IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH, PANAJI
BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER & SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. No. 77/PAN/2020
Assessment Year: 2015-16

Shri Nitin A. Shirgurkar 17, Tridal 2nd Cross, Hindwadi Belagavi Karnataka - 590011 [PAN: **AGVPS5635G**] **(Appellant)**	**Vs.**	**Pr. Commissioner of Income Tax, Hubballi** **(Respondent)**

Appellant by	**Pramod Vaidhya, Advocate**
Respondent by	**Rajan Kumar, CIT, D/R**

Date of Hearing	28.03.2022
Date of Pronouncement	13.05.2022

ORDER

Per Anikesh Banerjee, J.M.:

The captioned appeal is filed against the order of the Learned Principal Commissioner of Income Tax - Hubbballi, [hereinafter the "ld. Pr. CIT] dt. 12/03/2020, passed u/s 263 of the Income Tax Act, 1961 [hereinafter 'the Act'], for the Assessment Year 2015-16.

2. The assessee has filed the following grounds of appeal:-

"1. On the facts and circumstances of the case and in law the Pr Commissioner of Income Tax (Pr.CIT) erred in passing order u/s 263 on points outside the scope of limited scrutiny assessment u/s 143(3) of the Act.

2. Without prejudice, the Pr.CIT failed to appreciate that the AO in limited scrutiny assessment, after verifying the details has made lump sum disallowance of interest u/s 14A.

3. The Pr.CIT erred in holding that Advance to Hemal Rajpopat Rs.23,78,803/- and to Vikrant Hongekar Rs. 10,00,000/- given in earlier years is for non business purpose ignoring the fact that-

i) Advance to Hemal Rajpopat was given in A. Y 2009-10 for acquiring stake in LLP as evidenced by ledger extract, correspondence and confirmation on record.

ii) Advance to Vikrant Hongekar was given in A.Y 2014-15 for purchase of plot as evidenced by ledger extract.

iii) Both the amounts for business purpose through banking channel are given in earlier years, not during this year and form a part of accounts and B/S since earlier years.

4. The Pr.CIT erred in directing A.O to tax in assessee'e hands profit/gain of p.ship firm M/S Nasco Developers, on land sold by it to assessee's mother Mrs. Sheela Shirgurkar.

5. The Pr.CIT erred in directing the A. O to verify and intimate ITO(TDS) regarding TDS of Rs.8,15,433/- made on unsecured loans of Rs.82,14,360/- after noting that TDS compliance has been done except one payment of Rs.4,110/-(less than Rs.5,000/- not liable for TDS) and another Rs. 1,20,000/- (Form 15G furnished).

6. The Pr.CIT erred in holding that interest payment of Rs. 27,36,096/- to co-operative societies without TDS is liable to be disallowed @30% u/s 40(a)(ia) ignoring the provisions of section 194A(3)(iii)(a) and possible view thereon.

7. The Pr.CIT erred in directing the A. O to disallow interest payment of Rs. 8,96,703/- to Jai Bhavani Co-op Credit Society wherein Form No. 26A obtained by assessee remained to be filed with DGIT (Systems) by certifying C.A.

8. The Pr.CIT erred in setting aside the issue of short deduction of TDS of Rs. 1,71,293/-, in spite of the fact on record that the same was paid along with interest before the due date of filing ROI as evidenced by Tax Audit Report.

9. The Pr.CIT erred in setting aside the issue of interest of Rs. 1,00,288/- to p.ship firm NASCO Ishyanya Reality even after accepting that in view of section 194A(3)(iv) no disallowance is warranted.

10. The Pr.CIT erred in setting aside the issue of TDS on subcontract payments evidenced by Tax Audit Report and verified by A.O in assessment proceedings.

11. The Pr.CIT erred in directing A.O to verify chargeability to Wealth Tax of flat at Bangalore, being the only partly self occupied exempt asset appearing in B/S of the assessee and when rent out of let out portion is taxed and the same was verified by A. O in assessment proceedings.

12. Reasons assigned for setting aside the assessment order in limited scrutiny assessment and directing the A. O to verify points not covered by it and also reverify points covered in assessment proceedings is wrong and contrary to law and facts of the case.

13. The Appellant craves leave to add, alter, amend or modify any of the grounds of appeal.

3. Prelude:- The assessee is and individual engaged in the business of real estate i.e., building, promoting & developing, property dealing and contractor works. He has filed its return electronically for the assessment year 2015-16 on 31/10/2015 declaring total income of Rs.36,36,240/-. Subsequently the case was selected for limited scrutiny under CASS. Thereafter the ld. AO issued notices u/s 142(1) of the Act and completed the assessment u/s 143(3) of the Act, vide order dt. 28/12/2017 *interalia* making an disallowance of Rs.2,41,079/- u/s 14A of the Act being income from business or profession for the impugned assessment year.

3.1. The ld. Pr. CIT found the assessment order passed under section 143(3) dt. 28/12/2017 to be erroneous and prejudicial to the interest of the revenue and sought to revise the order passed by the ld. AO by invoking powers u/s 263 of the Act by issuing notice to the assessee, for reasons given in his order, which is extracted for ready reference:-

*"**2. Non disallowance of interest payment in respect of advancing of interest bearing funds for non-business purposes:***

It is seen from the balance sheet that you have advanced a sum of Rs.67,39,003/-to the following three parties for the purpose other than the business:

1. Shri Rajpopat Hemal Bhupendra	*Rs.23,78,803/-*
2. Smt. Snehal Shirgurkar	*Rs.33,60,200/-*
3. Shri Vikrant Honagekar	*Rs.10,00,000/-*
	Rs,67,39,003/-

Considering interest rate of 13.5% on loans obtained by you and that such interest bearing funds are advanced for non-business purposes and that no interest is charged on such advances to the tune of Rs.67,39,003/- the Assessing Officer should have disallowed such interest out of interest paid by you equaling to Rs.67,39,003 X Rs.9,09,765/-.

2.1 Non application of provisions of Section 40(a)(ia) on account of non deduction of tax at source on interest payment made to Co-operative Credit Societies:-

You have paid interest of Rs.69,77,004/- to various co-operative Societies and Rs.6,75,248/-to Jai Bhavani Society without deducting tax at source. Accordingly, the Assessing Officer was required to disallow the interest payment made as per provisions of section 40(a)(ia) amounting to 30% the said payment of Rs.76,52,252/- i.e. Rs.22,95,676/-.

2.2. Non application of provision of section 40(a)(ia) on account of non deduction in respect of interest payments to others:

"You have deducted tax at source in respect of the following payments, but not paid the entire TDS into Government account:

	Amount paid	*TDS*	*TDS not paid as qualified in Audit Report An-VI*
Interest (10%)	*Rs.80,72,228*	*Rs.8,11,007*	*Rs.1,63,847*
Contract (1%)	*Rs.13,77,717*	*Rs.15,585*	*Rs.5919*
Consultancy	*Rs.33,95,000*	*Rs.39,500*	*Rs.1,527*
Total	*Rs.98,44,945*		

As per the provisions of section 40(a)(ia) of the Income Tax Act, 1961 the Assessing Officer was required to disallow 30% of the payments made i.e. Rs.98,44,945/- X 30% + Rs.29,53,483/- which has not been done.

2.3. Non application of provisions of Section 40(a)(ia) on account of non deduction in respect of interest payments made to firm by the partner:

You have made payment of Rs.1,00,288/- to NASCO Ishanya Realty, a firm in which you are a partner, but not tax deducted at source, As such, the Assessing Officer was required to disallow a sum of Rs.30,086/- i.e. 1,00,288 X 30%= Rs.30,086/- as per provisions of Section 40(a)(ia) of the Act, which has not been done.

3. On perusal of records, the following observations have also been made.

3.1 You have shown sub contract payment at Rs.45,89,556/- but claimed that the amount suffering TDS is Rs.13,77,717/- only in Audit Report An-VI.

3.2 In the Audit Report, the Auditor has qualified the following payments as outstanding liabilities, in respect of which applicability of Section 43B needs to be examined:

1. Professional Tax 2014-2015 Rs.4150/-

2. Sales Tax payable 2014-15 Rs.1,48,044/-

3.3. You have shown flat at Bangalore worth Rs.3,23,00,000/- The applicability of Wealth Tax in respect of this asset for this year and earlier Assessment Years also needs to be examined, as from records, it is not clear whether you are offering any rental income from this asset.

3.4 As per Audit Report Annexure-V, you have made payment of interest of Rs.82,14,360/- to various parties other than Banks and co-operative Societies. However you have debited interest payment of Rs.69,77,004/- only in the P&L account under the head "To Interest paid for loan" which may also include paid to co-operative societies"."

3.2. Accordingly, a show cause notice was issued by the ld. Pr. CIT and the ld. A/R of the assessee appeared on different dates before the ld. Pr. CIT and also filed written submission on 19/07/2019 submitting the following details:-

"*(1)Copy of the letter received from Al Hamas Tiles & Hemal via mail details of payments made to him.*

(2)Property Purchase document of Sheela Shirgurkar and Gift Deed

(3)Form 15G/15H

(4)Details of interest paid

(5)Form obtained from auditor of the society (Annexure-A to Form 26A)

(6)Details of contract payments made

(7)Details of TDS challans paid"

3.2.1. During the course of hearing the ld. Counsel for the assessee drew the attention of the Bench to the notice of limited scrutiny issued by the ld. AO bearing notice no. ITBA/AST/143(2)/2016-17/1000119721(1) dt. 25/07/2016. The following issues were identified for the purpose examination in the limited scrutiny:-

"*i. Interest expenses*

ii. Income from Real Estate Business
iii. Sales Turnover Mismatch
iv. Other Deduction claimed
v. Squared up loans
vi. Purchase of Property
vii. Payment to related persons mismatch,
viii. Unsecured Loans,
ix. Mismatch in Income/Capital Gain on sale of land or building

3.3 The ld. Counsel for the assessee, Shri Pramod Vaidhya, further drew our attention to the order of the ld. Pr. CIT, wherein at page 5 para 4, the ld. Pr. CIT has observed as under:-

> *"4. In response the show cause notice dated 12.2.2020, Sri Sanjeev Adhyapak, CA & AR duly authorized appeared and stated that the assessee has submitted submission as well as details on the issues raised in the show cause notice. He sought adjournment and accordingly case was re-fixed for hearing on 04.03.2020 at 11.00 AM. However, he did not appear on the said date. Therefore, as mentioned above, case was again fixed for hearing on 11.03.2020 and in response to the said hearing letter, Sri Sanjeev Adhyapak, FCA attended and furnished letter explaining the advances given to Rajpopat Hemal Bhupendra and Vikrant Honagekar is paid for business purposes in the F.Y. 2008-09 and F.Y. 2012-13 respectively. He further contended that the advances given to above two parties are still receivable. In support of his claim, the AR also furnished copy of Balance sheet as on 31.03.2009 and as on 31.03.2013, wherein, these advances are reflected at Assets side of the respective year's Balance- sheet. The written submissions as well as details furnished in support of various issues raised during the proceedings under section 263 of the I.T. Act, 1961 are placed on record after due verification".*

4. The ld. Counsel for the assessee submitted that the issues raised in the limited scrutiny were duly examined by the ld. AO during the assessment proceedings and that he has taken a plausible view. He further drew our attention to page no. 11 of the paper book which reflects the deduction of TDS from different parties under different heads.

5. The ld. D/R relied upon the order of the ld. Pr. CIT and submitted that the issues relating non-deduction of TDS, non-business advance and residential property

at Bangalore, were not properly examined and verified by the ld. AO during the assessment proceedings. That these issues were untouched and unattended to during the assessment proceedings under limited scrutiny.

6. The ld. Counsel for the assessee relied on a number of case-laws, for the proposition that the revision in question is made on the basis of the order of the ld. AO passed u/s 143(3) of the Act under limited scrutiny. And that the issues raised in the limited scrutiny has been examined to the satisfaction of the ld. AO and plausible view has been taken. In such a scenario the ld. Pr. CIT was wrong in invoking his powers u/s 263 of the Act directing the ld. AO to pass *de novo* assessment on merits. He further submitted that the ld. Pr. CIT on examination of the submissions of the assessee, has not come to a conclusion that there is an error, or discrepancy or falsity in the submissions. He argued that without forming an opinion that there is an error, the ld. CIT cannot is set aside the issue to the file of the assessing officer for further enquiry on presumptions and assumptions.

7. We have heard rival submission, gone through the orders of the authorities below, perused the material available on record as well as the case-laws cited.

8. Be it as it may, the entire thrust of the ld. CIT is that the enquiries made by the assessing officer are inadequate. There is no allegation of non-enquiry. On these facts the various Courts have laid down the following propositions of law:-

The *Hone'ble Andhra Pradesh High Court in the case of Spectra Shares and Scrips Pvt. Ltd. V CIT (AP) 354 ITR 35* had considered a number of judgments on this issue of exercise of jurisdiction u/s 263 of the Act by the Principal Commissioner of Income Tax and culled the principles laid down in the judgments as below :

"24. In Malabar Industrial Co.Ltd. (2 Supra), the Supreme Court held that a bare reading of Sec.263 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suomotu under it, is the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent – if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act. It also held at pg-88 as follows:

"The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. RampyarideviSaraogi v. CIT (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal V. CIT (1973) 88 ITR 323 (SC)".

25. In Max India Ltd. (3 Supra), reiterated the view in Malabar Industrial Co.Ltd. (2 Supra) and observed that every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. On the facts of that case, Sec.80HHC(3) as it then stood was interpreted by the Assessing Officer but the Revenue contended that in view of the 2005 Amendment which is clarificatory and retrospective in nature, the view of the Assessing Officer was unsustainable in law and the Commissioner was correct in invoking Sec.263. But the Supreme Court rejected the said contention and held that when the Commissioner passed his order disagreeing with the view of the Assessing Officer, there were two views on the word "profits" in that section; that the said section was amended eleven times; that different views existed on the day when the Commissioner passed his order; that the mechanics of the section had become so complicated over the years that two views were

inherently possible; and therefore, the subsequent amendment in 2005 even though retrospective will not attract the provision of Sec.263.

26. In Vikas Polymers (4 Supra), the Delhi High Court held that the power of suomotu revision exercisable by the Commissioner under the provisions of Sec.263 is supervisory in nature; that an "erroneous judgment" means one which is not in accordance with law; that if an Income Tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately; that the section does not visualize the substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with the law; that to invoke suomotu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

27. In Sunbeam Auto Ltd.(5 Supra), the Delhi High Court held that the Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc.; that whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed. In that case, the Delhi High Court held that the Commissioner in the exercise of

revisional power could not have objected to the finding of the Assessing Officer that expenditure on tools and dies by the assessee, a manufacturer of Car parts, is revenue expenditure where the said claim was allowed by the latter on being satisfied with the explanation of the assessee and where the same accounting practice followed by the assessee for number of years with the approval of the Income Tax Authorities. It held that the Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. Merely because the Assessing Officer in his order did not make an elaborate discussion in that regard, his order cannot be termed as erroneous. The opinion of the Assessing Officer is one of the possible views and there was no material before the Commissioner to vary that opinion and ask for fresh inquiry.

28. In Gabriel India Ltd. (6 Supra), the Bombay High Court held that a 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. It held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted; that to do so is to divide one argument into two and multiply the litigation. It held that cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes inquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the account or by making some estimate himself; that the Commissioner, on perusal of the record, may be of the opinion that the estimate made by the Officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income Tax Officer; but that would not vest the Commissioner with power to reexamine the accounts and determine the income himself at a higher figure; there must be material available on the record called for by the Commissioner to satisfy him prima facie that the order is both erroneous and prejudicial to the interests of the Revenue. Otherwise, it would amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh inquiry in matters which have already been concluded under law.

29. In M.S. Raju(15 Supra), this Court has held that the power of the Commissioner under Sec.263 (1) is not limited only to the material which

was available before the Assessing Officer and, in order to protect the interests of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

30. In Rampyari Devi Saraogi(21 Supra), the Commissioner in exercise of revisional powers cancelled assessee's assessment for the years 1952-1953 to 1960-61 because he found that the income tax officer was not justified in accepting the initial capital, the gift received and sale of jewellery, the income from business etc., without any enquiry or evidence whatsoever . He directed the income tax officer to do fresh assessment after making proper enquiry and investigation in regard to the jurisdiction. The assessee complained before the Supreme Court that no fair or reasonable opportunity was given to her. The Supreme Court held that there was ample material to show that the income tax officer made the assessments in undue hurry; that he had passed a short stereo typed assessment order for each assessment year; that on the face of the record, the orders were pre-judicial to the interest of the Revenue; and no prejudice was caused to the assessee on account of failure of the Commissioner to indicate the results of the enquiry made by him, as she would have a full opportunity for showing to the income tax officer whether he had jurisdiction or not and whether the income tax assessed in the assessment years which were originally passed were correct or not"

31. From the above decisions, the following principles as to exercise of jurisdiction by the Commissioner u/s.263 of the Act can be culled out:

a) The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act.

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

c) To invoke suomotu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed

reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

e) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted

f) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed.

g) The power of the Commissioner under Sec.263 (1) is not Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

Now we examine the following judgements. :-

DIRECTOR OF INCOME TAX vs. JYOTI FOUNDATION 357 ITR 388 (Delhi High Court)

It was held that revisionary power u/s 263 is conferred on the Commissioner/Director of Income Tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because the revisionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken.

INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD343 ITR 329 (Delhi)

Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. S. 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression "prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term "erroneous" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.

The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under s. 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT 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/inquiry 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 Assessing Officer, 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 Assessing Officer 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 Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under s. 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided

whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.
This distinction must be kept in mind by the CIT while exercising jurisdiction under 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 Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer 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 Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

COMMISSIONER OF INCOME TAX vs. J. L. MORRISON (INDIA) LTD. [2014] 46 taxmann.com 215 (Calcutta)

As regard the submission on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable, it was held that the case of CIT vs. M. M. Khambhatwala was not applicable. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case were the issue is debatable was a mere passing remark which is again contrary to the view taken by the Apex Court in thecase of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. CIT vs. M. M. Khambhatwala reported in 198 ITR 144; CIT vs. Ralson Industries Ltd. reported in 288 ITR 322 (SC), not applicable; Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83, relied on.

(Para 72)
As regard the third question as to whether the assessment order was passed by the Assessing Officer without application of mind, it was held that the Court has to start with the presumption that the assessment order was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the assessing officer after due application of mind. Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., ITA No. 116 /Coch/ 2012; CIT vs. Infosys Technologies Ltd., 341 ITR 293 (Karnataka); S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984; A. A. Doshi vs. JCIT, 256 ITR 685; Hindusthan Tin Works Ltd. Vs. CIT, 275 ITR 43 (Del), distinguished.
(Paras 90-92, 102)

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A reference to the provisions of s. 263 shows that jurisdiction there under can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1

lakh was to be received for sale of permit. If that is so, there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under s. 263.

Applying the propositions of law laid down in all these case laws, to the facts of this case, we uphold the contention of the assessee that the exercise of powers by the ld. CIT u/s 263 of the Act, is bad in law. Hence, we cancel this order passed under section 263 of the Act.

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

Order pronounced in the open court on 13.05.2022

Sd/-	**Sd/-**
(Dr. M.L. Meena)	**(Anikesh Banerjee)**
Accountant Member	**Judicial Member**

SC, Sr.P.S.

Copy of the order forwarded to:

(1)The Appellant:-
(2) The Respondent :-
(3) The CIT:-
(4) The CIT (Appeals):-
(5) The DR, I.T.A.T.:-

True Copy

By Order

Sr. Private Secretary
ITAT