

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, Hon'ble JUDICIAL MEMBER
AND Dr. ARJUN LAL SAINI, Hon'ble ACCOUNTANT MEMBER

(Virtual Hearing)

आ.अ.सं./I.T.A No.386/SRT/2018

निर्धारण वर्ष/Assessment Year: 2014-15

M/s Nilkanth Stone Industries, Shop No.a-1/2/3, Nilkanth Residency, B/h Old Jakarta Nagar, Tithal Road, Valsad. [PAN: AAJFN 5653 K]	Vs.	The Principal Commissioner of Income Tax, Valsad.
अपीलार्थी / Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओर से /Assessee by	Shri Surji Chheda - CA
राजस्वकीओर से /Revenue by	Shri Ritesh Mishra - CIT-DR

सुनवाई की तारीख/ Date of hearing:	08.04.2021
उद्घोषणा की तारीख/Pronouncement on:	27.05.2021

आदेश / O R D E R

PER PAWAN SINGH, JUDICIAL MEMEBER:

1. This appeal under section 253 of Income-tax Act (Act) by the assessee is directed against the order of ld. Principal Commissioner of Income Tax, Valsad hereinafter referred as "ld. PCIT" passed under section 263 of Income-tax Act (Act) dated 27.03.2018, for the assessment year (AY) 2014-15. The Assessee vide his application dated 16.08.2018 following concise Grounds of Appeal:

"1. In the facts and in the circumstances of the case, the learned CIT has erred in initiation of proceedings u/s 263 of the Income Tax Act, 1961 and which was without jurisdiction and the CIT erred in holding that the assessment order was erroneous and prejudicial to the interest of revenue on all issues discussed in revision order and has erred in setting it aside for fresh

assessment and has also erred in setting aside the order which were outside the preview of limited scrutiny.

2. The learned CIT has erred to hold that the assessment order was erroneous and prejudicial to the interest of revenue on issue of disproportionate **Quantum of expenses debited to the post-survey P & I a/c as compared to pre-survey P & I a/c** and the learned CIT has erred to hold that there was no inquiry for correctness of claim regarding expenses.
3. The learned CIT has erred to treat the orders as erroneous and prejudicial to revenue on **issue of revenue recognition** and to hold that the ITO has not examined the revenue recognition method and applicability of AS-9 which is mandatory.
4. The learned CIT has erred to treat the orders as erroneous and prejudicial to revenue on **issue of all unsecured loan generally without specifying circumstances of each party** and the learned CIT has erred to held that there is complete absence of cursory inquiry by the A. O. on the ground that the loan confirmations obtained during the assessment proceedings and as well as during the current proceedings are incomplete in nature merely on the ground that the confirmations do not contain the details of cheque number, bank branch name & address. The learned CIT has erred to hold that the confirmations are incomplete in nature without appreciating the supporting documents like Financials & Bank statements of the loan parties.
5. The learned CIT has erred to treat the orders as erroneous and prejudicial to revenue on **issue of advance given to Shri Amrutbhai I. Patel and to hold that the ITO has not examined the purpose for which the appellant has given advance of Rs. 50.00 Lakh to Shri Amrutbhai I. Patel.**
6. The learned CIT has erred to treat the orders as erroneous and prejudicial to revenue on **issue of purchase of machinery & claim of additional depreciation to held that the ITO has not examined the proof of the machinery having been purchased, installed and put to use by the appellant during the year.**
7. The learned CIT has erred to treat the orders as erroneous and prejudicial to revenue **issue of sundry creditors generally without specifying circumstances of each party and to hold that the ITO has not examined the issue of sundry creditors being paid in cash.**

8. *The learned CIT has erred to treat the orders as erroneous and prejudicial to revenue on issue of commission paid to Shri. Deepakbhai M. Dama & Shri. Manjibhai L. Bhanushali and to hold that the ITO has not examined the claim of commission expenses paid to Shri. Deepakbhai M. Dama & Shri Manjibhai L. Bhanushali.*
 9. *The learned CIT has erred to hold that there was no inquiry on all issues. The learned CIT failed to appreciate the fact that even 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 Act, 1961, merely because he had a different opinion The learned CIT failed to appreciate the fact that where the assessment order has been passed by the AO after taking into account the assessee' submissions and documents furnished by him and no material what so ever has been brought on record by the CIT which showed that there was any discrepancy or falsity in evidences furnished by the assessee, the order of the AO cannot be set aside for making deep inquiry only on the presumption and assumption that something new may come out.*
 10. *The learned CIT has made the revision order which is bad in law and required to be set aside as the learned CIT has failed to give the directions to how extent order is to be revised and on what issues and has erred to set aside on the issues which are outside the preview of limited scrutiny.*
 11. *Your appellant prays that the order of CIT u/s 263 may be set aside for all issues or issues which are not treated as erroneous and prejudicial to the interest of revenue.*
 12. *The Appellant craves leave to add, amend, alter or delete any or all the above grounds of appeal at the time of regular hearing and all grounds are without prejudice to each other.”*
2. At the outset, on hearing the learned authorised representative (Id.AR) of the assessee submits that while revising the assessment order Ld. PCIT identified seven issues for revision of assessment order, however, the AO in the order giving effect

has accepted the explanation furnished by assessee on all the issues except on Ground No.5 and 8, therefore, he is confining his submission on Ground No.5 and 8 only. Considering the submissions of ld. AR for the assessee, other grounds of appeals except ground No. 5 & 8 are dismissed as infructious. Therefore, we are proceeding to deal with the facts qua ground No. 5 & 8 only.

3. Brief facts of the case are that assessee is partnership firm engaged in the business of Stone crushing & selling of crushed stone, filed its return of income for assessment year 2014-15 on 28.09.2014 declaring taxable income of Rs.81,38,470/-. The case was selected for scrutiny vide notice dated 23.09.2015, issued under section 143(2) of the Act for a limited scrutiny under Computer Assisted Scrutiny System (CASS). The assessment was completed under section 143(3) of the Act on 23.12.2016. The Assessing Officer (AO) while passing the assessment order, made addition in the Gross Profit by taking view that the Gross Profit for the post survey cannot be accepted blindly for fair justification of Gross Profit, the Gross Profit is estimated by adopting the Gross Profit Ratio as disclosed by partner of assessee in pre-survey period. The AO after issuing show cause notice and considering the submissions of the assessee on various issues made addition of 1.21 % of Gross Profit, being one half of pre-post survey period was added for any discrepancy to cope up any whole thereby

added Rs.3,17,113/- and disallowed Rs.37,229/ under section 40(a)(ia) of the Act for the want of TDS on payments of interest to Kotak Mahindra Prime Ltd.

4. Subsequently, the assessment was revised by Ld. PCIT by exercising his power under section 263 vide his order dated 27.03.2018. The Ld. PCIT besides other issues identified issues related to the advance of Rs.50 lakhs given to Amrutbhai I. Patel for purchase of property, by taking view that the stages of deal of sale purchase have not been examined by the assessing officer. Further, the payments of commission to Deepakbhai M. Dama & Shri Manjibhai L. Bhanushali of Rs.4,10,400/- each, the nature and services rendered by these two parties have not examined by the assessing officer. The names of the commission agents suggest that both are related parties. The Ld. PCIT on the basis of his aforesaid observation issue notice under section 263 of the Act dated 05.10.2017. The assessee filed its reply and attended the proceedings before the Ld. PCIT. The Ld. PCIT after considering the reply of the assessee held that the advance of Rs.50 lakhs given to Amrutbhai I. Patel for purchase of property. The Ld. PCIT after obtaining the reply and assessee and copy of ledger account in the books of assessee noted that the assessee has received back the said amount in September 2014. Therefore, there was no transaction of sale and purchase. The Ld. PCIT held that advances were given without any agreement. The AO failed to

make minimum enquiries about the purpose of advance and evidence thereof and held that the assessment order erroneous and as well as prejudicial to the interest of the Revenue. Similarly, for commission payment to Deepakbhai M. Dama & Shri Manjibhai L. Bhanushali of Rs.4,10,400/- to each, the ld PCIT held that the assessee in his reply tried to justify that payment of commission on the basis of quantum of sale. The claim needs to be verified by calling and placing on record the exact details of services rendered by them, work done, visit by these parties and sales made on different dates. It was also held that these details were not called by AO and the assessee had not submitted the same voluntarily, is not denied. On the basis of his aforesaid observation the ld. PCIT held that there is a complete absence of enquiry on these two commission payment to these parties, which makes the assessment order erroneous as well as prejudicial to the interest of the Revenue. The Ld. PCIT while referring various decisions in his order set-aside the assessment order and directed to pass fresh assessment order after giving opportunity to the assessee. Aggrieved by the order of Ld. PCIT the assessee has filed present appeal before this Tribunal.

5. We have heard the submission of Ld. Authorised Representative (AR) of the assessee and Ld. Senior Departmental Representative (Sr. DR) for the Revenue and perused the material available on record.

6. Ground No.5 relates to advances given to Amrutbhai I. Patel. The Id.AR of the assessee submits that Ld. PCIT in his finding has held that AO has not examined the purpose for which the assessee has given advance of Rs.50 lakhs to Amrutbhai I. Patel. In the show cause notice, the Ld. PCIT himself has referred advance has been claimed to have been given for property. However, copy of agreement, date of advance and the present status has not been examined. The Ld.AR for the assessee submits that during the assessment, all details related to advance given to Amrutbhai I. Patel was provided to the AO vide reply/latter dated 25.11.2014 and 21.09.2016. The AO made sufficient enquiries and after his satisfaction no addition was called for. The AO was fully satisfied about the correctness of the claim of the assessee. The Ld. PCIT cannot substitute his own view. No specific reference to any item or no deficiency was pointed out. The Id. AR for the assessee at the time of his submissions, invited our attention on the show cause notice dated 04.08.2016 about the questionnaires regarding advance/ loan taken and given. The assessee vide his reply dated 22.09.2016 furnished the details of advance/ loan given to Amrutbhai Patel for advance on property. The assessee vide reply dated 25.11.2016 also explained that assessee given advance of Rs.50 lakhs to Amrutbhai Patel of Property for purchase of property. It was further explained that amount was returned back as deal was cancelled. The copy of

ledger account of the said party was also furnished. On the aforesaid submission, the ld.AR of the assessee submits that the order passed by the AO was neither erroneous nor prejudicial to the interest of the Revenue. In support of his submission, the ld.AR relied upon the following decisions:

- CIT Vs Design and Automation Engineers (Bombay) Pvt. Ltd. [2010] 323 ITR632 (Bombay HC),
 - CIT Vs Vikas Polymers [2012] 341 ITR 537 (Delhi HC),
 - ITO Vs DG Housing Projects [2012] 343 ITR 329 (Delhi HC),
 - Jyoti Foundation, 357 ITR 3858 (Delhi HC.),
 - CIT – Vs. Leisure wear Exports Ltd., 341 ITR 166 (Delhi HC.),
 - CIT vs. Sunbeam Auto Ltd. 332 ITR 167 (Delhi HC),
 - CIT vs. DLF Power Ltd. 329 ITR 289 (Delhi HC),
 - CIT vs. Max India Ltd. 295 ITR 282 (SC),
 - ITA NO.3206/DEL/2017 Amira Enterprises ltd Vs PCIT,
 - CIT Vs Arvind Jewellers (259 ITR 502 GUJ HC),
 - CIT Vs R. K. Construction Co. (313 ITR 65),
 - Indus Best Hospitality ITA No. 3125/MUM/2017”
7. On ground No.8, the ld.AR submits that the commission of Rs.4.10 lakhs each was paid to Deepakbhai M. Dama & Shri Manjibhai L. Bhanushali. The ld. PCIT in his show cause notice stated that nature of services rendered by parties is not examined, and the names of parties suggest that they are related party. The ld.AR for the assessee submits that before the AO, the assessee provided all evidence and contribution of both the parties vide reply through letter dated 16.12.2016 along with the copy of sales register, Profit and Loss account and confirmation of parties. The ld.AR for the assessee further submits that before the Ld. PCIT all details were again

furnished in the revision proceedings including the services provided by both the parties. Nothing has been found wrong by the Ld. PCIT. There is no finding of Ld. PCIT against those documents furnished by the assessee. The Ld. PCIT concluded that commissions claim needs to be verified by calling further record. The ld.AR for the assessee submits that the AO has taken a sustainable view. The view taken by the AO cannot be substitute by the Ld. PCIT. Without giving any finding that order passed by AO is erroneous and prejudicial to the interest of the Revenue, the assessment order cannot be revised. To support his submission, the ld.AR of the assessee relied upon the same decisions which were relied on ground no.5. The ld. AR for the assessee also furnished the copy of the assessment order passed by assessing officer under section 143(3) rws 263 dated 27.12.2018.

8. The ld.AR further submits that the case was selected limited scrutiny under CASS. The CBDT in its circular no.20 of 2015 dated 29.12.2015 issued certain instruction to Assessing Officer's for confining the questionnaire under limited scrutiny for which the cases has been picked up and further that scope of enquiry shall be restricted to limit scrutiny. The ld.AR for the assessee submits that though the case was selected for limited scrutiny and in view of circular no. 20/2015 (supra), the AO was precluded from raising any other queries except of which the issues the case was selected for scrutiny. Yet the AO

examined both the issues and passed the assessment order. The ld.AR for the assessee submits that the assessment order on both the aforesaid issues is neither erroneous nor prejudicial to the interest of the Revenue.

9. On the other hand, the CIT-DR for the Revenue supported the order of Ld. PCIT. The ld. DR for the revenue further submits that his predecessor has already filed written submissions, which may be read as a part of his submissions. In the written submissions the ld CIT-DR has submitted that as per the power conferred on ld. PCIT under section 263 of the Act, he is entitled to call and examine the record of any proceeding for this purpose he does not need to show any reason. Calling any record for his examination is a part of administrative control. The second condition is that he may consider that any order passed by the AO erroneous in so far as it is prejudicial to the interest of the Revenue. Having regard to language employed in the section, apparently it is a consideration, which he exercised by calling for and examining the record as indicated above. If after calling the record or examining it, Ld. PCIT consider that assessment order is erroneous, in so far as prejudicial to the interest of the Revenue, the third condition of section 263 of the Act come into operation, after these two stages, which are purely administrative. This third stage required to do what is stated in the statute i.e. he may after giving the assessee an opportunity being heard and after

making or causing to be made such enquiry as deemed necessary, pass such order thereon as suggested in the case justified, including in the assessment or modifying the assessment or cancelling the assessment and directing for fresh assessment. This requires that Ld. PCIT must give the assessee an opportunity of being heard. It also empowers the Ld. PCIT to cause or make such enquiry as he deems necessary. The fourth condition under section 263 of the Act is the power PCIT/CIT under this section can enhance or modify the assessment including direction for fresh assessment. The Ld. CIT-DR further submitted that Explanation 2 was inserted w.e.f 01.06.2015 by Finance Bill by virtue of which the assessment order passed by AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the Revenue, if, in the opinion of Ld. PCIT or Ld.CIT, the order is passed without making enquiry or verification which should have been made, the order is passed allowing any relief without enquiry into the claim, the order has not been made in accordance with direction of instruction issued by CBDT or the order has not been passed in accordance with the decision which is prejudicial to assessee, rendered by Jurisdictional High Court or Supreme Court in case of assessee or any other assessee. The Ld. CIT-DR submitted that the scope of Explanation 2, was examined by Mumbai Tribunal in Crompton Greaves Limited in ITA No.1994/Mum/2013 in order dated 01.02.2016 and held that

Explanation 2 to 263 is declaratory and clarificatory in nature and inserted to provide clarity on the issue as to which order passed by the AO shall constitute erroneous and prejudicial interest of the Revenue, inter-alia, provided that if the order is passed without enquires or verification by the AO which, should have been made or the order is passed allowing any relief without enquiry into the claim. The Ld. CIT-DR for the revenue also relied upon the decision of Hon'ble Supreme Court in CIT Vs. Amitabh Bachhan in Civil Appeal No.5009/2016 dated 11.05.2016. The ld. CIT-DR for the Revenue further submits that section 263 is to be invoked not as a Jurisdictional correctives or as a review of his sub-ordinate order in exercise of supervisory power but it is to be invoked and employed only for the purpose of setting right distortions and prejudice to the revenue which is a unique conception which has to be understood in the context and in the interest of revenue administration. The ld. CIT-DR further submits that Ld. PCIT while directing the AO clearly held that the assessment order passed by the AO without making any enquiries in respect of the issues. To support his submission, the Ld. CIT-DR relied upon the decision of Delhi High Court in Gee Vee Enterprises Vs Add CIT (99 ITR 386 Delhi), Duggal & Co Vs CIT (200 ITR 456 Delhi) P.

10. We have considered the record submission of both the parties and have gone through the orders of the Lower Authorities. We

have also deliberated a various case laws relied by both the parties. As noted above, we are confining our adjudication on ground no.5 and 8 only. We find the return of the income filed by the assessee was selected for scrutiny and the assessment was completed under section 143(3) on 23.12.2016. We find that the assessing officer while passing the assessment made GP addition by adding $\frac{1}{2}$ of difference of pre survey and post survey thereby adding Rs. 3,17,113/- and disallowance under section 40(a)(ia) of Rs.37,229/-. However, in the entire assessment there is no reference about the issue revised by Id. PCIT, which are impugned before us in ground No. 5 & 8 (supra). During the course of hearing the Ld. AR for the assessee submitted that during the assessment, all details related to advance given to Amrutbhai I. Patel was provided to the AO vide reply/latter dated 25.11.2014 and 21.09.2016 and that the AO made sufficient enquiries and after his satisfaction no addition was made. It was also argued that the AO was fully satisfied about the correctness of the claim of the assessee. On perusal of reply dated 21.09.2016 filed by assessee in response to the show cause notice dated 04.08.2016, copy of which is duly acknowledged by assessing officer, the assessee furnished the details of loan and advances to ' DGVCL' and Amrutbhai I Patel. The assessee also mentioned in the reply that loan to Amrutbhai Patel was given as advance for property. The assessee further vide reply dated 25.11.2016 explained

that advance given to Amrutbhai Patel was return back in the next year and furnished the copy of ledger account. On perusal of ledger account and bank statement of Amrutbhai Patel, we find that the advance of Rs. 50.00 lacks was return back to the assessee. Thus, the assessee has substantiated its contention, which we find in order. Accordingly the assessment order is not erroneous on this issue.

11. So far as issue with regard to commissions' payments is concerned, there is no reference about this issue in the assessment order. The ld.AR for the assessee before us submitted all evidence and contribution of both the parties was provided to the assessing officer vide reply through letter dated 16.12.2016 along with the copy of sales register, Profit and Loss account and confirmation of parties. It was again furnished in the revision proceedings including the services provided by both the parties and that nothing has been found wrong and no finding of Ld. PCIT against those documents furnished by the assessee. It was also pleaded that the assessing officer has taken a sustainable view on the issues. We find that the assessee vide its reply dated 06.12.2016, filed before assessing officer furnished the details and the evidence of the contribution of Karsan D Bhanushali. Further before Ld. PCIT during the revisions proceedings, the assessee again furnished the details of commission payments and the services rendered by Karsan D Bhanushali and Deepak Dama.

However, the Id. PCIT instead of giving his finding held that the claim needs to be verified.

12. The Hon'ble Bombay High Court in CIT Vs Gabriel India Ltd (233 ITR 108 Bom /71 Taxman 585) held that the power of *suo motu* revision under sub-section (1) of section 263 is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; and (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. One finds that the expressions 'erroneous', 'erroneous assessment' and 'erroneous judgment' have been defined in Black's Law Dictionary. According to the definition, 'erroneous' means 'involving error; deviating from the law'. 'Erroneous assessment' refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, 'erroneous judgment' means 'one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles. The Hon'ble Court further held that from the above said definitions

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

Commissioner the order in question is prejudicial to the interests of the revenue. But that by itself will not be enough to vest the Commissioner with the power of *suo motu* revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the revenue, then also the power of *suo motu* revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. Therefore, in order to exercise power under section 263(1) there must be material before the Commissioner to consider that the order passed by the ITO was erroneous insofar as it is prejudicial to the interests of the revenue and that it must be an order which is not in accordance with the law or which has been passed by the ITO without making any enquiry in undue haste. An order can be said to be prejudicial to the interests of the revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realized or cannot be realized. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no

authority to initiate proceedings for revision. Exercise of power of *su motu* revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the Court, it would be open to the Courts to examine whether the relevant objectives were available from the records called for and examined by such authority. The decision of the ITO could not be held to be 'erroneous' simply because in his order he did not make an elaborate discussion in that regard. Moreover, 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, he simply asked the ITO to re-examine the matter, which was not permissible.

13. The Supreme Court in the case of *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 832 held that a bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of the 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. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous, that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the Income-tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial

to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law.

14. The Hon'ble Jurisdictional High Court in CIT Vs Arvind Jewellers (259 ITR 502), while relying on the decision of Hon'ble Apex Court has taken a view that the provisions of section 263 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 section will be attracted and incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. The Supreme Court has also made it clear that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer and that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue. It was further emphatically stated that when an ITO adopts one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the ITO 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 ITO is unsustainable in law.

15. The Hon'ble Jurisdictional High Court in Aryan Arcade Ltd., vs PCIT (2019) 412 ITR 277 (Gujarat) held that merely because Commissioner held a different belief that would not permit him to take the order in revision, it if further held that when Assessing Officer made full enquiry, he made up his mind, the notice of revision is not valid. (*emphasis added by us*). Further, Hon'ble Madras High Court in CIT Vs Mepco Industries Ltd., (2007) 207 CTR 462 (Madras) held that when two views are possible on an issue and it is not the case of the Commissioner that the view taken by Assessing Officer is not permissible in law, Commissioner cannot invoke his jurisdiction under section 263 of the Act. (*emphasis added by us*)
16. The Hon'ble Delhi High Court in CIT Vs Vikas Polmers (341 ITR 537 Delhi) held that it is a pre-requisite that the Commissioner must give reasons to justify the exercise of *suo motu* revisional powers by him to reopen a concluded assessment. A bare reiteration by him that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interest of the revenue, will not suffice. The exercise of the power being quasi-judicial in nature, the reasons must be such as to show that the enhancement or modification of the assessment or

cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income-tax Officer was not only erroneous but was prejudicial to the interest of the revenue. Thus, while the Income-tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his *suo motu* revisional powers unless supported by adequate reasons for doing so. It was further held that applying the aforesaid law to the facts of the present case, we are of the view that the exercise of revisional power by the Commissioner in the instant case was uncalled for and unjustified. It was more in the nature of roving and fishing enquiry. The Commissioner has proceeded on the assumption that no such information, as was furnished to him, was furnished at the time of assessment. The Commissioner has mentioned that the Income-tax Officer has not examined the cash credits of the partners or deposits of Chit Fund. Assuming this to be so (though there does not appear to be any justification for the aforesaid observation), this may make the order erroneous, but how it is prejudicial to the interest of the revenue has not been stated by the Commissioner as he did not deal with the explanation given by the assessee in the course of section 263 proceedings.

16. Now advertng to the facts of the present case qua the issues under consideration with regards to commission's payment to two persons. We find that during the assessment the assessee has filed reply to the quarry raised by the assessee and produced relevant evidence and offered explanation in pursuance of the notices issued and after considering those materials and explanation, the assessing officer has come to a certain conclusion, though it has not been mentioned explicitly in the assessment order. The ld. PCIT is not agreed with the conclusion reached by the assessing officer.
17. At the cost of repetition we may refer that before Ld. PCIT during the revisions proceedings, the assessee again furnished the details of commission payments and the services rendered by Karsan D Bhanushali and Deepak Dama. However, the ld. PCIT instead of giving his finding held that the claim needs to be verified. The Ld. PCIT has not deal with the explanation given by the assessee in the course of section 263 proceedings. Thus, in view of the above mentioned factual and legal discussions section 263 does not empower the ld. PCIT to take action on these facts to arrive at the conclusion that the order passed by the assessing officer is erroneous and prejudicial to the interest of the revenue. Since, on the basis of the material on record and the said explanation and evidence was considered by the assessing officer and a particular view was taken, the mere fact that different view can be taken, should

not be the basis for an action under section 263 and it cannot be held to be justified, we hold so. Accordingly the ground No. 5 & 8 of the appeal raised by the assessee is allowed.

18. The case laws relied by Id CIT-DR in Gee Vee Enterprises Vs Ad CIT (supra) is not applicable on the facts of the present case, in the said case it was held that the ITO/AO is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word 'erroneous' in section 263 emerges out of this context. It is because it is incumbent on the ITO further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word 'erroneous' in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. However, in the case in hand the assessing officer has made required inquiry and came to a possible conclusion in allowing the claims to the assessee. It is not the case of the revenue that the Assessing officer was passive while allowing relief to the assessee. The case law relied by the revenue in Crompton Greaves Limited (supra) is also not helpful to the assessee in

any way as the order in the said case was subsequently recalled by the Tribunal.

19. Resultantly, the ground No. 5 & 8 of the appeal raised by the assessee is allowed.

20. In the result the appeal of the assessee is partly allowed.

Order pronounced on 27th May, 2021 by placing result on the notice board.

Sd/-

(Dr. ARJUN LAL SAINI)

(लेखा सदस्य/ACCOUNTANT MEMBER)

सुरत/ **Surat**, दिनांक **Dated:** 27 May, 2021

#SGR

Copy of order sent to-

Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

Sd/-

(PAWAN SINGH)

(न्यायिक सदस्य/JUDICIAL MEMBER)

By order

/ / **TRUE COPY** / /

Assistant Registrar, Surat