

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'C' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>ITA No. 435/Bang/2022</b>
<b>Assessment Year : 2018-19</b>

Shri Haris Kalandan Mohammed, D.No. 23-10-810, Umay Bagh, 1 <sup>st</sup> Cross, Yemmekere, Mangaluru – 575 001. <b>PAN: ABJPH9234P</b>	<b>Vs.</b>	The Principal Commissioner of Income Tax [Central], Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri V. Srinivasan, Advocate
Revenue by	:	Shri Praveen Karanth, CIT-DR

Date of Hearing	:	14-09-2022
Date of Pronouncement	:	21-09-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against order dated 22/03/2022 passed by Ld.Pr.CIT u/s. 263 for A.Y. 2018-19 on following grounds of appeal:

- “1. The order of revision passed by the learned Principal Commissioner of Income tax [Central], Bengaluru, under Section 263 of the Act dated 22/03/2022, 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] r.w.s. 153D of the Act dated 24/12/2019 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] r.w.s. 153D 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 Pr.CIT failed to appreciate that the amount declared by the appellant of Rs. 24,84,727/- as income from other sources, cannot be treated as unexplained credits as per section 68 of the Act and consequently the provisions of section 115BBE of the Act is not attracted 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] r.w.s 153D of the Act on 24/12/2019 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.*

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

*9. 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. Brief facts of the case are as under:**

2.1 Search & seizure action U/s. 132 of the IT Act was carried out in the case of M/s. Mukka Sea Food Industries P Ltd and also at the residence of assessee on 08.2.2018. The assessee filed his return of income for the A.Y 2018-19 on 29.3.2019 declaring total income of Rs.1,59,34,350/-. Assessment U/s. 143(3) of the IT Act was completed on 24.12.2019 assessing the income at Rs.10,19,39,061/-.

2.2 During search proceedings, it was noticed that cash payments to the extent of Rs. 28,84,727/- towards construction of house had been made by the assessee which was not accounted. In the statement recorded U/s. 132(4) of the IT Act, 1961, the assessee admitted an amount of Rs. 28,84,727/- as undisclosed income on account of cash payment for the construction of house for AY 2018-19. However, the admitted income of Rs.28,84,727/- was not declared in the return of income filed for AY 2018-19. During the assessment proceedings, the assessee submitted that the additional income admitted during search proceedings on account of cash expense had been declared as commission income under the head "Income from other sources" in the return of income filed. The AO accepted the admission and assessment order was passed.

2.3 In the return of income filed for AY 2018-19, an amount of Rs.67,24,595/- was declared as commission under the head "Income from other sources" including the admitted amount u/s. 132(4) of the Act. Examination of case records by the Ld.PCIT, revealed that, during assessment proceedings, no further details was enquired regarding the money admitted during the search.

2.4 Subsequently, notice u/s. 263 was issued to the assessee dated 05/01/2022 which is as under:

*"On examination of the assessment records, it is noticed that the assessment order passed u/s. 143(3) of the Income Tax Act for Asst Year 2018-19 on 24.12.2019 by the DCIT CC 1, Mangaluru is erroneous in so far it is prejudicial to the interests of revenue due to the reasons mentioned below:-*

*2. The ROI was filed on 29.03.2019 for the A.Y. 2018-19 declaring total income of Rs.1,59,34,350/-. Search and seizure action u/ s 132 of the I.T. Act, 1961 was carried out u/s 132 on 8.2.2018. Assessment u/s 143(3) of the Income-tax Act, 1961 was completed on 24.12.2019 assessing the income at Rs.10,19,39,061/-.*

*3. On a perusal of the records, following discrepancies are found:*

*During the course of search, it was noticed that unaccounted cash payments to the extent of Rs.28,84,727/- towards construction of house was made. In the statement recorded u/s 132(4) of IT Act during search proceedings, you admitted the amount of Rs.28,84,727/- as undisclosed income on account of cash payment for the construction of house for AY 2018-19.*

*4. The admitted income was not declared by you in the return of income filed for AY 2018-19. During assessment proceedings, it was submitted that the additional income admitted during search proceedings on account of cash expenses was declared in the return of income as commission received under the head 'Income from other sources'. The Assessing officer accepted the contention and assessment order was passed accordingly.*

*5. In the return of income filed for AY 2018-19, an amount of Rs.67,24,595/ - was declared as commission under the head 'Income from other sources' including the undisclosed cash expenses declared during search proceedings. Examination of case records revealed that no further*

*details was submitted regarding receipt of commission. As such, the sources of receipts declared as commission remained unexplained and should have been brought to tax as per the provisions of Section 68 rws 115I3BE of Income Tax Act.*

*6. Since the AO failed to tax the commission income u/s 68 r.w.s 115BBE of Income Tax Act, the assessment order is erroneous and prejudicial to the interests of revenue and I propose to invoke the provisions of section 263 of the Income Tax Act.*

*7. In this regard, you are hereby, given an opportunity of being heard and show cause as to why the impugned order should not be enhanced/ modified or set aside for a fresh assessment under section 263 of the Income-tax Act, 1961. This opportunity is being given to you to furnish your reply in respect of the impugned issue, either in person or through your Authorised Representative in this office on 18.01.2022 at 10.30 A.M. If you do not avail this opportunity, it will be presumed that you have nothing to say in the impugned matter and the issue will be decided on the basis of the facts available on records and on merits of the case.”*

2.5 Assessee in response to the above notice, furnished reply objecting the review proceedings vide letter dated 10/02/2022 by submitting as under:

*“The order passed U/ s. 143(3) dt. 24.12.19 is neither erroneous in law nor prejudicial to the interests of the revenue. The learned AO has passed the order and the additional commissioner has approved the same. Hence, there is application of mind by two assessing authorities.*

*It may be noted that, the additional income declared during the search proceedings is duly offered in the return of income filed. The learned AO made the proposal to assess the income as declared during the search. In this regard, it was submitted that an additional income of Rs. 28,84,727/ - was offered in the statement recorded U/ s. 132(4). But subsequently on verification of seized materials it was noticed that an amount of Rs. 4,00,000/ - was considered twice while arriving at the additional income of Rs. 28,84,727/ -. Hence, after reducing the said amount net income of Rs. 24,84,727/ - was offered under the head Income from other sources. During the assessment proceedings the learned AO has made a specific enquiry on the income declared and after considering the reply filed, the learned AO held as under :-*

*The claim of the assessee is verified and the same is in order. In view of the above, the investment of Rs. 24,84,727/- in the construction of residence at Pandeshwara is assessed as the income of the assessee. It is evident from the above that the learned AO has verified the claim and considered it in the order. Thus, it is to be noted that the present proposal for revision is because of mere change of opinion. It is settled law that the mere change of opinion or view would not enable the CIT to exercise jurisdiction u/s. 263 of the Act more so, when the AO had considered the details and the explanation offered by the assessee.*

*Change of opinion by reappraising the evidence is not within the parameters of revisional jurisdiction of the Commissioner under section 263 of the Act. Further to attract the provisions of section 68 as alleged in the notice U/ s. 263 the primary condition of a sum found credited to books of the assessee is not satisfied. Hence provisions of section 68 do not apply. Even assuming that the provisions of section 68 is applicable, the income is not assessable under section 68 as both the nature and source is explained as the receipt is in the nature of income and source is the commission received. The provisions of section is applicable if the assessing officer is not satisfied with explanation provided, but in the instant case, the assessing officer as well as the approving authority are satisfied with the nature and source explained.*

*In view of the above, I submit that the order is not erroneous in so far as it is prejudicial to the interest of revenue. Hence, it is humbly prayed that the proposal for revision of order may kindly be dropped.”*

## 2.6 The Ld.PCIT observed and held as under:

*“9.1 The contention of the assessee is correct to the extent that additional income declared during search proceedings was declared in the return of income; however the AO failed to examine the source of cash expenses declared as commission in the return of income. In absence of source of cash expenses the same should have been treated as unexplained cash credit in the books of account and taxed under section 115BBE of Income Tax Act, which was not done. There is no change of opinion on the issue as claimed by the assessee as the assessing officer had not made any enquiries on the details of commission received such as source of the same, from whom the same is received, mode of receipt or services rendered by assessee for receipt of the same. Hence the contention of the assessee is not acceptable.*

10. *In view of the facts, it is held that the Assessment Order passed by the Assessing Officer is erroneous so far as it is pre-judicial to the interest of the Revenue as per the provisions of Clause (a) of Explanation (2) to the Section 263 of the Income Tax Act, 1961. The declaration of cash payment of Rs.28,84,727/- as commission income under the head 'Income from other sources' in the return of income filed require verification and proper enquiry by the assessing officer as to whether the same is in the nature of unexplained cash credit u/s 68 in the books of account and whether the same is required to be taxed u/s 15BBE of Income Tax Act. Hence, the assessment order dated 24.12.2019 is hereby partly set-aside to the file of the Assessing Officer for passing a fresh assessment Order after making thorough enquiry on above issues.*

11. *It is further directed that the Assessing Officer will provide sufficient opportunity of being heard to the assessee during the course of the set-aside proceedings."*

2.7 Aggrieved by the above order of the Ld.PCIT, assessee is in appeal before this *Tribunal*.

3. At the outset, the Ld.AR in Ground no. 3 assessee raised a legal issue, wherein, the review proceedings is challenged, based on the submission that, the assessment order passed u/s. 143(3) was after taking necessary permissions as per section 153D of the Act. It is the submissions of the Ld.AR that under such circumstances, the review proceedings is bad in law.

4. He placed reliance on the following decisions in support.

- *Decision of Hon'ble Delhi Tribunal in case of Smt. Abha Bansal & Others vs. Pr.CIT in ITA Nos. 383 to 386/Del/2021 by order dated 31/05/2021*
- *Decision of Hon'ble Pune Tribunal in case of M/s. B.U. Bhandari Schemes vs. Pr.CIT in ITA Nos. 637 to 643/PUN/2018*
- *Decision of Hon'ble Lucknow Tribunal in case of Mehtab Alam vs. ACIT in ITA Nos. 288 to 294/LKW/2014 by order dated 18/11/2014*

5. On the contrary, the Ld.DR submitted that there is no embargo on the Ld.PCIT to initiate the revisionary proceedings under this statute. He submitted that 263 can be initiated in respect of any order passed by an assessing officer which is

found to be erroneous in so far as prejudicial to the interest of the revenue if the Ld.PCIT is satisfied after having verified the records merely because the assessment order is passed after taking necessary approval u/s. 153D will not estop the Ld.PCIT from initiating proceedings u/s. 263 of the Act. The entire reliance of the Ld.DR was on the relevant provision as enacted in the statute for the relevant period.

We have perused the submissions advanced by both sides in the light of records placed before us.

5.1 We have carefully considered the decisions relied by the Ld.AR. The decision of the *Hon'ble Delhi Tribunal* in the case of *Abha Bansal(supra)* dealt with identical issue relying on the decision of the *Hon'ble Allahabad High Court* in the case of *CIT Vs. Dr. Ashok Kumar* in *ITA No. 192 of 2000, dated 06.08.2012*. *Hon'ble Delhi Tribunal* has reproduced therein, list of decisions of the Co-ordinate Bench of the *Tribunal*, which has followed the decision of the *Hon'ble Allahabad High Court* in the case of *CIT Vs. Dr. Ashok Kumar* (supra) and held that an assessment order, which has been approved by the Joint Commissioner of Income Tax under [Section 153D](#) of the Act cannot be revised by the Id. Pr. CIT under [Section 263](#) of the Act.

5.2 We have carefully considered the above decision. *Hon'ble Allahabad High Court* in the case of *CIT Vs. Dr. Ashok Kumar(supra)*. In that decision, *Hon'ble Allahabad High Court* upheld the order of the Co-ordinate Bench, quashing the 263 order, wherein the *Tribunal* found that the assessee therein had sufficiently explained the retraction of his statement given on 12.12.1994 and that, the Ld.CIT could not point out as to

whether, the Assessing Officer failed to work out the amount of concealed income correctly. *Hon'ble High Court* further held that, the Assessing Officer made the addition on estimate basis for all the assessment years, and there was no material indicating suppression of receipts. Therefore, the *Hon'ble High Court* on these facts considered by the *Tribunal* upheld the order of the *Tribunal* quashing the order of the Ld.CIT passed under [Section 263](#) of the Act. For sake of convenience, the observation of *Hon'ble High Court* are reproduced as under:-

*"1. We have heard Sri R.K. Upadhyay, learned counsel for the appellants and Sri R.R. Agrawal, learned counsel appears for the respondent- assessee.*

*2. The revenue is aggrieved by the order of the Income Tax Appellate Tribunal dated 12.1.2000, which was set-aside the order of Commissioner Income Tax (A), remanding the matter to the Assessing Officer under Section 263 of Income Tax Act, 1961 after setting aside the assessment order dated 27.12.1995 for assessment year 1991-92 to 1994-95 and the order dated 31.7.1996 for the assessment year 1995-96.*

*3. These appeals were admitted on the question of law, which we have corrected as follows:-*

*"Whether on the facts and in the circumstances of the case, the Tribunal was justified in interfering with the order of the Commissioner of Income Tax, Under Section 263 of the Act, for the assessment years 1991-92 to assessment years 1995-96?"*

*4. We have gone through the order of Assessing Officer, Commissioner Income Tax (A) and Income Tax Appellate Tribunal and find that the ITAT has considered the reasons given by the CIT(A), and has found that the assessee had sufficiently explained the surrender of the income which he has subsequently retracted.*

*5. After assessments were completed, a raid was carried out, at the Nursing Home of the respondent- assessee on 7.12.2004. Some incriminating documents of concealment of income, were discovered. The assessee was not present at the time of inspection. He appeared before the AO on 12.12.1994 and surrendered the proposed additions in the income for the relevant years. The respondent- assessee thereafter retracted his statement, by giving an explanation that he did not have access to his accounts books, when he had appeared on his own before the AO on 12.12.1994. On checking up the account books, he had found that the returns were accepted, on the accounts books prepared by him.*

6. The Tribunal thereafter has observed as under:-

"5.1 The other relevant point to be noted is that CIT set aside the assessment order on the basis of incorrect reasons. As pointed out by the learned counsel, there was no material found during search about suppression of receipts for a.y. 1991-92 to 1994-95 nor the learned D.R. Was able to point out any such material which might have been ignored by the AO while framing the assessment and thus the vary basis for passing the impugned order goes away. The CIT also failed to point out as to why the AO failed to work out the amount of concealed income correctly, rather the AO had made the additions on estimate basis for all the assessment years though there was no seized material indicating suppression of receipts for these assessment years and for a.y. 1995-96 the material found at the time of search had been analysed after necessary enquiries and assessment had been framed accordingly.

5.2 In the last it is also relevant fact that the AO was fully alive about the facts of the case and that is why he got necessary approval of Addl. Commissioner before completing the assessment orders for all the assessment years and once that is not disputed by the Revenue than the CIT would not be justified in interfering in the approval accorded by the Addl. CIT for framing the assessment order and thus there was no case for setting aside the assessment orders for the assessment years in question. On the basis of facts and circumstances of the case I am of the opinion that the impugned order is liable to be quashed accordingly.

6. In the result, appeals are allowed."

7. Sri R.K. Upadhyay had relied upon *Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax*, (2000) 243 ITR 83 and *Commissioner of Income Tax Vs. Kwaliti Twxtile Associate Pvt. Ltd.*, (2005) 272 ITR 371. In these cases the Supreme Court and the Madras High Court have discussed the powers of CIT under Section 263 of the Act, to remand the matter. If the twin conditions namely that the order of AO sought to be revised is erroneous, and it also prejudicial to the interest of the revenue are satisfied the CIT can remand the matter to the file of A.O.

8. We find that the Tribunal has considered the relevant principles of law in interfering with the order of CIT. The Tribunal found that the assessee-respondent had sufficiently explained the retraction of his statement given on 12.12.1994. It also found that the CIT could not point out as to whether the AO had failed to work out the amount of concealed income correctly. The AO had made additions on estimate basis for all the assessment years. There was no material indicating suppression of receipts.

9. We find that the Tribunal has not committed any error of law in setting aside the order of CIT passed under [Section 263](#) of Income Tax Act for the assessment year 1991-92 to 1995-96.

*10. The question of law is decided against the revenue and in favour of assessee. The Income Tax Appeals are accordingly dismissed."*

5.3 Therefore, in our view, the basis on which the decision in case of Abha Bansal(supra) has been rendered stands factually distinguished.

Section 263 of the Act reads as under:

*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 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, including,—*

*(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or*

*(ii) an order modifying the order under section 92CA; or*

*(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section.*

*Explanation 1.—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 or the Transfer Pricing Officer, as the case may be, 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 or the Transfer Pricing Officer, as the case may be, conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;*

*(iii) an order under section 92CA by the Transfer Pricing Officer;*

*(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 Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;*

*(c) where any order referred to in this sub-section and passed by the Assessing Officer or the Transfer Pricing Officer, as the case may be, had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or 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.*

*Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer 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 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.*

*Explanation 3.—For the purposes of this section, "Transfer Pricing Officer" shall have the same meaning as assigned to it in the Explanation to section 92CA.*

*(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.*

5.4 On a plain reading of the section, we do not find any fetters on the powers of Ld.PCIT/CIT for revising any order passed by the Ld.AO, except as provided in *Explanation 1(c)* of the section. However, the argument of the assessee is that, powers granted to the PCIT and CIT u/s 263 becomes otiose if the authority below the rank of PCIT/ CIT i.e Joint Commissioner of Income tax, has approved the order u/s 153D of the Act. The Ld.Ar is making out an argument that, if the lower authority, u/s 153D, has approved the order, the Higher Authority i.e., PCIT and CIT lose their power to revise such orders. We do not find force in this argument of the assessee as Pr.CIT is way high above the Jt.CIT. We refer to section 116 of the Act, where the Income Tax authorities in their hierarchical order are listed, clears the doubt about it.

5.5 The assessment order in the present facts are not passed under the instructions of the superior authority or under the direction of the superior authority, but merely an approval was granted by the Joint Commissioner of Income Tax under [Section 153D](#) of the Act to pass the orders. Provisions of [Section 153D](#) speak about "*prior approval for assessment in the case of search*". The section also provide for obtaining the prior approval of the Joint Commissioner for merely passing an order. Therefore, the decision of the (*supra*) clearly lays down that '*any order passed by the Assessing Officer*' can be revised under [Section 263](#) of the Act irrespective of the fact that any authority has granted any direction to the Assessing Officer. Therefore, if the argument of the Ld. AR is to be accepted then in such cases where the assessment has been framed under [Section 153A](#) or [Section 153C](#), the same will go out of the ambit of the

provisions of [Section 263](#) of the Act and such a view cannot be even considered to be a plausible view in the eye of law. Provisions of [Section 263](#) of the Act give un-fettered right to the Commissioner of Income Tax to revise any order passed by the Assessing Officer. Whatever was to be excluded by the law has already been provided under that Section and the only exception are the issues 'decided and considered' in the appellate orders. Therefore, the reasoning of the arguments advanced by the Ld. AR in respect of Ground no.3 falls without any legs to stand.

5.6 *Hon'ble Delhi High Court in NIIT Ltd. Vs. Union of India in WPC No. 172-179/2009 dated 11th December, 2009* held that:-

*"20. The legal position which cannot be disputed is that when a particular authority is vested with the power to discharge statutory function, like the Commissioner who is empowered to pass orders under Section 263 of the Act, it is that authority which is to apply its independent mind and arrive at its own conclusion without being influenced by any other authority, much less the higher authority. Unfettered discretion lies in the Commissioner of Income Tax to pass orders under Section 263 of the Act. He is supposed to examine the records produced before him to arrive at a conclusion whether the assessment order passed by the AO suffers from infirmities and needs to be revised under Section 263 of the Act. The parameters which are laid down in Section 263 of the Act need to be fulfilled in exercising such a discretion. It is the Commissioner who has to satisfy himself, on the basis of available records, that in a given case the conditions stipulated under Section 263 of the Act are satisfied. In arriving at this conclusion, he is not to be controlled even by a higher authority. Likewise, the higher authority is not to interfere with the independence of his unfettered discretion which is statutorily conferred upon the Commissioner."*

5.7 Thus, even the authority above PCIT and CIT cannot deprive the powers of the revision and thus there is no reason that lower authority exercising powers granted to it can prevent the PCIT or the CIT to exercise revisionary powers. Therefore, it is apparent that none of the lower authorities or even a superior authority cannot put spokes in exercising the power of the Pr.CIT.

5.8 *Hon'ble Supreme Court in T.N. Civil Supplies Corpn. Ltd Vs Commissioner of Income-tax* reported in (2003) 260 ITR 82 was seized with the issue wherein, the Assessing Officer passed order on the direction of the Inspecting Assistant Commissioner under Section 144B of the Act, which was subject to revision under Section 263 of the Act. The *Hon'ble Supreme Court* categorically held that, the orders are to be revised are orders passed by the Income Tax Officer. *Hon'ble Supreme Court* further held that, provisions of Section 263 did not exclude 'orders passed by the Assessing Officer on the direction of a superior authority either under Section 144A or Section 144B of the Act.

5.9 The *Hon'ble Supreme Court* thus held as under :-

*"2. The power to revise orders of the Income-tax Officer under section 263 of the Income-tax Act, 1961 was sought to be limited by the appellant-assessee by contending that the phrase "order passed by the Income-tax Officer" in section 263 excluded those orders passed by the Income-tax Officer pursuant to the directions of the Inspecting Assistant Commissioner under section 144B which was then included in the Act.*

*3. The High Court in its decision has followed its earlier decision in which it had referred to and relied upon the reasoning of several other High Courts on the same issue to negative the contentions of the assessee. Given the uniformity of interpretation by the several High Courts, it would not be appropriate to interfere with the decision of the High Court.*

*4. In any event we are of the view that having regard to the subsequent amendments to the Act issued from time to time there was no scope for limiting the phrase 'order passed by the Income-tax Officer' in section 263 to exclude orders passed by the Income-tax Officer on the directions of a superior authority either under section 144A or 144B."*

5.10 The power of the Commissioner under [Section 263](#) of the Act is in the nature of supervisory jurisdiction. This power is granted to correct an error, which is prejudicial to the interest of the Revenue in the order of the Assessing Officer, even if it is approved by the Joint Commissioner, who is also falling below

the rank of the Pr. Commissioner. If the argument of the ld. AR is accepted then the supervisory authority of the Pr. Commissioner granted under the Act is hampered. Provisions of [Section 263](#) of the Act give unfettered right to the Commissioner of Income Tax to revise any order passed by the Assessing Officer. Whatever was to be excluded by the law has already been provided under that Section and the only exception are the issues 'decided and considered' in the appellate orders. Therefore, the reasoning of the arguments advanced by the Ld. AR on this line also fails and we dismiss the same.

**Accordingly this ground raised by the assessee stands dismissed.**

6. Coming to the merits of the case, the Ld.AR submitted that, in the statement recorded u/s. 132(4), assessee had admitted an amount of Rs.28,84,727/- as undisclosed income on account of cash payment for construction of house during the relevant year.

7. It is submitted that the said amount was declared in the statement u/s. 132(4) without verifying the seized material. But subsequently, upon verification of the seized materials, it was noticed that an amount of Rs. 4 Lakhs was considered twice while arriving at the additional income while recording the statement u/s. 132(4). The Ld.AR submitted that, it was therefore, after reducing the said amount of Rs. 4 lakhs, net amount of Rs.24,84,727/- was offered under the head income from other sources. The Ld.AR relied on the computation of income wherein a sum of Rs.67,98,565/- includes the said amount of Rs.24,84,727/-.

8. The Ld.AR submitted that this claim of assessee was verified by the Ld.AO, wherein, a specific enquiry was made in respect of the income declared and the Ld.AO after considering the reply observed as under:

*7. Cash payments for house construction*

*7.1 During the course of search proceedings, evidence with regard to construction of new house at B.R. Karkera Road, Pandeshwar, Mangaluru was found. On analysis of seized material marked as A/MSFIPL/02, it is seen that certain payments were made towards construction expenses both in cash and cheques. However it was seen that the cash payments made were not accounted. The details of cash payments are as under:*

<i>Page No.</i>	<i>Name of the party to whom payments made</i>	<i>Date of payment</i>	<i>Amount</i>
9	Mahabala	05.08.2017	4,00,000
9	Mahabala	15.01.2018	3,86,000
7	Gulshan Roy	19.10.2017	2,50,000
7	Gulshan Roy	05.12.2017	2,50,000
4	Mahabala	05.08.2017	4,00,000
3	Mahabala	03.11.2017	6,28,727
3	Mahabala	13.12.2017	5,20,000
1	Mahabala	02.12.2017	50,000
		<i>Total</i>	<i>28,84,727</i>

*7.2 In the statements recorded u/s 132(4) and 131 of the IT Act assessee had admitted that the cash payments appearing in the books seized have not been accounted and offered this amount of Rs.28,84,727 as additional income for the A.Y. 2018-19.*

*7.3 However on perusal of the return of income filed for the assessment year 2018-19, it was seen that though the assessee had admitted Rs. 28,84,727 as unaccounted investment in the construction of house the same was not offered to tax. In view of this the assessee was requested to show cause why Rs.28,84,727 should not be assessed as his income for the assessment year 2017-18.*

*7.4 In reply to this the assessee, vide letter dated 13.11.2019 has intimated as follows:*

*"During the search proceedings a notebook containing cost incurred for the construction of the house was found. During the search proceedings the cost incurred in cash was treated as my additional income and was quantified as Rs.28,84, 727. However on verification of seized material numbered as A/MSFIPL/02 it is noticed that payment of Rs. 4,00,000 paid to Mahabala is recorded twice in page no. 9 & 4. Thus I have reduced the said sum from total additional income estimated and declared Rs. 24,84,727 as my additional*

*income for Assessment year 2018-19. Computation of income is enclosed herewith. As could be noticed therefrom the income of Rs. 24,84,727 is included in the income of Rs. 67,98,656 declared under the head Income from Other Sources."*

*7.5 The reply of the assessee is considered. The assessee has pointed out that Rs. 4,00,000 paid to Mahabala has been considered twice and hence the unaccounted investment is Rs. 24,84,727. The assessee has also stated that he has offered the additional income admitted of Rs. 24,84,727 as income under the head Other sources. The claim of the assessee is verified and the same is in order. In view of the above the investment of Rs. 24,84,727 in the construction of residence at Pandeshwara is assessed as the income of the assessee.*

*Penalty proceedings u/s 271AAB is initiated on this issue."*

9. The Ld.AR thus submitted that, necessary verification was carried out by the Ld.AO, during the assessment proceedings, and therefore, the revisionary proceedings are based on mere change of opinion. He placed reliance on the decision of *Hon'ble Supreme Court* in case of *Malabar Industrial Co. Ltd. vs. CIT* reported in 243 ITR 83.

On the contrary, the Ld.DR relied on orders passed by authorities below.

We have perused the submissions advanced by both sides in the light of records placed before us.

10. We note that the Ld.AO during the assessment proceedings observed the declared income having reduced to Rs.24,84,727/- and the same has been put to the assessee and Ld.AO had called for explanation. *Hon'ble Supreme Court* in case of *Malabar Industrial Co. Ltd. vs. CIT (supra)* in such facts observed as under:

*"A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar 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.*

*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 orders passed without applying the principles of natural justice or without application of mind.*

*The phrase prejudicial to the interests of the revenue is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in *Dawjee Dadabhoy & Co. Vs. S.P. Jain and Another* [31 ITR 872], the High Court of Karnataka in *Commissioner of Income-tax, Mysore Vs. T. Narayana Pai* [98 ITR 422], the High Court of Bombay in *Commissioner of Income-tax Vs. Gabriel India Ltd.* [203 ITR 108] and the High Court of Gujarat in *Commissioner of Income-tax Vs. Smt. Minalben S. Parikh* [215 ITR 81] treated loss of tax as prejudicial to the interests of the revenue.*

*Mr. Abaraham relied on the judgment of the Division Bench of the High Court of Madras in *Venkatakrishna Rice Company Vs. Commissioner of Income-tax* [163 ITR 129] interpreting prejudicial to the interests of the revenue. The High Court held, In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration. In our view this interpretation is too narrow to merit acceptance. The scheme of the 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 an erroneous order of the Income-tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue.*

*The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of 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. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue. Rampyari Devi Saraogi Vs. Commissioner of Income-tax [67 ITR 84] and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income-tax, West Bengal [88 ITR 323].”*

11. In view of the above discussion, we are of the view that the Ld.PCIT is not justified in set aside assessment order passed u/s. 143(3). The Ld.AO had conducted enquiry based on the return filed in lieu of the notices issued post search action. A specific query has been raised as to why the amount offered by assessee at the time of recording statement u/s. 132(4) stands reduced by a sum of Rs. 4 Lakhs in response to which reply has been furnished by assessee which has been accepted by the Ld.AO and no addition has been made. In the view of the fact that the said amount has been offered to tax by assessee as business income and no addition has been made by the Ld.AO under any other provisions of the Act, applicability of section 115BBE is not possible. We note that the Ld.PCIT has stated that AO should have treated the said income as unexplained cash credit and addition should have been made u/s. 68 of the Act. This contention is not accepted as for invoking the provisions of section 68 there has to be entries in the books of account for which no explanation is offered by assessee. In the present facts of the case, the declaration by assessee is based on a seized material which is self-explanatory in terms of the parties to whom

payments have been made in cash as well as cheque towards construction.

11.1 In the present facts of the case, the order passed by the Ld.AO may be prejudicial however, it cannot be held to be erroneous and the Ld.AO had adopted one of the possible view.

Respectfully following the ratio laid down by *Hon'ble Supreme Court* we hold the revisionary proceedings initiated in the present facts to be bad in law and quash the consequential order passed dated 22/03/2022.

**Accordingly, the grounds raised by assessee being Ground nos. 4 to 6 stands allowed.**

**In the result, the appeal filed by assessee stands allowed on merits.**

Order pronounced in open court on 21<sup>st</sup> September, 2022.

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 21<sup>st</sup> September, 2022.  
/MS /

**Copy to:**

- |               |                        |
|---------------|------------------------|
| 1. Appellant  | 4. CIT(A)              |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT        | 6. Guard file          |

By order

Assistant Registrar,  
ITAT, Bangalore