

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ “बी”, चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH ‘B’, CHANDIGARH

BEFORE SMT.DIVA SINGH, JUDICIAL MEMBER
AND SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

ITA No. 106/Chd/2021

(Assessment Year: 2016-17)

Smt.Sunita Gupta, Mohali.	बनाम	Principal Commissioner of Income Tax, Chandigarh-1.
स्थायी लेखा सं./PAN NO: AAYPG0425B		

ITA No. 107/Chd/2021

(Assessment Year: 2016-17)

Shri Vishal Gupta (HUF), Mohali.	बनाम	Principal Commissioner of Income Tax, Chandigarh-1.
स्थायी लेखा सं./PAN NO: AAIHV1188A		

ITA No. 108/Chd/2021

(Assessment Year: 2016-17)

Shri Rajat Gupta (HUF), Mohali.	बनाम	Principal Commissioner of Income Tax, Chandigarh-1.
स्थायी लेखा सं./PAN NO: AAQHR0878D		

ITA No. 109/Chd/2021

(Assessment Year: 2016-17)

Shri Deepak (HUF), Mohali.	बनाम	Principal Commissioner of Income Tax, Chandigarh-1.
स्थायी लेखा सं./PAN NO: AAHHD8426N		

निर्धारिती की ओर से/Assessee by : Shri Nikhil Goyal, CA &
Shri Ashok Goyal, CA
राजस्व की ओर से/ Revenue by : Shri Sarabjeet Singh, CIT DR
सुनवाई की तारीख/Date of Hearing: 05.01.2022
उद्घोषणा की तारीख/Date of Pronouncement: 09.03.2022

(Hearing through Webex)

आदेश/ORDER

Per Vikram Singh Yadav, Accountant Member:

These are appeals filed by the aforesaid assessees against the respective orders of Learned Principal Commissioner of Income Tax, Chandigarh-1 [in short the 'Ld. Pr.CIT'] all dated 30.03.2021 passed u/s 263 of the Act pertaining to assessment year 2016-17.

2. Since the common issues are involved, all these appeals were heard together and are being disposed off by this consolidated order.

ITA No.106/Chd/2021

3. With the consent of both the parties, the case of the assessee, Smt. Sunita Gupta in ITA No.106/Chd/2021 for assessment year 2016-17 was taken as a lead case wherein the contentions advanced by both the parties were heard and material pursued in the context of following grounds of appeal taken by the assessee:

“1. Whether on the facts and circumstances of the case and in law, the ld CIT has exceeded legislative jurisdiction under section 263 of the Act thus order passed is bad in law.

2. That the ld CIT has erred in passing order under section 263 in the absence of any erroneous position prejudicial to the interest of Revenue in the original assessment order passed by the ld ITO under section 143(3) of the Act.

3. That the ld CIT has erred in concluding proceedings under section 263 of the Act without proper perusal of the assessment record.

4. That the ld CIT has erred in substituting an alternative view as against the firm view adopted by the ld AO at the time of original assessment under section 143(3) of the Act.”

4. Briefly, the facts of the case are that during the year under consideration, the assessee derives income from share trading and other sources and has filed her return of income on 15.09.2016 declaring total income of Rs.5,08,000/-. Thereafter, the case of the assessee was selected for limited scrutiny under CASS and notices u/s 143(2) and 142(1) of

the Act alongwith questionnaire were issued. In response, the Ld. Counsel for the assessee filed submissions containing information/documentation as called for by the Assessing officer and after examining the same, the returned income was accepted by the Assessing officer.

5. Thereafter, the assessment records were called for and examined by the Ld. Pr.CIT and a show cause dated 09.03.2021 was issued to the assessee u/s 263 of the Act. In the show cause notice, it has been stated by the Ld. Pr.CIT that on perusal of the assessment records, it has been observed that you have shown the income on account of F&O in your return of income at Rs.17,62,364/- whereas the net premium/profit as per the details furnished by M/s Vikson Securities Pvt. Ltd.(Broker) during the course of assessment proceedings amounts to Rs.15,05,532/- and as per details furnished by NSEL, the net premium/profit comes to Rs.47,41,907/-. Therefore, while making the assessment, the differential net premium/profit as per the details furnished by the NSEL amounting to Rs. 29,79,543/- remained unverified and which has, therefore, escaped assessment in your case. In view of the above facts, the order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the Revenue and the assessee was accordingly asked to show cause as to why the order so

passed by the AO may not be revised under the provisions of section 263 of the Act.

6. In response to the show-cause, the assessee filed her submissions which were considered and find mention in the impugned order but for reasons stated therein, were not found acceptable to the Ld. Pr.CIT.

7. Firstly, the Ld. Pr.CIT reiterated his preliminary findings as given in the show cause notice that while making the assessment, the net premium/profit to the tune of Rs.29,79,543/- basis the details furnished by the NSEL remained unverified. It was further held by the Ld. Pr.CIT that the AO has accepted the premium of Rs 15,05,532/- as against the premium of Rs 47,41,907/- and therefore, the profit earned by the assessee in transacting its futures and options during the course of the year through M/s Vikson Securities Pvt. Ltd. has not been investigated and questioned by the AO and the AO has failed to raise any query in this regard.

8. It was further held by the Ld. Pr.CIT that the assessee has claimed that statement received from M/s Vikson Securities Pvt. Ltd. is incomplete and a complete statement has been provided by her and as per which, the premium earned is Rs.25,33,788/-. However, as per the said

statement, there is a closing balance of various options and futures as on the last day of the year, the value of which has to be considered for working out the exact premium earned by the assessee. Since the AO has failed to consider the same, the order so passed by the AO is erroneous and being prejudicial to the interest of the Revenue.

9. It was further held by the Ld. Pr.CIT that on perusal of the copy of account of M/s Vikson Securities Pvt. Ltd., it is noted that the assessee has received Rs.1,32,300/- from M/s Vikson Securities Pvt. Ltd. on 29.04.2015 and has paid Rs.25 lacs to M/s Vikson Securities Pvt. Ltd. on 20.04.2015 and thereafter has received back various amounts from time to time during the course of the year. The Ld. Pr.CIT stated that the investment so made by the assessee by transferring amounts to M/s Vikson Securities Pvt. Ltd. should have been investigated and questioned by the AO. However, the AO has failed to raise any query in this regard, therefore, the order so passed is erroneous being prejudicial to the interest of the Revenue.

10. It was accordingly held by the Ld. Pr.CIT that the AO has neither called for relevant documents, nor examined the documents filed by the assessee, nor considered the legal provisions of the Act. It was also held by the Ld. Pr.CIT that

there is failure to make proper enquiries/verification to arrive at the correct and complete facts and to apply the correct law and failure thereof makes the assessment order erroneous and prejudicial to the interest of the Revenue. Thereafter referring to the judicial authorities on the subject, it was held that the order so passed by the AO is not only erroneous but also prejudicial to the interest of the Revenue and has been issued without proper enquiries either from the assessee or from third parties to confirm the realities of the additions made in capital and income shown by the assessee. Therefore, the order passed by the AO was set aside to pass a fresh order after making necessary enquiries/investigations after giving due opportunity to the assessee.

11. Against the said findings and directions of the Ld. Pr.CIT, the assessee is in appeal before us. During the course of hearing, the Ld. AR submitted that the case of the assessee was selected for limited scrutiny to examine whether the investment and income relating to securities (derivatives) transactions are duly disclosed by the assessee or not. Thereafter during the course of assessment proceedings, notices u/s 143(2) and 142(1) of the Act were issued calling for necessary information and explanation and in response, the assessee has filed her submissions

containing requisite information/documentation as called for and which were duly examined and verified by the AO. It was submitted that in order to verify the income from sale and purchase of securities and derivatives transactions as reported by the assessee, notice u/s 133(6) of the Act was also issued to M/s Vikson Securities Pvt. Ltd. and in response, M/s Vikson Securities Pvt. Ltd. vide its letter dated 10.07.2018 submitted ledger statement, net position (future segment)/sauda summary, profit & loss summary (cash segment) and Demat account detail of the assessee and thereafter taking into consideration the submissions filed by the assessee, which were independently verified and corroborated by the information submitted by the broker, the assessment proceedings were completed accepting the returned income so filed by the assessee. It was accordingly, submitted that the findings of the Ld. Pr.CIT that the AO has neither called for the relevant documents, nor examined the documents filed by the assessee, nor considered the legal provisions of the Act, are factually incorrect and the said findings deserve to be set aside. It was submitted that the AO has conducted proper enquiries and examined all facts and after thorough scrutiny of the documents so filed, the returned income has been accepted. In support, reliance was placed on the Coordinate Bench's decisions in the case

of M/s Darshan Medicos Vs. CIT (2021) 62 CCH 341 (Chandigarh Trib.), in the case of CIT Vs. Pawan Kumar (2015) 62 Taxmann.com 260 and in the case of CIT Vs. Rajshyama Constructions Pvt. Ltd. (2012) 20 Taxmann.com 251.

12. It was further submitted by the ld AR that subsequent to the finalization of assessment proceedings, there were certain developments wherein the assessee came to know that there was fraud and mis-management committed by the broker wherein the broker had fraudulently diminished her invested capital and was running a fraudulent scheme of assured returns prohibited by SEBI, pursuant to which the assessee filed complaints before various forums and Courts, and both the parties are currently drawn into protracted litigation both of civil and criminal nature and there is an underline fraud at play against the assessee which is currently sub-judice before various Forums and Courts. It was further submitted that on inspection of the records, it also came to the light of the assessee that Shri Vijay Kumar Joshi, the Director of M/s Vicksons Securities Pvt Ltd has filed a Tax Evasion Petition on 18.05.2019 against the assessee and her family members making an allegation that he and her family members have been evading taxes by filing forged income records. It was submitted that Shri

Vijay Kumar Joshi has also sought permission to inspect the assessment records pertaining to the assessee, which shows that the Tax Evasion Petition has been pursued by him as a measure of vengeance against her family for filing various civil and criminal cases and the Revenue authorities by granting access to private records of the assessee and her family members has allowed an interested party to not just inspect her personal records but manipulate the same by submitting falsified information contrary to documentation previously submitted by them. It was submitted that the broker has submitted falsified statement in contravention to his earlier statement after taking copy of the same from the tax department. It was submitted that upon filing of Tax Evasion Petition, the Addl.CIT, Range-6, Mohali had sought permission from the Ld. Pr.CIT to call for records from NSEL by making a requisition u/s 133(6) of the Act and in this very request, the Addl.CIT has clearly mentioned that calling for such information was to take remedial action u/s 263 of the Act. It was submitted that without prejudice to the non-compliance of CBDT memorandum of procedure for dealing with TEP, it is clear that record has been requisitioned by the ld PCIT to conduct an investigation which is aimed at taking remedial action under section 263 of the Act. It was submitted that calling for such records

from NSEL cannot be deemed to be a record for the purpose of Explanation-1(b) to section 263 of the Act. It was submitted that the proceedings u/s 263 of the Act, were nothing but remedial action created on the request of the Addl.CIT and approved by the Ld. Pr.CIT. It was submitted that in the show cause notice, where the Ld. Pr.CIT has stated that he has perused the assessment records and found difference in the income declared by the assessee and the income as per details furnished by the NSEL, the so called NSEL data was not part of the assessment records and the same has been specifically called for to take remedial action u/s 263 of the Act. It was submitted that the NSEL data has been collected behind the back of the assessee purposefully to create an action u/s 263 of the Act and there existed no record with respect to NSEL data which has been merely placed on the file by making a requisition u/s 133(6) of the Act by Addl.CIT. It was submitted that the evidence which was not available at the time of assessment proceedings nor was lawfully acquired, is being used as the basis for assuming jurisdiction u/s 263 of the Act, which is clearly beyond legislative mandate, arbitrary and against the spirit of law.

13. It was further submitted that the assessee in a bonafide manner produced the records available with her

and the broker has also placed on record its submission confirming the basis of declaration of income by the assessee and the assessee relied upon the broker's statement in order to compute her income and where the broker after the closure of the assessment proceedings claims that such statements are incorrect, the same cannot be malafide on the part of the assessee and the same was properly investigated and examined by the AO. It was submitted that invoking of Explanation-2 to section 263 of the Act to claim jurisdiction, has been incorrectly exercised by the Ld. Pr.CIT as proper enquiries and verifications were done by the AO and the case does not fall within the meaning of clauses (a) and (b) to Explanation-2 to section 263 of the Act. In support, reliance was placed on the Coordinate Benches decision in the case of Satish Kumar Lakhmani Vs. Pr.CIT (2021) 128 Taxmann.com 264 and in the case of Smt.Shardaben B. Patel Vs. Pr.CIT (2019) 112 Taxmann.com 118.

14. It was further submitted that on detailed scrutiny of consolidated NSEL data provided by the ld PCIT, it was observed that data so received is incomplete as the ld PCIT has not received financial ledgers, profit & loss statement, etc from NSEL and even from data sought by assessee directly from NSEL subsequent to receipt of the show-cause

notice u/s 263, it doesn't tally. It was submitted that total amount earned by the assessee was substantially lower than even what has been shown in the return of income and over a period of three years, excess income to the tune of Rs 75,83,804/- has been shown in the return of income and excess taxes paid thereon. It was further submitted that in the transaction wise data of sales and purchase figures, effect of brokerage has also not been considered which was a substantial amount and therefore, the data so received by the ld PCIT was incomplete. It was submitted that said facts were brought to the notice of ld PCIT during the course of revisionary proceedings and it was submitted that the subject notice is based on incomplete data and in absence of any concrete material on record, the proceedings have been initiated and concluded u/s 263 of the Act without rebutting the submissions so made by the assessee. Without prejudice, it was submitted that if at all, there is any concrete information/material from NSEL which comes on record and which has escaped the attention of the AO resulting in any escapement of income and which is not the case currently, the right course of action would be for the AO to invoke his jurisdiction u/s 147 of the Act and not for the ld PCIT to acquire jurisdiction u/s 263 of the Act as has happened in the instant case. It was accordingly, submitted

that the order so passed by the Ld. Pr.CIT u/s 263 be quashed and set aside in absence of requisite jurisdiction and also on merits of the case where the matter has been properly examined by the Assessing officer.

15. Per contra, the Ld. CIT DR drawn our reference to the provisions of section 263 of the Act and submitted that the Ld. Pr.CIT may call for and examine the records of any proceedings under this Act and if he consider that any order passed therein by the AO is erroneous in so far it is prejudicial to the interest of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiries as he deems necessary, pass such an order thereon as the circumstances of the case justify including setting aside the order as has been done in the present case. It was submitted that the term 'record' has also been defined in Explanation-1 to section 263 of the Act and it has been provided that the record shall include and shall be deemed always to have included all records relating to any proceedings under this Act available at the time of examination by the Ld. Pr.CIT. It was accordingly submitted that the records of the assessee maintained with NSEL are part of the public records and when they were called for and examined by the Ld. Pr.CIT, the same are very much form part of the records as so

defined in the Act which the ld PCIT is empowered to examine and take into consideration while initiating action u/s 263 of the Act and, therefore, the contention advanced by the Ld. AR in this regard cannot be accepted.

16. Regarding the contention advanced by the Ld. AR that the AO has independently called for the records from M/s Vikson Securities Pvt. Ltd. u/s 133(6) of the Act, it was submitted that it is not in dispute that the AO did call for the information u/s 133(6) of the Act vide letter dated 02.07.2018 and certain information has been provided by M/s Vikson Securities Pvt. Ltd. vide its letter dated 10.07.2018. At the same time, our reference was drawn to the extracts of the Tax Evasion Petition filed on 18.05.2019 available as part of assessee's Paper Book page No.34 wherein it has been alleged that the original profit reports were replaced with the duplicate reports with the connivance of the AO. It was submitted that given such allegation, when the details were again called for from M/s Vikson Securities Pvt. Ltd., it has been found that there is difference in the income returned by the assessee and what has been submitted by M/s Vikson Securities Pvt. Ltd. It was accordingly submitted that basis such differences in the income, the information was further called for directly from the NSEL and again, it was found that there has been

difference in terms of the income offered by the assessee and what has been provided by the NSEL. It was accordingly submitted that in the light of the said information which has come on record where the Ld. Pr.CIT has initiated action u/s 263 of the Act, there is no infirmity in such an action whereby he has directed the AO to verify the said details which has resulted in under-assessment of income in the hands of the assessee. He accordingly, supported the findings of the Ld. Pr.CIT.

17. We have heard the rival contentions and perused the material available on record. In the context of assessee's transactions in the F & O Segment and resultant net profit/premium arising therefrom, which are undisputedly subject matter of limited scrutiny before the AO, the Ld. Pr.CIT has held that the AO has neither called for relevant documents, nor examined the documents filed by the assessee, nor considered the legal provisions of the Act and thereafter, it was also held by the Ld. Pr.CIT that there is failure to make proper enquiries/verification to arrive at the correct and complete facts and to apply the correct law and failure thereof makes the assessment order erroneous and prejudicial to the interest of the Revenue. We therefore find that in the context of examining a singular matter i.e, assessee's transactions in the F & O Segment and resultant

net profit/premium arising therefrom, there are two sets of findings by the 1d PCIT and in the first set of findings, it has been held that it is a case of lack of enquiry or no enquiry on part of the Assessing officer and in the second set of findings, it has been held that there has been failure on the part of the Assessing to make proper enquiries and verification. It can either be a case of lack of enquiry on part of the AO or where the enquiries have been conducted by the AO, proper enquiries have not been conducted by the AO and we therefore find these two set of findings by the 1d PCIT as self-contradictory.

18. Having said that, if we examine the facts of the present case where are emerging from records, we find that the assessee in her return of income has shown income on account of F&O at Rs.17,62,364/-, during the course of assessment proceedings, notice u/s 143(2) dated 13.07.2017 was issued calling for information and explanation from the assessee specifically to examine whether the investment and income relating to securities (derivative) transactions and in response, the assessee has filed her submissions containing requisite information/documentation as called for. Further, in order to verify the income so disclosed, notice u/s 133(6) of the Act dated 2.07.2018 was also issued by the Assessing officer to the broker, M/s Vikson Securities Pvt. Ltd. and in

response, M/s Vikson Securities Pvt. Ltd. vide its letter dated 10.07.2018 submitted ledger statement, net position (future segment)/sauda summary, profit & loss summary (cash segment) and Demat account details of the assessee. It is noted that as per the details so furnished by M/s Vikson Securities Pvt. Ltd. during the course of assessment proceedings, the net premium/profit amounts to Rs.15,05,532/- as against gross figure of Rs 17,62,364/- and rates and taxes of Rs 2,56,832/- disclosed by the assessee. Taking into consideration the figures so disclosed by the assessee in her return of income supported by the audited financial statements and other documentation which were also placed on record during the course of assessment proceedings and taking into consideration the information/documentation so supplied directly by M/s Vikson Securities Pvt. Ltd. and thereby independently verifying and reconciling the same, the net premium/income of Rs.15,05,532/- so disclosed by the assessee was accepted by the Assessing officer. It is therefore not a case where no enquiry has been conducted by the Assessing officer, the Assessing officer has called for the information/documentation to verify the claim of the assessee, has thereafter called for the information from the assessee's broker through whom the transactions in the

F & O Segment has been conducted and thereafter, taking into consideration, the entirety of information and documentation and in absence of any contrary facts and figures, the assessment proceedings were completed accepting the returned income so filed by the assessee. We therefore do not agree with the findings of the Ld. Pr.CIT that the AO has neither called for the relevant documents nor examined the matter and applied the legal provisions of the Act and it is therefore clearly not a case of no enquiry or lack of enquiry and the findings of the ld PCIT in this regard are set-aside and the contentions so advanced by the ld AR are accepted.

19. Now, coming to other findings of the ld PCIT that proper enquiries which should have been conducted by the AO have not been conducted and therefore, the order so passed by the AO is erroneous in so far as prejudicial to the interest of the Revenue. The ld PCIT has referred to details furnished by the NSEL wherein the net premium/profit comes to Rs. 47,41,907/- and it was held that while making the assessment, the differential net premium/profit amounting to Rs. 29,79,543/- remained unverified and which has, therefore, escaped assessment in your case and therefore, the order so passed by the Assessing officer is erroneous in so far as prejudicial to the interest of the

Revenue. In other words, the findings of the 1d PCIT rest solely on the information furnished by NSEL as per which apparently, there is difference in net profit/premium reported by the assessee and as per the data which has been furnished by NSEL.

20. Admittedly and undisputedly, the information so sought and furnished by NSEL was not on record at the time of passing of the assessment order and thus was not part of the assessment records at the time of examination by the Assessing officer. We will come to the contention advanced by the 1d AR latter in the context of whether the same constitute "record" in the context of section 263 of the Act. Firstly, the question that arises for consideration is whether the AO was required to call for information from NSEL or were there any circumstances which are apparent on record which could have necessitated to verify the information, so submitted by the assessee during the course of assessment proceedings, not just with the broker through whom the assessee has transacted, but also through the designated stock exchange i.e, NSEL where the transactions were so conducted on behalf of the assessee and where the circumstances so exist and which were apparent on record during the course of assessment proceedings, whether the AO has failed to carry out such verification with the stock

exchange and in which case, it can be held that proper enquiries which should have been made have not been conducted by the AO resulting in the assessment order so passed as erroneous in so far as prejudicial to the interest of the Revenue.

21. On careful perusal and examination of the assessment proceedings as apparent from records made available before us, we find that the Assessing officer has called for the information/documentation from the assessee to examine the net profit/premium from transactions in the F & O Segment and to verify the figures so reported in the return of income, and has thereafter, to independently verify the said figures has further called for the information from the assessee's broker through whom the transactions in the F & O Segment were conducted and thereafter, the assessment proceedings were completed accepting the figures of income so reported and returned income so filed by the assessee was accepted. We therefore find that where the facts and figures so reported in the return of income were verified with the documentation so submitted by the assessee as well as cross-verified with the broker who has in turn submitted the documentation in support thereof, and where the facts and figures so reported were reconciled and there was nothing prima facie abnormal in terms of

doubting the facts and figures or for that matter, the authenticity of any documentation so submitted which could have raised any suspicion calling for further or more extensive and deeper examination, we find that there was nothing on record which occasion any further verification or examination by the AO in terms of seeking and enquiring facts and figures with NSEL in respect of assessee's transactions so undertaken through the broker. The AO has done what all was expected from him and he has carried out necessary examination and verification as was expected from him in terms of discharge of his statutory functions and as a person of reasonable intellect and understanding, nothing more could have been expected in the facts and circumstances of the present case. Therefore, in our considered view, the AO was not required to call for information from NSEL nor there were any circumstances which were apparent on record which could have necessitated to verify the information, so submitted by the assessee with NSEL during the course of assessment proceedings and therefore, it cannot be held that proper enquiries which should have been made have not been conducted by the AO and the findings of the ld PCIT in this regard are thus set-aside and the assessment order so passed by the AO cannot be held

erroneous in so far as prejudicial to the interest of the Revenue on this account.

22. Now, coming to the contention advanced by the 1d AR that subsequent to completion of assessment proceedings to take remedial action u/s 263, the records have been sought from NSEL and such records cannot be deemed to be record for the purposes of explanation 1 (b) to section 263 of the Act. We find that in context of section 263, the meaning of term "record" is no more *res integra* and the legal proposition as laid down by the **Hon'ble Supreme Court** in case of **Commissioner of Income-tax v. Shree Manjunathesware Packing Products & Camphor Works** [1998] 96 Taxman 1 (SC) reads as under:

"14. It, therefore, cannot be said, as contended by the learned counsel for the respondent, that the correct and settled legal position, with respect to the meaning of the word 'record' till 1-6- 1988, was that it meant the record which was available to the ITO at the time of passing of the assessment order. Further, we do not think that such a narrow interpretation of the word 'record' was justified, in view of the object of the provision and the nature and scope of the power conferred upon the Commissioner. The revisional power conferred on the

Commissioner under section 263 is of wide amplitude. It enables the Commissioner to call for and examine the record of any proceeding under the Act. It empowers the Commissioner to make or cause to be made such enquiry as he deems necessary in order to find out if any order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue. After examining the record and after making or causing to be made an enquiry if he considers the order to be erroneous then he can pass the order thereon as the circumstances of the case justify. Obviously, as a result of the enquiry, he may come in possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the ITO when he made the assessment could, thus, be taken into consideration by the Commissioner after holding an enquiry, there is no reason why the material which had already come on record, though subsequently to the making of the assessment, cannot be taken into consideration by him. Moreover, in view of the clear words used in clause (c) of the Explanation to section 263(1), it has to be held that while calling for and examining the record of any proceeding under section 263(1) it is and it was open to

the Commissioner not only to consider the record of that proceeding but also the record relating to that proceeding available to him at the time of examination.”

23. The revisional powers conferred on the 1d PCIT u/s 263 is therefore of wide amplitude and he can call for and examine the record of any proceeding under the Act available to him at the time of examination and his powers are not restricted to record of any proceeding under the Act as available at the time of examination by the Assessing officer. Both the material which has come on record though subsequent to making of assessment order as well as new material after making or causing to be made an enquiry which has come in his possession, the 1d PCIT would be entitled to take that material into account for the purposes of exercise of jurisdiction u/s 263 of the Act. In the instant case, we therefore find that the information so sought and called for from NSEL subsequent to passing of the assessment order and which has come in his possession at the time of issue of the show-cause, the said information is clearly part of the record available at the time of examination by the 1d PCIT and he is well within his power to take the same into consideration while exercising his jurisdiction u/s 263 of the Act read with explanation thereto.

24. Now, in terms of the information so received from NSEL, in the show-cause notice, the ld PCIT has stated that as per details furnished by NSEL, the net premium/profit comes to Rs 47,41,907/- as against figure of Rs 17,62,364/- shown by the assessee in her return of income. In this regard, what is relevant to determine is whether the figure of Rs 47,41,907/- is a tangible and determinative number which is supported by adequate documentation or not and whether the same reflects the net results of transactions so undertaken by the assessee during the year under consideration. In other words, whether the same can effectively replace the figure so reported by the assessee or whether the same call for further examination and verification and if so, whether such examination has been undertaken by the ld PCIT and what are the specific findings recorded by the ld PCIT in this regard basis which the assessment order has been held as erroneous in so far as prejudicial to the interest of Revenue.

25. In this regard, it has been contended by the ld AR that on detailed scrutiny of consolidated NSEL data provided by the ld PCIT, it was observed that data so received is incomplete as the ld PCIT has not received financial ledgers, profit & loss statement, etc from NSEL and even from data sought by assessee directly from NSEL subsequent to receipt

of the show-cause notice u/s 263, it doesn't tally. It was submitted that total amount earned by the assessee was substantially lower than what has been shown in the return of income and over a period of three years, excess income to the tune of Rs 75,83,804/- has been shown in the return of income and excess taxes paid thereon. It was further submitted that in the transaction wise data of sales and purchase figures, effect of brokerage was also not been considered which was a substantial amount and therefore, the data so received by the 1d PCIT was incomplete and cannot be relied upon. It was submitted that said facts were brought to the notice of 1d PCIT during the course of revisionary proceedings, however, without rebutting the submissions so made, the proceedings u/s 263 have been concluded. We find merit in the contentions so advanced by the 1d AR as evident from the assessee's submissions before the 1d PCIT which also find mention in the impugned order and the same read as under:

“Para 8. Further, vide our request submitted on e-proceedings on 13/03/2021, your office was very kind to send us consolidated data which is the basis of subject notice.

We have painstakingly analyzed the whole data by converting the said data in excel format and segregating the same for relevant assesses. From our detailed scrutiny of the data pertaining to the subject assessee, we have observed that the data received is incomplete as it doesn't tally with the data received through NSEL by us. Your office has not even received financial years, profit & loss statement, etc. from NSEL which were necessary to arrive at the correct income earned in the subject year. Without these statements, it is almost impossible to arrive at the correct figure of income due to below listed reasons:

1. That the amounts given in the transaction wise data the sale and purchase figures are gross figures which don't include the effect of brokerage deducted by the broker on sale and added by the broker on purchase. This amount is a substantial amount. The comparative chart showing difference in a few scrips (as mentioned in the case of Sunita Gupta) showing that brokerage has not been considered in the data available with you, that is why the same substantially doesn't match with the profit/loss figures made available by us through NSEL. Therefore, this data being gross amount doesn't provide you with the correct earnings of the assessee.

2. That the total sum of lots purchased in the data provided by you is not equal to the total sum of lots sold in the data provided by you, resulting thereby more sales/purchase of the lots which requires reconciliation because in any case the total purchase must tally with the totally sales, therefore, it appears that the data received by the department is incomplete.

3. Your are requested to ask for the financial ledger and P& L account of the assessee through NSEL, only which can give the clear picture of our earnings otherwise the whole exercise will be futile.”

26. We also note that the Id PCIT has acknowledged this fact that the details so received were incomplete and has held that closing balances of various options and futures have to be considered for working out the exact premium by the assessee and has directed the Assessing officer to pass fresh order after making necessary enquiries/verifications. We therefore find that the figure of Rs 47,41,907/- was a broad, un-reconciled figure forming part of raw data provided by NSEL and cannot be termed as tangible and determinative number reflective of net premium earned by the assessee and which is not even supported by adequate documentation as apparent from the findings of the Id PCIT

where he himself acknowledges as incomplete and direct the Assessing officer to examine and verify the said figures.

27. Having acknowledged this fact of incomplete data which doesn't reflect the net results of transactions so undertaken by the assessee during the year under consideration, it is also clear that right from the stage of show-cause till passing of the impugned order, the ld PCIT has maintained a status quo or rather a silence and has blindly gone by the initial figure so stated in the show-cause notice and no efforts have been made even to look at the reconciliation so sought to be made by the assessee. Therefore, even taking into consideration the fresh material/data received from NSEL, which represent a broad, un-reconciled raw data, the said data and the figure of Rs 47,41,907/- cannot be termed as tangible and determinative number by any stretch of imagination and in absence of any specific finding recorded by the ld PCIT, the same cannot form the basis for holding the assessment order so passed as erroneous in so far as prejudicial to the interest of Revenue. We find that similar view has been taken by the **Coordinate Delhi Bench** in case of **CIT Vs. Rajshyama Constructions Pvt. Ltd** (*Supra*) wherein the Coordinate Bench has held that in absence of specific material on record, the powers under section 263 have been

wrongly exercised by the ld CIT and only in cases where the ld CIT is able to bring on record specific material which has not been verified by the Assessing officer, the order so passed by the Assessing officer can be held to be erroneous on an incorrect assumption of facts and the relevant findings read as under:

“34. Though learned CIT has referred to a figure of Rs. 1,94,66,944, but he has not quantified that amount vis-a-vis the vouchers or other head from where such figure has been drawn. Moreover, in the order passed by him he has not specified those items and he has just asked the AO to make fresh assessment without specifying that which vouchers were not verified by the AO. Therefore, we are of the opinion that powers under s. 263 have been wrongly exercised by the CIT as he has not brought specific material on record to show that how the AO did not verify the raw material purchased to the tune of Rs. 1,94,66,944.

37. In the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC), while interpreting s. 263, it has been held by Hon'ble Supreme Court that for exercising power under s. 263 it is essential that the assessment order which is passed by the AO and which is subject to s. 263 should be erroneous as well as prejudicial to the interest of Revenue. It was observed that in order to invoke s. 263, the CIT has to be satisfied on two conditions : (i) the order of the AO

sought to be revised is erroneous and (ii) it is prejudicial to the interest of the Revenue. If one of them is absent—if the order of the ITO is not erroneous but is prejudicial to the interest of Revenue or if it is not erroneous, but is prejudicial to the interest of Revenue—recourse cannot be taken to s. 263(1) of the Act. It was observed that the provisions of s. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO. It is only when an order is erroneous, s. 263 will be attracted. Defining the word 'erroneous', it was observed that an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. Therefore, in order to hold an order to be erroneous, it must be passed either on an incorrect assumption of facts or there must be an incorrect application of law.

38. Now, we examine the facts of present case to determine that whether on the issues, on which learned CIT has invoked power under s. 263, the AO did not make any addition either on an incorrect assumption of facts or on an incorrect application of law. Incorrect assumption of facts can be said to have existed only if learned CIT is able to bring on record any material to show that apart from the vouchers, which were identified and stated in the assessment order, there were certain other vouchers which were unverifiable. Learned CIT has not brought any such

material on record. In the absence of any such material, it is very difficult to hold that the assessment order passed by the AO was erroneous. What has been done by learned CIT is that he has simply cancelled the assessment order passed by the AO to be made afresh after giving the assessee a reasonable opportunity of hearing. Therefore, it is not a case where assessment order is based on an incorrect assumption of facts. It is not even the case of learned CIT that assessment order is based on an incorrect application of law. Thus, on both accounts, the order of AO cannot be said to be erroneous. The AO, in the assessment order, has identified the vouchers which could not be substantiated by the assessee and the details of those vouchers are mentioned in the assessment order itself on the basis of which the additions have been made by the AO. If learned CIT was of the opinion that the identification by the AO of the vouchers which could not be substantiated by the assessee was incorrect, then only the case of the assessee could fall under the first factor i.e., incorrect assumption of facts. In that case learned CIT was required to pinpoint the vouchers which were not identified by the AO and which, according to the CIT, were unverifiable. This having not been done by learned CIT, it cannot be said that there were certain unsubstantiated vouchers which were not identified by the AO as there is no material on record to suggest that any such vouchers other than mentioned in the

assessment order were identified by the CIT to hold that the AO has worked out the addition on the basis of incorrect assumption of facts. The case of the CIT merely is that the AO did not verify certain vouchers or the vouchers maintained by the assessee were still unsubstantiated which were other than the vouchers specified by the AO. Thus, the observations of learned CIT that certain vouchers were still unverifiable appears to be based on mere assumption and mere assumption is not sufficient to hold that assessment order is erroneous. Therefore, we hold that in the present case there is no incorrect assumption of facts and there is no incorrect application of law so as to make the assessment order passed by the AO as erroneous.”

28. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, we find that there is no justifiable and legal basis for exercise of jurisdiction u/s 263 by the 1d PCIT and the order so passed is hereby set-aside and the order of the Assessing officer passed u/s 143(3) is sustained.

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

ITA No.107-109/Chd/2021

30. In these three appeals, both the parties fairly submitted that the facts and circumstances of these cases are exactly identical and similar contentions as raised in

ITA No.106/Chd/2021 may be considered. Therefore, our findings and directions contained in ITA No.106/Chd/2021 shall apply *mutatis mutandis* in these cases and the appeal of the respective assesseees are allowed.

In the result, all the appeals filed by the respective assesseees are allowed in light of aforesaid directions.

Order pronounced on 09.03.2022.

Sd/-
(DIVA SINGH)
न्यायकि सदस्य/**Judicial Member**
Member

Sd/-
(VIKRAM SINGH YADAV)
लेखा सदस्य/**Accountant**

Dated: 09.03.2022

रती

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar

