

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
JAIPUR BENCHES,"B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 639/JP/2018  
निर्धारण वर्ष/Assessment Year : 2013-14

Shri Harshad Mehta C-31A, Kamla Villa, Piyush Path Bapu Nagar, Jaipur	बनाम Vs.	The Pr.CIT-1 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BBMPM 8198 P		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Ashish Sharma, Adv.  
राजस्व की ओर से / Revenue by: Shri Sanjay Dhariwal, CIT

सुनवाई की तारीख / Date of Hearing : 15/03/2022  
उदघोषणा की तारीख / Date of Pronouncement: 30 /03/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

The assessee has filed an appeal against the order of the Id. Pr. CIT(A)-1, Jaipur dated 14-03-2018 u/s 263 of the I.T. Act, 1961 for the assessment year 2013-14. The assessee has taken following grounds:-

“1. The Id. PCIT, Jaipur-1 has erred in passing order u/s 263 of the Act, dated 14-03-2018, setting aside the order of the ITO, Ward- 2(4), Jaipur u/s 143(3) dated 29-03-2016 holding the same to be erroneous and prejudicial to the interest of Revenue.

2. The Id. PCIT, Jaipur-1 has erred in characterizing the order of the ITO, as hasty, mechanical, routine, perfunctory, framed

without enquiries/ verification and lacking in application of mind and therefore, erroneous and prejudicial to the interest of Revenue.

3. The ld. PCIT, Jaipur-1 has erred in holding that the AO did not examine the details of "audited accounts" and the return of assessee for A.Y. 2012-13 and A.Y. 2013-14, the reasons of CASS, and failed to make requisite enquiries, as seen from entries on order sheet and lack of discussions in the assessment order.

4. The ld. PCIT, Jaipur-1 has erred in holding that the claim of assessee of his income being from business and not from capital gain and not liable to provisions of Section 50C, was accepted by AO without critical examination.

5. The ld. PCIT, Jaipur-1 has erred in setting aside the order u/s 143(3) on the basis of an audit objection which she says had only supplemented her decision.

6. The ld. PCIT, Jaipur-1 has erred in holding that the AO's order suffered from lack of enquiry and non-application of mind only because the AO, conscious of all facts and information, chose one of the possible views in law by opting to accept the contentions of the assessee and this was not an error. Therefore, the order of the assessment did not suffer from any lack of enquiry and non-application of mind.

7. The ld. PCIT, Jaipur-1 has erred in referring to decisions, which were not relevant to the facts and circumstances of the assessee.

8. The ld. PCIT, Jaipur-1 has erred in assuming that the books of accounts were audited and there were no defects in the filling up of columns of the return of income / computation of income filed.

2. The hearing of the appeal was concluded through audio-visual medium on account of Government guidelines and on account of prevalent situation of Covid-

19 Pandemic. Both the parties have placed their written as well as oral arguments during this online hearing process.

3. During the course of hearing, the ld.AR of the assessee submitted that he would not like to press Ground No. 5. Hence, the same is dismissed being not pressed.

4. Brief facts of the case are that the assessee filed the return of income on 28.12.2013 declaring a total income of Rs. 59,48,940/-. The case of the assessee was selected for scrutiny through CASS, and accordingly notice u/s 143(2) of the I.T. Act, 1961 was issued by ITO, Ward-2(4), Jaipur, on 02.09.2014 fixing the date of hearing for 16.09.2014, which was duly served upon the assessee. The case was later transferred to Circle-2, Jaipur, as the correct jurisdiction of the case lies with DCIT, Circle-2, Jaipur. The jurisdiction over this case had been assigned from the DCIT Circle-2, Jaipur to the Income tax officer, Ward-2(4), Jaipur by the ld. Pr. CIT-1, Jaipur in exercise of powers conferred by sub section (2) of section 127 of I.T. Act, 1961 vide his office order no. 2910 dated 05.02.2016. A fresh notice u/s 142(1) was issued on 05.02.2016 on change of incumbent. As no compliance was made, notice u/s 142(1.) was again issued on 19.02.2016, fixing the case for hearing 26.02.2016. In response to the said notice, Shri Ashish Sharma, Advocate and ld.AR of the assessee, attended and filed written reply along with the required information. The AO noted that books of

accounts had not been properly maintained. However, bills/vouchers for expenses, etc, were produced which had been examined on test check basis. During assessment of assessee's case, the AO pointed out that the assessee was required to get his books audited as the total turnover from sale of plots, which the assessee claimed to be his business exceeded Rs. One Crore. As the assessee failed to get his books audited as required u/s 44AB of the Income tax Act, therefore, the assessee is liable to penalty u/s 271B. Thus, the proceedings relating to penalty u/s 271B had been initiated. During the course of assessment proceeding, the AO found from the records that the assessee is engaged in purchase and sale of residential and commercial plots. During the relevant year, the assessee sold two plots through registered sale deeds for a sale consideration of Rs. 1,00,51,000/- after claiming certain indirect expenses. Hence, the assessee had shown a net profit of Rs. 54,48,935/- which gives a Net profit rate of 54.21%. On examination of the details filed by the assessee, the AO noted that assessee has claimed interest payment of Rs.6,85,141/-(net) in his P&L account for which the assessee was asked to provide the details of interest payment. The assessee produced an abstract of Interest received and paid which showed payment of interest of Rs.6,34,122/- to Raj Laxmi Bank. The AO asked the assessee to produce bank statement but the assessee provided copy of Loan ledger account in the name of Smt. Kamla Mehta. The AO noted

that since the loan had not been taken by the assessee for his business purposes, therefore, the interest paid on it, cannot be allowed u/s 36(1)(iii) of the Act. Thus, the payment of interest of Rs. 6,34,122/- was disallowed by the AO and added to the total income of the assessee. Penalty proceedings u/s. 271(1)(c) was initiated for furnishing inaccurate particulars of income. Further, the AO noted that the assessee did not follow a systematic accounting procedure and most of the expenses are internally vouched with no details of expenses. Thus, the assessee could not satisfactorily prove the genuineness of Travelling, Conveyance and General expenses. Further, all expenses were incurred in cash which were not capable of verification. In view of defective vouchers, a lump sum disallowance of Rs.30,000/- was made, out of these expenses, by the AO. Taking into consideration the above disallowances, the AO computed the total income of the assessee amounting to Rs. 66,13,060/- which included disallowance of interest expenses of Rs. 6,34,122 and unvouched expenses of Rs. 30,000/- apart from returned income of Rs. 59,48,940/-.

5. On completion of assessment proceeding, the ld. PR.CIT-1, Jaipur initiated the proceeding by invoking the provision of Section 263 of the Act as he was of the view that the assessment was made in routine manner just by accepting the fresh claim of the assessee regarding changed head of income for

income declared as against the declared head of income in the return of income.

5.1 The Id. Pr.CIT-1,Jaipur keeping with the requirements of natural justice and placing reliance on Explanation 2 of Section 263 of the Act, a show cause notice was issued to the assessee.

"Sub:-Show cause notice u/s 263 of the Income Tax act 1961 , A.Y. 2013-14—reg.

From perusal of the assessment records in your case it is seen you are engaged in real estate trade. The return of income had been filed by you declaring total income at Rs. 59,48,9401. Your case was selected under scrutiny through CASS and the assessment u/s 143(3) was completed on 29.03.2016 by the assessing officer. In the said assessment a disallowance of Rs. 30,000/- for expenses claimed was made.

Further perusal of the records reveal that you have during the year under consideration sold two commercial properties situated at Gayatri Enclave, Village-Jhujharpura, Tehsil-Sanganer, the details of which is given in the table below:-

Plot No.	Date of sale	Sale consideration received	Value adopted by Sub-registrar for registration purposes
C-64	18.09.2012	Rs. 50,00,000/-	Rs. 1,06,16,150/-
C-62	18.09.2012	Rs. 50,00,000/-	Rs. 1,06,15,216/-

In the return of income filed in ITR-2 in Part B-TI (3)(c) short-term gains have been shown at Rs. 64,871,787/-, in Schedule CG full value of consideration shown at Rs. 1,12,01,000/- (as against value adopted by Sub registrar at Rs. 2,12,31,366/-) and after claiming cost of acquisition at Rs. 47,19,213/- short term capital gains have been shown at Rs. 64,81,787/-. However, in schedule BFLA (iii) of return of income filed short term capital gains was declared at Rs. 59,48,935/-. From the entries in the return of income for A.Y. 2012-13, it is apparent that income under the head 'Short-term capital gains' has been declared. In spite of your declaration of income under the head 'Short-term capital gain', the AO has without going into the details of such declaration in your return of income has mechanically levied tax under the head 'Income from Business' whereas income was liable to be taxed as short term capital gains as per the provisions of Sec. 50C of the Income Tax Act, 1961 As per the provisions of Sec. 50C of the Act, income from short term capital gains is worked out as under:-

Plot No. C-62

Value adopted by Sub-registrar	10615216
Purchase value	<u>2024888</u>
Short term capital gains	8590328

Plot No. C-64

Value adopted by Sub-registrar	10616150
Purchase value	<u>1650000</u>
Short term capital gains	8966150
Total Taxable capital gains	8590328+8966150= Rs. 17556478

The AD finalized the assessment u/s 143(3) at Rs. 66,13,060/- after making addition of Rs. 30,000/- to the returned income of Rs. 59,48,940/- and taxed this income as business income instead of income from short term capital gains. Thus, the income for A.Y. 2013-14 has been under-assessed to the extent of Rs. 1,09,43,418/-.

It is seen that in your case assessment has been completed u/s 143(3) of the I. T. Act 1961, and the details of business activities as provided by you has been accepted by the assessing officer in totality barring expenses disallowed as stated above in this letter and the income from short term capital gains has been treated as income from business and taxed accordingly. However, the taxability of short term gains has not been examined or verified by the assessing officer as per the prevalent provisions of the I T Act 1961 /IT Rules and Law on the subject. Since in various columns of ITR-2 filed income from short term capital gains has been shown, therefore, taxability was to be done as per the provisions of Section 50C of the Act. This in turn has resulted in passing of an erroneous order by the assessing officer in your case due to non- application of mind to relevant material, an incorrect assumption of facts and on incorrect application of law which is prejudicial to the interest of the revenue. It was very imperative for the assessing officer to have properly verified the taxability of income declared in the return of income as per the provisions of Income Tax Act during the scrutiny proceedings to ensure that the true income of the assessee under the declared head of income is brought to taxation. Examination of records reveals that the AO has simply accepted the claim as made. There is nothing on record to show efforts made by the AO to verify facts.

Considering the above-mentioned facts, I Am of the opinion that, the order passed u/s 143(3) dated 29.03.2016 passed by the AO for the A.Y. 2013-14 in your case is erroneous and prejudicial to the interest of the revenue for the reasons mentioned earlier on in this notice. Therefore, I intend to commence proceedings u/s

263 of the IT Act, 1961 in your case. You are accordingly, in the interest of natural justice, given an opportunity on or before 23.02.2018 either in person or through your authorized representative, to explain your case and also show cause why order passed dated 29.03.2016 u/s. 143(3) of the IT Act 1961 by the AO, should not be set aside for reassessment / revision in view of the fact that requisite and proper inquiries were not conducted regarding the taxability of income under the declared head of income as per the prevalent law on the issue and the assessment order was passed mechanically rendering it both erroneous and prejudicial to the interest of revenue.

**Your case is posted for .hearing on 23.02.2018 at 12 noon,** affording you an opportunity of being heard regarding the issue raised."

6. In response to the said show cause notice, the assessee filed the detailed reply. The same is extracted herein below for the sake of brevity.

“8. Reply of the assessee was received on 05.03.2018. The same is discussed as under:-

On the issue of not-conducting proper inquiries regarding taxability of income under declared head of income making the order erroneous and prejudicial to the interest of revenue, the assessee has submitted that voluminous details were submitted along with books of accounts and filed reply as to how the provisions of Section 50C of the Act were not applicable to the given facts and circumstances of the case.

The fact that the assessee submitted details is not denied. What is considered here is the lack of examination and critical scrutiny of those details by the AO before accepting the statement of the assessee. Non application of mind to relevant material makes the order of the AO being termed as erroneous as done in this case .This has resulted in an underassessment of the income of the assessee and short levy of tax. The assessee's statement that section 50C is not applicable in its case is unacceptable as from the assessee's own declaration it is seen that he has sold assets that are capital assets being investments and they thus definitely attract provisions of section 50C of the Income tax act.

2) In his reply to second issue the assessee claims to substantiate his claim that in A.Y. 2012-13 also income from business of real estate was shown. This fact has been found to be incorrect. The perusal of the return of income for A.Y. 2012-13 it

is seen that the assessee has sold plot held as investment in the balance sheet. No stock in trade has been declared therein. In the P & L Account no 'Sales/ Gross receipts from business or profession' were shown. Income of Rs. 58,87,740/- was shown as income in the column meant for 'Any other income' i.e Income from other sources out of which after claiming deduction net profit of Rs. 51,49,594/- was declared. This clearly shows that this income of Rs. 51,49,594/- was not income from business or profession. Therefore, the assessee's claim that he had derived and declared his income from business & profession in A.Y. 2012-13 is not acceptable as he has himself declared it as 'Any other income'. Had his main income been from business & profession, it should have been shown as 'Sales/ Gross receipts from business & profession'. Further, in the audited balance sheet for A.Y. 2012-13 no closing stock in trade was declared. It is also noticed that land at Gayatri Enclave has been shown as investment and not as closing stock by the assessee in his balance sheet.

3) On the issue of taxability of income as per the declared head of income in return of income, the assessee in his reply the assessee submits that return of income/computation was filed incorrectly by inadvertence by the preparer of the return. Further, to substantiate his claim that his declared income was from business & profession and not from capital gains the AR tries to take help of AO's initiation of penalty u/s 271B i.e. for unaudited books of accounts. However, this contention does not hold ground as from the copies of balance sheet and profit & loss account submitted during the assessment proceedings and during the hearing u/s 263 of the Act, as it is apparent that the books of accounts of the assessee were prepared by a professional. They not being audited is another issue and cannot be taken as an excuse. Therefore, it is obvious that the return of income for A.Y. 2012-13 & 2013-14 have been filed on oath as per the books of accounts so prepared wherein the nature of assessee's income for A.Y. 2012-13 is not from business & profession but from income on any other account. Similarly, income for A.Y. 2013-14 is from capital gains and not from business & profession which finds strength from the fact that the assessee filed his return of income in ITR-2 which is certainly not for the persons who carries on business or profession. Further, the mistake cannot be attributed to the action of persons filing the ROI on behalf of the assessee as they do so on the basis of details submitted to them by the assessee and as per his directions. It is also for consideration here that his ROI has been filed by a professional and a professional has knowledge of Income Tax Act and is duty bound to file the

ROI in correct form and under correct head of income as has been done in this case. Ignorance of I.T .Law cannot become an excuse if a professional help is taken.

4) The observation regarding that it has been accepted that he derives business income from real estate it is stated that even though it may have been mentioned that the assessee in real estate trade it does not hold that in the year under consideration it is to be accepted that the income derived is from the sale of stock in this trade. Each real estate transaction is to be seen according to the nature of asset sold. The sale this year is not of any stock in trade but of an investment declared. This indicates a sale of capital asset attracting the provisions of Capital Gains. The mention of real estate trade does not give the assessee the shelter he is trying to seek.

It has been stated that the observation of the audit party cannot become the basis of action u/s 263 of the I T Act. This statement is acceptable as for invoking section 263 the CIT has to form an opinion independently. However, for doing so the CIT 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. According to clause (b) of Explanation to section 263(1) "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 Commissioner. Therefore, the observation made by the audit can become a part of record to form a holistic view. It is not necessary that an audit observation be accepted for action however they can help formulate an opinion if on record at the time of examination of the assessment orders. In the present case all information on record was considered. For taking the said information into consideration reliance is placed on the pronouncement of the Hon'ble Court in the case of CIT v. K. Ramachandran (Dr.) [2004] 139 Taxman 320 (Mad.) (HC) wherein the Hon'ble court has held that "Record" does not mean only the record available with ITO at time of passing of assessment order. It would include the records available with the Commissioner at the time of passing of the order by the Commissioner. Reliance is also placed on the judgment of the Hon'ble Apex Court in the case of CIT vs Shre Manjunathaswara Packing Products and Camphor works (1198)231 ITR 53 (SC) which states that it was open to the CIT not only to consider the records of that proceeding but also to the records relating to that proceeding available to him at the time of examination. Keeping this in view the observation of the audit was perused and it is seen that they too refer to the erroneous

adoption of assesses statement by the AO in haste without verification thereby causing the income of the assessee being under assessed and thus supplement the independent opinion formed that this is a case for invocation of sec 263 of the IT act.

5) The contention that the order u/s 143(3) dated 29.03.2016 was passed after making proper enquiries, examination of books of account and application of mind is not acceptable at all. As detailed above the AO has not even examined the return of income for the year under consideration wherein income from capital gains was shown and without referring to the return of income for A.Y. 2012-13 at all which was the basic requirement of a scrutiny assessment.

6) Case laws cited by the assessee were examined. The assessee has relied on the judgement of the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 to say where two opinions are held no application of section 263 is mandated . This is true but in the instant case there are no two opinions on the issue. The AO has grossly erred in not looking into the details and the head of income declared by the assessee himself in his ROI filed. That needed to be done before any acceptance of a statement made by the assessee's representative during the course of assessment proceedings and formation of an opinion. If this had been there and the AO had discussed the issue after critically examining the same before coming to a decision to allow the change of head of income from the one declared then there could be a case of two opinions. However by disregarding all details as declared by the assessee and by accepting a course of action beneficial to the assessee the AO has grossly erred. The above mentioned judgment also says that an incorrect assumption of fact or an incorrect application of law will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. For the expression "prejudicial to the interests of the revenue", the Hon'ble Supreme Court held, 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 a loss of tax. It was held, that the term must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which is to be considered as prejudicial to the interests of Revenue Administration. Reliance is also placed on the following judicial pronouncements:-In the

Shri Harshad Mehta vs Pr. CIT-1, Jaipur case of CIT v. Bhagwan Das [2005] 272 ITR 367 (AII.)(HC), the High Court held that non-application of mind by the Assessing Officer was prejudicial to the interest of the revenue. In Bharat Overseas Bank Ltd. v. CIT [2013] 152 TTJ 546 (Chennai) (Trib.) it was held that when the order of the Assessing Officer was silent on the claim made by assessee, and allowed such claim, without any discussion, it was held that such an order was erroneous and prejudicial to the interest of revenue. A routine acceptance of material submitted by the assessee without further analysis indicates a failure on the part of the assessing officer in making a correct assessment in the case of the assessee. Therefore, it is to be construed that the order passed by the assessing officer was both the erroneous and prejudicial to the interest of revenue and hence liable for initiation of section 263 of the Income Tax Act. It is stated that judicial authorities have delivered judgements in favour or against initiation of section 263 of the Income Tax Act which are very case specific that is to say that each case would need to be examined on merit individually. However as broadly stated in the order of Bharathi Hexacom Ltd versus CIT (2013) 21 ITR (T) 648 (Delhi) (Trib) and that of M/s. Crompton Greaves versus CIT -6, Mumbai dated 1/2/2016 (ITAT — Mumbai) in TA . No 1994/Mumbai/2613 and 2836/Mumbai/2014 for assessment year 2007-08, the failure by the assessing officer to make proper inquiry in respect of the claim made by the assessee makes his order erroneous and prejudicial to the interest of revenue and therefore liable to revision under section 263 of the Income Tax Act.

7. The ld. Pr.CIT-1, Jaipur has given his detailed finding on para 9 of his order and the same is reproduced as under:-

“9. Therefore with reference to the discussion above it can be said that:-

In the first instance it is noticed that the assessee has claimed that assessing officer had verified the details that had been placed before him and therefore it cannot be stated that verification had been done. I have carefully considered this point as raised however I find that it cannot be accepted. Records in order sheet as available show that the noting relate to issue and service of notice and the attendance on compliance of the same by the AR of the assessee but do not record any discussion on the reason for taking up the case for assessment from the point of view of verification and inquiry done. The details available on file are simply the audited profit and loss

account and balance sheet of the assessee concern along with related documents. As stated earlier on in this order the study of record reveals a mechanical acceptance of the submissions of the assessee without application of mind. There is no record of any action taken for scrutinizing the case of the assessee for the reason it was chosen for scrutiny. The assessing officer has recorded the explanation received by him from the assessee on the issue for selection of the case but has chosen to accept the explanation of the assessee without enquiring into the aspect as to how income was declared under the head 'Capital Gains' in the return of income can now be treated as his income from business when information available in return of income and audited books of account indicate to the facts that the assessee's income is from capital gains and not from business & profession. He has grossly erred in overlooking the fact that could have been gathered from returns of income for A.Y. 2012-13 & 2013-14 and audited books of accounts produced before him. I find that the AO has committed grave error in his order dated 29/3/2016 passed in the case of the assessee by accepting the claim of the assessee in a mechanical manner. In the assessment under discussion it is seen that the records are silent regarding further enquiry/verification done by the assessing officer while assessing the case under 143 (3) of the Income Tax Act 1961 on 29/3/2016 to conclude that the assessee derives his income from business & profession as against the declared head of capital gains in return of income for the year under consideration. The assessment has been made in a routine manner. As there has been no proper inquiry made or facts verified it is clear that there has been no application of mind to relevant material available and this action of the assessing officer is definitely an action which is erroneous and prejudicial to the interest of revenue. The assessing officer has not called upon the assessee to establish/prove the claim or discharge the burden of proof placed on it. The assessing officer before accepting the statement of the assessee ought to have requested the assessee to discharge the onus that was upon him to establish its claim and should have conducted further enquiry before accepting the claim of the assessee.

No queries or enquiries made by the assessing officer while scrutinizing a case for assessment especially when a major issue of applicability of Section 50C of the Act on the declared income under other head capital gains was involved, makes the order itself liable to be termed as a mechanical acceptance. This action has allowed the assessee short levy of taxes on an under-assessed income as detailed above in this order. This renders the order not only erroneous but also prejudicial to the interest of revenue. As the income of the assessee stands under-assessed it leaves the

assessment open to the invocation of section 263 of the I T Act 1961. Accordingly, the request of the assessee that proceedings under section 263 be dropped as the assessing officer has passed the order in his case after due consideration cannot be accepted. In my opinion the said order has been passed in haste and is erroneous in so far as it is prejudicial to the interests of the revenue.

10. Keeping the above discussion in view by the virtue of the powers conferred on the undersigned under the provisions of Section 263 of the IT Act 1961 I hold that the order under Section 143(3) dated 29/3/2016 for assessment year 2013-14 passed by the assessing officer is erroneous insofar as it is prejudicial to the interest of revenue as the order has been passed by the assessing officer in a routine and perfunctory manner without making enquiries /verification which ought to have been made before accepting the submission made by the assessee regarding his claim to treat his income as business income when the income declared was under the head 'Capital Gains'. It is therefore liable to revision under explanation (2) clause (a), clause (b) of section 263 of the Income Tax Act. Hence the assessment order is set aside on this issue with a direction to the assessing officer to assess the case of the assessee denovo in accordance with law after making the necessary enquiries, examination and verification in respect of the claim made by the assessee regarding the issue under discussion. The AO is directed to finalize the assessment keeping in view the information available in income tax returns and audited books of accounts and the details regarding the assessee's income for assessment years 2012-13 which indicated the receipt of income from sale of investments in this case. Provisions of section 50C which are clearly applicable to this case are to be invoked for calculation of STCG. It is clear that the income for A.Y. 2013-14 has been under-assessed as detailed above in this order due to an erroneous order made by the AO which is prejudicial to the interest of revenue to the extent of Rs. 1,75,56,478/-. An opportunity is to be allowed to the assessee to state its case in the interest of natural justice.’’

8 During the course of hearing, the ld.AR of the assessee put emphasis on the assessment order of the AO and submitted that the record was before the AO during assessment proceeding. The ld.AR of the assessee also filed the Trading and P&L account for the year ending 31<sup>st</sup> March 2013. Further,

the Id.AR of the assessee filed the written submission and relied on various case laws, some of which are mentioned as under:-

1. Adani Exports vs DCIT, 240 ITR 224 (Guj)
2. Pr.CIT-3, New Delhi vs Delhi Airport Metro Express Pvt. Ltd. (ITA No.705/2017 dated 5-09-2017)
3. CIT vs Vikas Polymers, 341 ITR 537 (Del)
4. CIT vs Krishna Capbox (P) Ltd. 373 ITR 310 (All)  
(Head Note)

The Id.AR of the assessee in his written submission prayed that on a holistic consideration of facts, circumstances of the case and legal decisions, the action of the Id. Pr. CIT needs to be quashed.

9. On the other hand, the Id. DR supported the order of the Id. PR.CIT and argued that return of income filed by the assessee is prime document for making assessment. Relying on the decision of Goetze (India ) Ltd case, AO cannot change a stand which is contrary to the return of income filed. Even the Form No. ITR-2 filed is also not for business income and Id. DR also relied on his written submission as extracted herein below.

“The brief facts of the case are that the assessee has purchased plot no. and ‘C-62, C 54 & C 55’ (PB-55) and C 64 (PB-59) at Gayatri Enclave on 24.09.2009 and 26.09.2009 for a consideration of Rs. 24.01 Lac and Rs. 16.50 Lac respectively. The assessee has sold plot no. C 62 and C 64 during the year

under consideration for sale consideration of Rs. 50.51 Lac and Rs. 50 Lac respectively i.e. for a total sale consideration of Rs. 100.51 Lac, which were valued by the stamp duty authority for the purposes of charging stamp duty at total amount of Rs. 2,12,31,366/-. In its return of income, the assessee has declared STCG of Rs. 59,52,364/- on sale of these two plots. The case was selected under CASS to examine the capital gains declared by the appellant. It was a case of full scrutiny and not limited scrutiny. Thus, the AO was required to examine the case thoroughly on all the issues, including the applicability of section 50C for determining the correct income of the assessee. However, in the assessment order, the AO has accepted the STCG as business income of the assessee without making any enquiries thereof. It is pertinent to mention here that the AO is not empowered to entertain a new claim without a revised return of income as held by the Hon'ble Apex Court in the case of Goetze India Ltd. Vs CIT 284 ITR 323 (SC), whereas the AO has accepted the claim of the assessee without having any revised return of income. In fact, in the instant case, the assessee has not filed any revised computation of income.

2. It may be mentioned that first notice u/s 143(2) was issued by the AO on 02.09.2014 and the case was transferred to the present AO on 05.02.2016 and thereafter assessment proceedings were initiated. In fact, the AO has issued questionnaire u/s 142(1) on 10.03.2016 (PB-53,54) fixing the date of hearing for 14.03.2016 and the assessment order was passed on 29.03.2016 i.e. within a period of just 19 days and thus, it cannot be said that the assessment proceedings continued for 2 years. In its reply to show cause notice, the assessee has explained that it was engaged in real estate business, which has been accepted by the AO on its face value without examining the facts in a right perspective. It is noted from the balance sheet of the assessee as on 31.03.2012 (PB-7) that 'Land at Gayatri Enclave' was shown at Rs. (-) 39,55,000/-. It is difficult to understand how the stock-in-trade could be in negative, if contention of the assessee that it was engaged in real estate business is accepted. Further, from the copy of profit and loss account of the assessee for the FY 2011-12 (PB-11), there was no sale or purchase and indirect income of Rs. 58,87,791/- has been declared and net profit was declared at Rs. 51,49,594/- without having any reference to opening and closing stock. The kind attention of the Hon'ble Bench is invited to assessment order for AY 2012-13 (PB-12 to 20), wherein the AO has assessed the entire amount of Rs. 58,87,740/- from 'Gayatri Enclave' as 'income from other sources' and did not allow any expense as claimed by the assessee in its above referred P & L account. Thus, the claim of the assessee that it has developed 'Gayatri Enclave' and was in the real estate business was not accepted by the AO in the assessment order for AY 2012-13. It is pertinent to mention that the assessee has filed 4 different balance sheets as on 31.03.2012 which were enclosed by the AO with the assessment order for AY 2012-13.

It may be mentioned that the assessee has filed its return of income in ITR-2, which is not meant for business and in its computation of income (PB-49) for AY 2013-14, it has declared 'STCG' at Rs. 64,81,787/- and it has not shown any income from business or profession. Further, it has shown loss of Rs. 5,32,852/- under the head 'income from other sources' and computed the total income at Rs. 59,48,940/-. It is interesting to mention that in its profit and loss account for FY 2012-13, it has shown 'by sales gross receipt of business' at Rs. 78,52,787/- but it has not shown any corresponding 'cost of goods sold' and again, there was no opening and closing stock. The AO has not looked into the assessment record for the AY 2012-13 and these facts were totally overlooked by the AO while passing assessment order for the year under consideration.

The assessee has filed certain documents relating to action taken by the authorities to justify the sale consideration of these two plots lower than the DLC rates but it may be pointed out that these were relating to plot numbers C-58 to C-61, whereas the assessee has sold plot numbers C-62 and C-64 during the year under consideration. Further, there is nothing on record about the plot numbers C-54 and C-55, which were also purchased by the assessee on 24.09.2009 along with plot number C-62. Thus, it appears that the AO has accepted the submissions of the assessee on its face value without examining these basic facts, which are very relevant for deciding whether, the assessee was engaged in real estate business or not.

1. Mehulbhai Durlabhjiibhai Vithalani vs ACIT , Circle – 2(2), Surat.
2. Crompton Greaves Ltd. vs CIT -6, Mumbai.”

10 We have heard the rival contentions and perused the materials available on record. Firstly, it is imperative to go through Section 263 of the Act under which the Ld. Pr. CIT passed the order.

“Section 263 (1): -The 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 interest of the Revenue, he may after giving the assessee an opportunity of being heard and after or causing to be made such enquiry 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. “

We find from the available records that the assessee during the year under consideration had sold following two commercial properties situated at Gayatri Enclave, Village, Jhujharpura, Tehsil-Sanganer.

Plot No.	Date of Sale	Sale Consideration received	Value adopted by Sub-Registrar for registration purposes.
C-64	18-09-2012	Rs.50,00,000	Rs.1,06,16,150
C-62	18-09-2012	Rs.50,00,000	Rs.1,06,15,216

The assessee in the return of income filed in ITR-2(in Part B-TI(3)( c ), short term gains had been shown at Rs. 64,81,787/-. In Schedule CG, full value of consideration shown at Rs. 1,12,01,000 (as against value adopted by Sub-Registrar at Rs. 2,12,31,366/-) and after claiming cost of acquisition at Rs. 47,19,213/- short term capital gains have been shown at Rs. 64,81,787/-. However, in Schedule BLFA(iii), return of income was filed wherein short term capital gain was declared at Rs. 59,48,935/-.The income of the assessee was liable to be taxed as short term capital gain as per the provisions of Section 50C of the Act. It is further noted that in place of above while filing return of income , the assessee had declared short term capital gains at Rs. 59,52,364/- which the AO in his order had treated as business income and

that in a wrong ITR-2 which is not for business income. The AO had finalized the assessment u/s 143(3) at Rs. 6,13,060/- after making addition of Rs. 30,000/- to the returned income of Rs. 59,48,940/- and taxed this income as business income instead of income from short term capital gains without any justification and why and how even though the returned income filed by the assessee reflected as short term capital can be chargeable to tax under the different heads as business income without revising the claim by the assessee. It is not the fact that the AO ignored the different value of STCG declared for the same transactions by the assessee in his ITR-2 in two different Schedules CG and in BLFA had also not been taken care of but he was aware of the issue. Therefore, he has raised a issue by a specific final show cause notice dated 17-03-2016 (APB Page 8 & 9) and the relevant portion is reproduced for the sake of brevity of the facts.

*“Please refer to the above, it is seen from the records that you are willfully evading the notice and are not providing the information called for or producing the books of accounts for verification. In the interest of natural justice, a final opportunity is being provided before finalizing the assessment, to you to place your cards on the following issues.*

1. *During the FY 2012-13, you have sold two properties viz. C-62 and C-64, Gayatri Enclave Jhujharpura, Jaipur for Rs. 50,51,000/- and Rs. 50,00,000/- respectively. The DLC of these properties as assessed by the Sub-Registrar is Rs. 1,06,15,216 and Rs. 1,06,16,150/- respectively. The balance sheet submitted by you shows that these properties do not appear in your balance sheet meaning thereby that the investment of the same is out of books. The implies that the entire sale consideration as per sec 50C of the I.T.*

*Act, 1961 will be assessed as your short term capital without providing you the benefit of cost of acquisition. In that view of the matter, please state as to why not the aggregate DLC value of these properties i.e. Rs. 2,12,31,366/- not be assessed as short term capital gain.’’*

The assessee also filed a detailed reply to the said show cause notice which is filed in assessee's paper book pages 10 to 13. All the submission is related to the facts that about how the property is acquired and what are the issues in that property. As regards the applicability of Section 50C of the Act, the reply of the assessee is reproduced herein below:-

*‘‘Your assertion that the aggregate value as assessed by Sub-Registrar as per DLC rate is liable to provision of section 50C without indexation, benefits and assessable as short term capital gains is for removed from the facts and circumstances, in which these properties were acquired /sold. Firstly, the properties were business assets of the assessee and therefore, section 50C is not applicable. Secondly the DLC rate of the sub-registrar, while mandatory for the purposes of section 50C is not sacrosanct in case of sale of business asset.’’*

Not only that there is no discussion about the issue of show cause notice in the assessment order and its submission of the assessee on that reply. Why this fact has not been discussed in the assessment order which itself suggests that the order is non-speaking order and this order is prejudicial to the interest of Revenue and looking to this basiv error in the order, the assessment order passed is prejudicial order and the invoking of provision section 263 is correct and no interference in the order of Id. PCIT-1, Jaipur is required. Thus, the income for A.Y. 2013-14 had been under-assessed -.

Hence, it is found that the AO had erred in accepting the total income of the assessee under the head "Business & Profession" instead of income declared under the head "Capitals Gains" without mentioning anything in the assessment order. It is clear from the assessment order that the AO had not examined or verified the reason for which the case was selected under CASS and even the specific show cause notice is not mentioned in the assessment order. When the case of the assessee was selected under CASS to examine the capital gains then the AO was required to examine the case meticulously on all the issues including the applicability of Section 50C for determining the correct income of the assessee and should pass a speaking order. Not only that the claim of income under business head cannot be made in ITR-2. Looking to all these apparent error in the order of the AO, it leaves the assessment open to the invocation of provision of Section 263 of the I.T. Act, 1961.

11. From the available records, it is found that the Pr. CIT has rightly invoked the provisions of Section 263 of the Act in the case of the assessee Shri Harshad Mehta by observing as under:-

*"10. Keeping the above discussion in view by the virtue of the powers conferred on the undersigned under the provisions of Section 263 of the IT Act 1961 I hold that the order under Section 143(3) dated*

Shri Harshad Mehta vs Pr. CIT-1, Jaipur  
29/3/2016 for assessment year 2013-14 passed by the assessing officer is erroneous insofar as it is prejudicial to the interest of revenue as the order has been passed by the assessing officer in a routine and perfunctory manner without making enquiries /verification which ought to have been made before accepting the submission made by the assessee regarding his claim to treat his income as business income when the income declared was under the head 'Capital Gains'. It is therefore liable to revision under explanation (2) clause (a), clause (b) of section 263 of the Income Tax Act. Hence the assessment order is set aside on this issue with a direction to the assessing officer to assess the case of the assessee denovo in accordance with law after making the necessary enquiries, examination and verification in respect of the claim made by the assessee regarding the issue under discussion. The AO is directed to finalize the assessment keeping in view the information available in income tax returns and audited books of accounts and the details regarding the assessee's income for assessment years 2012-13 which indicated the receipt of income from sale of investments in this case. Provisions of section 50C which are clearly applicable to this case are to be invoked for calculation of STCG. It is clear that the income for A.Y. 2013-14 has been under-assessed as detailed above in this order due to an erroneous order made by the AO which is prejudicial to the interest of revenue to the extent of Rs. 1,75,56,478/-. An opportunity is to be allowed to the assessee to state its case in the interest of natural justice.'''

12 Keeping in view the finding of facts and circumstances of the case, the relied upon case laws by the Id.AR of the assessee are on different facts and circumstances. Once the facts are not similar, no relevance was there on the

finding of this case. The same were considered but are not discussed. Thus, we find no reason to interfere with the order of the Id. Pr.CIT which is sustained and therefore, all the grounds raised except Ground No. 5 relating to invoking of provisions of Section 263 are dismissed.

13. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 30/03/2022

Sd/-

(संदीप गोसाईं)  
(Sandeep Gosain)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur  
दिनांक / Dated:-

30/03/2022

Sd/-

( राठोड कमलेश जयन्तभाई )  
(Rathod Kamlesh Jayantbhai)  
लेखा सदस्य / Accountant Member

\*Mishra

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

1. The Appellant- Shri Harshad Mehta, Jaipur
2. प्रत्यर्थी / The Respondent- Ld. Pr.CIT-1, Jaipur
3. आयकर आयुक्त / The Id CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 639/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar