IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA

Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member

I.T.A. No. 130/KOL/2021
Assessment Year: 2010-2011

M/s. Salarpuria Properties Pvt. Limited,.....Appellant
C/o. M/s. Salarpuria Jajodia & Co., 3rd Floor,
7, Chittaranjan Avenue, Kolkata-700072
[PAN: AAGCS8492P]
-Vs.-

Principal Commissioner of Income Tax,.....Respondent
Central-2, Kolkata,
Aayakar Bhawan Poorva,
E.M. Bypass,
110, Shanti Pally, Kolkata-700107

Appearances by:
Shri Siddharth Jhajharia, FCA, appeared on behalf of the assessee
Shri Deba Kr. Sonowal, CIT (DR), appeared on behalf of the Revenue

Date of concluding the hearing : August 02, 2022
Date of pronouncing the order: August 3, 2022

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of ld. Principal Commissioner of Income Tax (Central), Kolkata-2 dated 24.03.2021 passed for the assessment year 2010-11 under section 263 of the Income Tax Act.

2. Brief facts of the case are that the assessee has filed its return of income under section 139(1) of the Income Tax Act on 09.10.2010 declaring total income of Rs.18,85,80,920/-. This return was revised by the assessee. Assessment order under section 143(3) was passed on 26.03.2013. Thereafter a search was carried out upon "Salarpuria Group" on 15.03.2016 under section 132 of the Income Tax Act. A notice under

section 153A of the Income Tax Act was issued and served upon the assessee. In response to the notice, the assessee has filed its return electronically declaring total income at Rs.1,50,00,160/- on 16.10.2017. The ld. Assessing Officer has passed the assessment order on 31.12.2017 under section 153A read with section 143(3) of the Income Tax Act, 1961. Ld. Assessing Officer has determined the taxable income of the assessee at Rs. 55,13,56,830/-. Dissatisfied with the determination of this income, the assessee carried the matter in appeal before the ld. CIT(Appeals) and ultimately it travelled to the Tribunal vide ITA No.2094/KOL/2017, IT(SS)A No. 42/KOL/2019. The Tribunal, apart from these two appals also heard other appeals for A.Ys. 2010-11 to 2016-17. The Tribunal has decided all these appeals vide its order dated 10.05.2022 and copy of this order is available on page no. 299 of the paper book.

3. Ld. Commissioner perused the record and thereafter formed an opinion that action under section 263 of the Income Tax Act is required to be taken against the assessee. Basically ld. Commissioner was of the view that deduction under section 80IB has been claimed by the assessee for its two Projects, namely Salarpuria Sanctity and Salarpuria Serenity. In the opinion of the ld. Commissioner, the ld. Assessing Officer did not conduct proper enquiry before allowing this deduction to the assessee and, therefore, assessment order deserves to be set aside because it is erroneous as much as prejudicial to the interest of the revenue.

4. In response to the show-cause notice, the assessee has given detailed reply, which has been placed on pages no. 1 to 196 of the paper book. The ld. Commissioner has gone through the record and thereafter set aside the assessment order for *denovo* enquiry. Before us under Grounds No. 3 to 5, the assessee has pleaded that the claim of 80IB deduction was the subject matter of original assessment order passed under section 143(3) dated 26.03.2013. In the search assessment, income of the assessee was to be determined on the basis of seized material.

Since search was conducted on 15.03.2016 and the assessment order involved is 2010-11, assessment order was passed under section 143(3), the proceeding would not abate unless some incriminating material was found during the course of search. In the present case, according to the ld. counsel for the assessee, no incriminating material was found and, therefore, assessment order has been quashed by the ITAT. He took us through the finding of the Tribunal available in paragraph no. 4.6. For a ready reference, we would like to note the finding, which reads as under:-

> *"4.6. After hearing the rival contentions and perusing the materials on record as placed before us, we note that search was conducted on 15.03.2016 on Salarpuria Group of companies including the assessee and its Directors. It is undisputed that the assessment was framed in the instant assessment year vide order dated 26.03.2013 and thus it had attained finality on date of search and would be an unabated assessment on the date of search in terms of provisions of section 153A of the Act. It is settled legal position that in order to make addition in an unabated assessment on the date of search, there has to be incriminating material found during search as laid down in various decisions as cited by the assessee's counsel supra. After carefully analyzing the facts of the acts and after the perusal of assessment order, we find that there is no reference at all by the AO to any such incriminating material found during search. The various additions were undisputedly made on the basis of observation of the AO during search. The additions made inter alia include disallowance u/s 14A, disallowance of interest on service tax & TDS, disallowance of donation, membership and subscription and loss on sale of fixed assets, etc, the case of the assessee is squarely supported a series of decisions as decided by various judicial forums which have laid down the same ratio namely PCIT –vs.- Meeta Gutgutia (supra), CIT –vs.- Kabul Chawla and CIT –vs.- Continental Warehousing Corporation (Nhava Sheva) Ltd. Under these facts and circumstances and respectfully following the ratio as laid down in the above decisions, we hold that the additions have been made without any incriminating material found during the course of search and, therefore, cannot be sustained. The legal and jurisdictional grounds raised by the assessee are allowed".*

5. On the strength of this finding, ld. counsel for the assessee contended that since the assessment order has been quashed, therefore, there is no foundation for the ld. Commissioner to assume jurisdiction under section 263 of the Income Tax Act.

6. On the other hand, ld. CIT(DR) relied upon the impugned order.

7. We have duly considered the rival contentions and gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

> *"263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*
>
> *[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-*
>
> *(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-*
>
> > *(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;*
> >
> > *(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;*
>
> *(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of*

examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

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

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

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

8. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the

assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of *Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095*, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of *Malabar Industries 243 ITR 83* and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

9. Apart from the above principles, we deem it appropriate to make reference to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Sun Beam Auto reported in 227 CTR 113* and *Gee Vee Enterprises Ltd vs. Addl. Commissioner of Income Tax (99 ITR 375)*. In the case of Sun Beam Auto, the Hon'ble High Court has pointed out a distinction between lack of inquiry and inadequate inquiry. If there is a lack of enquiry, then the assessment order can be branded as erroneous. The following observations of the Hon'ble Delhi High Court are worth to note:

"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 Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer 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 Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment 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 Commissioner to pass orders under section 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".

10. In the case of *Gee Vee Enterprise vs. Commissioner of Income Tax reported in 99 ITR page 375,* the Hon'ble court has expounded the approach of ld. Assessing Officer while passing assessment order. The observation of the Hon'ble court on pages 386 of journal read as under:-

> *"...it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.*
>
> *The reason is obvious. The position and function of the Income-tax Officer is very diffident from that of a civil court. The statement made in a pleading proved by the minimum amount of evidence may be adopted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only on adjudicator but also an investigator. He cannot remain passive in the face of the return which is apparently in order but called for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry... It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would made such an inquiry prudent that the word 'erroneous' in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."*

11. In the light of above, let us examine the facts of the present case. The assessment order passed under section 143(3) dated 26.03.2013 attained finality. No seized material was found during the course of search with respect to 2010-11. Hence, ITAT has held that in the absence of any seized material, the assessment order passed on 26.03.2013 would not abate. The income of the assessee could be re-examined *qua* those aspects for which incriminating material was found and seized. Since there was no material with respect to this year, the same item of income cannot be re-appreciated. The ITAT has quashed the assessment. We have reproduced the finding recorded by the Tribunal in the appeal against the

assessment order passed under section 153A read with section 143(3). The action under section 263 can only be taken if a valid assessment order is existed. Once the foundation has extinguished, there cannot be any order on the basis of assessment proceeding. Therefore, we allow this appeal and quash the impugned order passed by the ld. Commissioner.

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

Order pronounced in the open Court on August 3, 2022.

Sd/-	Sd/-
(Girish Agrawal)	**(Rajpal Yadav)**
Accountant Member	**Vice-President (KZ)**

Kolkata, the 3rd day of August, 2022

Copies to : *(1)* ***M/s. Salarpuria Properties Pvt. Limited, C/o. M/s. Salarpuria Jajodia & Co., 3rd Floor, 7, Chittaranjan Avenue, Kolkata-700072***

(2) ***Principal Commissioner of Income Tax, Central-2, Kolkata, Aayakar Bhawan Poorva, E.M. Bypass, 110, Shanti Pally, Kolkata-700107***

(3) *Commissioner of Income Tax--------, Kolkata,*
(4) *The Departmental Representative*
(5) *Guard File*

TRUE COPY

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.