest of revenue. The assessment framed by Ld. A.O after verification of relevant records and applying statutory provisions may kindly be restored.

2. The appellant crave liberty to add, amend, alter, modify or delete any of the ground of appeal on or before its hearing before its hearing before your honour.

5. With regard to ITA. No.517/Ind/2019, M/s Charitra Gold Pvt Ltd for Assessment Year 2014-15 assessee has raised following grounds of appeal:-

1. From the facts and on the circumstances of the case order passed by the Hon'ble Pr. CIT u/s 263 of IT Act, 1961, is illegal and bad in law.

2. From the facts and on the circumstances of the case order passed by the Hon'ble Pr. CIT wrong in considering order dated 09.12.2016 passed by the ACIT is erroneous and prejudicial to the interest of revenue.

3. From the facts and on the circumstances of the case all the facts has been discussed during the assessment proceeding regarding FMV of 54000 shares as on 01.10.2013 and appellant has filled share valuation details as per Rule 11UA(2)(a) for the purpose of Section 56(2)(viib) Exp. (a)(i) as option given in the Act and the same has been accepted by the A.O.

4. The appellant further craves to leave to add, alter/or amend any of the foregoing grounds of appeal as and when considered necessary

6. Before going through the facts and issues raised in the instant appeal which are commonly challenging the respective impugned orders passed by Ld. PCIT wrongly assuming jurisdiction u/s 263 of the Act, we deem it fit to first go through the provision of Section

263 of the Act and the settled judicial precedents in this regard and thereafter we can examine the facts of the instant cases in the light of principles so laid down so as to decide accordingly.

7. Provisions of Section 263 of the Act reads as follows;

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

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

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—*
 - (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner 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.

8. It is well settled law that for invoking the provisions of section 263 of the Act both the conditions that the assessment order must be erroneous and prejudicial to the interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

9. Hon'ble Jurisdictional High Court of Madhya Pradesh in the case of *H.H. Maharaja Raja Power Dewas (1983) 15 Taxman 363* in para 10 of this order held that “*However, the first argument, viz., that an assessment order without compliance with the procedure laid down*

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in section 144B is erroneous but not prejudicial to the interests of the revenue conferring revisional jurisdiction on the Commissioner under section 263(1), has force. Under section 263(1) two pre-requisites must be present before the Commissioner can exercise the revisional jurisdiction conferred on him. First is that the order passed by the ITO must be erroneous. Second is that the error must be such that it is prejudicial to the interests of the revenue. If the order is erroneous but it is not prejudicial to the interests of the revenue, the Commissioner cannot exercise the revisional powers under section 263(1). There cannot be any prejudice to the revenue on account of the ITO's failure to follow the procedure prescribed under section 144B, and unless the prejudice to the interests of the revenue is shown, the jurisdiction under section 263(1) cannot be exercised by the Commissioner, even though the order is erroneous. The argument that such an order may possibly be challenged in appeal by the assessee, and for this reason it is prejudicial to the interests of the revenue, has no merit. Section 263(1) clearly contemplates that the order of assessment itself should be prejudicial to the interests of the revenue and this prejudice has to be proved by reference to the assessment order only. It cannot be argued that there is some

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possibility of the assessment order being challenged or revised in appeal and, therefore, on account of this contingency, the order becomes prejudicial to the interests of the revenue.” [emphasis supplied]

10. Hon’ble Apex Court in the case of *Malabar Industrial Co. Ltd.* – [2000] 243 ITR 83 – order pronounced on 10.02.2000 – HEAD NOTE – “Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1983-84 - Whether in order to invoke section 263 Assessing Officer's order must be erroneous and also prejudicial to revenue and if one of them is absent, i.e., if order of Income-tax Officer is erroneous but is not prejudicial to revenue or if it is not erroneous but is prejudicial to revenue, recourse cannot be had to section 263(1) - Held, yes - Whether if due to an erroneous order of ITO, revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to interests of revenue - Held, yes - Assessee-company entered into agreement for sale of estate of rubber plantation - As purchaser could not pay installments as scheduled in agreement, extension of time for payment of installments was given on condition of vendee paying

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damages for loss of agricultural income and assessee passed resolution to that effect - Assessee showed this receipt as agricultural income - Resolution passed by assessee was not placed before Assessing Officer - Assessing Officer accepted entry in statement of account filed by assessee and accepted same - Commissioner under section 263 held that said amount was not connected with agricultural activities and was liable to be taxed under head 'Income from other sources' - Whether, where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified - Held, yes

11. Hon'ble Gujarat High Court in the case of *Smt. Minalben S. Parikh* – [1995] 215 ITR 81 – order pronounced on 17.10.1994 – Para 12 – “From the aforesaid, it can well be said that the well-settled principle in considering the question as to whether an order is prejudicial to the interests of the revenue or not is to address oneself to the question whether the legitimate revenue due to the exchequer has been realised or not or can be realised or not if his orders under

consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realised, has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at a rate at which it could yield the maximum revenue in accordance with law or not. If income in question has been taxed and legitimate revenue due in respect of that income had been realised, though as a result of erroneous order having been made in that respect, in our opinion, the Commissioner cannot exercise powers for revising the order under section 263 merely on the basis that the order under consideration is erroneous. If the material in that regard is available on the record of the assessee concerned, the Commissioner cannot exercise his powers by ignoring that material which links the income concerned with the tax realization made thereon. The two questions are inter-linked and the authority exercising powers under section 263 is under an obligation to consider the entire material about the existence of income and the tax which is realizable in accordance with law and further what tax has in fact been realised under the alleged assessment orders.[emphasis supplied]

12. Hon'ble Karnataka High Court in the case of *V. G. Krishnamurthy* – [1985] 20 *Taxman* 65 – order pronounced on 19.03.1984 – Para 10 – “Section 263 can be invoked by the Commissioner only when he *prima facie* finds that the order made by the ITO was erroneous and was prejudicial to the interests of the revenue. Both these factors must simultaneously exist. An order that is erroneous must also have resulted in loss of revenue or prejudicial to the interests of the revenue. Unless both these factors co-exist or exist simultaneously, the Commissioner cannot invoke or resort to section 263. It cannot be exercised to correct every conceivable error committed by an ITO. Before the *suomoto* power of revision can be exercised, the Commissioner must at least *prima facie* find both the requirements of section 263, namely, that the order sought to be revised is *prima facie* erroneous and prejudicial to the interests of the revenue. If one of the other factor was absent, the Commissioner cannot exercise the *suomoto* power of revision under section 263.”
[emphasis supplied]

13. The Income-tax Appellate Tribunal in the case of *Mrs. Khaiiza S. Oomerbhoy v. ITO* [2006] 101 *TIJ* 1095 (Mum), analysed in detail

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various authoritative pronouncements including the decision of the hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83 (SC) and has propounded the following broader principle to judge the action of the Commissioner of Income-tax taken under section 263.

- (i) The Commissioner of Income-tax must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. Both the conditions must be fulfilled.
- (ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it was only when an order is erroneous that the section will be attracted.
- (iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.
- (iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.
- (v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the Assessing Officer has adopted one of the courses permissible

under law or where two views are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree. If cannot be treated as erroneous order, unless the view taken by the Assessing Officer is unsustainable under law.

- (vi) If while making the assessment, the Assessing Officer examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the Commissioner of Income-tax, while exercising his power under section 263 is not permitted to substitute his estimate of income in place of the income estimated by the Assessing Officer.
- (vii) The Assessing Officer exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the Commissioner of Income-tax does not feel satisfied with the conclusion.
- (viii) The Commissioner of Income-tax, before exercising his jurisdiction under section 263 must have material on record to arrive at a satisfaction.
- (ix) If the Assessing Officer has made enquiries during the course assessment proceedings on the relevant issues and the assessee has detailed explanation by a letter in

writing and the Assessing allows the claim on being satisfied with the explanation of the assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

14. By exercising such power u/s 263 the Ld. PCIT can himself pass an order determining taxable income of the assessee. He can enhance income or he can cancel the assessment order with a direction to pass fresh assessment order. Thus, it is not a mere continuation of original proceedings. It is a proceeding which is assumed for determining/recomputation of income of an assessee. Hence unless a valid jurisdiction is being assumed by the Commissioner, he cannot redo an act done by his subordinate authorities. His direction would give fresh dimension to the determination of income of an assessee. Therefore, the power exercised by the Commissioner is an original jurisdiction akin to the Assessing Officer for the purpose of determining taxable income of the assessee.

15. We observe that there was an amendment in Section 263 of the Act by Finance Act 2015 w.e.f. 1.6.2015 inserting explanation 2

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to sub section 1 of Section 263 of the Act wherein it is mentioned that order of the A.O shall be deemed to be erroneous in so far as it is prejudicial to the interest of revenue, if 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.*

16. The above inserted explanation has been discussed and analysed by the Hon'ble High Court of Delhi in the case of *ITO V/s D.G Housing Projects Ltd* (2012) 20 Taxman.com 557 and was subsequently considered by this Tribunal in the case of *Rakesh Khandelwal* 65 ITA No.204 of 2019 order dated 29.1.2020 observing as follows:-

“Therefore, it is not the case where there was no enquiry at all by the A.O. The assessee had furnished certain evidences, which the assessing officer has gone through. There is no dispute that the Ld. Principal CIT can exercise the revisionary jurisdiction u/s 263 of the Act. If he considers that any order passed by the A.O. is erroneous in so far as it is prejudicial to the interest of the revenue. Explanation (2) to section 263 of the Act

further clarifies that an order passed by the A.O. shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if in the opinion of the Principal Commissioner or Commissioner (a) the order is passed without making enquiries or verification which should have been made (b) the order is passed allowing any relief without enquiring into the claim (c) the order has not been made in accordance with the order, direction or instruction issued by the Board u/s 119 or (d) 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. In the present case, Principal CIT has revised the order on the ground that the A.O. has failed to make enquiries or verification, which should have been made. Ld. Principal CIT has not specified that what enquiries the A.O. has not made. There is no material suggesting that the Principal CIT has expressed his view about insufficiency of enquiry on the material placed on record. The issue regarding whether the assessment order is erroneous or prejudicial on the ground of insufficiency of enquiry has been dealt by the Hon'ble Delhi High Court in the judgement of ITO Vs. DG Housing Projects Ltd. (2012) 20 Taxmann.com 587, which has been followed by this Tribunal in various cases. Hon'ble High Court while adverting to the issue held that in cases of wrong opinion for finding on merit, the CIT has to come to the conclusion and himself decide that order is erroneous, by conducting necessary enquiry, if required and necessary before the order u/s 263 of the Act is passed. In such cases, the order of the A.O. will be erroneous because the order passed is not sustainable in law and the said finding must be recorded 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 CIT must give and record a finding that the order/enquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is

able to establish and show the error or mistake made by the A.O. making the order unsustainable in law. In some cases, possibly though rarely, the 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 A.O. 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 A.O. who conduct further enquiries without a finding that the order is erroneous finding that order is erroneous the 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 A.O. would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the A.O. to decide the aspect/question. The Hon'ble Court further held that this distinction must be kept in mind by the CIT while exercising jurisdiction u/s 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the A.O., who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/enquiry.

The order of the A.O. may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the A.O. to decide whether the order was erroneous. This is not permissible. An order is erroneous, unless the CIT held and records reason why it is erroneous. An order will become erroneous because on remit, the A.O. may decide that order is erroneous. Therefore, CIT must after recording reasons, hold that order is erroneous the jurisdictional pre-condition stipulated is that CIT must come to the conclusion that the order is erroneous and is

unsustainable in law. It was further observed that the material, which the CIT can rely includes not only the records as it stands at the time when the order in question was passed by the A.O. but also record as it stands at the time of the examination by the CIT. Nothing appears/prohibits CIT from collecting and relying new/additional material which evidence to show and state that the order of the A.O. is erroneous. We find that Ld.CIT in the present case has not carried out any enquiry of his own has merely set aside the assessment to the file of the A.O. to re-examine issue of source of cash deposited by the assessee. Therefore, it is contrary to the guidelines as mandated in the Hon'ble Delhi High Court in the case of ITO Vs. DG Housing Projects Ltd. (supra) coupled with the fact that the assessee during the assessment proceedings had submitted evidences in support of sale of jewelleries and receipt of gift. Moreover, the issue of examination of Rakesh Khandelwal 69 ITA No.204 of 2019 source of gift was not subject matter of the scrutiny.

Therefore, the decision of the Ld. CIT invoking provisions of section 263 of the Act is not justified and cannot be sustained under the facts and circumstances of the present case. We therefore, set aside the impugned order and allow the grounds raised by the assessee.”

17. From perusal of the above decision in the case of *Shri Rakesh Kahndelwal (supra)* we can add one more principle to the nine principles referred above in para 13. *Tenth principles would be that “the PCIT/CIT before holding the order of the AO as erroneous and prejudicial to the interest of revenue should examine the issues at its end by way of conducting necessary enquiries/investigation and verify the issue/transaction and give a finding on merit”.*

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18. Now we proceed to examine the facts of the instant case in the light of the ratio laid down by Hon'ble Courts so as to examine firstly whether the assessment order passed by the Ld. A.O is erroneous in nature and secondly whether it is prejudicial to the interest of revenue.

19. We will first take up ITA No.632, 634, 635 & 637/Ind/2019 wherein Ld. PCIT has set aside the orders of the Ld. A.O to have not examined in detail the transaction of Long Term Capital from sale of shares of scrip of M/s Kappac Pharma Limited alleged to be a penny stock company in order to ascertain the true facts of the case.

20. Since the issue raised and facts under consideration in all the four appeals are same as agreed by both the parties, we will take up the facts of Shri Aditya Mundra in ITA No.632/Ind/2019 for adjudication and our decision shall be applicable *mutandis mutandis* to other three assessee(s) namely Shri Govind Das Mundra (ITA No.634/Ind/2019), Manish Mundra (ITA No.635/Ind/2019) and Shri Manoj Mundra (ITA No.637/Ind/2019).

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21. Brief facts of the case as culled out from the records are that the assessee is an individual deriving income from salary, rent, interest and capital gain and agriculture income. The return of income was e-filed declaring the income on 30.9.2014 declaring total taxable income of Rs.11,60,008/-. Exempt income of Rs.36,11,017/- included exempt Long Term Capital Gain on sale of equity shares of *Kappac Pharma Ltd* at Rs.35,13,945/- shown. The Case was selected for scrutiny through CASS. Notice u/s 143(2) of I.T. Act was issued on 31.08.2015. Subsequent to this questionnaire u/s 142(1) was served upon the assessee. The assessment was completed u/s 143(3) on 22.12.2016 at total income of Rs.12,08,010/- after making addition of Rs.48,800/- being net profit difference. Subsequently Ld. Pr.CIT, Ujjain assuming his jurisdiction u/s 263 of the Act initiated the proceedings u/s 263 of the Act against the assessee by issuing following show cause notice dated 25.02.2019:-

In this case, the assessee filed return of income for the A.Y 2014-15 on 30.09.2014 declaring total income of &.11,60,010/- and agricultural income of &.10,000/-. The case was selected for scrutiny through CASS. The assessment was completed u/s 143(3) on 22.12.2016 by the AO [ITO-1, Dewas] at total income of &.12,08,010/-, which is considered erroneous

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and prejudicial to the interest of revenue for the following reasons :-

On perusal and examination of records, it is noticed that the assessee had sold 5000 shares of Kappac Pharma Ltd. for an amount of ₹.35,73,945/-, which was purchased by the assessee for an amount of ₹.60,000/-. The capital gain arising on such sale transaction of ₹.35,13,945/- is claimed to be exempted u/s 10(38) of the I T Act.

On perusal and verification of record. it is observed that the assessee submitted copy of transfer form for share transfer as evidence for date of purchase. The shares were purchased in physical form for ₹.60000/- @ ₹.5 per share. The date of purchase is not verifiable and detailed investigation by the DG (Inv.), New Delhi has revealed that the transactions were fraudulent. The Pr. DIT(Inv.), Bhopal also informed that a large number of assesseees have taken bogus entries of LTCG and shares at premium through broker of Kalkatta to various persons. The AO, has despite specific input, accepted the capital gain claimed without verification.

In the light of entire facts discussed above, I am of the considered view that the assessment order passed u/s 143(3) on 22.12.2016 for the A.Y. 2014-15 in your case is erroneous as well as prejudicial to the interest of revenue, which requires to be revised u/s 263. However, before I proceed to invoke the powers u/s 263 and pass an appropriate order, I deem it proper to give you an opportunity of being heard in the matter.

22. The assessee duly replied to the above show cause notice submitting as follows:-

The assessee is earning income from Job work of engineering/vehicle parts in the name of his proprietary concern M/s Aditya Engineering and salary from M/s Gangotri Flexitubes Pvt. Ltd. Besides this he earns

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income from rent, capital gain and interest income during the year under assessment. He is regularly assessed to tax since A. Y.1993-94. The assessee has sold 5000 shares of Kappac Pharma Limited on 4/02/2014 & 05/03/2014 for Rs. 25,06,906/- and Rs.10,67,039/- respectively totalling Rs.35,73,945/-. The assessee has held such shares more than 12 months and as such the same is a long term capital assets. The share duly listed on stock exchange and Security Transaction has also been charged. The long term capital gain arise on transfer of share is exempted u/s 10 (38) of Income Tax Act, 1961 the same may please be accepted.

As regards, date of purchase of shares, it is humbly submitted that the assessee has purchased 5000 shares of Kappac Pharma Limited on 26/06/2012 for &.60,000/- through broker. The shares are duly appearing in the balance sheet of the assessee as on 31/03/2013. During the assessment proceedings before the Ld. Assessing Officer the copy of debit note along with ledger copy with broker have been filed which clearly shows the date of purchase. The assessee has filed complete details of sale and purchases of shares and assessment records along with financial statement. After seeing the documents the Ld. Assessing Officer has accepted after scrutinized the documents. The Ld. Assessing Officer has elaborated his view in the assessment order also.

In view of above submission and on the facts and circumstances the order of the Assessing officer is not prejudicial to the interests of the revenue. Also your honour an order cannot be termed as erroneous that the order should have been written more elaborately.

It is humbly submitted your honour that relying on the following decisions of Hon'ble Courts both conditions must co-exist for proceedings under section 263 of Income Tax Act, 1961.

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Tara Devi Aggarwal (Smt.) vs. CIT 88 ITR 323 (SC).

CIT vs. Max India Ltd. 295 ITR 282 (SC)

CIT vs. Ratlam Coal Ash Co. 171 ITR 141 (MP).

CIT vs.'Shri Govindram Seksariya Charity Trust 166 ITR 580 (MP)

CIT vs. Gabriel India Ltd. 203 ITR 109 (Bom).

CIT vs. Smt. Minalben S.Parikh 215 ITR 81 (Guj).

CIT vs. Sohana Woollen Mills 296 ITR 238 (P& H).

It is therefore prayed your honour that the proceedings may please be dropped.

23. The submissions made by the assessee could not satisfy the Ld. PCIT and he relied on the information received from Director, Investigation, Kolkatta treating Kappac Pharma Ltd as a penny stock and was of the view that the Ld. A.O has not carried out sufficient enquiries with regard to the transaction of Long Term Capital Gain and thus held that the assessment order dated 22.12.2016 issued u/s 143(3) of the Act as erroneous and prejudicial to the interest of revenue observing as follows :-

3.5 In view of the above findings of Investigation Wing, there was no reason for the AO to accept the Long Term Capital Gains

of the assessee as genuine and exempt LTCG without carrying out the enquiries regarding the nature of security trade by the assessee and verification from seller, buyer and operators as brought by the Investigation Wing. The AO has not carried out any of above enquiries before the passing of order. The case was required to be examined from all the angles including value of the above Scrip KAPPAC PHARMA LTD and the value at which profits were claimed to have received. The AO has ignored the various aspects which are required to be investigated in case of penny scrips while passing the order and has not made enquires which ought to have been made, thereby making the order erroneous and prejudicial to interest of revenue.

3.6 In several decisions of the Tribunals, High Courts and the latest judgment of the Apex Court, it has been held that in case of Long Term Capital Gains from trading in shares of penny stock companies, the enquiries from all the angles including real. value of the scrip traded are to be carried out from brokers, operators promoters and stock exchange before allowing the same as genuine exempt Long Term Capital Gains, which has not been done in present case.

3.7 In view of the above, the AO is required to examine this issue in detail in order to ascertain the true state of the facts. As discussed above, the assessment order is erroneous and prejudicial to the interest of revenue.

4. *The relevant explanation to section 263 is reproduced as below :-*

Explanation 2 – “For the purpose 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;”

As such the provisions of section 263 are applicable on the issue of the case.

5. *Thus, the order is erroneous and prejudicial to the interest of revenue in respect to the above issue.*

6. *The order of the AO is, therefore, set aside to the file of the AO with direction to examine the issue, as discussed above, and after affording proper opportunity to the assessee. The order dated 22.12.2016 passed u/s 143(3) is, accordingly, set aside.*

24. Now the assessee is in appeal before the Tribunal.

25. Ld. Counsel for the assessee submitted at length referring to the written submissions and relying on the jurisdictional pronouncements as reproduced below:-

The assessee is an individual deriving income from Salary, rent, interest and capital gain and agricultural income. The return of income was filed declaring the income of Rs. 11,60,010/-.

During the course of the assessment proceedings, the Ld. A.O. asked the assessee to file the necessary details and explanation in respect of the income declared. Various queries were raised and the necessary explanation was offered. The Ld. A.O. raised a specific query about the long term capital gains which was claimed exempt. Complete details and explanation were filed along with the bank statements, the copy of the brokers account for purchases and sale, and the details of security transactions payments. It was further submitted that the shares were transferred in the name of the assessee. On the sale of the shares the consideration was received through banking channel. The purchases of shares were duly reflected in the statement of affairs. After considering all these documents the Ld. A.O. accepted the profits on sale of share and in para 3 he observed as under:

"During the course of assessment proceeding the assessee asked to explained about capital gain on sale of share. In connection with long term capital gain assessee submitted in writing that long term capital gain on sale of shares is exempted u/s 10(38). Also enclosed with written reply details of sale/purchase records along with copy of account of the brokers., it is further stated that the assessee has purchased 5000 shares of Kappac Pharma Ltd. on 26/06/2012 for Rs.60,000/- and the same has been sold

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on 24/02/2014 and 05/03/2014 for Rs.25,06,906/- and Rs.1,067,039/-. The assessee has held such shares more than 12 months and as such the same is a long term capital assets. The share duly listed on stock exchange and Security Transaction has also been charged. In view of the above submissions, the long term capital gain arise on transfer of share is exempted u/s 10(38) of Income Tax Act, 1961. Reply submitted by the assessee is examined with records produced for verification. "

Subsequently, the Ld. PCIT issued a notice to invoke the provision u/s 263 with the reasons that the Investigation Wing, Bhopal has informed that large number of assessee's have taken bogus entries of LTCG. Thus, the A.O. has despite specific input has accepted the capital gains without verification. On this basis the order u/s 143(3) has been held to be erroneous and prejudicial to the interest of the revenue.

Before the Ld. PCIT a detailed submission was made and it was submitted that the assessee has purchased the shares on 26/06/2012 and the same has been duly recorded in the books and have been shown in the statement of affairs as on 31/03/2013. It was further submitted that the debit note with the ledger copy of the broker have been filed which shows the date of purchase and complete details of sales. The amounts of sale was duly received through banking channel. After considering all these details the Ld. A.O. has accepted the claim of the assessee. Thus, the order cannot be said to be erroneous and it is a mere change of opinion and as such provisions of section 263 are not applicable.

The Ld. PCIT in para 3.2 reiterated the reasons given in the notice. The Ld. PCIT discussed the modus operandi of the shares transaction and opined that the scrip of Kappac Pharma Ltd. was a penny stock as per

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the report of Investigation Wing, Calcutta. The Ld. PCIT in para 3.5 observed that the A.O. has not made any enquiry regarding the nature of security traded by the assessee. He therefore, set aside the assessment order, being erroneous and prejudicial to the interest of the revenue.

It is humbly submitted that since the assessment has been framed after due verification of the facts and material on record, the action u/s. 263 is bad in law. The assessee filed complete explanation with necessary documents. After considering all the details the Ld. A.O. accepted the explanation about the profits on the sale of shares. The brokers note, the transfer of name on the share certificate and the consideration received on the sale of shares together with the fact about the payment of security transaction tax conclusively proved that the transaction is genuine. The claim of the assessee is accepted after considering all the facts. The report of the Investigation Wing is general and the name of the assessee has not been specifically mentioned. Under these circumstances, the order cannot be said to be erroneous. It is humbly submitted that the assessment order is neither erroneous nor is prejudicial to the interest of the revenue and as such the action u/s 263 is bad in law.

In this connection we would like to draw your honours kind attention to the various High Court judgments which are as under:-

CIT V/s. Govindram Sakseria Trust 166 ITR p.580 (MP)

CIT V/s. Ratlam Coal Ash Co. 171 ITR p.141 (MP)

CIT V/s. A.K. Timber 177 ITR p.486 (Punjab)

CIT V/s. Gabriel (India) Ltd. 203 ITR p.108 (Bom.)

CIT V/s M/s Max India Ltd 295 282

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CIT V/s DLF Power 329 ITR Pg. 289 (Delhi)

CIT V/s Krishna Capbox 372 ITR 310 (All.)

Om Prakash Badaya V/s Pr. CIT (ITA No.217/JP/2020 dated
19.11.2020 (Jaipur-Tribunal)

26. Per contra Ld. Departmental Representative vehemently argued and apart from relying on the finding of Ld. PCIT in the impugned order u/s 263 of the Act, also referred to the information filed in the paper book before us on 22.10.2020 and submitted that as per i-taxnet of A.O, EFS instruction No.53 dated 08.03.2016 and Instruction No.54 dated 21.03.2016 uploaded by Director of Income Tax (System), New Delhi regarding information related to penny stock is made available to AO by way of adding a new button in the name of penny stock which is added on individual transaction screen (ITS) of ITD system of AO which can be utilized by the AO to scrutinize the cases selected under CASS. Ld. Departmental Representative also submitted that the A.O ought to have conducted further enquiries to examine the genuineness of the transaction of sale of equity shares of M/s Kappac Pharma Ltd.

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27. We have heard rival contentions and perused the records placed before and carefully gone through the decisions referred and relied by Ld. Counsel for the assessee. Through these four bunch of appeal of Shri Aditya Mundra, Shri Govind Das Mundra, Manish Mundra and Manoj Mundra vide ITA Nos. 632, 634, 635 & 637/Ind/2019 the common issued raised is challenging the jurisdiction assumed by Ld. PCIT invoking revisionary powers u/s 263 of the Act and setting aside the order u/s 143(3) of the Act holding it to be erroneous and prejudicial to the interest of revenue as Ld. A.O has not conducted sufficient enquiry for the transaction of purchase/sale of equity share of Kappac Pharma Ltd.

28. We note that Ld. PCIT in the show cause notice dated 25.02.2019 has referred to the transaction of Long Term Capital Gain arising from sale of 5000 equity shares of Kappac Pharma Ltd which took place on 24.2.2014 & 05.03.2014 and sale consideration amounting to Rs.35,73,945/-. These 5000 equity shares were purchased on 25.06.2012 @ Rs.12/- per share. The observation of Ld. PCIT is that the date of purchase is not verifiable and detailed Investigation by DG (Inv.),New Delhi has revealed that

the transactions were fraudulent. Ld. PCIT has also referred to the information received from Principal DIT (Inv.), Bhopal that a large number of assessee(s) have taken entries of Long term Capital Gain and shares premium through broker of Kolkatta to various persons. Ld. PCIT has also mentioned that the Ld. A.O despite having specific input accepted the capital gains claim without verification.

29. Now to examine this issue we will first go through the assessment proceedings. We find that Ld. A.O vide letter dated 25.2.2016 issued notice u/s 143(2) of the Act and in the Annexure to this notice 16 informations were called for. In this annexure at Serial No.1 the Ld. A.O has asked for the complete details of the income relevant to Assessment Year under consideration along with evidences also furnish income claimed exempt under Chapter VI-A. At Point No.6 of the annexure the Ld. A.O asked assessee to provide the “details of any FDs, Debentures, Shares or any other investments made in your name or joint name. Also furnish the source of such investment”. In reply to this notice dated 25.5.2016 assessee filed its written submission on 03.08.2016 providing

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various details. Thereafter on 11.12.2016 another reply was submitted which was included the information relating to the transaction of sale of share of Kappac Pharma Limited and relevant Para No.1 of the letter dated 11.12.2016 is mentioned below:-

As regards, long term capital gain on shares, it is humbly submitted that the Long Term Capital Gain on sale of shares is exempted u/s 10 (38). We are enclosing herewith sale purchase records along with copy of account of the brokers for your kind perusal. In this connection, it is further humbly submitted that the assessee has purchased 5000 shares of Kappac Pharma Limited on 26/06/2012 for Rs.60,000/- and the same has been sold on 24/02/2014&05/03/2014 for Rs. 25,06,906/- and Rs.10,67,039/- respectively totalling Rs.35,73,945/-. The assessee has held such shares more than 12 months and as such the same is a long term capital assets. The share duly listed on stock exchange and Security Transaction has also been charged. '

2. In view of the above submissions, the long term capital gain arise on transfer of share is exempted u/s 10 (38) of Income Tax Act, 1961 the same may please be accepted.

30. It is also not disputed that along with the replies assessee have also submitted copy of contract note and bill of Fair Wealth Securities Ltd towards the sale of 5000 equity shares of Kappac Pharma Limited, financial ledger of Fair Wealth Securities Ltd, copy of share certificate of Kappac Pharma Limited and copy of purchase

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bill issued by Shah & Sons Propon Private Limited, Ahmedabad. In the copy of balance sheet of assessee as on 31.3.2013 the investment in equity shares of Kappac Pharma Limited is shown under the head "Investment in shares".

31. The Ld. A.O after having analyzed all the information referred herein above and submissions filed by the assessee on various dates completed the assessment on 22.12.2016 after making addition of Rs.48,000/- to the income disclosed by the assessee in the return. In the body of assessment order Ld. A.O has given complete details of purchase and sale of equity share of Kappac Pharma Limited and the relevant finding is extracted below:-

3. Assessee derived income from Salary, rent & interest, Capital Gain & Agricultural During the course of assessment proceeding the assessee asked to explained about capital gain on sale of share. In connection with long term capital gain assessee submitted that the Long Term Capital Gain on sale of shares is exempted u/ s 10 (38). Also enclosed details of sale/ purchase records along with copy of account of the brokers. In this regards assessee stated that he has purchased 5000 shares of Kappac Pharma Limited on 26/06/2012 for Rs. 60,000/ - and the same has been sold on 24/02/2014 & 05/03/2014 for Rs. 25,06,906/- and Rs.10,67,039/- respectively totalling Rs.35,73,945/-. The assessee has held such shares more than 12 months and as such the same is a long term capital assets. The share duly listed on

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stock exchange and Security Transaction has also been charged. In view of the above submissions, the long term capital gain arise on transfer of share is exempted u/s 10 (38) of Income Tax Act, 1961. Reply submitted by the assessee is examined with records produced for verification. During the year as per return filed by the assessee he has shown return income at Rs. 11,60,010/- + Agricultural income for Rs. 10,000/_. After taking into consideration, the details submitted by the assessee, and the explanation offered by him, the assessment completed as under:-

32. During the course of hearing Ld. Counsel for the assessee also submitted the details of price of equity shares as on the date of purchase which has been downloaded from Business Stock Exchange Ltd from the "Section search historical data". We find that the off market purchase made by the assessee is at Rs.12/- per share which is similar to the price of the Kappac Pharma Limited at National Stock Exchange on the very same date.

33. So from the perusal of the above we observe that the Ld. A.O has raised specific query about the exempt income earned by the assessee, specific reply along with of relevant details were filed by the assessee and complete particulars were placed on record and Ld. A.O after going through these submissions have duly noted the

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facts in the assessment order and after being satisfied with the purchase price of the equity shares of listed company which is at fair market price and so is the sale which has been effected on the recognized stock exchange at the price available on that date and also observing that the equity share were purchased from a broker at Ahmedabad and the agent through which the share were sold is based in Delhi and the company i.e. Kappac Pharma Limited is registered in Bombay and without finding any iota of evidence showing that any party based in Kolkatta or company based in Kolkatta had any role in this transaction, has finally accepted the transaction.

34. In so far as the assessee's facts reveal that it is not a case that of "NO ENQUIRY". Against the specific question asked by Ld. A.O detailed reply has been filed along with supporting documents. Ld. A.O has examined those documents and has taken one of the possible view while completing the assessment and has also given a detailed observation in the assessment order. So far as the above facts are concerned the same are analyzed in the light of the above judgments and the action of the Ld. PCIT cannot be held to be justified.

35. In the above referred decisions it has been held that Ld. PCIT/CIT cannot set aside the assessment to the file of the Ld. A.O without making any enquiry on his own. In other words the matter cannot be remitted for afresh decision to the Ld. A.O to conduct further enquiries without finding that an order is erroneous and the same is to be arrived at by Ld. PCIT/CIT by conducting necessary verification/enquiry.

36. In the instant case we find that the Ld. PCIT has referred to the investigation by DG(Inv.), Bhopal but the revenue authorities has not placed the copy of the reports before us. Ld. PCIT has submitted that the alleged fraudulent transaction of bogus entries of Long Term Capital Gain were carried out through brokers posted at Kolkatta, but in the case of the assessee the broker is posted at Ahmedabad. Ld. PCIT has also not rebutted the fact that the purchase and sale consideration were carried out at fair market value as appearing on the portal of recognized stock exchange which is under the control of government authorities. There is no enquiry with regard to the company Kappac Pharma Limited and

the observation in the notes issued by Ld. PCIT are “general” in nature and there is no specific enquiry conducted by Ld. PCIT.

37. On the other hand all the relevant documents to prove the purchase and sale were before the Ld. A.O. Purchases were at the fair market value at Rs.12/-. Sales have been effected through registered broker after payment of security transaction tax and sold at the prices appearing at the recognized stock exchange. Merely observing that the prices of the equity shares have been increased drastically cannot be a evidence in itself to treat the transactions as bogus. There are number of incidences where the share prices of certain listed companies increased drastically but that all depends on demand and supply of the equity share, perception of its growth and the market sentiments. Unless and until the company of which the equity shares are being traded is found to be involved in malpractices the financial results are not commensurate with the prices at the NSE/BSE portal and sufficient proofs are available showing the alleged company to be a bogus/penny stock or paper company, one cannot question the genuineness of transactions

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carried out on the portal of NSE/BSE which are under the control of Securities and Exchange Board of India.

38. Ld. Departmental Representative through the paper book has referred to some instructions issued by the Directorate of Income Tax Systems to all the Assessing Officers which are reflected in the computer system of all the respective Assessing Officers. The basic purpose of the same is that if such transaction is appearing in the Income Tax Return of an assessee under scrutiny then the same needs to be examined in detail. It is not in dispute that the assessee's case was selected for limited scrutiny and that too is not evident from record that it was selected for scrutiny for examining the transaction of capital gain. Even then the Ld. A.O has made all necessary efforts to examine the fair market value of purchase and sale price of all the equity shares purchased and sold. Ld. Departmental Representative could not rebut this fact that the purchase and sale price paid and received by the assessee and similar to the price appearing on the respective dates on the portal of recognized stock exchange controlled by Securities and Exchange Board of India (In short 'SEBI'). The optimum enquiry which the

Ld. A.O could have conducted has been done in the instant case with regard to the transaction giving rise to Long Term Capital Gain.

39. We also observe that this transaction of dealing the shares M/s Kappac Pharma Ltd is not solitary in itself. During the period when such public companies are listed at stock exchange there are continuous transaction of purchase and sale. Till the controlling authority of stock market suspends the activity of such scrips the transaction are carried out on auto mode. Ld. Departmental Representative before us could not place any such evidence to show that any action at the instance of SEBI or the Income Tax Department has been taken against all the buyers and sellers who have dealt in the scrip named Kappac Pharma Ltd. It is only in some cases where on the basis of information some action is taken up in other words pick and choose.

40. Under these given facts and circumstances the enquiries conducted by the Ld. A.O are fair and justified and in our view this is a detailed case of enquiry conducted by the Ld.A.O and not the case of no enquiry. Plethora of judgments asserts this view and in

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light of decisions referred herein above it is a clear case that since the Ld. A.O has conducted sufficient enquiry as required and the transactions have been carried out at a fair market value, the contention of the Ld. Departmental Representative will not stand that the Ld. A.O has not adhered to the instructions issued by DIT(Systems). This fact is further fortified with the detailed observation of the Ld. A.O appearing in the body of the assessment order and Ld. Departmental Representative also could not controvert this fact that no separate enquiry/investigation was carried out by Ld. PCIT before setting aside the order of Ld. A.O and his decision was mainly based on the information received by the department in some other case. Ld. PCIT has not made any efforts at its own to conduct the enquiry in order to verify the genuineness of the transaction and has not given any finding on merit.

41. Hon'ble jurisdictional M.P High Court in the case of CIT V/s. Ratlam Coal Ash Co. 171 ITR p.141 (M.P.) held that:-

An order of assessment was revised by the Commissioner u/s. 263, on the ground that the income tax officer had not made proper enquiries. The order of revision was set-aside by the Tribunal because it was found that the assessee had furnished requisite information and the income tax officer had completed

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the assessment after considering all facts.

Held, that the Tribunal was justified in Law reversing the order of the Commissioner u/s. 263.

42. Hon'ble Punjab High Court in the case of CIT V/s. A.K.

Timber 177 ITR p.486 (Punjab) held that:-

The Income Tax Officer completed assessment u/s.144 and granted registration to the firm. The CIT held that the ITO should have cancelled the registration and failure on his part to do so, constituted an error u/s.263. Held, if the assessee firm can satisfy the revenue that there was no wilful default, the benefit of continuation of registration may not be denied. In the instant case, the Tribunal was right in law in holding that there was no error in the order of the income tax officer and therefore the commissioner had no jurisdiction u/s.263 in respect thereof.

43. Hon'ble Bombay High Court in the case of CIT V/s. CIT V/s

Gabriel (India) Ltd 203 ITR p.108 (Bom) held that:-

The income tax officer 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, evidently the claim was allowed by the ITO on being satisfied with the explanation of the assessee. The decision of the Income tax officer could not be held to be erroneous simply because in his order he did not made an elaborate discussion. The Tribunal

was justified in setting aside the order passed by the CIT u/s.263.

44. Recently the Co-ordinate Bench Jaipur in the case of *Shri Om Prakash Badaya V/s Pr. CIT (supra)* adjudicating similar issue wherein also the Ld. PCIT directed the Ld. A.O to examine the transaction of Long Term Capital Gain from sale of equity shares was under consideration and the order issued u/s 263 of the Act was quashed by the Tribunal observing as follows:

12. We find that Ld. Pr. CIT has relied upon the various case laws i.e. Puja Gupta vs. Pr. CIT In ITANo.4057/Del/2018 and also heavily relied upon the amendment made in the law. We find that the coordinate Bench of this Tribunal in the case of ITO vs. Shri Narayan Tatu Rane(supra) , M/s. Arun Kumar Garg, HUF, vs. Pr. CIT(supra) have ruled that the Pr. CIT can not pass the order u/s 263 of the Act on the ground that thorough enquiry should have been made by the Assessing Officer. In the present case the assessing officer had given a specific notice regarding the disputed transactions and the assessee also gave specific reply to the show cause notice issued by the assessing officer. Therefore, it is not a case where the assessing officer has not made any enquiry regarding impugned transactions but the Ld. Pr. CIT invoked the provisions of section 263 of the Act on the ground that the enquiry was not made in the manner, it ought to have been done. In the light of the ratio laid down in the judgment of the Hon 'ble Delhi High Court in the case ITO vs. Dg Housing

Projects Ltd. (supra) and other decisions of the Coordinate Benches of this Tribunal i.e. ITO vs. Shri Narayan Tatu Rane(supra) , M/s. Arun Kumar Garg, HUF, vs. Pr. CIT(supra). In our considered view Ld. Pr. CIT himself ought to have made some enquiry regarding the impugned transactions before setting aside to the file of the assessing officer. Hence, the action of the Ld. Pr. CIT is contrary to the ratio laid down by the binding precedence. We, therefore, hold accordingly, impugned order is quashed. Grounds raised in this appeal are allowed.

45. We therefore in the given facts and circumstances of the case and respectfully following the judgments and decisions referred herein above are of the considered view that since the alleged transaction of sale and purchase of equity share giving rise to the Long Term Capital Gain has been examined by the Ld. A.O in detail by raising specific queries, acknowledging the details filed by the assessee, examining the same with the fair market value and mentioning the observation in the assessment order with a clear finding, shows that sufficient enquiry was conducted and the independent proof of the purchase and sale of equity share i.e. price appearing at the recognized stock exchange have been applied to the purchase and sale transaction and further Ld. PCIT while

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conducting the proceedings u/s 263 of the Act has not conducted any specific enquiry on merit nor has found any new information to rebut the facts shown by the assessee in the alleged transaction of earning Long Term Capital Gain. Therefore the assessment order of Ld. A.O dated 22.12.2016 cannot be held to be erroneous in so far as prejudicial to the interest of revenue. We thus quash the impugned orders u/s 263 of the Act as the action of Ld. PCIT is contrary to the ratio laid down by the binding precedence and restore the assessment order u/s 143(3) of the Act dated 22.12.2016 and allow the ground raised by the assessee in ITA No.632/Ind/2019.

46. As regards the grounds raised in the appeals by three assessee(s) namely Shri Govind Das Mundra, Shri Manish Mundra and Shri Manoj Mundra in Appeal Nos. 634, 635 & 637/Ind/2019 respectively since the facts and issues remain the same as agreed by both the parties. We therefore apply our decision in ITA No.632/Ind/2019 *mutandis mutandis* in the remaining appeals also and quash the respective orders of Ld. PCIT u/s 263 of the Act, restore the assessment order framed u/s 143(3) of the Act in the

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case of respective assessee(s) and allow grounds raised in the Appeal Nos. 634, 635 & 637/Ind/2019.

47. In the result all the four appeals in ITA No. 634, 635 & 637/Ind/2019 are allowed.

48. Now we take up remaining two appeals in the case of M/s Dhirendra International Pvt. Ltd (ITA No.750/Ind/2019) and M/s Charitra Gold Pvt. Ltd (ITA No.517/Ind/2019) wherein also assessee(s) have challenged the action of Ld. PCIT assuming jurisdiction u/s 263 of the Act. In both these cases Ld. PCIT has directed the Ld. A.O to examine the issue of valuation of equity shares allotted during the year and the application of rule 11 UA(b) of the Income Tax rules. As agreed by both the parties since similar issues has been raised the same can be decided on the basis of the facts in the case of M/s Dhirendra International Pvt. Ltd in ITA No.750/Ind/ 2019.

49. Brief facts of the case as culled out from the records and as narrated by the Ld. Counsel for the assessee are that the assessee is a limited company deriving income from processing of agricultural produce. The return was filed declaring income of

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Rs.15,75,110/-. The case was selected for scrutiny and the assessment was completed u/s 143(3) on 22.12.2016 on the total income of Rs. 29,12,610/- by making the additions of Rs.13,37,500/- on account of the share premium received in excess of valuation as per Rule 11 UA r.w.s. 56(2)(viib). During the course of the assessment proceeding a notice u/s 143(2) along with a detailed questionnaire was issued with a number of queries. Detailed replies were given vide two letters. The valuation of shares as per Rule 11 UA was made by a Chartered Accountant. The details of valuation of share was given along with the Balance Sheet and P&L A/c as on 14th October, 2013. On the basis of this the share valuation was made and the premium was charged as per the valuation of shares. This value was accepted by the Ld. A.O. while framing the assessment. Complete details of valuation of shares has been reproduced by the Ld. A.O. in the assessment order. After quoting Rule 11 UA and section 56(2)(viib) the Ld. A.O. came to a conclusion that the excess premium of Rs.5 has been charged for issue of share. Accordingly, he made the addition of Rs.13,37,500/- u/s 56(2)(viib). Subsequently, the Ld. PCIT issued a notice to invoke the provision u/s 263 with the reasons that the certificate by a

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Chartered Accountant has not been filed and as such the Fair Market Value of the shares is to be calculated as per the last Balance Sheet as on 31.03.2013. If this is considered the value of the shares comes to Rs.77 per share. The assessee has issued the shares at a premium of Rs.90. Therefore, the excess premium received at Rs.82,21,070/- is taxable U/S 56(2)(viiia). On this basis the order *u/s* 143(3) has been held to be erroneous and prejudicial to the interest of the revenue.

50. Before the Ld. PCIT it was submitted that the shares are valued as per Rule 11 UA and thus, the order is not erroneous. It was specifically submitted in para 7 of the submissions that the audited Balance Sheet and P&L A/c duly certified by the Chartered Accountant is filed and should be considered. Thus, it was submitted that the value of the shares is determined as per Rule 11 UA. It was further submitted that the Ld. A.O. issued the query letter and asked for application of section 56(2)(viib) in respect of share premium and the same has been examined by him. After discussion and reproducing the calculations he has made the addition of Rs.13,37,500/- *u/s* 56(2)(viib). Thus, the order cannot be

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said to be erroneous and it is a mere change of opinion and as such provisions of section 263 are not applicable. The Ld. PCIT in para 3.2 reiterated the reasons given in the notice and came to the conclusion that the books of accounts are neither audited nor approved in the AGM and as such the Fair market value of the shares has been worked out without fulfilling the mandatory condition as laid down under Rule 11 UA. He therefore, set aside the assessment order, being erroneous and prejudicial to the interest of the revenue.

51. Now the assessee is in appeal before the Tribunal.

52. Ld. Counsel for the assessee vehemently argued referring to following written submissions which are reproduced below:-

It is humbly submitted that since the assessment has been framed after due verification of the facts and material on record, the action *u/s*. 263 is bad in law. The Ld. A.O. has raised a specific query about the provisions of section 56(2)(viib) and also required the computation of fair market value of shares as per Rule 11 UA. The detailed calculation of value of shares with the Balance Sheet was filed for determining the value of shares as on 14.10.2013. The shares were valued as per Rule 11 UA as per the Balance sheet. The said valuation was provided to the Ld. A.O. during the course of the assessment. After considering all the details the Ld. A.O. reproduced the calculations given in the assessment order and held that the share premium received is in excess by Rs.5 and

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made the addition of Rs.13,37,500/-. Once the claim of the assessee is accepted after considering all the facts, the order cannot be said to be erroneous. The audited Balance Sheet and P&L Account as on 14.10.2013 was filed before the Ld. PCIT. The Ld. PCIT did not bother to look into the audited Balance Sheet but merely passed a remark that the same was not filed before the A.O. and was not passed in the AGM. It is humbly submitted that Rule 11 U(b) states

"balance sheet in relation to the company means- for the purpose of sub-rule 2 of Rule 11 UA the balance sheet of the company as drawn up on the valuation date which has been audited by the auditor of the company appointed U/S 224 of the Companies Act and where the balance sheet is not drawn up, the balance sheet drawn up as on the date immediately preceding the valuation date which has been approved and adopted in the AGM of the shareholders of the company.

In any other case, the balance sheet of such company as drawn up on the valuation date which has been audited by the auditor appointed u/s 224 of the Companies Act. "

Thus, the Rule does not lay down that the balance sheet which is drawn up and audited as on the valuation date need not be approved and adopted in the AGM. The Ld. PCIT has mislead himself about the interpretation of the Rule that the balance sheet drawn up and audited by the auditors should be approved in the AGM. The assessee has valued the value of the shares as per Rule 11 UA. The audited balance sheet was submitted before the Ld. CIT(A). The remark that the books are not audited as on the valuation date is contrary to the evidence. The Ld. PCIT also did not consider Clause(c) of Rule 11 UA which clearly states that the Fair Market Value of unquoted shares may be estimated to be the price it would fetch if sold in the open market and the assessee may

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obtain a report from an accountant in respect of such valuation. The assessee has got the books audited on 14/10/2013 and has submitted the valuation on that basis. Thus rule 11 UA has been complied with and the valuation is made on the basis of the said Rule. The Ld. A.O. has applied his 'mind and has passed the order accepting the assessee's submissions. It is humbly submitted that the assessment order is neither erroneous nor is prejudicial to the interest of the revenue and as such the action *u/s* 263 is bad in law.

In this connection we would like to draw your honours kind attention to the various High Court judgments which are as under:-

CIT V/s. Govindram Sakseria Trust 166 ITR p.580 (MP)

CIT V/s. Ratlam Coal Ash Co. 171 ITR p.141 (MP)

CIT V/s. A.K. Timber 177 ITR p.486 (Punjab)

CIT V/s. Gabriel (India) Ltd. 203 ITR p.108(Bom.)

53. Ld. Counsel for the assessee also submitted that the issue of valuation of equity shares allotted to the assessee during the year and its valuation as per rule 11 UA of the Income Tax Rules was very much under consideration by the Ld. A.O since a specific query was raised and the detailed reply was filed by the assessee. Ld. A.O has thoroughly examined the valuation on the basis of unaudited balance sheet as on 14.10.2013 filed during the course of

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assessment proceedings and also made the addition of Rs.13,37,500/-. However, when Ld. PCIT issued the show cause notice u/s 263 of the Act the audited balance sheet as on the date of allotment of shares i.e. 14.10.2013 was placed before him. There is no change of figures in the unaudited balance sheet as on 14.10.2013 filed before Ld. A.O and the audited balance sheet of even date filed before the Ld. PCIT and thus the valuation of shares as adopted by Ld. A.O remains unchanged and therefore there was no justification in setting aside the issue again to the Ld. A.O.

54. Per contra Ld. Departmental Representative supported the order of Ld. PCIT.

55. We have heard rival contentions and perused the records placed before us. The order of Ld. PCIT framed u/s 263 of the Act in the case of M/s Dhirendra International Pvt. Ltd and M/s Charitra Gold Pvt. Ltd are in challenge before us. The common facts as narrated above are that during the year under consideration assessee company M/s Dhirendra International Pvt. Ltd allotted equity shares of face value of Rs.10/- at a share premium of Rs.100/- per share. During the assessment

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proceedings Ld. A.O made a specific query asking as to why disallowance u/s 56(2)(viib) of the Act in respect of share premium in excess of fair market value of shares on the date of allotment be made. The assessee company filed a detailed calculation of the share premium as per Rule 11 UA of Income Tax Rules attaching there with balance sheet as on 14.10.2013 and other necessary details. These details were examined by the Ld. A.O in detail and in para 8,9 and 10 of the assessment order has given a categorical finding which is extracted below:-

8. The assessee has furnished computation of fair market value of shares of the company as on 15.10.2013 prepared on the basis of balance sheet as on that date. While submitting the calculation stated above, the assessee has taken into consideration proportionate net profit derived by the company till the date of allotment i.e. 15.10.2013. Fair market value of the shares of the company as on 31.03.2014 is more than Rs.100/- (rate of shares allotted on that date) and hence no addition in respect of shares allotted on 31.03.2014 is made.

9. The assessee has claimed that fair market value of the shares allotted on 15.10.2013 is more than that determined under Rule 11UA of Income Tax Rules, 1962 as it has a large chunk of tangible and intangible assets in nature of experienced directors, lease hold land, several licenses, location of the unit, past performance, availability of huge order book, dedicated work force, large range of satisfied customers, ambitious expansion plan, good will etc. After considering the reply of the assessee in this regard, fair market value of shares as on 15.10.2013 is hereby

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taken at Rs.95/- per share. Increase in fair market value from Rs.91.69/- as determined under Rule 11UA to Rs.95/- is made considering the claim of tangible and intangible assets of the company mentioned above.

10. In view of above discussion, it is clear that share premium taken by the assessee company is more than fair market value of the shares allotted on 15.10.2013. The assessee has made allotment of 2,67,500 shares at a rate of Rs.100/- per share. Considering excess premium of Rs.5/- per share, addition of Rs.13,37,500/- is hereby made u/s 56(2)(viib) of the Income Tax Act, 1961. As the assessee has furnished inaccurate particulars of its income, penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 are also initiated.

56. After giving above finding Ld. A.O made addition of Rs.13,37,500/-. So from the above it is evident that the issue for which Ld. PCIT has directed the Ld. A.O to re-examine the details has already been examined in detail by the Ld. A.O in the first round itself. It is neither the case of no enquiry nor incomplete enquiry. The Ld. A.O has taken one of the permissible view as provided in the law and has completed the assessment.

57. Similarly in the case of assessee M/s Charitra Gold Pvt. Ltd also similar issue was there for which Ld. A.O raised specific query in the notice issued u/s 142(1) of the Act dated 2.11.2016 and at point No.28 following information was called;

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“from the copy of return of income it has been noticed that you have received share premium of Rs.26,00,000/-. Please explain as to why no addition be made u/s 56(2)(viib) of the Income Tax Act, 1961 in respect of share premium in excess of fair market value of share on the date of allotment. Please furnish computation of fair market value of shares as per rule 11UA of the Income Tax rules, 1962.”

58. The above referred notice issued u/s 142(1) of the Act was duly replied by the assessee giving all the necessary details in order to compute the value of shares as per rule 11UA which was found to be correct out by the Ld. A.O. In this case also there was a complete enquiry completed by the Ld. A.O.

59. The only common reason for which the Ld. PCIT has directed the Ld. A.O to examine the issue of fair market value of shares was that during the course of assessment proceedings assessee submitted unaudited financial statements prepared for the dates on which allotment took place. As per Ld. PCIT it should have been audited by a Chartered Accountant as provided in rule 11UA(b) of the Income Tax rules and in the alternative last audited balance sheet should be taken as the basis. Further the same should have been approved in the Board of Directors in the annual general

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meeting. It is brought to our notice by Ld. Counsel for the assessee and the same have not been controverted by Ld. CIT(DR) is that when the proceedings u/s 263 of the Act were undergoing, the audited financial statements i.e. duly certified by Chartered Accountant as on the day before the day of date of allotment of equity shares as provided in Rule 11UA(b) of the Act were placed on record and all these audited statements were same i.e. there is no variation in any figure which were presented before the Ld. A.O. Therefore the valuation as calculated by Ld. A.O on the basis of unaudited balance sheet on the date of allotment of shares and valuation as per the audited balance sheet placed before Ld. PCIT remains the same. Therefore there is no prejudice or loss caused to the revenue.

60. Under these given facts where the Ld. A.O has conducted necessary enquiry as provided under the Act for the particular issue in question and since there is no change in the income of the assessee even if issue is set aside to the Ld. A.O, the assessment order cannot be held to be erroneous so far as prejudicial to the interest of revenue. Our above view is further supported by

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following decisions also.

a. CIT v/s Ratlam Coal Ash Co. 171 ITR .141 (M.P)

An order of assessment was revised by the Commissioner u/s. 263, on the ground that the income tax officer had not made proper enquiries. The order of revision was set-aside by the Tribunal because it was found that the assessee had furnished requisite information and the income tax officer had completed the assessment after considering all facts.

Held, that the Tribunal was justified in Law reversing the order of the Commissioner u/s. 263.

b. CIT V/s A.K. Timber 177 ITR p.486 (Punjab):

The Income Tax Officer completed assessment u/s.144 and granted registration to the firm. The CIT held that the ITO should have cancelled

the registration and failure on his part to do so, constituted an error u/s.263. Held, if the assessee firm can satisfy the revenue that there was no wilful default, the benefit of continuation of registration may not be denied. In the instant case, the Tribunal was right in law in holding that there was no error in the order of the income tax officer and therefore the commissioner had no jurisdiction u/s.263 in respect thereof.

c. CIT V/s Gabriel(India) Ltd 203 ITE p./ 108 (Bom.)

Held, that the income tax officer 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, evidently the claim was allowed by the ITO on being satisfied with the explanation of the assessee. The decision of the income tax officer could not be held to

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be erroneous simply because in his order he did not made an elaborate discussion. The Tribunal was justified in setting aside the order passed by the CIT u/s.263.

61. Our view is also supported by the judgment of *ITO V/s D.G Housing Projects Ltd (supra)* wherein the Hon'ble Court has observed that *"if the Assessing Officer has not examined the issue properly, the said finding will be correct if the CIT had examined and verified the said transaction himself and given a finding on merit"*.

62. The above judgment is applicable on the instant case also wherein also the Ld. PCIT has mentioned that though the issue of valuation of equity share had come up before Ld. A.O during the assessment proceedings but he need to examine the issue in detail. Before directing so, Ld. PCIT should have made an enquiry and examination of the facts which would have certainly landed up in computing the same fair market value of equity share as was adopted by Ld. A.O. Here we would also like to mention that the proceedings initiated u/s 263 of the Act may not always result into outcome of setting aside the assessment order or giving direction to examine certain issues. It is fairly possible that once the show cause notice u/s 263 of the Act is issued to which the detailed reply

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is filed by the assessee and after indepth examination and if necessary after conducting any investigation or for calling relevant information, if Ld.CIT/PCIT may end up the proceedings that find that A.O has rightly concluded the assessment proceedings which are neither erroneous nor prejudicial to the interest of revenue. In the instant case also the litigation before us may not have erupted if in the proceedings u/s 263 by Ld.. PCIT have mentioned that the audited financial statements are similar to the unaudited financial statement placed before Ld. A.O and the same has been examined by him and there is no change in valuation of the fair market value of the equity shares as per rule 11UA of I.T. Rules.

63. We therefore in the given facts and circumstances of the case and respectfully following the decisions and judgments herein above are of the considered view that since proper enquiry was conducted by the Ld. A.O with regard to the issue mentioned in the impugned order u/s 263 of the Act in the case of assessee(s) M/s Dhirendra International Pvt. Ltd and M/s Charitra Gold Pvt. Ltd, the assessment order u/s 143(3) of the Act of the Ld. A.O are neither erroneous or prejudicial to the interest of revenue. Thus Ld.

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PCIT erred in assuming jurisdiction u/s 263 of the Act and we therefore quash the revisionary proceedings carried out through the impugned order u/s 263 of the Act and restore the assessment orders dated 22.12.2016 of Ld. A.O passed in the case of both the assessee(s). Thus the appeals of both the assessee(s) namely M/s Dhirendra International Pvt. Ltd (ITA No.750/Ind/2019) and M/s Charitra Gold Pvt. Ltd (ITA No.517/Ind/2019) are allowed.

64. In the result all the appeals of the assessee(s) (i) Shri Aditya Mundra (ITA No.632/Ind/2019), (ii) Shri Govind Das Mundra (ITA No.634/Ind/2019),(iii)Shri Manish Mundra (ITA No.635/Ind/2019), (iv)Shri Manish Mundra (ITA No.637/Ind/2019), (v) M/s Dhirendra International Pvt. Ltd (ITA No.750/Ind/2019) and (vi) M/s Charitra Gold Pvt. Ltd (ITA No.517/Ind/2019) stands allowed.

The order pronounced in the open Court on 13.01.2021.

Sd/-

Sd/-

(KUL BHARAT)

(MANISH BORAD)

JUDICIAL MEMBER

ACCOUNTANT MEMBER

दिनांक /Dated : 13 January, 2021

/Dev

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Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore