

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 501/DEL/2021 [A.Y 2015-16]

Genpact Consulting [Singapore] Pte Ltd
[Earlier known as "Headstrong Consulting
Pte Ltd., 600, North Bridge Road, 23 01
Parkview Square, Singapore 188778

Vs. The C.I.T
Inttl. Taxation-2
New Delhi

PAN: AADCH 4943 D

(Applicant)

(Respondent)

Assessee By : Shri Percy Pardiwalla, Sr. Adv
Shri Sachit Jolly, Adv
Shri Rohit Garg, Adv
Shri Sohumi Dua, Adv

Department By : Shri Gangadhar Panda, CIT-DR
Shri Sanjay Kumar, Sr. DR
Shri Vinod Sharma, Addl. CIT
Shri Mandeep Singh, DCIT

Date of Hearing : 08.06.2022
Date of Pronouncement : 13.06.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 30.03.2021 framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Year 2015-16.

2. The assessee has raised as many as 4 grounds of appeal, but the sum and substance of the grievance of the assessee is that the order passed by the CIT [International Taxation], New Delhi u/s 263 of the Act is without jurisdiction, bad in law and void ab initio.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon by both the sides were duly considered.

4. Briefly stated, the facts of the case are that the assessee company e-filed its return of income on 30.11.2015 declaring NIL income. Return was selected for scrutiny under CASS and, accordingly,

statutory notices were issued and served upon the assessee. A detailed questionnaire alongwith notice u/s 142(1) of the Act was issued and, thereafter, the case was referred to the Transfer Pricing Officer.

5. A perusal of the assessment order shows that simultaneous proceedings were undertaken, one by the Assessing Officer and the other by the TPO. Notes to Indian Income tax return for Assessment Year 2015-16 reads as under:

"1. Headstrong Consulting (Singapore) Pte. Limited {'HCS' or 'the Company'}) is a company incorporated under the laws of Singapore and has its effective place of management in Singapore.

2. During the Year 2015, it was a tax resident of Singapore and held a valid Tax Residency Certificate ('TRC') issued by Inland Revenue Authority of Singapore. HCS, therefore, was governed by the provisions of India-Singapore Agreement for the Avoidance of-Double Taxation and Prevention of Fiscal Evasion with respect to taxes on Income {'DTAA'} {'DTAA'} or the provisions of the Indian Income-tax Act, 1961 ('the Act'), whichever were more beneficial to HCS.

The principal activity of the Company is that of Software, Computer Consultants and Advisors and Investment holding.

1. During the Financial Year 2014-15, the Company transferred 1,486,025 equity shares held in Genpact India (an Indian company) to its wholly owned Indian subsidiary, Empower Research- Knowledge Services Private Limited ('Empower India'; now known as Genpact India Private Limited), for a total consideration of USD 1,397,263,241. The shares were transferred in two tranches viz., 701,675 shares on January 28, 2015 and 784,350 shares on March 25, 2015.

3. Taxability of gains arising from, the above transfer of shares:

Transfer by HCS of the shares held in Genpact India to Empower India would tantamount to transfer of capital asset as per Section 2(47) of the Act. However, in view of the specific exemption provided in Section 47(iv) of the Act, the aforesaid transfer would not be considered as a "transfer" for the purpose of computing capital gains under Section 45 of the Act and hence will not result into taxable capital gains in the hands of HCS, since Empower India was a wholly owned Indian subsidiary of HCS at the time of above transfer.

Without prejudice to above, the gains arising to HCS from the above transfer of shares would also be exempt in India in view of the provisions of Article 13 of the DTAA.

4. Filing of Return of Income

Although the gains arising to HCS on transfer of shares held in Genpact India to Empower India would not result in any taxable capital gains in the hands of HCS in India (in view of the provisions of Section 45 read with Section 47(iv) of the Act as well as provisions of Article 13 of DTAA), the Company is filing its return of income under the provisions of the Act declaring Nil taxable income in India.

5. The Company craves leave to furnish further detailed notes/explanations and information, as necessary, to support its Income-tax return and the computations made therein,"

6. It can be seen from the above that in the notes to accounts, the assessee has explained the transactions relating to the transfer of shares and consideration received thereon. It can also be seen that the assessee has explained as to why the said transfer of shares does not result into any capital gains tax liability and why the income is exempt.

7. The first notice issued by the Assessing Officer during the course of scrutiny assessment proceedings is dated 16.08.2017 wherein the Assessing Officer had asked the assessee to submit copies of

acknowledgement of filing return of income alongwith Income tax return form and notes to return and also Form No. 3CEB for the year ending on 31.03.2015.

8. On 18.10.2018, the Assessing Officer again issued a notice which reads as under:

*NOTICE UNDER SECTION 142(1) OF THE
INCOME - TAX ACT, 1961*

OFFICE OF THE
ASSISTANT COMMISSIONER OF INCOME TAX
INTERNATIONAL TAXATION, CIRCLE 2(1 X ROOM
NO. 310, 3RD FLOOR, E-2 BLOCK, CIVIC CENTRE.

MINTO ROAD, NEW DELHI - 1100T1

PAN : AADCH4943D

Dated : 18/10/2018

To

The Principal Officer
M/s Headstronge Consulting (Singapore)
Pte Ltd., 220 Orchard, 05-01, Singapore.

Sir/Madam,

In connection with the assessment for the A. Y. 2015-16 you are required to :

- a) Furnish or cause to be furnished on or before 25/10/2018 at 02:30 PM the accounts and documents specified overleaf.

b) Furnish and verified in the prescribed manner under rule 14 of I.T. rules 1962 the information called for as per annexure and on the points or matters specified therein on or before 25/10/2018 at 02:30 PM.

c) The above mentioned evidence/information is to be furnished online electronically in 'E-Proceeding' facility through your account in 'e-filing' website of Income Tax Department.

d) Para(s) (a) to (c) are applicable if you have an account in e-filing website of Income Tax Department. Till such an account is created by you, assessment proceedings shall be carried out either through your e-mail account or manually (if e-mail is not available).

e) In cases where order has to be passed under section 153A/153C of the Income Tax Act, 1961 ready with section 143(3), assessment proceedings would be conducted manually.

(Arindam Misra)
Assistant Commissioner
of Income Tax.
International Taxation,
Circle 2(1)(1)
New Delhi,

9. Alongwith the following Annexure:

ANNEXURE

M/s HEADSTRONG Consulting {Singapore PTE Ltd.

PAN : AADCH4943D - A.V. 2015-16

1. Please give detailed background of the company alongwith its activities and sources of revenue with particular reference to business model and activities carried out in India during the year under consideration. Give a detailed note regarding nature of your business activities and furnish details in respect of the works undertaken/executed in India during the year.
2. Please give assessment history in your case from beginning, file copy of last, assessment order and status of appellate proceeding, if any.
3. Please intimate as to whether you had a Permanent Establishment (in the form of Fixed place PE, Agency PE, Installation PE, Service PE...) or Business Connection in India during the year. If so, please furnish names and complete addresses of such concerns. Also furnish details of Branch Offices/Project offices/Liaison office/Godowns and Warehouses and construction or other business sites in India.

4. Please furnish copy of the tax residency certificate for the relevant Assessment year.

5. Please furnish copies of all contracts and agreements operative during the year in respect of your activities in India. Copy of agreement/Contracts entered into with Indian customers/clients or any other party in India from whom any payment is received during the year "or has accrued or arisen during the year may also be provided.

6. Please confirm whether you have maintained books of accounts for your Indian operation as required u/s 44AA of the Act. If yes, please confirm whether they have been audited as required u/s 44AB of the Act, and furnish the same. If not, give your explanation for not complying with provisions u/s 44AA and u/s 44AB of the Act.

7. Please furnish computation of income.

8. Please furnish copy of order of Advance Ruling obtained in your case, if any.

9. Please explain the Large international transaction(s).

Please send your reply through email and also furnish the hard copy of your reply in this office by 25/10/2018,"

(Arindam Misra)
Assistant Commissioner
of Income Tax.
International Taxation,
Circle 2(1)(1)
New Delhi,

10. It can be seen from Point No. 9 to the Annexure that the Assessing Officer had sought explanation from the assessee to explain the large international transactions.

11. The assessee filed reply dated 31.10.2018 which reads as under:

October 31,2018

Assistant Commissioner of income Tax,
Circle- 2(1)(1), (International Taxation)
New Delhi.

Respected Sir,

Re; Headstrong Consulting (Singapore) Pte Limited (now known as 'Genpact Consulting (Singapore) Pte. Ltd.']) ('the Company' or 'the assessee')

PAN: AADCH4943D

Assessment Year ('AY'): 2015-16

Sub: Notice dated October 18. 2018 under Section 142(1) of the Income-tax Act. 1961 - Response thereto

The Company is in receipt of the captioned notice dated October 18, 2018 issued by your goodself's office (copy of the notice enclosed herewith as *Annexure 1*). As per the aforesaid, the Company is required to furnish its response electronically through 'E-Proceeding' facility through the Company's account. However, we would like to bring to your goodselfs kind attention that the option of uploading the documents/response to the enclosed notice is not available, on the E-filing portal for the AY 2015-16. Screenshot of the E-filing portal is enclosed herewith as *Annexure 2*.

Accordingly, for the purpose of compliance to the aforesaid notice, the Company will be filing the requisite information/documents manually with your goodselfs office and also to all future notices that may be issued during the course of captioned assessment proceedings until the facility of uploading the documents for AY 2015-16 is made available on the e-filing portal of the income Tax department. We trust that filing the required information/documents manually with your office would be treated as a sufficient compliance of the aforesaid notice and subsequent notices that may be issued if: the course of captioned assessment proceedings.

We request your office to take the above information on record. Further, the Company is in process of collating/compiling the information sought for by your goodself as per the captioned notice which would be furnished in due course. We request your office to provide us with an opportunity to personally represent

this case before finally concluding the present proceedings.

Thank you

Yours faithfully,

Authorised Signatory

End; As Above

12. And then on 06.11.2018, the following reply was filed:

"November 6, 2018

Assistant Commissioner of Income Tax,
Circle- 2(1){1}, (International Taxation) New Delhi.

Respected Sir

Re: Headstrong Consulting (Singapore) Pte. Ltd.
[now known as 'Genpact Consulting (Singapore) Pte.
Ltd.']['the Company' or 'the assessee']

PAN: AADCH4943D

A.Y. 2015-16

Sub : Notice dated October 13. 2018 under Section 142(1)
of the-income-tax Act. 1961 - Response, thereto

In response to the captioned notice dated October 18, 2018 issued by your goodself's office (copy of the notices are collectively enclosed herewith as *Annexure I*) and in continuation to our earlier submission dated August 16, 2017, we respectfully

submit the following information:

1. Note on the Business of the Company

The Company was incorporated as a private limited company in Singapore. The principal activity of the Company was that of Software, Computer Consultants and Advisors and Investment holding.

2. Assessment order for the last year

No assessment under section 143(3) of the Act has taken place in the Company's case for any of the earlier assessment years.

3. Permanent Establishment in India

The Company has not carried out any activity which could lead to constitution of its Permanent Establishment in India, in terms of Article 5 of the 'Agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries Singapore' entered into between the Government of the Republic of India and the Government of the Republic of Singapore DTAA. The Company would, however, be pleased to furnish further detailed submissions and/or clarifications in this respect so as to substantiate its claim, on hearing from your goodself.

4. Tax residency certificate

A copy of tax residency certificate of the Company is enclosed herewith as *Annexure 2*.

5. Contracts/ Agreements with Indian parties

The Company has not entered into any contracts/ agreements with Indian parties in the financial year 2014/15.

6. Books of Accounts required under section 44AA of the Act

The Company was not required to maintain any books of accounts under section 44AA of the Act in the financial year 2014-15

7. Computation of Income

The Company has already filed a copy-of the acknowledgement of filing of Return of income for the Assessment Year 2015-16 along with the copy of Income tax Return Form and notes to return of income with your goodself's office vide submission dated August 16, 2017.

8. Order of Advance Ruling Authority

It is submitted that the Company has not sought any advance ruling from the Authority for Advance Rulings in India

9. Large International Transactions

Detail of the international transactions as per the form 3CEB for the captioned year, already filed before your goodself' submissions dated August 16, 2017 Copy of the Form 3CEB is

enclosed herewith for your good self's ready reference as
Annexure

We request your office to take the above information on record.
In addition to above, the Company would be obliged to furnish
further information / documentation on hearing from your
gondself's office We request your office u> provide us with an
opportunity to personally represent this case before finally
concluding the present proceedings,

Thank you
Yours faithfully,

Authorized Signatory

Encl: : As Above."

13. It can be seen from the above at Point No. 9 that the assessee has given details of International Taxation as per Form No. 3CEB. On 27.11.2018, the Assessing Officer again issued a notice u/s 142(1) of the Act to which the assessee replied on 03.12.2018 explaining the transaction relating to transfer of shares as under:

December 3, 2018

Assistant Commissioner of Income Tax, Circle- 2(i)(1),
(International Taxation) New Delhi.

Respected Sir,

Re: Headstrong Consulting (Singapore) Pte. Ltd. [now known as 'Genpact Consulting (Singapore) Pte. Ltd,'] ['the Company' or 'the assessee']

PAN: AADCH4943D

Assessment Year: 2015-16

Sub: Notice dated November 27, 2018 under Section 142(1) of the Income-tax Act, 1961 - Response thereto

In response to the captioned notice dated November 27, 2018 issued by your office (copy of the notice is enclosed herewith as *Annexure 1*) and in continuation to our earlier submissions dated August 16, 2017, October 31, 2018 and November 5, 2018, we respectfully submit the following information:

1. The Company, during the year under consideration, transferred 1,486,025 equity shares held in Genpact India (an Indian company) to its wholly owned Indian subsidiary Empower Research Knowledge Services Private Limited (hereinafter referred to as 'Empower India', now known as Genpact India Private Limited), for a total consideration of USD

1,397,263,241. The said shares were transferred in two tranches, viz., 701,675 shares on January 28, 2015 and 784,350 shares on March 25, 2015.

2. The shares transferred, as discussed under point 1 above, by the Company to its wholly owned subsidiary, would tantamount to transfer of capital asset under Section 2(47) of the Act. However, in view of the specific exemption provided under Section 47(iv) of the Act, the said transfer would not be regarded as a "transfer" for the purpose of computing capital gains under Section 45 of the Act and hence gain accrued to the Company will not be chargeable to capital gains tax in India

Genpact Consulting (Singapore) Pte. . UFN: 109805194G

30/F Singapore Land Tower,
SO Raiiks Place.
Singapore 048623

Regd. Off,: 600 North
Bridge Road, #23-01
Parkview Square,
Singapore 188778

Without prejudice to above, the Company being a tax resident of Singapore, is also entitled to claim the benefit under India-Singapore Tax Treaty. The gains arising to HCS from the aforesaid transfer of shares are also exempt to tax in India, in view of the provisions of Article 13 of India- Singapore Tax Treaty.

The Company would, however, be pleased to furnish-its detailed submissions and/or provide clarifications in this respect so as to substantiate its claim, on hearing from your goodself.

3. In view of the specific exemption provided under Section 47(iv) of the Act, the gains accrued to the Company on transfer of shares, as discussed under point 1 above, are not chargeable to tax in India. However, only with a view to explain the transaction in detail, the Company has prepared a working of gains, not chargeable to tax in India. The same is hereby respectfully submitted as *Annexure Z*.

4. Copy of the valuation report for the valuation of the shares of Genpact India is enclosed herewith as *Annexure 3*.

We request your office to take the above information on record. In addition to above, the Company would be obliged to furnish further information / documentation on hearing from your goodself's office. We request your office to provide us with an opportunity to personally represent this case before finally concluding the present proceed

Thank you

Yours faithfully

Authorised signatory

14. On 27.11.2018, alongwith notice u/s 142(1) of the Act, the following was annexed by the Assessing Officer:

1. The details of the share transactions undertaken.
2. Detailed calculation of income.
3. Capital gains offered to tax if any. If not reasons for the same.
4. The valuation report of the shares sold or purchased.

As many notices sent earlier have not been complied, with it is requested that the compliance for the above questions be made on time to avoid the initiation and levy of penalty u/s 271(l)(b) of the Income Tax Act.

15. The assessee filed reply alongwith the following Annexure:

		Amount	Amount
Sales Consideration received by HCS for transfer of 701,675 shares held in Genpact			659,763,251
Number of shares	701,675		
Selling price per share fin USD]	940.259		
Date of transfer	28/1/2015		
Cost of acquisition of 701,675 shares acquired by HCS in Genpact India (Refer Note 2 to 5 below)			8,499,285
Date of acquisition	24/09/2014		
Short term Capital Gains on transfer of 701,675 shares			651,263,966
SBI Telegraphic Transfer Buying rate as on		61.1	
'Short term Capital Gains on transfer of 701,675 shares converted into INR at the SBI Telegraphic Transfer Buying rate as on the date of transfer		39,792,228,	322

16. As mentioned elsewhere, the transfer pricing assessment proceedings were also undertaken simultaneously and on 19.09.2017, TPO sought explanation /details of all international transactions. The details/explanation sought by the TPO were duly replied/answered by the assessee vide replies dated 06.12.2017, 04.01.2018, 10.01.2018 and 31.07.2018.

17. All these replies are exhibited at pages 140 to 148 of the paper book. In fact, vide reply dated 31.07.2018, the assessee has also furnished valuation report relating to fair valuation of equity shares transferred by the assessee during the year under consideration.

18. Vide reply dated 11.09.2018, the assessee has explained the transfer of equity shares of Genpact India to its AE namely, Empower Research Knowledge Services Pvt Ltd. on 28.01.2015 and 25.03.2015.

19. After considering the plethora of evidences, the TPO concluded transfer pricing assessment vide order dated 20.08.2018 framed u/s 92CA(3) of the Act wherein major international transactions undertaken by the assessee with its AE were duly considered and after examination of the transfer pricing documentation produced and after

considering the economic analysis contained therein and details and explanations submitted no adverse inference was drawn in respect of ALP of the international transaction for the F.Y. 2014-15.

20. After receiving the order of the TPO, assessment was completed on 12.12.2018 u/s 143(3) of the Act wherein returned income i.e. NIL, was accepted by the Assessing Officer. While completing the assessment order, the Assessing Officer put the following office note:

"The case was selected for complete scrutiny for the examination of "Large International transaction(s) [Form 3CEB]. Issue has been examined thoroughly and found in order. No adverse inference has been drawn. Assessment has been finalized as per order"

21. Before us, the ld. DR had placed strong reliance on the decision of the Hon'ble Supreme Court in the case of Daniel Merchants Pvt Ltd Vs. ITO Appeal No. 2396/2017 order dated 29.11.2017. In our considered opinion, the facts of that case are totally different from the facts of the case in hand in as much as in that case, the Assessing Officer did not make any proper enquiry while making assessment and accepting the explanation of the assessee in so far as receipt of share

application money is concerned, whereas in the case in hand, after receiving information relating to share transfer proper enquiries were made which is also evident from the office note exhibited elsewhere.

22. Another decision relied upon by the Id. DR is the case of Surya Financials Services Ltd ITA No. 2158/DEL/2017 where the Assessing Officer failed to carry out adequate enquiry about the alleged accommodation entries and the co-ordinate bench upheld the order of the PCIT framed u/s 263 of the Act.

23. As mentioned elsewhere, in the case in hand, the Assessing Officer had not only made sufficient enquiries, but after satisfying himself, assessment was framed u/s 143(3).

24. The Id. DR also referred to the decision of the Hon'ble Delhi High Court in the case of Ashok Logani 347 ITR 22 wherein the Hon'ble Delhi High Court held that where the Assessing Officer has left many loose ends, that too in a case where huge cash was found during search, most of which was surrendered by giving statement at the time of search, it was necessary for the Assessing Officer to properly

adjudicate upon that issue [surrender] and assessment order should have at least reflected that he was satisfied with the explanation disclosing source of cash found. In the present case, the facts are different.

25. The Hon'ble Supreme Court in *Malabar Industrial Co. Ltd.*, 243 ITR 83, has laid down the following ratio:

"A bare reading of [section 263](#) of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that 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 is prejudicial to the Revenue--recourse cannot be had to [section 263\(1\)](#) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous".

26. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

"The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. 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 more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, 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. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie

material on record to show that 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. We, therefore, hold that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power.

It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to

examine whether the relevant objective factors were available from the records called for and examined by such authority.

The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

27. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to

establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 Taxmann.com 272 (Bombay)".

28. The Hon'ble High Court of Gujarat in the case of [CIT vs. Nirma Chemical Works Ltd.](#) 309 ITR 67 has observed as under:

"if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing . A.Y. 2009-10 Officer issued a query memo to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent-Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank

accounts. On perusal, the Assessing Officer was satisfied about the creditworthiness/capacity of the donors, the source from where these funds have come and also the creditworthiness/capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue cannot be accepted."

29. We find that the Hon'ble Delhi High Court in the case of CIT Vs Sunbeam Auto reported in 332 ITR 167 has held as held as under:

"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the CIT under s. 263 of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the AO had not

applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open".

30. Considering the facts of the case in totality from all possible angles, we failed to persuade ourselves to accept the contention of the ld. DR who had strongly supported the findings of the PCIT. We are of the considered view that the order framed u/s 263 of the Act deserves to be set aside and that of the Assessing Officer deserves to be restored. We order accordingly.

31. In the result, the appeal of the assessee in ITA No. 501/DEL/2021 is allowed.

The order is pronounced in the open court on 13.06.2022.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 13th June, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	