

THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Sandeep Singh Karhail (JM)

I.T.A. No. 1286/Mum/2021 (A.Y. 2016-17)

Sehorse Mercantile Company Pvt. Ltd. Flat No. B/308, Wing B Sneha Apna Ghar Unit 11 Plot No. 30, Tandon Road Andheri, Mumbai-400 053. PAN : AAJCS1507L (Appellant)	Vs.	PCIT-6 501, 5 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Dharmesh Shah & Shri Dhaval Shah
Department by	Shri Amol B. Kirtane
Date of Hearing	15.03.2022
Date of Pronouncement	28.04.2022

ORDER

Per Shamim Yahya (AM) :

This appeal by the assessee is directed against the order of learned CIT passed under section 263 of the I.T. Act dated 30.3.2021 pertains to A.Y. 2016-17.

2. The grounds of appeal read as under :

1. The Ld. Pr, Commissioner of Income-tax has erred in law and in facts in issuing notice u/s. 263 of the Act and passing revision order without satisfying the conditions laid down u/s. 263 of the Act and without appreciating that the assessment order was neither erroneous nor prejudicial to the interest of revenue.
2. The Ld. Pr. Commissioner of Income-tax has erred in law and in facts in directing the assessing officer to assess the income of the appellant afresh after making enquiries into genuineness of the business conducted by the appellant.

3. The Ld. Pr. Commissioner of Income-tax ought to have appreciated that nature of business and transactions in PMS/DMS products was genuine and is fully explained with evidences and hence cannot be doubted.

3. In this case in the order passed under section 263 of the I.T. Act learned CIT noted that return of income was filed on 30.11.2017 declaring loss at Rs. 1,823/-. That thereafter assessment was completed under section 143(3) of the Act on 28.12.2018 assessing total income of Rs. 1,48,27,610/-. Thereafter learned CIT observed that :

“On a reference the following issue is noticed:

1. Assessee claims to be engaged in the business of share trading as well as trading in DMS/PMS products. There are certain facts which are emanating from the reference which indicates that the business of the assessee in DMS/PMS products is not genuine and is only a transfer funds from one entity to another so as to layer the transaction at multiple levels and conceal the true nature of receipt of money and its ultimate application.”

4. Thereafter learned CIT observed that considering the reference the assessment record was called for and examined. That from the perusal of the record it is confirmed that AO had not examined following aspects. Learned CIT held that the AO failed to make enquiries on following issues:
 1. During the course of assessment proceedings assessee could not explain the nature of its business or provide supporting documents for the business carried out by it for A.Y.2011-12.. Further, during the course of assessment proceedings for A.Y. 2016-17, details regarding Sales parties were not submitted by the assessee.

 2. Further, during the course of assessment proceedings for AYs 2012-13 to 2013-14 and 2017-18 the assessee submitted the details of the sales and purchase for all the different assessment years. On perusal of those details it is observed that there was an exponential growth in the DMS/PMA business of the assess, to the extent that turnover increased to about Rs. 900 Crores for A.Y. 2015-16 from Rs.261.33 Crores in A.Y. 2014-15, while at the same time it did not result in any significant profits for the assessee. Assessee never explained the prevalence of low profit rationale or sustenance of loss over the years and why it continued with the business when there is persistent loss from this business.

 3. Further, on perusal of details of Trading in shares, it is seen that Assessee has primarily invested in shares of Vakrangee Holding Pvt. Ltd. Further, in all the years, unlike the trading in DMS products the amount of Sales is more than Purchases giving rise to Profits which is however set-off

against the losses from DMS business. Thus, the Taxable Profits on trading of shares are adjusted against the loss created in DMS/PMA business. In all the years fictitious losses were booked in DMS trade business which achieved twin objectives of both layering of money transfers and reducing taxable income for the assessee against the profit earned in trading of Shares.

4. There are only a few buyers and sellers in the business of the assessee. For A.Y. 2013-14 and A.Y. 2014-15 there is only one buyer, namely, M/s. Abhirathi Trading Company Private Ltd. and the seller being M/s Mindtree Exports Pvt. Ltd. It is also seen that both buyer and seller is same entity, like for A.Y. 2017-18 M/s Newtree Trading Company Pvt. Ltd. and M/s Bluepearl Trading Co. Pvt. Ltd. had bought and sold goods to & from the assessee. Similarly, Highpoint Trading Company Pvt. Ltd. bought goods worth Rs. 233.82 Crores in A.Y. 2012-13 while in A.Y. 2016-17 it sold goods worth Rs. 186 Crores to the assessee, apart from providing business advance of Rs 110.55 crore in A.Y. 2015-16.

5. The above discussed transactions prove that there is no definite chain or order in value addition. At the same time how closely these companies are connected will become evident from the table below which shows clearly list of companies with which assessee has had transaction in the course of its trade in DMS products:

S.No	Company Name	Director/s	Address
1	Seahorse Mercantile Company Pvt. Ltd.	Sanjeev Tarachand Vohra Sunil Challia	Flat No.408, B-Wing, Sneha, Apna Ghar, Unit No. 11 , Tandon Road, Andheri(W), Mumbai City MH 400053.
2	Highpoint Trading Company Pvt. Ltd.	Vimal Kumar Bohar Bhimrao Balku Retharekar	Flat No. 18, Ground Floor, Samikaran Apartment, Sant Janabai Marg, Vile Parle(E), Mumbai Mumbai City MH 400057.
3	Newtree Trading Company Pvt Ltd.	Sudam Kanu Kathe Sunil Mohan Arya	407, A Wing, Bhaveshwar Acade Premises Co. Op. Soc.Ltd, LBS Marg Ghatkopar (W), Mumbai Mumbai City MH 400086.
4	Tenacity Technologies Pvt. Ltd.	Anil Vallabhadas Agarwal Ramchandra Sharma	The Kailas Esplanade Soc Ltd. C-Wing, Unit No.507 LBS Marg, Ghatkopar(W), Mumbai City MH 400086.
5	Bluepearl Trading Company t. Ltd.	Ramchandra Sharma Sunil Ramkrishan Bohra	Gala No.401, 4 th Floor, Kaveri Commercial CHS Jagannath Mandir Road, Sakinaka Mumbai City MH 400072.
6	Abhirathi Trading Company Pvt. Ltd.	Rajiv Rajendra Sharma Nirmal Laxminarayan Bohra	A 4, c-10, Jai Vidyadani CHS Ltd, Om Nagar, Sahar Pipe Line Road, Andheri(E), Mumabai Mumbai City MH 400099.

7	Hitanshi Properties Pvt. Ltd.	Rajiv Rajendra Sharma, Nirmal Laxminarayan Bohra	A 4, C-10, Jai Vidyadani CHS Ltd, Om Nagar, Sahar Pipe Line Road, Andheri (E), Mumbai City MH 400099.
8	Mindtree Export Pvt. Ltd.	Ashok Kumar Gautam Shulajah Sharma	Base No.B-16, Basement Marol Naka, Hind Saurashtra Ind. Estate, Andheri(E) Mumbai Mumbai City MH 400059.
9	Westlink Trading Pvt. Ltd.	Kuldeep Singh, Kapiz Dhvaj Singh Abhishek Kumar Singh Seeraj Singh Dhawaj	3-15, Basement, Hind Saurashtra Industrial Estate Marol Nak, Andheri(E), Mumbai City MH 400059.
10	Cybernetix Automation Pvt. Ltd.	Mahendra Amar Singh Gaur Radhey Shyam Tnanvi	Unit No.138, Raj Industrial Complex A-Wing, Military Road, Marol, Andheri (E), Mumbai City MH400059.

1. Assessee has had significant transactions with both M/s Highpoint Trading Company Pvt. Ltd. and M/s Cybernetix Automation Pvt. Ltd. (CAPL). Both these entities too profess to trade in electoral voter list. These entities have had huge transactions between them both on revenue account as well as capital account. During A. Y. 2011-12, Assessee received Rs. 10 Crores of Share Application Money from M/s Highpoint trading Co. Pvt. Ltd. and made Purchases worth Rs. 186 Crore of DMS products in A.Y. 2016-17. Similarly assessee received Rs. 60 crores as Loan from M/s Cybernetix Automation Pvt. Ltd. during the A.Y. 2012-13. However, the Statements recorded on Oath of people associated with both M/s Highpoint Trading Co. Pvt. Ltd. and M/s Cybernetics Automation Pvt. Ltd. show that these entities had no genuine business in DMS/PMS trade and hence related transactions are not genuine.”

5. Thereafter learned CIT mentioned that statements of people associated with both M/s Highpoint Trading Company Pvt. Ltd .and M/s Cybernetix Automation Company Pvt. Ltd were recorded by ITO 14(2)(1), Mumbai during the course of assessment proceedings of M/s Highpoint Trading Company Pvt. Ltd (HTCPL) for A.Y. 2011-12 and also by & DDIT (Inv) Unit 4(1), Mumbai. Thereafter learned CIT mentioned that statement of certain other persons associated by of Highpoint Trading Company Pvt. Ltd. as well as director of assessee company were also recorded. He observed that statement recorded on oath lead to the conclusion that in the aforementioned entities, no business of trading in DMS goods was carried out in these entities. That the assessee is well aware about these facts as these statements have already been provided to the assessee during the course of assessment proceedings. Thereafter learned

CIT observed that while concluding the assessment for A.Y. 2016-17, the aspect of the sales and purchases themselves being entries were not examined. No opinion was formed on the genuineness of the business of the assessee. The facts of the case, that the so called trade in DMS/PMS products (electoral voter list) is a mere facade for layering of transaction, emerged after the assessment for A.Y 2016-17 was concluded. In light of the facts that emerged later as discussed earlier, the assessment order for A.Y. 2016-17 is both erroneous and prejudicial to the interest of the revenue. There is no possibility of two or more valid views on the very genuineness of the business of the assessee. The true income of the assessee as per the Income Tax Act 1961 can be determined only after accounting for the sales proceeds of trade in DMS products as unexplained credits. All these aspects remained unexamined by the Assessing Officer at the time of assessment thereby rendering it liable for revision under section 263 of the Act. Accordingly, learned CIT noted that show-cause notice under section 263 of the Act was issued to the assessee on 5.3.2021 fixing the date of hearing on 15.3.2021. Thereafter learned CIT referred to assessee's submission in this regard. He reproduced the submission running into several pages. However learned CIT held that the same is not tenable. Learned CIT observed that on perusal of the case records it is seen that during the year under consideration i.e F.Y. 2016-17 relevant to the A.Y. 2017-18 assessee credited its P&L Account on various items from sales of Rs.697 crores, it also received exempt income in the form of dividend. The only major item of expenditure was purchase of Rs. 786.43 Crore. Inventories increased from Rs.58.11 Crore to Rs.149.64 Crore, thereby achieving a rough parity between sales and purchase. Apart from purchases there were certain minor items of expenditure like audit fees, filling fees, finance cost etc. Thereafter he referred a sketch of the P&L Account. He further observed that during the year there was sale of DMS products worth Rs. 390 crores and purchase of the same worth Rs. 473 crores. He further observed that the balancing figure for the year was the huge increase in trade payables. He further referred to a summary of the sales and purchase. Thereafter he

observed that on perusal of the records following facts emanates which indicate that the business of the assessee in DMS/PMS products was not genuine and was only a means to transfer funds from one entity to another so as to layer the transaction at multiple levels and conceal the true nature. In this regard he summarized as under :

The assessee could not explain the nature of its business or provide supporting documents for the business carried out by it for A.Y.2011-12 for A.Y. 2016-17. That neither details regarding the sales party were asked for the by Assessing Officer during course of scrutiny proceeding nor the same were submitted by the assessee. However he noted that that during the assessment proceedings for A.Y. 2012-13 to 2013-14 & 2017-18 the assessee submitted the details of the sales and purchase for all the different assessment years. He summarized credits and debits on account of DMS/PMS. Thereafter he observed that it can be seen from the above table that there was an exponential growth in the DMS/PMA business of the assessee. Learned CIT observed that the assessee never explained the prevalence of low profit ratios or sustained loss over the years and why it continued with the business. He observed that the explanation given by the assessee in its submission dated 15.3.2021 is frivolous and cannot be accepted in view of the above discussion.

Thereafter learned CIT observed that while trading in shares, the assessee almost exclusively invested in shares of Vakrangee Holding Pvt. Ltd. He observed that in all the years unlike the trading in DMS products the amount of sales is more than the purchase giving rise to taxable profits which is however set off against the losses from DMS business.

He observed that there are only few buyers and sellers in the business of the assessee. For A.Y. 2013-14 and 2014-15 the only buyer of assessee's product was M/s. Abhirathi Trading Company Pvt. Ltd. and the seller to the assessee was M/s. Mindtree Exports Pvt. Ltd. He observed that these transactions give rise to the suspicion that there is no definite chain or order in value addition. He further observed that how closely the companies are connected will become evident from the table below. Thereafter learned CIT referred the names and address, directors and list of companies with which assessee has had transaction in the course of its trade in DMS products.

He referred to assessee's transaction with both M/s. Highpoint Trading Company Pvt. Ltd. and M/s. Cybernetrix Automation Company Pvt. Ltd. and referred to the statement of people associated with both these company. That the statements of people associated show that these entities had no genuine business in DMS/PMS. He further observed that how the products trade by the assessee reached the final customers/consumer were also not explained by the assessee. That how the assessee brought about any value addition to DMS product it traded was also not satisfactorily explained. He referred that in

assessment proceedings of M/s. Highpoint Trading Company Pvt. Ltd., all the losses incurred from trade in DMS products were not allowed to set off against income from share trading. He referred to a copy of these statements was received in his office on 2nd July, 2019. He further referred statements of director of the assessee company which was received in the office of the DDIT (Inv) on 28.3.2019. That these statements recorded under oath lead to the conclusion that in the aforementioned firms there were no actual business. Then he referred to the statement of office boy of M/s. Highpoint Trading Co. Pvt. Ltd. He further referred to several other statements and held that the so-called transaction in DMS products is not genuine and is a mere instrument to receive and transfer funds. Accordingly, learned CIT concluded as under :-

“6. While concluding the assessment for A.Y. 2016-17, the aspect of the sales and purchases themselves being entries could not be examined. No opinion was formed on the genuineness of the business of the assessee. The facts of the case, that the so called trade in DMS/PMS products (electoral voter list) is a mere facade for layering of transaction, emerged after the assessment for A.Y. 2016-17 was concluded. In light of the facts that emerged later, the assessment order for A.Y. 2016-17 is both erroneous and prejudicial to the interest of the revenue.

7. Further, the assessee has vide its letter dated 25.03.2021 submitted that due to the situation of Covid-19, they are facing difficulties to compile the information and documents. Without prejudice, assessee has requested to set-aside the current proceedings and restore the order to AO so as to enable to get some time to compile the details when normalcy returns.

8. Considering the above discussed facts and circumstances, I hold that the assessment order passed u/s. 143(3) of the Act, by the AO on 28.12.2018 is erroneous and in so far as is prejudicial to the interest of revenue. Therefore, the said order passed by the Assessing Officer is set-aside with a direction to pass the same de-novo taking into account the observation made herein above and after affording adequate opportunity to the assessee.”

6. Against the above order assessee filed appeal before us.

7. We have heard both the parties and perused the records. Learned counsel submitted that the power exercised by learned CIT is not sustainable. He submitted that at the outset learned CIT is referring that “on a reference following issues were noticed”. In this regard learned Counsel of the assessee submitted that there is no whisper from where reference was received by learned CIT. Hence, he submitted that it is not clear whether the jurisdiction exercised by learned CIT is on his own or on the direction of somebody else. Hence, he submitted that learned CIT’s order is not sustainable. He further made following submissions in this regard :

“The details of purchase and sales were already verified by the Ld. A.O. and therefore it is not a case of order being erroneous and prejudicial to the interest of revenue.

2. We submit that the assessment proceedings in the present case were originally completed on 28.12.2018 u/s. 143(3) of the Act. Thereafter, revision proceedings were taken up u/s. 263 of the Act vide notice dated 05.03.2021 and the order u/s 263 of the Act was passed on 30.03.2021 directing the Ld. A.O. to pass the assessment order after taking into account the observations made by the Ld. PCIT. While holding that the order passed by the Ld. A.O. was an erroneous in so far as prejudicial to the interest of revenue, the Ld. PCIT observed that from the details of purchase and sales filed by the Appellant during the assessment proceedings for earlier years, there was exponential growth in the trading of Document Management System and Printing Management System (DMS/PMS) products relating to trading in electoral voter list. However, the turnover did not result in any significant taxable profits of the company. According to the Ld. PCIT, the trading was undertaken by the Appellant only with few buyers and sellers in the business. The same entity buys from the appellant in one year and sells to the Appellant in another year. It was also alleged that some of the companies were closely connected with each other as evident from the names of the director and the addresses of the company. The Ld. PCIT has also alleged that the Appellant had various transactions in the nature of receipt of share application money and loans with some of the companies in the past years which shows that these entities have no genuine business in the DMS/PMS products. The Ld. PCIT observed that in the trading of DMS products, the interface was only with the political parties and not the actual retail buyers. Therefore, how the Appellant had brought about any value addition to the product traded by them was not satisfactorily explained in the original assessment proceedings. In view of the above, according to the Ld. PCIT, these transactions were giving rise to suspicion that there is no definite chain or order in value addition. It is also alleged that in the statements recorded of some of the parties, they could not explain the business carried on by their companies satisfactorily. Based on the aforesaid observations, the Ld. PCIT directed the Ld. A.O. to redo the assessment keeping in mind the various observations made with respect to the nature of business of the Appellant.

3. The Appellant submits that the allegations made by the Ld. PCIT does not call for exercising powers u/s. 263 of the Act. At the outset, the Appellant submits that the activity of purchase and sale of DMS/ PMS products was examined by the Ld. A.O. during the course of original assessment proceedings and after having satisfied with respect to nature of business, no addition was made with respect to the income from the said trading activity carried on by the Appellant during the year. In this regard the Appellant submits that the following details were filed during the course of original assessment proceedings:

- a. Notice dated 23.08.2018 u/s. 142(1) of the Act calling upon the details of purchases and sundry creditors along with the details of loans, share capital, etc.
- b. Letter dated 21.09.2018 filed in response to the notice u/s. 142(1) of the Act dated 23.08.2018 giving details of party-wise purchases, creditors, etc.
- c. Letter dated 10.10.2018 in response to the notice u/s. 142(1) of the Act dated 23.08.2018 submitting the copies of confirmation, nature of the purchase, confirmation/ledger of trade payable/sundry creditors, confirmation/ledger of the party from whom loans accepted during the year and the explanation to the reconciliation with AIR details.
- d. Letter dated 24.12.2018 submitting therein the party-wise details of trade receivables as on 31.03.2016 as well as details of trade receivables as on 30.09.2018.

Copy of the aforesaid letters along with the relevant attachments are enclosed herewith.

4. The aforesaid details filed before the Ld. A.O. during the course of the original assessment proceeding shows that the Ld. A.O. had called for the details of purchase and sales of the parties and the same were submitted before him. After perusing the details and having satisfied about the nature of business activity of the Appellant, no addition was made by the Ld. A.O. This therefore clearly shows that the issue under consideration raised by the Ld. PCIT was already examined by the Ld. A.O. and a possible view was taken after verifying the details called for.

5. It is submitted that the case of the Appellant at the most results into inadequate enquiry by the Ld. A.O. However, this by itself does not empower to the Ld. PCIT to take up the revision proceedings. We submit that the proceedings u/s. 263 of the Act cannot be taken up for want of adequate enquiry. The courts have time and again held that the revision proceedings can only be resorted to in case of lack of enquiry and not in case of inadequate enquiry by the Ld. A.O.”

8. Thereafter learned counsel for the assessee has relied upon the following decisions :-

- MOIL Ltd. Vs. CIT (396 ITR 244)
- CIT Vs. Nirav Modi (390 ITR 292)

9. Learned counsel further submitted that :

“No independent enquiry conducted by the Ld. PCIT to conclude that the assessment order was liable to be revised. The conclusion drawn by the Ld.

PCIT is solely based on inference from the assessment order without any support of independent enquiry or evidence. .

Without prejudice, we submit that the Ld. PCIT has also not exercised the powers conferred upon him in accordance with the provisions of the Act. A perusal of S. 263 of the Act clearly shows that the Ld. PCIT is required to establish that an order passed by the Ld. A.O. was an erroneous in so far as it is prejudicial to the interest of revenue. The legal position in this regard is very clear that it is upon the Ld. PCIT to conduct necessary enquiries and come to a conclusion that the assessment order passed by the Ld. A.O. was erroneous and prejudicial to the interest of revenue. In the present case, the assessee apprehends that the said revision has been resorted pursuant to audit objection.

In the present case, the perusal of the order u/s. 263 of the Act shows that the Ld. PCIT has merely relied upon the financial statements of the Appellant reflecting exponential sales growth in the business of the Appellant over the years, the low profit margin and limited customer/supplier base to come to conclusion that the business activity of the Appellant was not genuine. There is no material or evidence brought on record to prove the alleged inference drawn him. The Appellant submits that in order to prove that the assessment order passed was prejudicial to the interest of revenue, the Ld. PCIT ought to have brought on record some evidence to prove that the appropriate income has not been assessed by the Ld. A.O. and that the Appellant was liable to tax on an income which was higher than the income offered and assessed by the Ld. A.O. in the assessment order. In the revision order, except making certain allegations based on the inference from the financial statements of the Appellant and the enquiries made in case of the other entities pertaining to other years, Ld. PCIT has not explained as to how the income shown by the Appellant ought to have been more than the income assessed by the Ld. A.O. It is therefore submitted that unless any evidence to prove any amount has been under assessed, the Ld. PCIT cannot be said to have complied with the condition of "prejudicial to the interest of revenue."

10. Learned Counsel of the assessee placed reliance upon Hon'ble Bombay High Court decision in the case of Gabriel India Ltd. (203 ITR 108) and Hon'ble Delhi High Court decision in the case of ITO Vs. DG Housing Projects Ltd. (343 ITR 329). Further learned counsel submitted that without prejudice the issue raised by the learned PCIT could have at the most been taken up by reopening of the assessment and not revision under section 263 of the Act. He submitted that there was time for the Assessing Officer to reopen the assessment and in this regard he referred to Mumbai Tribunal decision in the case of Top Notch Buildcon LLP Vs. PCIT (ITA No. 524/Mum/2021 vide order dated 17.11.2021). Learned counsel further submitted that without prejudice the activity of the

assessee was genuine and the inference drawn by learned PCIT were without any basis. In this regard learned counsel has made following submissions :-

“We submit that the purchase and sales made by the Appellant are genuine and the same are fully supported by cogent documentary evidences. The Appellant submits that the trading activity involves purchase and sale of the Electoral Voter's List and therefore the same is relevant during the period when elections are likely to be conducted in any of the state or cities during the year. Further, with the increase in the population and awareness, as well as with the increase in the political parties over the period, the need for such voter list has increased resulting into increase in purchase and sale of the same. Under these circumstances, merely because the turnover of the Appellant has increased over a period, it cannot be presumed that the trading activity of the Appellant is not genuine.

It is further submitted that since the DMS/PMS product of the Appellant is relevant to people from different states and cities depending upon the forthcoming elections at that relevant point of time, the Appellant trades with only few companies who are dealing in the said product in the relevant state or city during the year. Hence, merely because the trading activity of the Appellant is restricted with few parties, it cannot be presumed that such activities of the Appellant are not genuine.

It is next submitted that during the course of the revision proceedings, the Appellant had submitted the details of sales to the Ld. PCIT. The complete company profile, business background and the business model comprising of 26 pages indicating the nature of business was also submitted before the Ld. PCIT. In spite of the same, the Ld. PCIT has not been able to find any deficiency or discrepancy in the same.

The Ld. PCIT has referred to certain statements of the persons namely, Mr. Balkrishna Yadav, office boy of the Abhirathi Trading Company Pvt. Ltd., Mr. Mahendra Gaur, Director of Cybernatics Automtion Pvt. Ltd., Mr. Ajay Jangid, Chartered Accountant for Highpoint Trading Co. Ltd. and Mr. Sanjeev Bohra, Director of the Appellant company. However, none of the statements referred to by the Ld. PCIT have any bearing on the purchase and sale of DMS/PMS products by the Appellant for the year under consideration. The discussion in respect of the said statements made by the Ld. PCIT in his order at page 15-16 shows that the statements were recorded in the course of assessment proceedings in the case of Highpoint Trading Co. Ltd. for A.Y. 2011-12 and not in connection with the proceedings of the Appellant for A.Y. 2016-17. Further, the statements nowhere reflect any allegations, much less adverse allegations, with respect to the trading activity of the Appellant. Under these circumstances, it cannot be said that the said statement was instrumental in coming to conclusion that the business for the Appellant was not genuine.

Lastly, the Appellant also submits that the assessment proceedings in case of other parties with whom the Appellant has made purchase and sale transactions has been concluded u/s 143(3) of the Act. In their assessment orders, the transaction of purchase and sale of DMS/PMS products with the

Assessee have been accepted to be genuine. In such circumstances, it is incorrect to observe that the transactions carried out by appellant with them are not genuine. Copy of the assessment orders of the various parties in similar line of business is enclosed herewith.”

11. Per contra learned Departmental Representative relied upon the order of learned CIT. Learned Departmental Representative was directed to give information as to what reference learned CIT is referring for exercising jurisdiction under section 263 of the Act. Learned Departmental Representative has not responded in this regard.

13. We have carefully perused the submission, the case laws and the records. We find that learned CIT has started his 263 order by referring that on a reference the issue was noticed. In this regard in the order there is no mention as to what was the reference and who made the reference. In this regard we have raised a query to the learned Departmental Representative to provide information as to from whom the learned CIT got reference which led to his exercise of power under section 263 of the I.T. Act. No response has been received. Accordingly from the facts on record it is not clear whether the exercise of the revision powers by learned CIT was his own. In this regard it is noted that Hon'ble Calcutta High Court in *Jewanlal Ltd. Addl. CIT (108 ITR 407)* has laid down that the exercise of discretion and judgment by the commissioner must be of himself. Where on suggestion of the audit department the commissioner exercised his power of revision it was held that the action on the part of commissioner was unwarranted. Similarly Hon'ble Guahati High Court in *Bajinath Biswanath and others Vs. State of Assam (133 STC 300)*(Chaturvedi & Pethesaria Income Tax law seventh Edition page 13526) has held that the power reposed on the commissioner is a power of judicial nature and therefore such power is to be exercised lawfully and with due application of mind. That the power cannot be exercised mechanically or at the behest of some other authority other than on the own discretion of the revisional authority himself. It was held that the commissioner is not to exercise his discretion on the dictation of some other authority. On the basis

of above case laws we find that in the present case revenue has not been able to bring any material on record to show that the exercise of revisionary power by learned CIT was of his own. As learned Commissioner himself states that he has exercised the power on a reference it follows that the ratio from above said Hon'ble High Court decision follows. In as much as the exercise of revision power by learned CIT is on the reference from an unspecified source the power exercised by learned CIT is vitiated and not sustainable in law.

14. Another aspect which is related to the above is that in the order learned CIT is referring to orders and examination of persons which happened subsequent to the order passed by the Assessing Officer in this case and also in proceedings in assessment of other entities. The order passed by the Assessing Officer in this case is dated 28.12.2018 while the return was filed on 30.11.2017. The commissioner in his order mentions that he has gotten the information by referring to the statements of people related to other concerns the copy of which was received in his office on 2.7.2019. Learned CIT further referred to statements of the director of the assessee company which was received in the office of the DDIT (Inv) on 28.3.2019. He also refers to assessment proceedings in other concerns. Thus it is amply clear that the information which is the basis of learned CIT exercising his jurisdiction under section 263 emerged after the passing of assessment order by the Assessing Officer. When subsequent to the passing of the order of the Assessing Officer if certain information comes to the possession of revenue regarding escapement of income the recourse provided in law is reopening of the assessment. When a particular method is prescribed in the act for performing an act the same cannot be done in another manner not specified in the act. Hon'ble Karnataka High Court in *Bidar Sahakar Sakkare Karkhane Vs. State of Karnataka* (58 STC 65), *H. Kenche Gowda Vs. State of Karnataka* (174 ITR 389)(Chaturvedi & Pethesaria Income Tax law seventh Edition page 13522) has expounded that

the revision power under section 263 cannot be exercised in respect of a matter which falls within the power to assess escaped income. That the revising authority should not trench upon the powers which are expressly reserved to the Assessing Officer under section 147. The commissioner in exercising of its revision of jurisdiction should not ignore such a specific power in this regard. We note that Hon'ble Jurisdictional High Court in the case of CIT vs. Gabriel India Ltd. 203 ITR 108 has expounded that there must be material available from the records called for by the Commissioner, so as to bestow upon him the power to exercise jurisdiction. In the present case as noted earlier the records of the assessing officer up to the date of passing of order did not have the statements and other aspects which came into existence subsequent to the order passed by the assessing officer. Moreover, the assessment details of other entities are not marked on record of the assessment of assessee. Hence in the background of aforesaid discussion it amply evident that the information and material on the basis of which learned CIT is exercising his jurisdiction under section 263 came into existence after the assessment order passed by the assessing officer. It is also not the case that they were available to the Assessing Officer in assessment record. These materials can be a source of reopening but on the touchstone of aforesaid case laws learned CIT cannot exercise jurisdiction under section 263 of the I.T Act. It is also noted that it is not the case that there was no time for the assessing officer to reopen the assessment. In such circumstances the Mumbai ITAT decision in the case of Top-Notch Buildcon Vs. versus DCIT (supra) applies fully here. In this case it was held that if the matter was to be a subject matter of reopening that was to be done by way of reopening notice and the same cannot be done indirectly through division order under section 263. Accordingly the jurisdiction exercised by the learned CIT in this case is vitiated in as much as he has stepped into the shoes of Assessing Officer in virtually reopening the assessment and on the touchstone of aforesaid case laws the jurisdiction exercised by the learned CIT is vitiated and not sustainable in law.

15. We further note that the learned CIT by referring to the assessment of other entities and the statements of other parties and referring to assessee's financials has tried to make out a case that business of the assessee was not genuine and was only a means to transfer funds from one entity to another so as to layer the transaction at multiple level and conceal the true nature. Furthermore learned CIT observed that the examination of the transactions give rise to the suspicion that there is no definite chain or value addition. Learned CIT further mentions that these statements point out that there was no actual business. In this regard we note that power under section 263 has to be exercised when an order by the assessing officer is erroneous as well as prejudicial to the interest of revenue. Learned CIT while exercising his power in his order has tried to make out a case that assessee's business is not genuine and the same is meant to layer transactions. In this regard we note that if the business is not genuine and the assessee has still returned Income, how the revenue is prejudiced is not clear. Moreover layering of transactions and routing of money is a matter of examination of unexplained funds of loans and advances et cetera. In the present case no case has been made out by the learned CIT about the existence of unexplained credits or advances in assessee's financials. In this view of the matter it cannot be said that in the exercise of power by the learned CIT satisfies the criteria that the order of the AO has been found by learned CIT to be prejudicial to the interest of revenue.

16. In the background of aforesaid discussion and precedents we are of the considered opinion that the jurisdiction power exercised by learned CIT is vitiated and not sustainable in law. Other aspects on merits of the case canvassed by the assessee and other aspects are of academic interest and hence we are not dealing with the same.

17. In the result, assessee's appeal is allowed as above.

Order pronounced in the open court on 28.04.2022.

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 28/04/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai