आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER,
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

आयकर अपील सं./**ITA No. 153/Rjt/2022**
निर्धारण वर्ष/Asstt. Years: 2017-2018

Shri Kuldipsinh Bhikhubha Basiya, Office No. 330, Star Plaza, Nr. Circuit House, Phulchhab Chowk, Rajkot. **PAN: ACBPB3675M**	Vs.	The Principal Commissioner of Income Tax, Rajkot-1, Rajkot.

Assessee by	:	Shri Mehul Ranpura, A.R
Revenue by	:	Shri Aarsi Prasad, CIT. D.R

सुनवाई की तारीख/**Date of Hearing : 08/07/2022**
घोषणा की तारीख /**Date of Pronouncement: 16/09/2022**

आदेश/O R D E R

PER BENCH:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Principal Commissioner of Income Tax, Rajkot-1, dated 01/03/2022 arising in the matter of assessment order passed under s.263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2017-18.

2. The only interconnected issue raised by the assessee is that the learned Principal CIT erred in holding the assessment framed under section 143(3) as erroneous insofar prejudicial to the interest of Revenue.

3. The brief facts are that the assessee is an individual and not filing return of income. However, the case of the assessee was selected for scrutiny on the basis of AIR information regarding deposits of cash for Rs. 1,02,82,500/- and credit card payment of Rs. 4,42,050/- only. Thereafter, the AO framed assessment u/s 144 of the Act and assessed the income of the assessee at Rs. 1,41,55,780/- which includes addition on account of cash deposit of Rs. 1,02,82,500/- only.

4. However, the PCIT on examination of the assessment records of the assessee found that the AO has not made addition with regard to payment towards credit card of Rs. 4,42,050/- which was required to be added under section 69C of the Act being unexplained expenditure. But the AO without proper examination and correct application of mind framed the assessment. Similarly the AO levied interest under section 234A of the Act for 24 months only whereas interest was to be charged for 36 months. Accordingly, the PCIT initiated the proceedings under section 263 of the Act vide show cause notice dated 13 January 2022.

5. The assessee in response to such show cause notice submitted that during the assessment proceeding detailed submissions with regard to payment against credit card were submitted. It was submitted that the credit card payment was met out of cash available in regular books of account which are in nature of deposit against the use of credit card. Thus, the AO after considering the submission and application of mind has taken view that payment towards credit card is taken care off by the addition made on account of cash deposit. Therefore, there is no error in the order of the AO in this regard as the AO has taken one of the possible view.

With regard to calculation of interest under section 234A the assessee submitted that if there is error then such error can be rectified under section 154 without setting aside the assessment order under section 263 of the Act.

6. However, the ld. PCIT found the assessee in support of its contention has not filed any evidence to establish that the credit card payment was made out cash available in regular books of accounts. The AO has also has not made any observation in this regard. Thus, there was lack of enquiry by the AO. Accordingly, the PCIT was of the view that the order passed by the AO was erroneous insofar prejudicial to the interest of revenue on account of non-proper verification which should have been done. Thus, the learned PCIT held the assessment framed under section 143(3) of the Act as erroneous insofar prejudicial to the interest of Revenue.

7. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

8. The learned AR before us filed a paper book running from pages 1 to 89 and contended that all the necessary details about the source of payment towards credit card were filed during the assessment proceedings. The learned AR in support of his contention drew our attention on pages 11 and pages 12 to 89 of the paper book where the notice under section 142(1) if the Act and the various detail such as summary of cash deposited and withdrawal, cash book and bank statement were placed. Thus, the learned AR contended that there cannot be said that the assessment order is erroneous and causing prejudice to the interest of Revenue in the given facts and circumstances.

9. On the contrary, the learned DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates whether the

assessment order has been passed by Ld. AO without making inquiries or verification with respect to the credit card payment deposited by the assessee in the bank account as discussed above and hence the assessment is erroneous insofar prejudicial to the interest of the Revenue. Thus requiring revision by Pr. CIT u/s 263 of the Act.

10.1 An inquiry made by the Assessing Officer, considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case. As far as adequacy of inquiry is considered, there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding of the extent of inquiry. There were a number of judgments by various Hon'ble High Courts in this regard.

10.2 Delhi High Court in the case of **CIT Vs. Sunbeam Auto 332 ITR 167 (Del.)**, made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 of the Act on the ground of inadequate inquiry. The relevant observation of Hon'ble Delhi High Court reads as under:

> "*12. ….. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open. ———*
> *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. 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.*

*15****. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquires rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'****."*

10.3 The Hon'ble Bombay High Court in case of **Gabriel India Ltd. [1993] 203 ITR 108 (Bom)**, discussed the law on this aspect in length in the following manner:

"*The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction.* ***The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.***

10.4 The Mumbai ITAT in the case of **Sh. Narayan Tatu Rane Vs. ITO, I.T.A. No. 2690/2691/Mum/2016, dt. 06.05.2016** examined the scope of enquiry under Explanation 2(a) to section 263 in the following words:-

"*20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provison shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case.* ***Hence, in our***

> ***considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquries or verification that would have been carried out by a prudent officer.*** *Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant."*

10.5 The Hon'ble Supreme Court in recent case of **Principal Commissioner of Income-tax 2 v. Shree Gayatri Associates*[2019] 106 taxmann.com 31 (SC),** held that where Pr. CIT passed a revised order after making addition to assessee's income under section 69A in respect of on-money receipts, however, said order was set aside by Tribunal holding that AO had made detailed enquiries in respect of such on-money receipts and said view was also confirmed by High Court, SLP filed against decision of High Court was liable to be dismissed. The facts of this case were that pursuant to search proceedings, assessee filed its return declaring certain unaccounted income. The Assessing Officer completed assessment by making addition of said amount to assessee's income. The Principal Commissioner passed a revised order under section 263 on ground that Assessing Officer had failed to carry out proper inquiries with respect to assessee's on money receipt. In appeal, the Tribunal took a view that Assessing Officer had carried out detailed inquiries which included assessee's on-money transactions and Tribunal, thus, set aside the revised order passed by Commissioner. The Hon'ble High Court upheld Tribunal's order. The Hon'ble Supreme Court while dismissing the SLP filed by the Department held as under:-

> *"We have heard learned counsel for the Revenue and perused the documents on record. In particular, the Tribunal has in the impugned judgment referred to the detailed correspondence between Assessing Officer and the assessee during the course of assessment proceedings to come to a conclusion that the Assessing Officer had carried out detailed inquiries which includes assessee's on-money transactions. It was on account of these findings that the Tribunal was prompted to reverse the order of revision. No question of law arises. Tax Appeal is dismissed"*

10.6 The Supreme Court in the another recent case of **Principal Commissioner of Income-tax-2, Meerut v. Canara Bank Securities Ltd[2020] 114**

taxmann.com 545 (SC), dismissed the Revenue's SLP holding that 263 proceedings are invalid when AO had made enquiries and taken a plausible view in law, with the following observations:

> *"Having heard learned counsel for the parties and having perused the documents on record, we see no reason to interfere with the view of the Tribunal. The question whether the income should be taxed as business income or as arising from the other source was a debatable issue. The Assessing Officer has taken a plausible view. More importantly, if the Commissioner was of the opinion that on the available facts from record it could be conclusively held that income arose from other sources, he could and ought to have so held in the order of revision. There was simply no necessity to remand the proceedings to the Assessing Officer when no further inquiries were called for or directed"*

10.7 From an analysis of the above judicial precedents, the principle which emerges is that 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 the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Assessing Officer adopts one of the course permissible in law and it has resulted in loss of revenue; or where two views are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot be treated as an erroneous order causing prejudice to the interests of the Revenue unless the view taken by the Assessing Officer is unsustainable in law, or the AO has completely omitted to make any enquiry altogether or the order demonstrates non-application of mind.

10.8 Now in the facts before us, in the case of the assessee the AO during the course of assessment proceedings, raises query on the issue of payment towards credit card which can be verified from the notice issued under section 142(1) of the Act dated 10-09-2019. The relevant question reads as under

> *You are further show caused as to why an amount of an amount of Rs.4,42,050/- of credit card payment should not be considered as part of your total income u/s.69C of the I.T Act 1961. Being unexplained expenditure.*

10.9 However, there is detail available on record that the assessee has made any submission with regard to such query raised by the AO. Therefore in absence of

such detail it cannot be said that the AO has verified the same and applied his mind. Thus it can be safely presumed that the AO has not made any enquiry. Indeed the Pr. CIT initiated proceedings under section 263 of the Act on the ground that the AO has not made enquiries or verification which should have been made in respect of credit card payment. In the instant set of facts, the AO had made enquiries by issuing query vide notice under section 142(1) but the same does not get verified in absence of material but the AO accepted the genuineness of the claim of the assessee without applying mind.

10.10 Coming to issue of interest under section 234A of the Act, it is certainly subject matter of verification at the level of the AO. In view of the above and after considering the facts in totality, we hold that there is error in the assessment framed by the AO under section 143(3) causing prejudice to the interest of revenue. Thus, the revisional order passed by the learned PCIT is upheld by us. Hence, the ground of appeal of the assessee is dismissed.

11. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the Court on 16/09/2022 at Ahmedabad.

Sd/-	**Sd/-**
(SIDDHARTHA NAUTIYAL)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 16/09/2022

Manish