IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.457/Bang/2022
Assessment year : 2018-19

Sadhu Salian, D.No.16, MMV Bhavan, Bunder Malpe, Udupi – 576 106. **PAN: ASZPS 5632F**	Vs.	The Principal Commissioner of Income Tax [Central], Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Smt. Susan Dolores George, CIT(OSD)

Date of hearing	:	21.07.2022
Date of Pronouncement	:	27.07.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the order of the Principal Commissioner of Income Tax (Central), Bangalore [PCIT] passed u/s.263 of the Income Tax Act (the Act) dated 28.03.2022 for the assessment year 2018-19 on the following grounds:-

> "1. The order of revision passed by the learned Principal Commissioner of Income tax [Central], Bengaluru, under Section 263 of the Act dated 28/03/2022, in so far as it is against the Appellant is opposed to law, weight of evidence, probabilities, facts and circumstances of the Appellant's case.

2. The learned Principal Commissioner of Income tax is not justified in law and on facts to set aside the assessment order passed under section 143[3] of the Act dated 11/12/2019 and direct the assessing officer to modify the original assessment passed by the learned assessing officer, on the facts and circumstance of the case

3. The learned Principal Commissioner of Income tax is not justified in passing an order under section 263 of the Act, as the order passed under section 143[3] of the Act, was pursuant to proper enquiry by the learned assessing officer on the facts and circumstances of the case.

4. The learned Principal Commissioner of Income tax has passed an unsustainable order which is based purely on assumptions and presumptions. The order is arbitrary and full of surmises, without considering the relevant material and considering irrelevant materials. Consequently, the order passed is a perverse order on the facts and circumstance of the case.

5. The learned Principal Commissioner of Income tax has grossly erred in revising the order passed by the learned Assessing officer without appreciating that there is no error, much less prejudicial to the interests of the Revenue to warrant a revision and therefore the order passed by the learned PCIT is ultra vires to the scope of Section 263 and requires to be cancelled on the facts and circumstances of the Appellant's case. The direction to make thorough and detailed enquiry amounts to ordering fishing and roving enquires without any material in support thereof and consequently the impugned order passed is bad in law and is liable to be cancelled.

6. The learned Principal Commissioner of Income tax failed to appreciate that the additional income declared and the nature and source of such additional income declared by the appellant of Rs. 25,00,000/- is on account of income from business of the appellant and the learned assessing officer after considering the submission of the appellant accepted the income returned by the appellant, on the facts and circumstances of the case.

7. The learned Principal Commissioner of Income tax failed to appreciate that the Assessing Officer before completing the assessment order under section 143[3] of the Act on 11/12/2019 had made detailed enquiries calling for relevant records and documents and explanation pertaining to the matter at hand, the same being produced by the appellant during various instances during the assessment proceedings and further as per the provisions of section 153D of the Act an approval has been sought for passing the order of assessment and having applied their mind and considering the facts the order of assessment has been passed. Hence on the very same issue no action can be taken under Section 263 of the Act as the actions of the Assessing Officer is pursuant to applying his mind to the matter and in accordance with law, on the facts and circumstances of the case.

8. Without prejudice, the order of revision passed by the learned Principal Commissioner of Income tax, is bad in law for not providing the appellant with reasonable opportunity of hearing which is against the principles of natural justice and consequently the impugned order of revision passed under section 263 of the Act requires to be cancelled, on the facts and circumstances of the case.

9. The Appellant craves leave to add, alter, substitute and delete any or all the grounds of appeal urged above.

10. For the above and other grounds to be urged during the hearing of the appeal, the Appellant prays that the appeal be allowed in the interest of equity and justice."

2. The brief facts of the case are that the assessee is an individual in the business of trading of fish and owns fishing boats. For the AY 2018-19, the assessee filed return of income on 29.10.2018 declaring total income of Rs.1,77,01,060. A search and seizure action u/s. 132 of the Act was carried out in the case of the assessee on 8.2.2018 and during the course of search proceedings, cash of Rs.7,50,000 was

seized from the residence of the assessee. The assessee declared an adhoc amount of Rs.25 lakhs as additional income from business over and above the business income in the return of income filed on 29.10.2018.

3. The case was selected for scrutiny and the AO during the course of assessment proceedings asked the assessee to explain why the cash seized of Rs.7,50,000 should not be assessed to tax as undisclosed income of the assessee. The assessee submitted before the AO that the assessee has voluntarily declared a sum of Rs.25 lakhs as additional income for the AY 2018-19 under the head 'income from business' to cover up the discrepancies, if any, found during the search and a sum of Rs.7,50,000 is part of the declared additional income of Rs.25 lakhs. The AO accepted the submission of the assessee that the unaccounted cash of Rs.7,50,000 seized is already assessed to tax and therefore he did not make any addition towards the same and concluded the assessment.

4. The PCIT issued a show cause notice dated 4.3.2022 u/s. 263 of the Act proposing to revise the assessment order passed u/s. 143(3) of the Act stating that the said order of assessment is erroneous and prejudicial to the interest of the revenue. The assessee responded to the said show cause notice by filing detailed submissions reiterating the submissions made before the AO. The PCIT, however, was of the view that the AO did not make any enquiries or verification with regard to the source of additional income of Rs.25 lakhs found during

the search proceedings and the AO allowed the claim of the assessee regarding additional income as income from business without making verification during the assessment proceedings. He therefore held that the assessment order was erroneous and prejudicial to the interests of the revenue according to the provisions of clause (a) of Explanation 2 to section 263 and set aside the assessment order with a direction to the AO to pass a fresh assessment order after making thorough enquiry. Aggrieved, the assessee is in appeal before the Tribunal.

5. Before us, the ld. AR submitted that the assessee has declared the adhoc additional income of Rs.25 lakhs which was over and above the cash amount seized to cover up certain omissions and commissions in the books maintained by the assessee in its business. The additional income declared by the assessee is nothing but business income. Since the assessee does not have any other source of income, the additional income was declared by the assessee on adhoc basis to buy peace with the department and put to rest the differences with the department. In this regard, ld. AR drew our attention to the return of income filed by the assessee where the assessee had included a sum of Rs.25 lakhs under "any other income" of addition u/s. 28 to 44DA (pg.22 of PB). He also submitted that the AO has considered the submissions of the assessee during the course of assessment proceedings and has accepted the income reported by the assessee after proper application of mind. There is no lack of enquiry or inadequate enquiry on the part of the AO to warrant invoking the revision proceedings u/s. 263 of the Act. The ld AR further submitted that the AO before concluding the assessment

as per provisions of section 153D of the Act had obtained approval of Addl. CIT, Central Range, Mangalore, who has given his approval after considering the observations and conclusion arrived at by the AO. When two Officers have applied their mind, there is no lack of enquiry or inadequate enquiry in concluding the assessment proceedings passed u/s. 143(3) of the Act.

6. The ld. DR submitted that in paras 5.2 & 5.3 of the assessment order, the AO has simply accepted the submissions of the assessee with regard to adhoc income of Rs.25 lakhs. There is no verification or enquiry on the part of the AO to examine the source of additional income declared, which the AO ought to have verified. The AO has also not recorded any finding with regard to additional income declared by the assessee in the order of assessment. He therefore supported the revision order u/s. 263 of the Act passed by the PCIT.

7. We have considered the rival submissions and perused the material on record. The main source of income as per the return of income filed by the assessee is the income from business and that the adhoc amount of Rs.25,00,000 is declared under the head income from business. This supports the claim of the assessee that there is no other source of income other than the income from business. The PCIT has stated that the source of additional income declared of Rs.25,00,000 is not substantiated with evidence and should have been taxed as per the provisions of section 115BBE of the Act and based on this premise, he concluded that the order of the AO is erroneous and prejudicial to the

interests of the revenue. Before proceeding further, it is apposite to take note of the relevant extract of section 263 and the Explanation (2) to section 263 of the Act, which read as under :-

"Revision of orders prejudicial to revenue.

263. (1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer 89[or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, 90[including,—

****

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer 94[or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal 95[Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

8. Thus, from close scrutiny of the provisions of section 263, it is evident that twin conditions are required to be satisfied for exercise of revisional jurisdiction under section 263 of the Act i.e., firstly, the order of the Assessing Officer is erroneous; and secondly, it is prejudicial to the interests of the revenue on account of error in the order of assessment. The Bombay High Court in the case of *Gabriel India Ltd. (1993) 203 ITR 108* has explained as to when an order can be termed as erroneous as follows:-

> "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 the 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 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 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 a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion …….. 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."

9. There is no dispute that u/s. 263 of the Act, the PCIT does have the power to set aside the assessment order and send the matter for a fresh assessment if he is satisfied that further enquiry is necessary and the assessment order is prejudicial to the interests of the Revenue. However, in doing so, the PCIT must have some material which would enable to form a *prima facie* opinion that the order passed by the AO is erroneous, insofar as it is prejudicial to the interests of the Revenue. In the present case, the PCIT has not brought out any material on record to substantiate that the source of the amount declared during the search proceedings is anything other than the income from business of the assessee. The AO has given a clear finding with respect to additional income offered by the assessee as business income. The PCIT in his order has stated that further enquiry would have revealed that the additional income is from an undisclosed source and would have resulted in unexplained income to be taxed u/s.115BBE of the Act. This view of the ld. PCIT, in our opinion, is not the right reason for exercising revisionary powers u/s. 263 of Act, as the error envisaged by Section 263 of the Act is not one that depends on possibility as a guess work, but it should be actually an error either of fact or of law. Further, from the perusal of facts, it is evident that the assessee has no other source of income other than business income and the impugned sum is already offered to tax as business income. When the only source of income is business income, then the provisions of section 115BBE cannot be invoked to tax the income as 'deemed income'.

10. With regard to the argument that the assessee's case requires to be considered in the light of the explanation (2) to Section 263 of the Act, we notice that the Hon'ble Gujarat High Court in the case of *Shreeji Prints (P) Ltd. (130 taxmann.com 293 – Guj)* while considering the explanation of Section 263 of the Act, has held that : -

> "4 Being aggrieved by the order passed by the PCIT under section 263 of the Act, 1961, the assessee went before the Tribunal. The Tribunal, after considering the submissions made by the assessee and after considering the scope of power to be exercised by the PCIT under section 263 of the Act, 1961 came to be conclusion that the Assessing Officer has made inquiries in detail about two unsecured loans taken by the respondent assessee and observed as under:
>
> > "13 In the light of the aforesaid judicial precedents in the present case what has to be seen is whether the AO has made enquiries about two loans taken from GTPL and PAFPL. If the answer is affirmative, then second question arises whether the acceptance of the claim by the AO was a plausible view or on the facts of the finding on the facts that the said funding of the AO can be termed as sustainable in law. We find that vide notice issued u/s.142(1) dated 13-10-2015 placed at Page No. 1 of Paper Book shows the AO vide item no.(iii) has asked the information regarding details of unsecured loan outstanding as on 31-3-2013 and the loans were squared up amounts in the format prescribed therein. In compliance to thereof, the assessee has furnished complete details of the unsecured loans outstanding/ squared up vide para 3 of his letter dated 2-11-2015 placed as Annexure-2 at page 4 of paper book. The assessee has also furnished details consisting of copy of ledger account, copy of acknowledgment of income filed for A.Y. 2012-13 and 2013-14 and copy of bank statement reflecting the payment received was paid during the financial year 2012-13 relevant to assessment year 2013-14 which are placed at paper book, page 9 to 49 in respect of GTPL as well as PAFPL. This indicate that the assessee has furnished account confirmation of the depositor, acknowledgment of income of the parties, audited balanced sheet and profit and loss account of the parties and bank pass book and bank statement of the parties. During the course of

assessee proceedings, form these facts it is clear that the assessee has not only proved the from these facts it is clear that the assessee has not only proved the identity of the lenders but also the genuineness of the transactions and credit worthiness of the lenders. Accordingly, the Ld. AO after verifying the details of unsecured loans being satisfied, accepted the submissions of the assessee which leads to infer that the Assessing Officer had made full enquiries of unsecured loans by raising the queries and calling for the all information in respect of the loan taken along with details evidences in support thereof and the same were also duly replied by the assessee and on receipt of all the details of evidences, the unsecured loans received by the assessee were accepted by the Assessing Officer and the assessment was finalised u/s.143(3) of the Act on 15-3-2016. We also note that there was audit objection in the case of the assessee. The language of audit objection and show-cause notice under section 263 is same meaning thereby that the show cause notice u/s.263 has been issued by the PCIT Without going through assessment records and without exercising his own application of his mind. The assessee has not only filed complete details of Income-tax Return, audited balance sheet, profit and loss account and bank statement. The assessee further explained that both the these unsecured loans stands fully repaid as on the date and there is no capital creation by the assessee on this count. In view of these facts and circumstances, we are of the considered opinion that the order of the Assessing Officer is not erroneous nor it is prejudicial to the interest of revenue. It was also brought to the notice of the PCIT that entire share capital of GTPL being already tax, all the investment made by the said company recorded in its balance sheet stands explained tax in its hands itself and hence, "there is no question of adding the same amount in the hands of the assessee. As regards loans from PAFPL, it was submitted that assessee company has made voluntary disclosure of income of Rs. 1.5 crore under IDS 2016 in September 2016 and the said loan was repaid before making declaration. In view of these facts and circumstances, we find that the AO has made due enquiries. Since we find that the AO had made enquiries regarding unsecured loans and accepted the claim of the assessee after detailed enquiries."

15 The Pr.CIT had observed that Explanation 2 of section 263 of the Act is clearly applicable and it is clear that the Assessing Officer has passed the assessment order after making enquiries for verification which ought to have been made in this case. However, we find that the Pr. CIT has not mentioned in the show-cause notice issued under section 263 that he is going to invoke the Explanation 2 to 263 hence, invocation of Explanation in the order without confronting the assessee is not appropriate and sustainable in law in support of this contention, the ld. Counsel has placed reliance on the following decision:

CIT v. Amir Corporation 81 CCH 0069 (Guj.), CIT Mehrotra Brothem -270 ITR 0157 (MP,CIT v. Ganpet Ram Bishnoi - 296 ITR 0292 (Raj.), Cadila healthcare Ltd. v. Cl 7, Ahmedabadh-1 [ITA no. 1096/Ahd/2013 & 910/Ahd/2014], Sri Saí Contractors v. ITO [ITO no. 109Nizag/2002] and Pyare lal Jaiswal v. CIT, Vamnesi [(2014) 41 taxmann.com 27 & (AII Trib.)]. It was contended by the Learned Counsel that clause -(a) & (b) of Explanation 2 of Section 263 are not applicable as the Assessing Officer has made enquiry and verification which should have been made. Further, in the show cause notice, the Explanation-2 of section 263 was not invoked by the PCIT and it was referred in the order u/s.263 of the Act. Therefore, in the light of decision of the Co-ordinate Bench of Mumbai ga in the case of Narayan Tatu Rane - 70 taxmann.com 227 (Mum. Trt.) [PB 153-1561 wherein held that explanation cannot laid to have over ridden the law as interpreted/the various High Courts where the High Courts have held that before reaching the conclusion that the order of the Assessing Officer is erroneous prejudicial to the interest of Revenue. The CIT himself has to undertake some enquiry to establish that the assessment order is erroneous and prejudicial to the interest of Revenue. The ld. Counsel relied on the decision of M/s. Amira Pure Foods Pvt. Ltd., v. PCIT in ITA No.3205/Del/2017 and Ahmedabad Tribunal in the case of Torrent Pharmaceuticals Ltd. v. DCIT [2018] 97 taxmann.com 671 (Ahd. - Trib.). it is clear from the enquiries made by the Assessing Officer and submissions made by the assessee that the Assessing Officer has taken the plausible view which is valid in the eyes of law. The Assessing Officer was satisfied consequent to making enquiry and after examining the evidences produced by the assessee, he accepted the assessee's claim of loan similar view

were also expressed by the Hon'ble Delhi High Court in the case of CIT v. Vodafone Essar South Ltd. [2013] 212 taxman 0184. We observe the Pr.CIT has drawn support from newly inserted Explanation 2 below section 263(1) of the Act introduced by Finance Act, 2015 w.e.f. 1-6-2015 for his action. The Explanation 2 inter alia provides that the order passed without making inquiries or verification 'which should have been made' will be deemed to be erroneous insofar as it is prejudicial to the interest of the Revenue. It is on this basis, the assessment order passed by the AO under section 143(3) of the Act has been set aside with a direction to the AO to pass a fresh assessment order. It will be therefore imperative to dwell upon the impact of Explanation 2 for the purposes of section 263 of the Act. The aim and object of introduction of aforesaid Explanation by Finance Act, 2015 was explained in CBDT Circular No. 19/2015 [F.NO.142I14/2015TPL], Dated 27-11-2015 which is reproduced hereunder:

> "53. Revision of order that is erroneous in so far as it is prejudicial to the interests of revenue.
>
> 53.1 The provisions contained in sub-section (1) of section 263 of the Income-tax Act, before amendment by the Act, provided that if the Principal Commissioner or Commissioner considers that any order passed by the Assessing Officer is erroneous in so far as it/s prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry pass an order modifying the assessment made by the Assessing Officer or cancelling the assessment and directing fresh assessment.
>
> 53.2 The interpretation of expression "erroneous in so far as it/3 prejudicial to the interests of the revenue" has been a contentious one. In order to provide clarity on the issue, section 263 of the Income-tax Act has been amended to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner. (a) the order is passed without making inquiries or verification which, should have been made; (b) the order is passed allowing any relief without inquiring into the claim; (c) the order has not been

made in accordance with any order, direction or instruction issued by the Board under section 119; or (d) the order has not been passed in accordance with any decision, prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

53.3 Applicability: This amendment has taken effect from 1st day of June, 2015."

"17 We thus find merit in the plea of the assessee that the Revisional Commissioner is expected show that the view taken by the AO is wholly unsustainable in law before embarking upon exercise of revisionary powers. The revisional powers cannot be exercised for directing a fuller inquiry to merely find out if the earlier view taken is erroneous particularly when a view was already taken after inquiry. If such course of action as interpreted by the Revisional Commissioner in the light of the Explanation 2 is permitted, Revisional Commissioner can possibly find fault with each and every assessment order without himself making any inquiry or verification and without establishing that assessment order is not sustainable in law. This would inevitably mean that every order of the lower authority would thus become susceptible to section 263 of the Act and, in turn, will cause serious unintended hardship to the tax payer concerned for no fault on his part. Apparently, this is not intended by the Explanation. Howsoever wide the scope of Explanation 2(a) may be, its limits are implicit in it. It is only in a very gross case of inadequacy in inquiry or where inquiry is per se mandated on the basis of record available before the AO and such inquiry was not conducted, the revisional power so conferred can be exercised to invalidate the action of AO. The AO in the present case has not accepted the submissions of the assessee on various issues summarily but has shown appetite for inquiry and verifications. The AO has passed after making due enquiries issues involved impliedly after due application of mind. Therefore, the Explanation 2 to section 263 of the Act do not, in our view, thwart the assessment process in the facts and the context of the case. Consequently, we find that the foundation for exercise of revisional jurisdiction is sorely missing in the present case.

> 18 In the light of above facts and legal position, we are of the considered view that the AO had made detailed enquiries and after applying his mind and accepted the genuineness of loans received from GTPL and PAFPL, which is also plausible view. Therefore, we find that twin conditions were not satisfied for invoking the jurisdiction under section 263 of the Act. The case laws relied by the ld. CIT(D.R.) are distinguishable on facts and in law hence, by the ld. Counsel as well and we concur the same hence not applicable to present facts of the case. Therefore, in absence of the same, the ld. CIT ought to have not exercised his jurisdiction under section 263 of the Act. Therefore, we cancel the impugned order under section 263 of the Act, allowing all grounds of appeal of the Assessee."
>
> 5. The Tribunal has found that in the order passed by the PCIT, Explanation 2 of section 263 of the Act, 1961 is made applicable. The Tribunal observed that the PCIT has not mentioned in the show cause notice to invoke the Explanation 2 of section 263 of the Act 1961. Therefore, by invocation of Explanation in the order without confronting the assessee and giving an opportunity of being heard to the assessee is not appropriate and sustainable in law.
>
> 6. Thus, the Tribunal has considered in detail the aspect of revisional power to be exercised by the PCIT in the facts of the case and has given a finding of facts that the Assessing Officer has made inquiries in detail and after applying mind, accepted the genuineness of loans received by the respondent assessee from the aforesaid two companies and such view of the Assessing Officer is a plausible view, and therefore, the same cannot be said to be erroneous or prejudicial to the interest of the Revenue."

11. The SLP against the above order of the Hon'ble High Court was dismissed by the Hon'ble Supreme Court, thereby the issue, that the explanation (2) to Section 263 of the Act could be invoked only in a very gross case of inadequacy in enquiring or where the mandatory enquiries are not conducted, has reached finality. The AO in the given case has conducted enquiry and perused the details submitted and has

taken a decision to accept the explanation provided by the assessee after proper application of mind.

12. In view of the above discussion, we are of the considered view that the PCIT is not justified in setting aside the order of the AO for examining the source of income of Rs.25,00,000 already offered to tax as business income. Accordingly the impugned order of the PCIT is quashed.

13. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 27th day of July, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 27th July, 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.