

2. The sum and substance of the grievance of the assessee is that the PCIT erred in law and facts in assuming jurisdiction u/s. 263 of the Act when the assessment order dated 06.6.2019 framed u/s. 143 (3) of the Act is neither erroneous nor prejudicial to the interest of the revenue.

3. Representatives of both the sides were heard at length. Case records carefully perused. The judicial decisions relied upon duly considered.

4. Briefly stated the facts of the case are that the assessee electronically filed return of income on 07.11.2017 declaring net taxable income of Rs.714440/-. This return was selected for limited scrutiny to examine/ verify cash deposit during the year and cash withdrawals. The requisite notices/ queries were served upon the assessee which were duly replied and considered by the AO.

5. Assuming the jurisdiction conferred upon him by the provisions of section 263 of the Act the PCIT, Ghaziabad issued notice dated 04.02.2022 the gist of the notice can be summarized as under :-

✓ It is noted that the assessee in his reply quoted above, had explained the source of cash deposit in his bank A/cs that "details of cash deposits and withdrawal in the bank and source of deposits were made out of business activities i.e. purchase/ sales and withdrawals were made for the purchase of good. I am enclosing herewith the books of a/cs for your verification". The assessee has not submitted supporting evidences with his reply to prove that the cash deposit in the bank a/c were made out of the business activities. The AO should have asked to furnish the name & complete address of the persons to whom the sales have been made in cash. Neither assessee has furnished the copy of a/c of the parties to whom the sales were made in cash, nor has the AO requisition the same to verify the version of the assessee. Similarly, the copies of A/cs of the parties from whom the purchases have been stated to made in cash are not obtained by the AO from the assessee. The AO should have asked for the copy of cash book and copies of A/cs of parties to whom the sale and purchase were made to verify the cash amount deposited in the bank accounts. The AO also failed to examine the source of cash deposit during demonetization period as the AO has not called for any supportive evidence regarding the amount which was deposited during the demonetization period. Thus, the AO has failed in his bounded duty to investigate the source of cash deposit and purpose of cash withdrawal.

3. In view of the above, the assessment order passed by the ITC, Ward-2/3(1), Bulandshahr is erroneous and prejudicial to the interest of revenue and may be cancelled or modified by invoking the provisions of section 263 of the Income Tax Act, 1961.

6. A perusal of the above show that the PCIT was of the opinion that the AO did not make any enquiry in respect of cash deposit and cash withdrawals. The observations of the PCIT are factually incorrect in as much as vide reply dated 06.06.2019 following was filed by the assessee :-

Before The Income Tax Officer
Ward-02(3)(1), Bulandshahr.

Reg: Ajay Garg Prop.
M/s Abhay Trading Co.
Anupshahr,
Bulandshahr.
A.Y.2017-18

Status: Individual

PAN: ABFPG1600G.

Sub: Reply of Notice issued u/s 142(1) of the Income Tax Act 1961.

Sir,

In response to your notice issued u/s 142(1) of the I.T.Act,1961 dated 03.06.19 in which Assessee was required to produce Books of A/c for verification & examination.

In this regard my submission is that I am producing manually books of A/c as required for your verification & examination as the same could not be produced through male.

My further submission is that during the course of hearing of the case you have required monthly cash deposit summary which is enclosed herewith.

Submitted.

Bulandshahr
06.06.2019

(Counsel for the Assessee)

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7. This reply also finds place in the body of the assessment order which is as under :-

“Thereafter, Shri K. S. Agarwal, AR of the assessee attended in this office and furnished books of accounts, bill vouchers and other relevant documents manually before the undersigned on 06.06.2019. Books of accounts have been examined for test-checked.


At the points raised vide notice u/s. 143 (2)/142 (1) of the I. T. Act, 1961 have been examined carefully and after examination no adverse inference is being drawn in this case.”

8. The month wise amount deposited in banks for the year under consideration is as under :-

<u>Amt. Deposited in-Banks monthwise for the F.Y. 2016-17</u>	
<u>Month</u>	<u>Amt. Deposited</u>
April	19,000.00
May	205,000.00
June	175,000.00
July	1,417,050.00
August	65,000.00
September	58,000.00
October	25,000.00
November	1,470,000.00
December	83,500.00
January	40,000.00
Feb.	Nil
March	112,000.00
Total	3,669,550.00

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9. A perusal of the above show that the cash deposited in the bank is even throughout the year. Surprisingly the PCIT has taken adverse view for the cash deposited in the months prior to

November, 2016 when the demonetization took place on 08.11.2016, therefore, any cash deposited prior to that date cannot be considered as heavy cash deposit of demonetized currency. All the cash transaction were duly recorded in the books of accounts which have been examined by the AO while scrutinizing the return of income and framing the assessment order u/s. 143 (3) of the Act.

10. In the light of the aforestated facts 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 ".

11. 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."

12. 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)".

13. 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."

14. 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".

15. Considering the facts of the case in totality from all possible angles, we failed to persuade ourselves to accept the contention of the Id. 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.

16. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 23.08.2022.

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

NEHA, Sr. Private Secretary
Date:- .08.2022

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER