IN THE INCOME TAX APPELLATE TRIBUNAL
"B'' BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.437/Bang/2022
Assessment Year: 2017-18

Mallikarjun Virupaxappa Yarasi House No.211/A/4b17 1, Vth Cross Mulgund Road, Renuka Nagar Gadag 582 103 **PAN NO : ADDPK6603R**	**Vs.**	Principal CIT Hubli
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri S.V. Ravishankar, A.R.
Respondent by	**:**	Sri Manjunath Karkihalli, D.R.

Date of Hearing	**:**	24.08.2022
Date of Pronouncement	**:**	30.08.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against the order passed by Ld. PCIT dated 30.3.2022 for the assessment year 2017-18 u/s 263 of the Act.

2. Facts of the issue are that the assessee is a contractor and filed his return of income declaring income of Rs.13,66,220/-. The case was selected for complete scrutiny under CASS and one of the issues for verification was excess contribution to provident fund or superannuation fund by employer. The assessment was completed u/s 143(3) at total income of Rs. 19,62,840/- after

making a disallowance of certain expenses amounting to Rs.5,96,620/-.

2.1 The assessee has shown Rs.74,49,754/- as sundry creditors as on 31.3.2017. During the course of assessment proceedings, the assessee has furnished the list of creditors. However, no confirmation letters from the creditors were furnished. It was contended by the assessee that the labour payments are made in cash through self-made vouchers. The names of the labourers to whom cash payments are made and the sundry creditors are one and the same. Thus, when the payments to labours are made in cash, there is least possibility of showing these labourers only as sundry creditors. The creditors were required to be examined regarding the genuineness of the transactions claimed and the creditworthiness of the lenders. The AO has not carried out necessary inquiry/investigation during the course of assessment proceedings. When the case was selected for complete scrutiny, it was necessary for the Assessing Officer to examine the genuineness of the sundry creditors claimed, in accordance with law and CBDT guidelines.

2.2 The assessee has debited a sum of Rs.59,66,121/- towards labour and salary charges. 13% thereof works out to Rs.7,75,595/-, which should have been the contribution towards PF. As against this, the assessee has contributed a sum of Rs.8,96,850/- towards PF. Thus, there is an excess payment of Rs.1,21,254/- which should have been disallowed. The Assessing Officer has failed to verify this issue and bring to tax the excess payment.

2.3 The Assessing Officer has not conducted necessary inquiries and has not made the additions/disallowances required as per law. The assessee failed to prove the genuineness of the sundry

creditors and claim of PF and this amount remained unproved, but no such addition has been made in the assessment order.

3. The Ld. A.R. submitted that the assessee being aggrieved by the order passed under section 263 of the Act, by the Principal Commissioner of Income Tax, Hubli, dated 30/03/2022 and received by the assessee on 30/03/2022 preferred this appeal before this Tribunal.

The relevant facts for appreciation of the grounds raised by the Appellant are mentioned hereunder:

1. The assessee is an individual earning business income from contracts, interest income, etc. The appellant has returned income of Rs. 13,66,225/-, vide return dated 03/10/2017.

2. The case has been selected for scrutiny under CASS. Notice U/s 143(2) was issued dated 10/08/2018 and Notice U/s 142(1) of the Act also issued, for which the assessee filed details from time to time to the satisfaction of the Assessing officer.

3. The assessing officer issued a detailed enquiry seeking clarification in respect of payments towards ESI, made enquiries of the creditors, which the appellant has explained by stating that the ESI payments were not part of the salary and made over and above the salary paid and thus the same was an allowable expenditure.
4. The Bagalkot Town Development Authority, had made it mandatory for the assessee to make payments towards the ESI from the year and the appellant has made payments as per the chart filed during the assessment proceedings and the entire amounts were claimed as an expenditure.

5. The learned assessing officer has also made enquiries in respect of the creditors, which has been accepted on making a test check of the confirmations, during assessment proceedings. The learned assessing officer upon verification of the details filed, has accepted the return of income and passed an order under section 143(3) of the act.

6. The Principal Commissioner of Income tax, has issued a proposal notice seeking to revise the order under section 263 of the Act, on the premise that the ESI claim was higher and inconsistent with the percentage permitted and further, no enquiry was made in respect of the creditors and thus the order passed under section 143(3) of the Act, was erroneous and prejudicious to the interest of revenue.

7. The assessee has filed a reply and submitted that the order of the AO was proper and that the proposal to revise the order of assessment was required to be dropped.

8. The learned Principal Commissioner of Income tax, proceeded to hold that the order passed was prejudicial to the interest of revenue and set aside the order of assessment and directed the Assessing officer to pass an order afresh.

9. The said order was subject to 263 proceedings on account of the proposal of the learned Assessing Officer, who sought revision on the following issues and the assessee is raising the following grounds of appeal before this Tribunal:-

    a) The order passed must be both erroneous and prejudicial to the interest of revenue.

b) There was no instance of lack of enquiry or inadequate enquiry to attract the provisions of section 263 of the Act.

10. The order passed must be both erroneous and prejudicial to the interest of revenue.

a) The learned PCIT in the order passed under section 263 of the Act, has held primarily that;

i. The assessing officer ought to have disallowed the excess ESI payments.

ii. The AO has not made proper enquiries in so far as the creditors.

b) The assessee submitted that the learned PCIT, has proceeded on the premise that the assessing officer has not made an enquiry into the excess payments of ESI, which in the reasoning of the PCIT, was excessive and was to be disallowed.

c) The PCIT, has also inferred that the creditors have not been verified individually and the confirmations ought to have been obtained, which in the view of the PCIT, was not filed along with the submissions made during the revision proceedings.

d) The assessee has in the revision proceedings filed details of queries made by the assessing officer and also submissions made by the assessee in the assessment proceedings, along with a submission that there was no error in the order passed and that the assessing officer has made proper enquiry and verification of documents and thus there was no error in the order of assessment, much less prejudicial to the interest of revenue.

e) The assessee has also offered to file the entire documents filed during the assessment proceedings, for the benefit of the PCIT, which would demonstrate that the assessing officer has made enquiry as required under section 142(1) of the act and the explanation offered was accepted as being true and correct. Thus, there was no instance of inadequate enquiry by the assessing officer and the revision proceedings were not called for.

f) The learned P.CIT failed to appreciate that the assessing officer has during the course of assessment, considered the fact that the ESI payments were not on account of a deduction and was allowable in its entirety and the AO has also made test checks of the creditors, which was primarily wage payments, which was verified through confirmations.

g) The AO has verified the submissions, the bank accounts, financials, confirmations, etc and arrived at the satisfaction that .the ESI payments were not out of a deduction from salary and thus allowable in its entirety.

h) Further, the confirmations of salary payments was verified and upon being satisfied that the payments were indeed made, the AO proceeded to make a disallowance of 10% of gross wages, which the assessee did not contest. Thus, the order of the AO was on appreciation of the submissions and clarification offered by the assessee, during assessment proceedings.

i) The assessee submits that the learned P.CIT is restrained from revising assessments in a routine manner and only on the belief formed by him, that an order passed was erroneous and prejudicial to interest of the revenue. The

learned P.CIT is again restricted from revising an assessment concluded on the sole reason of difference of opinion of the AO and the P.CIT and where two opinions are possible of which the AO has adopted one of the two opinions, the case is beyond scope of revision.

j) The learned P.CIT also cannot order revising of an assessment on the observation that the AO has not made an inference or mention in the assessment order regarding any particular issue. The revision of an assessment cannot be made on the mere non-mentioning of any particular issue in the order of the AO. The records and correspondences must be referred, to ascertain whether the AO had access to the said documents and whether any other aspect of the matter has found a mention in the order of the AO, to come to a conclusion that the AO has considered all the material on record.

k) The revision of an assessment cannot be made for the sole reason that the point of contention has not been discussed at length or that it does not find a specific mention in the order of the AO. The AO is not required to make a mention of each and every detail in the order of assessment.

l) These above-mentioned points have been judicially laid down for a better understanding of section 263 of the Act. The appellant places reliance on the below mentioned cases which enunciate the limitations of section 263 of the Act:

A. MALABAR INDUSTRIAL CO., LTD. Vs CIT [2000] 243 ITR 83 [SC]

B. CIT Vs SUNBEAM AUTO LTD. [2011] 332 ITR 167 [DEL]

m) Ld. A.R. submitted further that there was no lack of inquiry or inadequate inquiry by the learned Assessing

officer and Assessing officer after verifying the details produced by the assessee and also after accepting the explanations and submissions made by the assessee during the assessment proceedings concluded the assessment by accepting the income offered in the original return. Reliance is placed on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. M/s. **Sun Beam Auto Limited, reported in 332 ITR 167.** Wherein the Hon'ble Court has held as follows:-

> *............therefore one has to see from the record whether there was application of mind before allowing the expenditure in question as revenue expenditure. If there was an enquiry, even inadequate that would not by itself give occasion to the CIT to pass order u/s 263, merely because he has different opinion in the matter. It is only in cases of lack of enquiry that such a course of action would be open. [paras **12 to** 15]. ....in sum and substance the accounting practice of the assessee is questioned....... It is clear that view taken by the A.O. was one of the possible views and therefore, the assessment order passed by the A.O. could not be held to be prejudicial to the Revenue. Thus from whatever angle the matter is to be looked into, the conclusion could be that the order of the Tribunal does not call for any interference [paras 1648 & 21]. the A.O. having made enquiries, elicited replies and thereafter allowed the expenditure it cannot be said that it is a case of lack of enquiry.*

n) The assessee wishes to submit that the order passed by the learned Assessing officer is not erroneous or prejudicial to the interest of the Revenue and further when two views are possible a view adopted by the learned Assessing officer is not accepted by the P.Commissioner the same cannot be treated as an erroneous order prejudicial to the revenue. Reliance is placed on the decision of the Hon'ble Apex Court in the case of ·-(i) Malabar Industrial Co. Ltd., reported in 243 ITR 83 and also in the case of CIT Vs. Max India Ltd., reported in 295 ITR 282. The assessee further relied on

the decision of the Hon'ble Kerala High Court in the case of Paul Matthews & sons v CIT, reported in 263 ITR **101.**

3.1 The assessee submitted that the definition of **record,** includes all such information available before the lower authorities and also before the PCIT, which would not only demonstrate that the data filed was appreciated and the order of assessment was not erroneous to attract the provisions of section 263 of the Act.

3.2 In view of the above, Ld. A.R. submitted that there was no lack of enquiry or inadequate enquiry on the issue raised in the notice at the time of assessment and the original order passed u/s 143(3) of the Act is not prejudicial to interest of the revenue.

4. The Ld. A.R. submitted that in this case assessment order has been passed after due verification of the books of accounts of the assessee. He submitted that the AO issued the notice u/s 143(2) of the Act on 10.8.2018. Thereafter the AO issued notice u/s 142(1) of the Act on 3.1.2019. Once again he has issued notice u/s 142(1) on 27.5.2019 calling for various information specifically below mentioned in permission:

1. Books of accounts with supporting bills and vouchers
2. Copies of all bank pass books
3. Copy of P&L account, balance sheet for the assessment year 2017-18 along with return of income
4. Audit report for assessment year 2017-18, if books of accounts are audited.
5. Copy of statement of total income

4.1 It was submitted that assessee has furnished all this information vide his letter dated 29.5.2019 as below:-

1. Statement of computation of income with the acknowledgement of return of income

2. Copy of contract account and P&L account and balance sheet
3. Form 26AS
4. Copies of form VAT 156, confirming contract account,
5. Copy of bank account statement
6. Copy of depreciable accounts as per balance sheet

4.2 Further, he submitted that at the time of assessment, the A.O. observed that the assessee's total contract receipts was Rs.1,08,48,333/- on that assessee declared income of Rs.13,66,220/- which is about 8% of the total contract receipts. Further, the A.O. observed that payments under head Labour and Salary charges are made on the basis of self-made vouchers in cash which are not fully verifiable and the assessee could not substantiate the payment made to labour and salary charges. After due discussion, AO disallowed 10% of this expenditure of Rs.59,66,121/- worked out at Rs.5,96,620/- to the returned income of assessee. According to the Ld. A.R., it shows that the AO applied his mind while completing assessment to the facts of the case and taken a conscious decision on the issue of assessability of income of the assessee. Now the Ld. PCIT cannot impose his decision on the AO by invoking provisions of section 263 of the Act.

4.3 The assessee's counsel relied on following judgemenmts:-

i. CIT Vs. Anil Kumar Sharma 335 ITR 83 (Delhi)

ii. CIT Vs. Sunbeam Auto Ltd. 332 ITR 167 (Delhi)

iii ITA No.741/Hyd/2012 dated 19.12.2012 in the case of Sun Minerals Vs. Addl CIT reported in 276 Taxmann.com 460 (Karn)

5. On the other hand, Ld. D.R. relied on the order of PCIT.

6. We have heard the rival submissions and perused the materials available on record. First we take up the legal issue with reference to the jurisdiction of invoking the provisions of section 263 of the Act by the learned P. CIT. The scheme of the IT Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to erroneous order of the assessing officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of the revenue. As held in the case of Malabar Industries Co. Ltd., Vs. CIT (243 ITR 83 (SC), the P.Commissioner can exercise revision jurisdictional u/s 263 if he is satisfied that the order of the assessing officer sought to be revised is (i)erroneous; and also (ii) prejudicial to the interests of the revenue. The word 'erroneous' has not been defined in the Income Tax Act. It has been however defined at page 562 in Black's Law Dictionary (seventh Edition) thus';

> *'erroneous, adj. Involving error, deviating from the law'.*
>
> *The word 'error' has been defined at the same page in the same dictionary thus:*
>
> *'error No. 1 : A psychological state that does not conform to Objective reality; a brief that what is false is true orthat what is true is false'.*
>
> *At page 649/650 in P. Ramanatha Aiyer's Law Lexicon Reprint 2002, the word 'error' has been defined to mean-*
>
> *'Error: A mistaken judgement or deviation from the truth in matters of fact, and from the law in matters of judgement 'error' is a fault in judgement, or in the process or proceeding to judgement or in the execution upon the same, in a Court of Record; which in the Civil Law is called a Nullityie" (termes de la ley).*
>
> *Something incorrectly done through ignorance or inadvertence S.99 CPC and S.215 Cr.PC.*
>
> *'Error, Fault, Error respects the act; fault respect the agent, an error may lay in the judgement, or in the conduct, but a fault lies in the will or intention."*

6.1 At page 650 of the aforesaid Law Lexicon, the scope of Error, Mistake, Blunder, and Hallucination has been explained thus:

> *"An error is any deviation from the standard or course of right, truth, justice or accuracy, which is not intentional. A mistake is an error committed under a misapprehension of misconception of the nature of a case. An error may be from the absence of knowledge, a mistake is from insufficient or false observation. Blunder is a practical error of a peculiarly gross or awkward kind, committed through glaring ignorance, heedlessness, or awkwardness. An error may be overlooked or atoned for, a mistake may be rectified, but the shame or ridicule which is occasioned by a blunder, who can counteract. Strictly speaking, Hallucination is an illusion of the perception, a phantasm of the imagination. The one comes of disordered vision, the other of discarded imagination. It is extended in medical science to matters of sensation, whether there is no corresponding cause to produce it. In its ordinary use it denotes an unaccountable error in judgement or fact, especially in one remarkable otherwise for accurate information and right decision. It is exceptional error or mistake in those otherwise not likely to be deceived."*

6.2 In order to ascertain whether an order sought to be revised under Section 263 is erroneous, it should be seen whether it suffers from any of the aforesaid forms of error. In our view, an order sought to be revised under Section 263 would be erroneous and fall in the aforesaid category of "errors" if it is, inter alia, based on an incorrect assumption of facts or an incorrect application of law or non-application of mind to something which was obvious and required application of mind or based on no or insufficient materials so as to affect the merits of the case and thereby cause prejudice to the interest of the revenue.

6.3 Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the P.Commissioner to initiate *suo moto* proceedings either where the Assessing Officer takes a wrong

decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The P.Commissioner will be well within his powers to regard an order as erroneous on the ground that in the circumstances of the case, the Assessing Officer should have made further inquiries before accepting the claim made by the assessee in his return. The reason is obvious. Unlike the Civil Court which is neutral in giving a decision on the basis of evidence produced before it, the role of an Assessing Officer under the Income-tax Act is not only that of an adjudicator but also of an investigator. He cannot remain passive in the face of a return, which is apparently in order but calls for further enquiry. He must discharge both the roles effectively. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The scheme of assessment has undergone radical changes in recent years. It deserves to be noted that the present assessment was made under Section 143(3) of the Income-tax Act. In other words, the Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. Bulk of the returns filed by the assessees across the country is accepted by the Department under Section 143(1) without any scrutiny. Only a few cases are picked up for scrutiny. The Assessing Officer is therefore, required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. He should be fair not only to the assessee but also to the Public Exchequer. The Assessing Officer has got to protect, on one hand, the interest of the assessee in the sense that he is not subjected to any amount of tax in excess of what is legitimately due from him, and on the other hand, he has a duty to protect the interests of the revenue and to see that no one dodged the revenue

and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return when the circumstances of the case are such as to provoke inquiry. Arbitrariness in either accepting or rejecting the claim has no place. The order passed by the Assessing Officer becomes erroneous because an enquiry has not been made or genuineness of the claim has not been examined where the inquiries ought to have been made and the genuineness of the claim ought to have been examined and not because there is anything wrong with his order if all the facts stated or claim made therein are assumed to be correct. The P.Commissioner may consider an order of the Assessing Officer to be erroneous not only when it contains some apparent error of reasoning or of law or of fact on the face of it but also when it is a stereo-typed order which simply accepts what the assessee has stated in his return and fails to make enquiries or examine the genuineness of the claim which are called for in the circumstances of the case. In taking the aforesaid view, we are supported by the decisions of the Hon'ble Supreme Court in Rampyari Devi Saraogi v. CIT (67 ITR 84) (SC), Smt. Tara Devi Aggarwal v. CIT (88 ITR 323) (SC), and Malabar Industrial Co. Ltd's case (243 ITR 83) (SC).

6.4 In Malabar Industrial Co. Ltd. case the Hon'ble Court has held as under:

> *"There can be no doubt that 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. In the same category fall the orders passed without applying the principles of natural justice or without application of mind.*

In our humble view, arbitrariness in decision-making would always need correction regardless of whether it causes prejudice to an assessee or to the State Exchequer. The Legislature has taken ample care to provide for the mechanism to have such prejudice removed. While an assessee can have it corrected through revisional jurisdiction of the Commissioner under Section 264 or through appeals and other means of judicial review, the prejudice caused to the State Exchequer can also be corrected by invoking revisional jurisdiction of the Commissioner under Section 263. Arbitrariness in decision-making causing prejudice to either party cannot therefore be allowed to stand and stare at the legal system. It is difficult to countenance such arbitrariness in the actions of the Assessing Officer. It is the duty of the Assessing Officer to adequately protect the interest of both the parties, namely, the assessee as well as the State. If he fails to discharge his duties fairly, his arbitrary actions culminating in erroneous orders can always be corrected either at the instance of the assessee, if the assessee is prejudiced or at the instance of the Commissioner, if the revenue is prejudiced. While making an assessment, the ITO has a varied role to play. He is the investigator, prosecutor as well as adjudicator. As an adjudicator he is an arbitrator between the revenue and the taxpayer and he has to be fair to both. His duty to act fairly requires that when he enquires into a substantial matter like the present one, he must record a finding on the relevant issue giving, howsoever briefly, his reasons therefor. In S.N. Mukherjee v. Union of India AIR 1990 SC 1984, it has been observed by the Hon'ble Supreme Court as follows:

"Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances or arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has

given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge."

6.5 Similar view was earlier taken by the Hon'ble Supreme Court in Siemens Engg. & Mfg. Co. Ltd. v. Union of India AIR 1976 SC 1785. It is settled law that while making assessment on assessee, the ITO acts in a quasi-judicial capacity. An assessment order is amenable to appeal by the assessee and to revision by the P.Commissioner under Sections 263 and 264. Therefore, a reasoned order on a substantial issue is legally necessary. The judgments on which reliance was placed by the learned Counsel for the assessee also points to the same direction. They have held that orders, which are subversive of the administration of revenue, must be regarded as erroneous and prejudicial to the interests of the revenue. If the Assessing Officers are allowed to make assessments in an arbitrary manner, as has been done in the case before us, the administration of revenue is bound to suffer. If without discussing the nature of the transaction and materials on record, the Assessing Officer had made certain addition to the income of the assessee, the same would have been considered erroneous by any appellate authority as being violative of the principles of natural justice which require that the authority must indicate the reasons for an adverse order. We find no reason why the same view should not be taken when an order is against the interests of the revenue. As a matter of fact such orders are prejudicial to the interests of both the parties, because even the assessee is deprived of the benefit of a positive finding in his favour, though he may have sufficiently established his case.

6.6 In view of the foregoing, it can safely be said that an order passed by the Assessing Officer becomes erroneous and prejudicial

to the interests of the Revenue under Section 263 in the following cases:

(i) *The order sought to be revised contains error of reasoning or of law or of fact on the face of it.*

(ii) *The order sought to be revised proceeds on incorrect assumption of facts or incorrect application of law. In the same category fall orders passed without applying the principles of natural justice or without application of mind.*

(iii) *The order passed by the Assessing Officer is a stereotype order which simply accepts what the assessee has stated in his return or where he fails to make the requisite enquiries or examine the genuineness of the claim which is called for in the circumstances of the case.*

6.7 We shall now turn to the facts of the case to see whether the case before us is covered by the aforesaid principles. Perusal of the assessment order passed by the Assessing Officer does not show any application of mind on his part. He simply accepted the income declared by the assessee. This is a case where the Assessing Officer mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. The evidence available on record is not enough to hold that the return of the assessee was objectively examined or considered by the Assessing Officer. It is because of such non-consideration of the issues on the part of the Assessing Officer that the return filed by the assessee stood automatically accepted without any proper scrutiny. The assessment order placed before us is clearly erroneous as it was passed without proper examination or enquiry or verification or objective consideration of the claim made by the assessee. The Assessing Officer has completely omitted to examine the issues in question from consideration and made the assessment in an arbitrary manner. His order is a completely non-speaking order. In our view, it was a fit case for the learned P.Commissioner to exercise his revisional jurisdiction under section 263 which he rightly exercised by cancelling the

assessment order and directing the Assessing Officer to pass a fresh order considering the issues raised by the P.CIT. In our view, the assessee should have no grievance in the action of learned P.Commissioner in exercising the jurisdiction u/s. 263 of the IT Act.

6.8 It was however contended by the learned Counsel that the Assessing Officer had taken a possible view in accepting the return of the assessee with reference to credits and hence, the P.Commissioner was not justified in assuming the revisional jurisdiction under Section 263. We have given our thoughtful consideration to the aforesaid submissions. As already stated earlier, an order becomes erroneous because inquiries, which ought to have been made on the facts of the case, were not made and not because there is anything wrong with the order if all the facts stated or the claims made in the return are assumed to be correct. Thus, it is mere failure on the part of the Assessing Officer to make the necessary inquiries or to examine the claim made by the assessee in accordance with law, which renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing more is required to be established in such a case. One would not know as to what would have happened if the Assessing Officer had made the requisite inquiries or examined the claim of the assessee in accordance with law. He could have accepted the assessee's claim. Equally, he could have also rejected the assessee's claim depending upon the results of his enquiry or examination into the claim of the assessee. Thus, the formation of any view by the Assessing Officer would necessarily depend upon the results of his inquiry and conscious, and not passive, examination into the claim of the assessee. If the Assessing Officer passes an order mechanically without making the requisite inquiries or examining the claim of the assessee in accordance with law, such an order will clearly be

erroneous in law as it would not be based on objective consideration of the relevant materials. It is therefore, the mere failure on the part of the Assessing Officer in not making the inquiries or not examining the claim of the assessee in accordance with law that *per se* renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing else is required to be established in such a case to show that the order sought to be revised is erroneous and prejudicial to the interests of the revenue.

6.9 We are unable to accept the submission of the learned Counsel for two other reasons also. First reason is that the view so taken by the Assessing Officer without making the requisite inquiries or examining the claim of the assessee will *per se* be an erroneous view and hence will be amenable to revisional jurisdiction under Section 263. Second reason is that it is not taking of any view that will take the matter under the scope of Section 263. The view taken by the Assessing Officer should not be a mere view in vacuum but a judicial view. It is well established that the Assessing Officer being a quasi-judicial authority cannot take a view, either against or in favour of the assessee / revenue, without making proper inquiries and without proper examination of the claim made by the assessee in the light of the applicable law. As already stated earlier, we are not able to appreciate on what material was placed before the Assessing Officer at the assessment stage to take such a view. The assessee has also not been able to lead enough evidence to show to us that any inquiry was made by the Assessing Officer in this regard. Therefore, mere allegation that the Assessing Officer has taken a view in the matter will not put the matter beyond the purview of Section 263 unless the view so taken by the Assessing Officer is a judicial view consciously based upon proper inquiries and appreciation of all the relevant factual and legal aspects of the case. The judicial view taken by the Assessing Officer may perhaps place the matter outside the purview

of Section 263 unless it is shown that the view so taken by the Assessing Officer contains some apparent error of reasoning or of law or of fact on the face of it.

6.10 The learned Counsel has strongly relied upon the following observations made in the case of Malabar Industrial Co. Ltd. (supra) and submitted that the learned P.Commissioner was not justified in substituting his view for that of the Assessing Officer:

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

6.11 We have carefully gone through the aforesaid observations. "Adopting" one of the courses permissible in law necessarily requires the Assessing Officer to consciously analyse and evaluate the facts in the light of relevant law and bring them on record. It is only then that he can be said to have "adopted" or chosen one of the courses permissible in law. The Assessing Officer cannot be presumed or attributed to have "adopted" or chosen a course permissible in law when his order does not speak in that behalf. Similarly, "taking" one view where two or more views are possible also necessarily imports the requirement of analysing the facts in the light of applicable law. Therefore, proper examination of facts in the light of relevant law is a necessary concomitant in order to say that the Assessing Officer has adopted a permissible course of law or taken a view where two or more views are possible. It is only after such proper examination and evaluation has been done by the Assessing Officer that he can come to a conclusion as to what are the permissible courses available in law or what are the possible views on the issue before him. In case

he comes to the conclusion that more than one view is possible then he has necessarily to choose a view, which is most appropriate on the facts of the case. In order to apply the aforesaid observations to a given case, it must therefore first be shown that the Assessing Officer has "adopted" a permissible course of law or, where two views are possible, the Assessing Officer has "taken" one such possible view in the order sought to be revised under Section 263. This requires the Assessing Officer to take a conscious decision; else he would neither be able to "adopt" a course permissible in law nor "take" a view where two or more views are possible. In other words, it is the Assessing Officer who has to adopt a permissible course of law or take a view where two or more views are possible. It is difficult to comprehend as to how the Assessing Officer can be attributed to have "adopted" a permissible course of law or "taken" a view where two or more views are possible when the order passed by him does not speak in that behalf. We cannot assume, in order to provide legitimacy to the assessment order, that the Assessing Officer has adopted a permissible course of law or taken a possible view where his order does not say so. The submissions made by the learned Counsel, if accepted, would require us to form, substitute and read our view in the order of the Assessing Officer when the Assessing Officer himself has not taken a view. It could have been a different position if the Assessing Officer had "adopted" or "taken" a view after analysing the facts and deciding the matter in the light of the applicable law. However, in the case before us, the Assessing Officer has not at all examined as to whether only one view was possible or two or more views were possible and hence, the question of his adopting or choosing one view in preference to the other does not arise. The aforesaid observations of the Hon'ble Supreme Court do not, in our view, help the assessee; and rather they are against the assessee.

6.12 It was next contended by the learned Authorised Representative that the Assessing Officer had considered all the relevant aspects of the case carefully while passing the order. According to him, the mere fact that the assessment order passed by the Assessing Officer was short would neither mean failure on his part in not examining the matter carefully nor would render his order erroneous so long as the view taken by him was a possible view. In our view, the aforesaid submission of the assessee must fail for the reasons already explained in the foregoing paras of this order as the order, which is sought to be revised under Section 263 reflects no proper application of mind by the Assessing Officer and thus be amenable to revision under Section 263. In this case before us, the assessment order passed by the Assessing Officer lacks judicial strength to stand. It is not a case where the order is short but is not supported by judicial strength. It is in this view of the matter that we feel that the learned P.Commissioner has correctly exercised his revisional jurisdiction under Section 263.

6.13 In our opinion, the Assessing Officer has been entrusted the role of an investigator, prosecutor as well as adjudicator under the scheme of the Income-tax Act. If he commits an error while discharging the aforesaid roles and consequently passes an erroneous order causing prejudice either to the assessee or to the State Exchequer or to both, the order so passed by him is liable to be corrected. As mentioned earlier, the assessee can have the prejudice caused to him corrected by filing an appeal; as also by filing a revision application under Section 264. But the State Exchequer has no right of appeal against the orders of the Assessing Officer. Section 263 has therefore been enacted to empower the P.Commissioner to correct an erroneous order-passed by the Assessing Officer which he considers to be prejudicial to the interest of the revenue. The P. Commissioner has also been empowered to

invoke his revisional jurisdiction under Section 264 at the instance of the assessee also. The line of difference between Sections 263 and 264 is that while the former can be invoked to remove the prejudice caused to the State the later can be invoked to remove the prejudice caused to the assessee. The provisions of Section 263 would lose significance if they were to be interpreted in a manner that prevented the P.Commissioner from revising the erroneous order passed by the Assessing Officer, which was prejudicial to the interest of the revenue. In fact, such a course would be counter productive as it would have the effect of promoting arbitrariness in the decisions of the Assessing Officers and thus destroy the very fabric of sound tax discipline. If erroneous orders, which are prejudicial to the interest of the revenue, are allowed to stand, the consequences would be disastrous in that the honest tax payers would be required to pay more than others to compensate for the loss caused by such erroneous orders. For this reason also, we are of the view that the orders passed on an incorrect assumption of facts or incorrect application of law or without applying the principles of natural justice or without application of mind or without making requisite inquiries will satisfy the requirement of the order being erroneous and prejudicial to the interest of the revenue within the meaning of Section 263.

6.14 In this case, the Ld. P.CIT given direction to make enquiry with regard to sundry creditors at Rs.74,49,754/- as on 31.3.2017 and also with regard to excess contribution to PF by Rs.1,21,254/-. The assessee's total contract receipts for the assessment year under consideration was Rs.1,07,49,223/- and payment of wages in the assessment year under consideration at Rs.59,66,121/-. However, assessee shown outstanding credits in respect of labour payment from various parties shown at Rs.74,49,754/- and all the labour payment/salary payments was supported by self-made vouchers and

payment was made by cash. The assessee furnished the confirmation letters from these parties which were stereo typed and similar in nature. The Ld. A.R. made an argument that these are prepared by assessee itself and got the signatures from the recipients as such these confirmation letters were prepared in similar way. However, we find that these confirmations were not at all verified by the AO. He has collected these documents and kept on records without verification. The non-enquiry made by AO itself leads to invoking of jurisdiction u/s 263 of the Act. In view of this, we dismiss the appeal of the assessee.

7. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 30th Aug, 2022.

Sd/- **(N.V. Vasudevan)** **Vice President**	**Sd/-** **(Chandra Poojari)** **Accountant Member**

Bangalore,
Dated 30th Aug, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.