

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH, KOLKATA
{VIRTUAL COURT HEARING}**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No. 439/Kol/2020
Assessment Year: 2015-16**

M/s. Karnika Fuels & Commodities Pvt. Ltd. C/o RSVPC & Company, 41 A, A.J.C Bose Road, Suite No. 613, 6 th Fl., Kolkata-700 017. PAN: AACCK8368C	Vs.	Pr. Commissioner of Income Tax-2, Kolkata Aaykar Bhawan, P-7 Chowringhee Sq., Kolkata-700 069.
(Appellant/Department)		(Respondent/Assessee)

Present for:

Appellant by : Shri Vinod Kr. Jain, FCA (AR)
Respondent by : Shri Manish Kanojia, Addl.CIT(DR)

Date of Hearing : 08-02-2022
Date of Pronouncement : 27-04-2022

ORDER

Per Girish Agrawal, Accountant Member:-

This appeal filed by the assessee is directed against the order of the Pr. Commissioner of Income Tax -2, Kolkata, (hereinafter the 'Id. Pr. CIT'), dt.23.03.2020, passed u/s 263 of the Income-tax Act, 1961 (hereinafter 'the Act'), for the Assessment Year 2015-16.

2. The moot point involved in the present appeal of the assessee before us is on challenging the jurisdiction assumed by the Ld. PCIT for the revisionary proceedings and passing the impugned order u/s 263 of the Act.

3. Brief facts as noted from the records are that the assessee is a trader of coal. Assessee e-filed its return of income on 26.09.2015, reporting total income at 'Nil'. Its purchases are mainly from Coal India Ltd or its subsidiary Eastern Coal Field Ltd or MSTC Ltd. which are through e-auction on a virtual trading platform. Purchase of coal is subject to Tax Collection at Source (TCS) by Sellers from Buyers. The return of income of the assessee was selected for scrutiny on the issue "Low income from TCS receipts". Statutory notices were issued which were complied by the assessee by filing relevant documents and details in the assessment proceedings. In 142(1) notice dated 14.06.2017, Ld. AO sought, *inter alia*, copies of TCS receipts and details of commission paid, to which details were submitted vide letter dated 23.06.2017 by the Assessee. Another notice was issued by the Ld. AO dated 10.11.2017 wherein *inter alia*, details of month-wise purchase and sale as well as nature of services rendered by Smt. Babita Anchalia with corroborative details were sought. Assessee submitted the required details vide its letters dated 17.11.2017 and 23.11.2017. By noting that '*during the course of assessment proceedings the assessee was asked to explain books of accounts and bills and vouchers as such the A/R of the assessee company filed / produced the relevant documents and details with written explanation which were examined and verified with books of accounts and ITR hard copy & audited accounts*', the assessment order was passed u/s 143(3) of the Act on 27.11.2017 by ITO ward 4(4), Kolkata at the returned income as 'Nil'.

4. Ld. PCIT noted at Para 2 in the impugned order that subsequent to the assessment, an error was detected in the assessment order and a proposal was received by him from ITO (AO) for review and on the perusal of proposal of the AO, *prima facie*, it appears that the AO had failed to take a logical action on the information available with him. Accordingly, the impugned assessment is erroneous in so far as it was prejudicial to the interest of revenue. Consequent to this, a show

cause notice (SCN) dated 06.03.2020 was issued u/s 263(1) of the Act by the Ld. PCIT, for the following reasons –

“On examination of the assessment records of above mentioned assessment year 2015-16, it appears prima facie that there was failure on part of the A.O to assess the income correctly and as such, the instant order u/s 143(3) is erroneous in so far as it is prejudicial to the interest of the revenue within the ambit of sec. 263 of the Income Tax Act, 1961.

The primary reason for selection of complete scrutiny was "Low income from TCS receipts". On going through the assessment records, it is noticed that –

1. From 26AS statement, it is seen that in the case of the assessee Rs.10,23,329/- was collected as TCS @ 1%, corresponding to the total purchase of RS.10,23,32,749/-. But the assessee has declared purchase at Rs.10,03,87,328/- and claimed TCS of Rs.10,21,395/- in its return of income. Thus, it appears that there must be some undisclosed purchase/sale in the case of the assessee and the same has not been inquired into by the officer.

(ii) As per Tax Audit Report the gross profit percentage plummeted to 1.01% from 5.02% of previous financial year. Even though there was such drastic downfall of gross profit, the purchases and sales had not been verified by the officer.

(iii) Commission payment of RS.7,82,500/- made to the director's proprietorship firm has not been inquired upon / verified. The officer had asked vide letter dated 10.11.2017 to submit "nature of services rendered by Smt. Babita Anchalia with corroborative evidences". But the assessee submitted in respect of director's fee paid to her, but not regarding commission in its submission dated 17.11.2017. There was no submission in regard to commission paid to proprietary firm of Smt. Anchalia; but the officer had not taken any adverse view on commission payment.

In the course of assessment proceedings, the AO had passed the order without proper verification/examination of the issues mentioned above and accordingly making disallowance/addition in this regard.”

The assessee furnished its reply on 13.03.2020 before the Ld. PCIT as reproduced in the impugned order in Para 5, explaining its case against the SCN.

5. On 23.03.2020, the Ld. PCIT passed the impugned order, *inter alia*, observing in Para 6 as under:

“6. I have carefully considered the facts of the case and gone through the submission of the assessee. The AR of the assessee has stated that, the AO had sought the details related to purchase & sale, expenses and other related facts to ascertain whether the assessee has shown proper and true affairs of the state of assessee's business. The assessee had filed/produced/submitted the documents and records related to purchases, sales, credit of TCS, services rendered by the director for the payment of directors remuneration, carriage and freight charges. The AR of the assessee has already submitted its written submission as discussed in above Para 5

On perusal of the assessment order, it is seen that, the AO has not carried out proper verification/investigation. In this case, the primary reason for selection of complete scrutiny was "Low income from TCS receipts". On going through the assessment records, following observations are made- From 26AS statement, it is seen that in the case of the assessee Rs.10,23,329/- was collected as TCS @1 %, corresponding the total purchase of Rs.10,23,32,749/-. But, the assessee has declared purchase at Rs.10,03,87 328 /- and claimed TCS of Rs.10,21,395/- in its return of income. Thus, the same has not been inquired into by the officer. The officer had called for month-wise details of purchase and sales only, without any details of creditor or debtors. As per Tax Audit Report, the gross profit percentage plummeted to 1.01% from 5.02% of previous financial year. Even though there was such drastic downfall of gross profit, the purchases and sales had not been verified by the officer. Commission payment of Rs.7,82,500/- made to the director's proprietorship firm has not been inquired upon/verified. The officer had asked, vide letter dated 10.11.2017 to submit "nature of services rendered by Smt. Babita Anchalia with corroborative evidences". But the assessee submitted in respect of director's fee paid to her, but not regarding commission in its submission dated 17.11.2017. There was no submission in regard to commission paid to proprietary firm of Smt. Anchalia. In this regard, reliance is placed in the case of CIT vs. Anand Kumar Jain reported in 231 Taxman 534(All) order dated 03.11.2014 relying on the ratio laid down by SC in Malabar Industrial Co Ltd. (109 Taxman 66) has held that order passed by AO without applying his mind to the material available on record is erroneous and such order can be revisioned u/s.263 of the Act. Therefore, the assessment order passed by the AO appears to be erroneous and prejudicial to the interest of the revenue.”

With the aforesaid observations, Ld. PCIT drew his consideration and concluded the revisionary proceedings u/s 263 of the Act by giving a direction to the Ld. AO in Para 19, as under:

“19. Accordingly, in view of the facts and circumstances of the case as stated above, and also respectfully following the judgments cited above, I am of the considered view that, it is deemed fit and appropriate in the interest of justice to restore the file back to the A.O with a direction to the AO to verify the issue as discussed in Para 3 & Para 6 above afresh, after giving opportunity to the assessee. Accordingly, I direct the AO to re-assess the income of the assessee for the relevant AY-2015-16 on the issues as discussed supra.”

6. Learned Counsels for the assessee Shri Vinod Kumar Jain FCA, represented the matter and took us through the facts of the case corroborating with the material placed on record in the paper book and written submission. Ld. CIT(DR) Shri Manish Kanojia represented the matter for the Revenue.

7. At the outset, Ld. Counsel for the assessee raised the jurisdictional issue of assumption of revisionary powers by the Ld. PCIT by contending that the impugned revision order lacks the prime foundation of independent finding by the Pr CIT since the very initiation of the revisionary proceeding is on the proposal sent by the AO, against his own order.

7.1 It was further contended that nowhere in the impugned order the Ld. PCIT has held as to how the order of the Ld. AO is erroneous in so far as it is prejudicial to the interest of the revenue. Ld. Counsel also submitted that Ld. PCIT has to establish from the records by giving cogent reasons as to how and why the order of the Ld. AO is erroneous in so far as it is prejudicial to the interest of the revenue before cancelling or setting aside the assessment order. Therefore, according to the Ld. Counsel, neither in law nor on facts, the Ld. PCIT is justified in assuming the jurisdiction u/s 263 of the Act, setting aside the order of the Ld. AO to pass a fresh assessment order.

7.2 Ld. Counsel stated that Ld. PCIT has thus not verified the facts and brushed aside the submission of the assessee without giving any reasons before concluding that the AO has not made enquiries or verification and therefore the assessment order was erroneous and prejudicial to the interest of the revenue. It was incumbent upon the Ld. PCIT to verify from the assessment records, the materials available therein and the submissions made by the assessee during the assessment proceedings as well as the submissions made before him while arriving at his conclusion that the order of the AO is erroneous as well as prejudicial to the interest of the Revenue.

7.3 Learned Counsel for the assessee submitted that Ld. PCIT has grossly erred in assuming his jurisdiction and initiating proceedings u/s. 263 of the Act on a grossly incorrect set of facts. On the facts of the case before us, Ld. Counsel tabulated the submission for all the three issues raised by the Ld. PCIT in the SCN. The same is reproduced hereunder for ease of reference –

P.T.O.

<i>Issues raised in the SCN by the Ld. Pr CIT</i>	<i>Submission by the assessee</i>
<p>1. As per Form 26AS on TCS, the purchase reported is Rs.10,23,32,749/-, whereas the assessee has declared purchase at Rs.10,03,87,328/-.</p>	<p>I. TCS by the seller is on the Amount payable by the buyer at the percentage specified under the Income Tax Act. The "Amount" payable" includes the tax and other sums payable by the buyer apart from the cost of purchases. Thus TCS by the sellers took place on the amount of purchases including the applicable sales tax. The sales bills were also produced to demonstrate the point. The question is raised about the difference in amount on which TCS took place and the purchases shown in the profit and loss account, without verifying the facts and legal provisions in this regard.</p> <p>II. The records available demonstrate the purchases and sales are totally matching in quantities.</p> <p>III. There is no difference in the monthly purchases and sales or in sales tax records, as produced.</p> <p>IV. The reconciliation of TCS filed, sales and purchase bills produced to explain the TCS, purchases and sales details, quantitative details of traded goods were filed.</p>

<p>2. <i>The current year's gross profit percentage plummeted to 1.01% from 5.02% in comparison to the previous financial year.</i></p>	<p>I. <i>During assessment proceedings, AO took the details of purchases and sales, expenses and other related facts to ascertain the proper and true affairs of the state of the assessee's business.</i></p> <p>II. <i>The assessee had filed/ produced/ submitted the documents and records related to purchases, sales, credit of TCS , services rendered by the director for the payment of directors remuneration, carriage and freight charges.</i></p> <p>III. <i>The AO had taken a plausible view, which is not erroneous on the facts of the case.</i></p> <p>IV. <i>The reason for scrutiny was not for comparing the data of the immediate preceding financial year, but to ascertain the profitability of the concerned year based on the financials of the year.</i></p> <p>V. <i>Comparative profitability chart filed, no changes in % of direct or indirect expenses, but in Gross profit margin by 4%, due to high purchase prices.</i></p>
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<p>3. <i>The Commission payment of Rs.7,82,500/- made to the director's proprietorship firm has not been inquired upon / verified.</i></p>	<p>I. <i>The commission paid to the proprietary concern of the director for procuring orders for the company from the buyer. The said proprietary concern, K D Sales Corporation is also engaged in the trading business of coal and commodities. The commission expenses are also paid in the last year for the procurement of orders from the same buyer.</i></p> <p>II. <i>The commission income is part of commission recipient's total income. The proprietress is a taxpayer having PAN ACQPA8755J. She is subject to audit U/S 44AB, and paid substantial tax.</i></p> <p>III. <i>The Audited annual accounts, audit report, ITR of the commission recipient filed.</i></p> <p>IV. <i>The AO had all such records before taking the proper decision.</i></p>
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8. Ld. Counsel further pointed out that on the face of it, the accusation of difference in purchases is contrary to the perception drawn in SCN that the order has resulted in loss to revenue. The assessee has shown a lower amount of purchases than the purported figure considered in SCN, based on Form 26AS. Form 26AS is generated on information furnished by the Collectors/Deductors of tax on the total amount received by them. The assessee recorded the purchases as per invoice, excluding the sales tax/VAT/GST paid on such purchases, separately. Such input taxes are set off against the tax liabilities arising on sales. Those taxes are not the expenses or cost charged to the Profit and Loss account. However, TCS is applicable on the entire amount payable by the buyer to the seller, which includes taxes.

On the second issues, it was pointed by the Ld. Counsel that coal trade is a highly regulated one. The market is driven by international price, production by Coal India and economics of consumer markets. The AO had examined all major expenses,

freight inward expenses, purchases, sales, and quantitative details. Per him, in fact, the indirect expenses were reduced this year, but for high coal auction prices, the trade margin was drastically cut by 4%.

Also, on the third issue raised in the SCN, it was further submitted that assessee, apart from submission and documents filed, stated that there is no loss of revenue as the recipient had paid tax at maximum slab, whereas the assessee had no tax liability. The commissions are as per market standard. The recipient is in the same trade. The materials required by her customers/buyers were not available, so the order was passed to the assessee company, with whom materials were available in stock. The commission was also paid last year for sale of materials to the same buyer.

8.1 Ld. Counsel referred to the paper book placed on record to demonstrate the documents and details which formed part of the record before the Ld. PCIT for his examination and verification before arriving at a consideration of passing the revisionary order u/s 263 of the Act. Reference was made to PB – 55 of the paper book containing reconciliation of purchase with purchase shown in Form 26AS along with corroborative supporting records. Relevant extracts are produced hereunder for ease of reference –

“Purchase & TCS reconciliation for the FY 2014-15

	<u>Amount in Rs.</u>	<u>Amount in Rs.</u>
<u>Purchase as per Audited Accounts</u>		10,03,87,328.00
<u>Add : Statutory Taxes on which TCS is also Charged</u>		
Input VAT	23,96,025.13	
Deposit ag.CST	<u>5,78,815.12</u>	<u>29,74,840.25</u>
		10,33,62,168.25
 <u>Less: Purchase on which TCS not charged by Parties under the I.T Act</u>		
Annual Coal Suppliers (P) Ltd	3,72,420.36	
Saraogi Udyog Pvt. Ltd	3,77,885.03	
Shiv Traders	<u>9,04,596.00</u>	<u>16,54,901.39</u>
		10,17,07,266.86
		10,23,32,858.02
		6,25,59.16

<i>difference</i>		
<i>Eastern coalfields Ltd</i>	2,55,285.08	
<i>Anand Carbo</i>	3,71,080.00	
	6,26,365.08	773.92

N.B

TCS in Income Tax Return for Rs.10,21,395/- is claimed as per TCS Credit shown in Form 26AS at the time of preparation & filing of the I T Return with negligible rounding off difference in the amount as per books of accounts to keep parity with the records with I.T Department's side"

8.2 In respect of the issue relating to commission paid to Smt. Babita Anchalia, Ld. Counsel referred to the commission bills placed in the paper book to demonstrate that all the details were contained in the commission bill for the commission charged against supply of coal. It was further pointed from the paper book that Ld. AO in the assessment proceedings specifically asked vide notice dated 14.06.2017 and 10.11.2017 for the details of commission paid, copies of TCS receipts, month-wise purchase and sale, details of carriage inward, nature of services rendered by Smt. Bablta Anchalia, etc. which were all complied with, both before the Ld. AO and before the Ld. PCIT in the revisionary proceedings.

He further submitted that the material which the Ld. PCIT can rely upon includes not only the record as it stands at the time when the order in question was passed by the Ld. AO but also the record as it stands at the time of examination by the Ld. PCIT. By taking the bench through these records, the Ld. Counsel strongly contended that the very foundation on which the Ld. PCIT has assumed the jurisdiction to invoke provisions of section 263 is on an absolutely incorrect set of verifiable facts and therefore the impugned order is liable to be quashed *ab initio*.

8.3 Learned Counsel further submitted that Ld. PCIT has grossly erred in assuming his jurisdiction and initiating proceedings u/s. 263 of the Act since in the assessment order passed by the Ld. AO, in respect of all the three reasons because of which the scrutiny selection of the case was done, he had not only made adequate enquiries but also undertaken necessary verification of the details which were furnished during

the course of assessment proceedings and on the basis of which he had taken permissible views. To buttress the contentions, reliance has been placed on the following case laws as submitted in the paper book –

S. No.	Particulars
	<i>Case Laws relied upon:-</i>
	Lack of inquiry/inadequate inquiry
I	<i>Gupta Spinning Mills Pvt. Ltd. Vs Assessee</i>
	No independent finding
II	<i>Ashok Kumar Shivpuri, Navi Mumbai Vs CIT 22 [ITA no. 631/Mum/2014 dated 07.11.2014]</i>
III	<i>M/S Rupayan Udyogvs CIT, Kolkata [ITA no. 1073/ko1/2017 dated 28.11.2018]</i>
IV	<i>Ritin Lakhmani Vs PCIT [ITA no. 41/Kol/2019]</i>
V	<i>Satish Kumar Lakhmani Vs PCIT [ITA no. 260/Kol/2019]</i>
VI	<i>Shri Dinobandhu Sadhukhan, Howrah vs. I.T.O.[ITA 970/ko1/2019 Date.23.08.2019]</i>
VII	<i>Sinhotia Metals & Minerals (p) Ltd vs PCIT, Durgapur[ITA no 889/ko1/2017 dated 16.01.2019]</i>
	Mere non-mention/non-discussion in order
VIII	<i>Meerut Roller Flour Mills Pvt Vs CIT (2019) 420 ITR 216(All)</i>
IX	<i>CIT Vs Vodafone Essar South Ltd (2012) 28 taxmann.com 273</i>
X	<i>CIT Vs M/s Vikas Polymers (ITA no.3/1991) Delhi HC dt. 16.08.2010</i>
XI	<i>CIT Vs Goyal Private Family Specific trust [(1988) 171ITR 698 All]</i>

9. Per contra, Ld. CIT (DR) relied upon the impugned order of the Ld. PCIT. He submitted that the AO failed to conduct proper enquiry on both the issues and the Ld. PCIT has rightly invoked the action u/s 263 of the Act. He further submitted that Ld. PCIT has merely remitted these issues to the file of the assessing officer for fresh enquiry and no prejudice is caused to the assessee, if these issues are being examined afresh.

10. Before we advert to the facts and law involved in this appeal before us, it is worth apprising ourselves on the law governing the issue involved. Therefore, to examine the aspect whether Ld. PCIT is justified in holding the order of Ld. AO as erroneous and prejudicial to the interest of revenue, we will first go through the relevant provision of Section 263 of the Act which is reproduced as under for ease of reference:

263. (1) *The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any*

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

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

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—*
 - (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;*
 - (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;*
- (b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;*
- (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.*

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

- (a) the order is passed without making inquiries or verification which should*

have been made;

- (b) *the order is passed allowing any relief without inquiring into the claim;*
- (c) *the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
- (d) *the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*

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

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

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

11. From perusal of the aforesaid section, it is apparent that there are mainly four features / stages of the power for revision to be exercised u/s 263 of the Act by the Ld. PCIT –

i. The PCIT may call for and examine the records of any proceedings under the Act and for this purpose he/she need not show any reason or record any reason to believe as it is required u/s 147 or 143(2) of the Act. It is a part of his/her administrative control to call for the records and examine them.

ii. The PCIT on an analysis of both, the records and the order passed by the Assessing Officer arrives at a consideration that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. This is exercised by calling for and examining the records relating to any proceeding under this Act available at the time of examination by the PCIT. Till this stage, assistance of the assessee is not required by the PCIT.

iii. If after calling for and examining the records and the assessment order, the PCIT considers that the order of the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue, he/she is bound to give an opportunity of being heard to the assessee by issuing a show cause notice pointing out the reasons for arriving at such a consideration that action u/s 263 is required on a particular issue. The PCIT has to conduct an inquiry as he may deem fit and after hearing the assessee, he/she will pass the order as deem fit.

iv. The PCIT can annul or enhance or modify the assessment as a result of inquiry conducted and hearing the assessee by directing the Assessing Officer for a fresh assessment or to make such enquiries as he/she deem necessary.

12. At this juncture, before arriving at our conclusions on the multi-fold contentions of the Ld. Representatives, we deem it pertinent to take note of the fundamental four steps propounded above in the context of facts and circumstance of the present case before us.

12.1 Let us look at the rightful exercise of the first and second steps of revisionary powers u/s 263 of the Act by the Ld. PCIT, enumerated above. There must be material available on the record called for by the PCIT to satisfy himself *prima facie* that the two requisites of assessment order being erroneous in so far as it is prejudicial to the interest of the revenue, are present. If not, he has no authority to initiate proceedings for revision.

12.2 In the present case before us, it is an undisputed fact that the revisionary proceedings u/s 263 of the Act were triggered at the instance of proposal received by the Ld. PCIT from the AO, as noted in Para 2 of the impugned order. The issue in these set of facts is not about AO sending a proposal to the Ld. PCIT for the review of the assessment order but is about whether Ld. PCIT applied his own mind by

examination and verification of the material available on the record including the proposal so received to arrive at a consideration that the assessment order is erroneous in so far as it is prejudicial to the interest of the revenue. We observe that to invoke provisions of section 263, Ld. PCIT is required to examine the record of any proceeding under this Act and conduct such enquiries as he deems necessary.

12.3 We note that the Ld. PCIT on an analysis of both, the records and the order passed by the Assessing Officer has to arrive at a consideration that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. This is exercised by calling for and examining the records relating to any proceeding under this Act available at the time of examination by the PCIT. The term 'record' has been explained in Explanation 1(b) to section 263 of the Act as – *'record' shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner.* Record shall include all the documentary evidences which were submitted before Ld. AO and also those submitted before Ld. PCIT against the SCN issued to invoke the provisions of section 263. Ld. PCIT is required to examine all the documentary evidences including those which were before Ld. AO and submitted before him. We find that while arriving at the consideration in Para 6 of the impugned order, Ld. PCIT made a note of all the submissions made by the assessee before the AO in response to his notices but did not point out what was erroneous in so far as it is prejudicial to the interest of revenue. Ld. PCIT noted that claim of purchase by the assessee is of Rs. 10,03,87,328/- as against Rs. 10,23,32,749/- sought by Ld. PCIT based on TCS reverse calculations. We observe from the note number 7 of notes on accounts forming part of the audited financial statement of the assessee placed at PB 281 that 'Sales and Purchases have been stated at Net of Value Added Tax'. Further, Section 206C of the Act dealing with collection of tax refers to the 'amount payable' by the buyer for the purpose of collect of tax from the buyer. The percentage of TCS enumerated in the table contained in section 206C of the Act is to

be applied on the amount payable by the buyer to the seller which will include not only the cost of purchases but also the taxes levied thereon. Also, it is evident that claim of purchase expense by the assessee is of lesser amount which cannot be prejudicial to the interest of revenue. If the higher figure of Rs. 10,23,32,749/- worked out on the basis of TCS is considered, the gross profit percentage of the assessee will go down further. Despite having all the records before the Ld. PCIT in the revisionary proceedings which were even before the Ld. AO in the assessment proceedings, in view of step one and two noted above, we find that Ld. PCIT without examining and verifying himself or causing the examination / verification, erred in merely stating that since AO has not done verification, the assessment order passed by the AO appears to be erroneous and prejudicial to the interest of the revenue. Impugned order by Ld. PCIT lacks his independent findings and judicious appreciation of facts and records. For the above finding of ours, we find force from the decision of Hon'ble Bombay High Court in the case Gabriel India Ltd. [1993] 203 ITR 108 (Bom) wherein it is observed as under (page 113) –

" . . . From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is 'erroneous in so far as it is prejudicial to the interests of the Revenue'. It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction." [Emphasis supplied by us]

13. We further observe that in the course of proceedings u/s 263 of the Act before the Ld. PCIT, the assessee had furnished the relevant details and explained the issue supporting its contentions by relevant documentary evidences and judicial precedents. It is well settled law that for invoking the provisions of section 263 of the Act, both the conditions that the order must be erroneous and prejudicial to the

interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

13.1 Further, we find that it is not a case where there was no enquiry at all by the Ld. AO. Our perusal of the two notices u/s 142(1) dated 14.06.2017 and 10.11.2017 issued by the Ld. AO and the replies dated 23.06.2017 and 17.11.2017 filed by the assessee in the course of assessment, reveals that Ld. AO did enquire in to the three reasons noted by the Ld. PCIT in his SCN for invoking the revisionary proceedings.

Here, in support of our finding, we would like to refer the judgment of Hon'ble Delhi High Court in the case of CIT vs. Anil Kumar Sharma [2011] 335 ITR 83 (Del) wherein it has been held dismissing the appeal *“that the present case would not be one of, “lack of inquiry” even if the inquiry was termed inadequate. The Tribunal found that complete details were filed before the Assessing Officer and that he applied his mind to the relevant material and fact, although such application of mind is not discernable from the assessment order. The Tribunal held that, the Commissioner in proceedings under Section 263 also had all these details and material available before him, but not been able to point out defects conclusively in the material, for arriving at a conclusion that particular income had escaped assessment on account of non application of mind by the Assessing Officer. The Tribunal was right and the order of revision was not valid”*.

13.2 The issue regarding whether the assessment order is erroneous or prejudicial on the ground of insufficiency of enquiry has been dealt by the Hon'ble Delhi High Court in the judgment of ITO v. DG Housing Projects Ltd. (*supra*), which has been followed by various co-ordinate benches of the ITAT in various cases. Hon'ble High Court while adverting to the issue held that in cases of wrong opinion for finding on merit, the CIT has to come to the conclusion and himself decide that order is erroneous, by conducting necessary enquiry, if required and necessary before the order u/s 263 of the Act is passed. In such cases, the order of the AO will be erroneous because the order passed is not sustainable in law and the said finding

must be recorded by CIT who cannot remand the matter to the assessing officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/enquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the AO, making the order unsustainable in law. In some cases, possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record *per se* justified and mandated further enquiry or investigation but the AO had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the AO to conduct further enquiries without a finding that the order is erroneous, the condition or requirement which must be satisfied for exercise of jurisdiction u/s 263 of the Act. In such matters, to remand the matter/issue to the AO would imply and mean that the CIT has not examined and decided whether or not the order is erroneous but has directed the AO to decide the aspect/question. The Hon'ble Court further held that this distinction must be kept in mind by the CIT while exercising jurisdiction u/s 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the AO, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/enquiry himself. The order of the AO may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the AO to decide whether the order was erroneous. This is not permissible. An order is erroneous, unless the CIT holds and records reason why it is erroneous. Therefore, CIT must after recording reasons, hold that order is erroneous. The jurisdictional pre-condition stipulated is that CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It was further

observed by the Hon'ble High Court that the material, which the CIT can rely up on includes not only the records as it stands at the time when the order in question was passed by the AO but also records as it stands at the time of the examination by the CIT. Nothing prohibits CIT from collecting and relying new/additional material which evidence to show and state that the order of the AO is erroneous.

13.3 We find that Ld. PCIT in the present case has not carried out any enquiry of his own and has merely set aside the assessment to the file of the AO to re-examine the three issues raised in the SCN (*supra*). Therefore, it is contrary to the guidelines as mandated in the Hon'ble Delhi High Court decision in the case of ITO v. DG Housing Projects Ltd. (*supra*). Accordingly, the consideration arrived at by the Ld. PCIT invoking provisions of section 263 of the Act on the issues recorded by him in the SCN is not justified and cannot be sustained under the facts and circumstances of the present case.

14. On the three issues considered by the Ld. PCIT in the impugned order, no action u/s 263 of the Act is justifiable and the impugned order cannot be sustained under the facts and circumstances of the present case and judicial precedents dealt herein above. We, therefore, quash the impugned order u/s 263 of the Act and allow the grounds raised by the assessee.

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

Order is pronounced in the open court on 27th April, 2022

Sd/-
(SANJAY GARG)
Judicial Member

Sd/-
(GIRISH AGRAWAL)
Accountant Member

Dated: 27.04.2022

{SC SPS}

Copy of the order forwarded to:

1. Appellant- Karnika Fuels & Commodities Pvt. Ltd, C/o. RSVPC & Company, 41A, AJC Bose Road, Suite No. 613, 6th Floor, Kolkata – 700 017
2. Respondent- Pr. Commissioner of Income Tax-2, Aaykar Bhawan, P-7 Chowringhee Sq., Kolkata-700 069.
3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches