

आयकर अपीलिय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. SANJAY GARG, JM & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No. 473/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Ambey Engineers and Contractors BG185A, Paschim Vihar, New Delhi	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AALFA6162G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No. 474/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Hind Constructions Engineers Contractors C/o Sh. N.K. Garg, Advocate Railway Road, Sangrur	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AADFH9919A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No. 475/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Ganga Constructions C/o Sh. N.K. Garg, Advocate Railway Road, Sangrur	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AAGFG1512M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No. 476/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Adarsh Constructions and Engineers # 6, Mann Colony, Sangrur	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AANFA8995M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No. 477/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Anand Engineers and Contractors #6, Mann Colony, Sangrur	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AANFA8994L		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No. 478/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Himalayan Constructions and Engineer C/o Sh. N.K. Garg, Advocate Railway Road, Sangrur	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AADFH9910K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No. 479/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Amar Constructions and Engineers C/o Sh. N.K. Garg, Advocate Railway Road, Sangrur	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AALFA5859N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No. 480/CHD/2022

निर्धारणवर्ष / Assessment Year : 2012-13

M/s Chenab Constructions C/o Sh. N.K. Garg, Advocate Railway Road, Sangrur	बनाम	The Pr. CIT, Patiala
स्थायी लेखा सं./PAN NO: AAFC6518M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Sh. Ashwani Kumar, CA,
Sh. Bhavesh Jindal, CA and
राजस्व की ओर से/ Revenue by : Smt. Kusum, CIT DR

सुनवाई की तारीख/Date of Hearing : 26/10/2022
उदघोषणा की तारीख/Date of Pronouncement : 28/10/2022

आदेश/Order

Per Bench:

These appeals are preferred by the aforesaid assessee against the separate orders dated 29.03.2022, passed by the Ld. Principal Commissioner of Income Tax, Patiala [hereinafter referred to as 'PCIT'] for assessment year 2012-13. Since the issues involved in all the appeals were similar, they were heard together and are being disposed off by this consolidated order.

2.0 With the consent of both the parties, the case of the assessee, M/s Ambey Engineers and Contractors in ITA No. 473/Chd/2022 was taken as the lead case for the purposes of present discussions,

2.1 The brief facts in this case are that the Department was in possession of a certain information that the assessee firm had been used by another company M/s S.P. Singla Constructions (Pvt.) Ltd to book bogus expenses to bring down its profits and that the assessee firm had allegedly received bogus entries of Rs. 22,84,130/- from M/s S.P. Singla Construction (Pvt.) Ltd and Rs. 9,69,388/- from M/s SPS Structures Ltd. during the year under consideration. Allegedly, no actual work had been done by this assessee firm as per the information. The AO proceeded to make inquiries u/s 133(6) of the Income Tax Act, 1961 [in short 'the Act'] but the assessee firm did not furnish the required details. Therefore, the AO proceeded to issue notice u/s 148 of the Act. In response to this notice, the assessee filed its return of income declaring income of Rs. 20,340/- from business u/s 44AD of the Act. The assessee also filed objections against issuance of notice u/s 148 of the Act.

2.2 During the course of assessment proceedings, the AO observed that a perusal of material available on record revealed that a search action had been

undertaken on M/s S.P. Singla Group of cases on 09.08.2018 and that post-search proceedings had revealed that this group had created a network of sub contractor firms having their registered addresses either at the residential / office premises of the auditor of the group Shri G.K.Garg or at the residential address of the company's main Accountant Shri Manoj Kumar. The AO further noted that these sub-contractor firms were allegedly used by the S.P. Singla Group to book bogus expenses to bring down the overall profits. It was further observed that a list of such sub contractor firms was recovered from the residential premises of the auditor Shri G.K. Garg and that the name of the assessee firm was also figuring in that list. The AO further observed that this established that the assessee firm was one of the sub contractor firms used to book bogus expenses by M/s S.P. Singla Group.

2.3 The AO issued a show cause notice and detailed questionnaire requiring the assessee to submit various details and explanations. In response, it was the assessee's submissions before the AO that the case records were not traceable as the partnership firm had been dissolved since March 2012. The AO noted that the assessee firm had not provided any details pertaining to purchases, creditors, debtors, expenses etc. and had also failed to provide copies of bills pertaining to work done for the year under consideration. It was further noted by the AO that the perusal of bank account statement of the assessee firm revealed that most of the credit receipts were withdrawn in cash and were allegedly converted into accommodation entries on the same day or the next day. The AO went on to conclude that, thus, the assessee firm had not undertaken any business activity during the year.

2.4 In the assessment order, the AO also made a reference to the statement of Shri G.K. Garg, the Auditor of S.P. Singla Group, wherein he had accepted on oath that many firms were shown as sub-contractors in the books of account of M/s S.P.Singla Construction (Pvt) Ltd which were created for the purpose of

booking bogus expenses and that these firms had never performed any construction related activities.

2.5 Based on all these observations, the AO proceeded to hold that it, thus, stood established that the total receipts for the year shown by the assessee firm to have been received from M/s S.P.Singla Constructions (Pvt.) Ltd and M/s S.P.S. Structures were mere paper entries for allegedly reducing the profits of S.P.Singla Group of Companies and were in the nature of accommodation entries as no details of business activity done during the year had been provided by the assessee.

2.6 Thereafter, the AO required the assessee firm to show cause as to why commission at the rate of 8% on the total receipt of Rs. 33,00,133/-, as shown in the income Tax Return, may not be taken as income of the firm. The assessee was also required to show cause as to why the expenses of Rs. 1,76,400/- and Rs. 2,68,578/- being remuneration and interest respectively paid to partners may not be disallowed for the reason that the assessee had failed to provide a copy of partnership deed in this regard.

2.7 In response, it was the assessee's submission that it had carried out the work as a subcontractor and had filed the return of income u/s 44AD of the Act on gross receipts of Rs. 33,00,133/- on which tax had duly been deducted at source by the two concerns from which the payments had been received i.e. M/s S.P.Singla Constructions (Pvt.)Ltd and SPS Structures Ltd. It was also submitted by the assessee that the statement of auditor of the S.P. Singla Group Shri G.K. Garg had no bearing on the assessment of the assessee as no material had been seized or obtained during the post search investigation and further that the statement of the auditor did not specifically mention that the assessee firm had not carried out the work as sub-contractor.

2.8 However, all these submissions of the assessee did not find any favour with the AO and while reiterating his earlier observation, he concluded that it was

established that the assessee firm had provided accommodation entries to the S.P. Singla Group companies and, accordingly, the assessee firm had earned commission income for providing such entries. The AO proceeded to reject the assessee's claim of having earned business income and calculated the alleged commission income of the assessee at Rs. 2,64,011/- at the rate of 8% on gross receipts of Rs. 33,00,133/- as shown in the Income Tax Return and taken at Rs. 4,65,318/- in view of returned income by the assessee. The AO also held that in view of the fact that the assessee firm had failed to furnish a certified copy of the partnership deed, the assessee firm was not eligible for any deduction on account of salary and interest paid to the partners.

3. Thereafter, the assessment records were examined by the PCIT and a Show Cause Notice u/s 263 of the Act vide dated 04.03.2022 which is being reproduced as under:-

2. In this regard, while examining the assessment record of your case for the Assessment Year 2012-13, it has been noticed that you had a receipt of Rs.33,00,133/- during the year 2011-12. The AO had concluded that this sub contractor firm(assessee) was used by other group to book bogus expenses to bring down its overall profits. Hence, it appears that you had provided accommodation entries to other group of companies and accordingly, you had earned commission income for providing such entries. Further, you had not carried out any business activity during the year under consideration and only provided accommodation entries on commission basis. Though, the AO rejected your claim of business income, and your income for the year was calculated at Rs.2,64,011/- @ 8% of the receipt of Rs.33,00,133/- which is against the provision of 44AD(6)(ii) of the act which reads as under:-

"(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to—

- (i) a person carrying on profession as referred to in sub-section (1) of section 44AA;*
- (ii) a person earning income in the nature of commission or brokerage; or*
- (iii) a person carrying on any agency business."*

As such whole gross receipts of Rs.33,00,133/- are required to be treated as commission income and the difference of Rs.30,36,122/- (33,00,133 - 2,64,011) has been taken into account as income by the AO while framing the assessment.

From the aforesaid facts and circumstances of the case, it is noticed that the AO has failed to verify / enquire the aforesaid facts and has not made any enquiry in this regard. Therefore, the assessment order dated 30.12.2019 passed by the AO u/s 147/143(3) of the Act is erroneous in as much as it is prejudicial to the interests of the Revenue."

3.1 In response to the aforementioned Show Cause Notice, the assessee submitted before the Ld. PCIT that the assessee firm had carried out the work as sub-contractor for which the payment had been received and that the return of income had been filed u/s 44AD of the Act on the total turnover. It was further submitted that even if it was to be accepted that the assessee firm had provided accommodation entries to the tune of Rs. 33,00,133/-, by no stretch of imagination, one can earn commission equal to the amount of accommodation entry provided as commission is earned at a certain percentage of the total transaction. It was submitted by the assessee before the Ld. PCIT that this issue had already been considered by the AO and the revision of assessment order would tantamount to imposing his opinion on the AO.

3.2 However, the Ld. PCIT did not accept the submissions of the assessee. The Ld. PCIT noted that the AO had not verified the flow of funds from the S.P.Singla Group companies to the assessee firm and their further utilization. It was also noted by the Ld. PCIT that the AO had also not examined the nature of work claimed to have been carried out by the assessee firm and that the AO had just relied upon the information available from the investigation wing and had passed the assessment order without conducting any relevant inquiries. It was the Ld. PCIT's observation that the conclusion of the AO regarding the assessee firm having earned commission income and the application of the rate of 8% was without any cogent reasoning. As per the Ld. PCIT, the AO should have brought the entire receipts to tax in the hands of the assessee firm as the firm had not incurred any expenses against the said receipts. As per the Ld. PCIT, the general modus operandi of the assessee firm was to route the money deposited in the bank accounts and cheques were issued for the introduction of share capital with the parent company. The Ld. PCIT also alleged that the AO had failed to even examine the partners of the assessee firm on relevant issues.

3.3 The Ld. PCIT went on to hold that neither the assessee firm was covered under the provisions of section 44AD of the Act and nor was the calculation made by the AO @ 8% justified as the AO was required to treat the entire gross receipts of Rs. 33,00,133/- as undisclosed income of the firm. The Ld. PCIT concluded that the assessment order was passed without making inquiries or verification and, therefore, the order of the AO was erroneous as the AO had not examined / verified about the complete details / facts and that it was also prejudicial to the interest of the Revenue. The Ld. PCIT also invoked Explanation 2 to section 263 of the Act and set aside the assessment order to the file of the AO for passing a fresh order in accordance with law in respect of the issue highlighted in the order passed u/s 263 as well as in the Show Cause Notice issued u/s 263(1) of the Act.

4. Against the aforesaid order and findings of the Ld PCIT, the assessee has approached this Tribunal challenging the order passed u/s 263 of the Act by raising the following grounds of appeal:-

1. *That order passed u/s 263 of the Income Tax Act, 1961 by the Learned Principal Commissioner of Income Tax, Patiala is against law and facts on the file in as much he has failed to show as to how the assessment order passed by the Learned Assessing Officer is erroneous in as much as prejudicial to the interest of revenue.*

2. *That the Learned Pr. CIT was not justified to hold that the order was passed by the Learned Assessing Officer without making enquiries and verifications and without properly examining the case thereby ignoring the fact that the matter had already been considered by the Learned Assessing Officer while framing the assessment.*

3. *That the Learned Pr. CIT failed to appreciate the import of detailed submissions made before him during the course of proceedings u/s 263 while coming to the conclusion that the order passed by the Learned Assessing Officer is erroneous in as much as prejudicial to the interest of Revenue."*

4.1 The Ld. AR submitted that the other appeals were also having identical facts, identical assessment orders, identical Show Cause Notices and identical orders passed u/s 263 of the Act which were under challenge before this Tribunal. The Ld. AR drew our attention to a chart depicting a snap shot view of

all the above captioned appeals. The same is being reproduced herein under for a ready reference:-

Particulars	ITA No. 473/Chandi/2022 M/s Amby Engineers And Contractors	ITA No. 474/Chandi/2022 M/s Hind Constructions Engineers Contractors	ITA No. 475/Chandi/2022 M/s Ganga Constructions	ITA No. 476/Chandi/2022 M/s Adarsh Constructions and Engineers	ITA No. 477/Chandi/2022 M/s Anand Engineers And Contractors	ITA No. 478/Chandi/2022 M/s Himalayan Construction and Engineers	ITA No. 479/Chandi/2022 M/s Amar Constructions and Engineers	ITA No. 480/Chandi/2022 M/s Chana Constructions
Status	Firm	Firm	Firm	Firm	Firm	Firm	Firm	Firm
Original return filed on	28.03.2013	28.03.2013	28.03.2013	28.03.2013	28.03.2013	28.03.2013	28.03.2013	28.03.2013
Income declared	Rs. 20,340/-	Rs. 3,800/-	Rs. 20,670/-	Rs. 5,060/-	Rs. 10,800/-	Rs. 7,700/-	Rs. 24,070/-	Rs. 13040/-
Total contract receipts	Rs. 33,00,133/-	Rs. 59,94,898/-	Rs. 59,89,388/-	Rs. 58,01,187/-	Rs. 55,78,667/-	Rs. 57,33,097/-	Rs. 54,34,227/-	Rs. 59,94,668/-
Notice u/s 148 issued on	30.03.2019	30.03.2019	30.03.2019	29.03.2019	29.03.2019	30.03.2019	30.03.2019	30.03.2019
Return filed in response to notice u/s 148	01.10.2019	01.10.2019	01.10.2019	-	11.10.2019	01.10.2019	01.10.2019	01.10.2019
Copy of reasons recorded by the Ld. A.O.	Pages 12-14 of the Paper Book	Pages 12-14 of the Paper Book	Pages 12-14 of the Paper Book	Pages 12-14 of the Paper Book	Pages 12-14 of the Paper Book	Pages 12-14 of the Paper Book	Pages 12-14 of the Paper Book	Pages 12-14 of the Paper Book
Income assessed u/s 143(3)/47 dt. 30.12.19	Rs. 2,64,011/-	Rs. 4,79,592/-	Rs. 4,79,151/-	Rs. 4,64,095/-	Rs. 4,46,293/-	Rs. 4,58,648/-	Rs. 4,34,738/-	Rs. 4,79,573/-
Copy of show cause notice u/s 263	Pages 1-2 of the Paper Book	Pages 1-2 of the Paper Book	Pages 1-2 of the Paper Book	Pages 1-2 of the Paper Book	Pages 1-2 of the Paper Book	Pages 1-2 of the Paper Book	Pages 1-2 of the Paper Book	Pages 1-2 of the Paper Book
Copy of reply to show cause notice u/s 263	Pages 3-8 of the Paper Book	Pages 3-8 of the Paper Book	Pages 3-8 of the Paper Book	Pages 3-8 of the Paper Book	Pages 3-8 of the Paper Book	Pages 3-8 of the Paper Book	Pages 3-8 of the Paper Book	Pages 3-8 of the Paper Book
Copy of notice u/s 142(1) dated 27.11.2019/29.11.2019 and 20.12.2019 issued by the Ld. A. O.	Pages 15-26 of the Paper Book	Pages 15-25 of the Paper Book	Pages 15-25 of the Paper Book	Pages 15-25 of the Paper Book	Pages 15-25 of the Paper Book	Pages 15-25 of the Paper Book	Pages 15-26 of the Paper Book	Pages 15-25 of the Paper Book
Copies of reply dated 30.11.2019/03.12.2019 and 21.12.2019 filed before the Ld. A. O.	Pages 27-50 of the Paper Book	Pages 26-51 of the Paper Book	Pages 26-51 of the Paper Book	Pages 26-55 of the Paper Book	Pages 26-52 of the Paper Book	Pages 26-53 of the Paper Book	Pages 27-51 of the Paper Book	Pages 26-49 of the Paper Book

4.2 The Ld. AR submitted that although he will be submitting his arguments in respect of ITA No. 473/Chd/2022, his arguments would be identical in all other appeals also. He drew our attention the reasons recorded for reopening the case u/s 148 of the Act and, thereafter, drew our attention to the various notices issued by the AO along with the questionnaires which were placed at pages 15 to 26 of the paper book. Our attention was further drawn to the replies furnished by the assessee in response to the said notices and questionnaires and which were placed at pages 27 to 50 of the paper book. It was submitted that, thus, the allegation of the Ld. PCIT that the AO had not carried out any inquiries was factually incorrect because the AO had issued detailed questionnaires and further the assessee also had duly responded to the same. It was further submitted that it is not the case of the Ld. PCIT that the assessee firm had not submitted any documentary evidences before the AO in as much as the assessee had submitted the work orders received from M/s S.P.S Structures Limited along with the terms and conditions of the private sub contract (placed at pages 37 to 40 of the paper book). The Ld. AR submitted that no details or vouchers for expenses were maintained / provided for the reason that the return had been filed u/s 44AD of the Act and in that terms of this provision, the assessee was not required to maintain any books of account or bills / vouchers

etc. as the income declared under this section is deemed to have been computed after allowing all expenses. It was submitted that in spite of the assessee having furnished the copies of the work contracts, the fact that the AO had chosen to reject the assessee's claim of having carried out sub-contract work and had treated the assessee's income as income from commission proves that there was due application of mind by the AO to the facts of the case. It was submitted that, therefore, the allegation of the Ld. PCIT that the AO had not carried out the required verification was not correct. It was further submitted that the AO had chosen to form a view by rejecting the assessee's claim of being a sub- contractor and by applying a rate of 8% for commission on gross receipts which was one of the possible view and the Ld. PCIT cannot, under the provisions of section 263, direct that the AO should take another view i.e. of taxing the gross amount, as receipts.

4.3 The Ld. AR also placed reliance on the decision of the Coordinate Chandigarh Benches in case of sister concerns, *M/s Shiv Shakti vs Pr CIT & others (ITA No. 481-485/CHD/2022 dated 30.09.2022)* and submitted that under identical facts and circumstances of the case, the matter has been decided in favour of the respective assesseees.

4.4 The Ld. AR reiterated that the other seven appeals were having identical grounds and that the reason for reopening, the assessment orders, the show cause notices issued u/s 263 of the Act and the orders passed u/s 163 of the Act were identical and, therefore, his arguments would be the same in those four appeals as well and the same were not being repeated for the sake of brevity.

5.0 In response, the Ld. CIT DR read out extensively from the impugned order passed by the Ld PCIT and pointed out that it was apparent that the AO had failed to make further inquiries with respect to the issue highlighted by the Ld. PCIT. The Ld. CIT DR argued that the AO had not raised the requisite queries vis-a-vis the bank statement of the assessee which shows debit and credit entries of

almost the same amounts and there was no entry pertaining to expenditure incurred by the assessee.

5.1 The Ld. CIT DR reiterated that the AO should have brought the entire amount to tax because if the assessee was not carrying out any sub contract work, the entire income was to be taxed, being the compensation paid to the assessee for providing accommodation entries. The Ld. CIT DR argued that the AO had prematurely reached a conclusion that the assessee had earned commission income whereas it was incumbent upon him to have made further enquires to reach that conclusion. It was submitted that, thus, it was evident that the assessment order had been passed without making such inquiries or verification which ought to have been made under the facts and circumstances of the case. It was submitted that it was a clear case where Explanation 2 to section 263 of the Act could be invoked.

5.2 The Ld. CIT DR also placed reliance on the various judgments which have been cited by the Ld. PCIT in the impugned order and prayed that the appeal should be dismissed.

5.3 The Ld. CIT DR also fairly accepted the submissions of the Ld. AR that all the seven appeals were identical in nature and he also submitted that his arguments would be the same in respect of the remaining seven appeals and that the same were not being repeated for the sake of brevity.

6. After considering the submissions of both the parties and material available on the record, we find that an identical issue having similar fact pattern has already been adjudicated by the Coordinate Chandigarh Benches in the case of **M/s Shiv Shakti Constructions Vs. Pr. CIT and others** (*Supra*) wherein the relevant observations / findings are contained at para 6 to 6.13 of the order which read as under:

"6.0 We have heard the rival submissions and have also perused the material on record. The facts are not in dispute. It is seen that the assessee's case was

reopened for the reason that a search had taken place in the S.P. Singla Group of cases, wherein during the course of search, the statement of the auditor of the said group Shri G.K. Garg was recorded, wherein it was stated that the S.P. Singla Group was involved in booking bogus expenses through a network of firms who were shown as sub-contractors. It was stated in the said statement that although these sub-contractors did not execute any work, they were given payments which were debited as expenses in the books of accounts of S.P. Singla Group. The name of the assessee firm also figured in the list of such sub-contractor firms. Based on this information, the AO reopened the case of the assessee in terms of section 147 of the Act and in response thereto the assessee filed its return of income in terms of Section 44AD of the Act and also claimed deduction of salary and interest paid to partners. The assessee firm expressed its inability to provide any other documents or details except some worked contracts to justify its claim of having worked as a sub-contractor. In fact, the assessee firm also did not furnish a copy of the partnership deed. Under these circumstances, the AO held that the assessee firm had not worked as a sub-contractor for the S.P. Singla Group companies but had rather worked as an accommodation entry provider. The AO proceeded to hold that a rate of 8% was to be applied on the gross receipts being commission earned on such accommodation entries provided by the assessee to S.P.Singla Group companies.

6.1 Subsequently, when the case records came to be examined by the Ld. PCIT, he formed the view that the AO had not carried out the requisite inquiries as was required under the facts and circumstances of the case and had rather erred in taxing the gross receipts at the rate of 8% only when he should have taxed the entire gross receipts. After issuance of Show Cause Notice u/s 263 of the Act and, thereafter, after considering the submissions of the assessee, the Ld. PCIT set aside the order of the AO by holding that the assessment order was erroneous as being prejudicial to the interest of the Revenue and directed the AO to make a fresh assessment. The Ld. PCIT also invoked Explanation 2 to section 263 of the Act.

6.2 Now, the only question for our consideration is whether the Ld. PCIT was justified in exercising his revisionary powers u/s 263 of the Act when the AO had already rejected the various contentions of the assessee and had also made additions to the returned income by disallowing salary and interest to partners and had also enhanced the percentage of earnings by taking the same as 8% being commission earned by the assessee firm.

6.3 Before we proceed to examine the issue before us at length, it will be worthwhile to reproduce the provisions of section 263 of the Act 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 ⁹²[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."

6.4 From the perusal of the aforesaid section, it is apparent that the powers of the revision can be exercised suo motu by the Ld. Commissioner. The Ld. Commissioner may call for and examine the records and any proceedings under the Act and for this purpose he need not show or record any reason. If, after calling for and examining the records, the Ld. Commissioner considers that the order of the AO as erroneous in so far as it is prejudicial to the interest of the Revenue, he is bound to give opportunity to the assessee of being heard and it is only after giving that opportunity, he may pass such order thereon as the facts of the circumstances of the case may warrant. It is also settled law that for invoking the provisions of section 263 of the Act, both the conditions i.e. the order passed by the AO being erroneous as well as being prejudicial to the interest of Revenue must be satisfied. If one of them is absent, the provisions of section 263 cannot be invoked. Further, an order can be said to be erroneous if there is incorrect assumption of facts or an incorrect application of law by the AO. However, if the AO, after making the inquires and examining the records, has taken one of the possible views, it cannot be said that the order passed by the AO was erroneous until and unless the view taken by the AO is unsustainable in law. It is also settled law that if the AO has not carried out any inquiry, it can be said that the order passed is erroneous as the due process has not been followed. However, it is also settled law that inadequacy of inquiry does not give jurisdiction to the Ld. Commissioner to invoke provisions of section 263 and set aside the assessment. No doubt, clause (a) of Explanation 2 to section 263 deems the order to be erroneous and prejudicial to the interest of the Revenue in case the order is passed without making inquires or verification which should have been made. However, it has again been held by various Hon'ble Courts as well as the Coordinate Benches of this Tribunal that for the applicability of clause (a) of Explanation 2, it is necessary that the Ld. Commissioner must mention in the order as to what inquires or verification, the Ld. Commissioner desires to have been carried out by the AO.

6.5 However, it is seen that in the present case, the Ld. PCIT has not specifically pointed out as to what inquires or verification should have been carried out by the AO in this regard. From the records produced before us, it is very much evident that the AO had made inquiries regarding assessee's claim of having earned income from sub-contract work and, thereafter, after considering the reply submitted by the assessee, the AO reached a conclusion that the assessee's claim regarding its working as a sub-contractor was not to be accepted and that the assessee's such claim was to be rejected. Thereafter, the AO proceeded to hold that the assessee's work was in the nature of providing accommodation entries and based on this conclusion, the AO held that a rate of 8% should be applied being percentage of commission earned on providing the accommodation entries. Thus, in view of the questionnaires issued by the AO and the replies submitted by the assessee, the conclusion reached by the AO of rejecting the assessee's claim apparently proves that the AO had made proper

inquiries and had also duly applied his mind to the facts of the case. Therefore, the contention of the Ld. PCIT that no enquiry was made by the AO is factually incorrect. It is not a case, where no inquiry had been made by the AO. Merely because the Ld. PCIT felt that further inquiry should have been made does not make the order of the AO erroneous and prejudicial to the interest of the Revenue.

6.6 *We also note that there is no incorrect application of law by the AO in the present case and further, the AO, after making inquiries and examining the records, has taken a view which is one of the possible views, and since this view is not unsustainable in law, it cannot be said that the order passed by the AO was erroneous in so far as being prejudicial to the interest of Revenue. Even at the cost of repetition, we reiterate that inadequacy of inquiry does not give jurisdiction to the Ld. PCIT to invoke his revisionary powers and set aside the assessment and nor does this section provide such powers to the Ld. PCIT that he can impose his view on the AO dictating him how a particular assessment is to be concluded.*

6.7 *It is further seen that the Ld. Pr.CIT has ignored the replies of the assessee and he has not discussed as to why he does not agree with the contentions of the assessee. The Ld. Pr.CIT has merely remitted the matter back to the Assessing Officer without making any inquiry himself. It is apparent that no independent inquiries have been made by the Ld. Pr.CIT although it was incumbent upon him to make such inquiry so as to reach the conclusion that the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue.*

6.8 *The Hon'ble Delhi High Court in the case of Pr.CIT vs. Delhi Airport Metro Express Pvt. Ltd. in ITA No.705/2017 has categorically held that for the purpose of exercising jurisdiction u/s 263 of the Act and reaching a conclusion that the order is erroneous in so far as being prejudicial to the interest of the revenue, the CIT has to make some minimal inquiry and where the CIT is of the view that the Assessing Officer had not undertaken any inquiry, it becomes incumbent upon the CIT to conduct such inquiry. We are afraid that in the present case the Ld. Pr.CIT has not conducted any such inquiry.*

6.9 *Further, the Hon'ble Delhi High Court in the case of Pr.CIT vs. Modicare Ltd. in ITA 759/2017 has held that the exercise of jurisdiction u/s 263 of the Act cannot be outsourced by the Ld. Pr.CIT to the Assessing Officer and, therefore, the Ld. Pr.CIT cannot direct the Assessing Officer to provide details of the facts on the basis of which proceedings u/s 263 could have been initiated. In the present case, it is apparent that the Ld. Pr.CIT, unmindful of the inquiries conducted by the Assessing Officer during the course of assessment proceedings and the submissions made by the assessee in response to notice u/s 263 of the Act, has merely observed that the assessment order was passed without making proper inquiries and it is a matter of record that the Ld. Pr.CIT has himself not undertaken any inquiry to reach a conclusion that the order is erroneous and prejudicial to the interest of the revenue.*

6.10 *We may further add that there is a difference between lack of inquiry and inadequate inquiry and it is for the Assessing Officer to decide the extent of inquiry to be made and it is his satisfaction which is required under the law. The Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Sunbeam Auto Ltd reported in (2010) reported in 332 ITR 167 (Delhi) has held that if there was any inquiry, even inadequate, that would by itself not give occasion to the*

Commissioner to pass order u/s 263 of the Act merely because the Commissioner had a different opinion in the matter. It is a settled law that the Ld. Pr.CIT cannot pass the order u/s 263 on the ground that thorough inquiry should have been made by the Assessing Officer.

6.11 Although, there has been an amendment in the provisions of section 263 of the Act by which Explanation 2 has been inserted w.e.f. 1.6.2015 but the same does not give unfettered powers to the Ld. Commissioner to assume jurisdiction under section 263 to revise every order of the Assessing Officer to re-examine the issues already examined during the course of assessment proceedings. The Mumbai ITAT Bench has dealt with Explanation 2 as inserted by Finance Act, 2015 in the case of Narayan Tatu Rane vs. ITO reported in (2016) 70 taxman.com 227 to hold that the said Explanation cannot be said to have overridden the liability as interpreted by Hon'ble Delhi High Court, according to which the Ld. Commissioner has to conduct the inquiry and verification to establish and show that the assessment order was unsustainable in law. The ITAT Mumbai Bench has further held that the intention of the legislature could not have been to enable the Ld. CIT to find fault with each and every assessment order without conducting any inquiry or verification in order to establish that the assessment order is not sustainable in law, since such an interpretation will lead to unending litigation and there would not be any point of finality in the legal proceedings. The ITAT Mumbai Bench of the Tribunal went on to hold that the opinion of the Ld. Commissioner referred to in section 263 of the Act has to be understood as legal and judicious opinion and not arbitrary opinion.

6.12 We also note that it has been held by the ITAT Mumbai Bench in the case of M/s Indus Best Hospitality & Realtors Pvt. Ltd. in ITA No. 3125/Mum/2017 vide order dated 19.01.2018 that Explanation 2 to Section 263 of the Act introduced by Finance Act, 2015 is retrospective in nature. Since the year under consideration is AY 2012-13, we are afraid that Explanation 2 to section 263 will not come to the aid of the department in this case. Similar view has been taken by the various Coordinate Benches of the ITAT in the following cases:-

(a) AV Industries v. ACIT [ITA No. 3469/Mum/2010] dated 06.11.2015

(b) Metacaps Engineering and Mahendra Constructions Co. (JV) v. CIT [ITA No. 2895/Mum/2014] dated 11.09.2017

(c) Reliance Money Infrastructure Ltd. v. PCIT [ITA No. 3259/Mum/2017] dated 06.10.2017.

(d) Shantikrupa Estate Pvt. Ltd. [ITA No. 1252/Ahd/2015] dated 09.09.2016

(e) Amira Pure Foods Pvt. Ltd. v. PCIT [ITA No. 451/Del/2017] dated 29.11.2017."

6.13 Accordingly, respectfully following the ratio of the various judgments as referred to in the preceding paragraphs, we have no hesitation in holding that the Ld. Pr.CIT had wrongly invoked the revisionary powers u/s 263 of the Act and we have no option but to quash the same. It is so ordered accordingly."

7.0 In the instant case as well, we find that the AO had made necessary inquiries regarding assessee's claim of having earned income from sub-contract work and, thereafter, after considering the reply submitted by the assessee, the

AO has rejected such claim of the assessee regarding its working as a sub-contractor. Thereafter, the AO proceeded to hold that the assessee's work was in the nature of providing accommodation entries and based on this conclusion, the AO held that a rate of 8% should be applied being percentage of commission earned on providing the accommodation entries. Thus, in view of the questionnaires issued by the AO and the replies submitted by the assessee, the conclusion reached by the AO of rejecting the assessee's claim apparently proves that the AO had made proper inquiries and had also duly applied his mind to the facts of the case. Therefore, the contention of the Ld. PCIT that no enquiry was made by the AO is factually incorrect. Having said that, in the present case, the Ld. PCIT has not specifically pointed out as to what further inquiries or verification should have been carried out by the AO in this regard. Merely because the Ld. PCIT felt that further inquiry should have been made does not make the order of the AO erroneous and prejudicial to the interest of the Revenue.

8. We also note that it is not a case where the AO has upheld the applicability of section 44AD as alleged by the Id PCIT. Rather, the AO has rejected the assessee's claim of business income under section 44AD of the Act and has determined the true nature of assessee's activities as that of an accommodation entry provider rather than provider of sub-contractor services as so claimed by the assessee. Having arrived at the true nature of assessee's activities of that of an accommodation entry provider, the AO has applied commission rate of 8% on total receipts/transaction value of entries totaling Rs 33,00,133/-. The Id PCIT has not pointed out how rate of 8% being the commission income so determined by the AO is unsustainable in the eyes of law and whether there are other benchmark of estimating commission income which the AO should have applied and which he has failed to apply. There is thus no incorrect application of law by the AO in the present case and further, the AO, after making inquiries and examining the records, has taken a view

which is one of the possible views, and since this view is not unsustainable in law, it cannot be said that the order passed by the AO was erroneous in so far as being prejudicial to the interest of Revenue.

9. In light of aforesaid discussions and following the decision of the Coordinate Benches in case of Shiv Shakti Constructions (*supra*), the order so passed by the Id PCIT u/s 263 is set-aside and the order of the AO is sustained.

10. Since the order for other captioned appeals i.e. ITA Nos. 474/Chd/2022, 475/Chd/2022, 476/Chd/2022 , 477/Chd/2022, 478/Chd/2022, 479/Chd/2022 and 480/Chd/2022 are having identical facts as submitted by both the parties, the reasoning and the resultant order in ITA No. 473/Chd/2022 will apply *mutatis mutandis* in these appeals also. Accordingly, the impugned order in these seven appeals also stand quashed.

11. In the result, all the appeals of the respective assessee stands allowed.

Order pronounced on 28/10/2022.

Sd/-

संजय गर्ग
(SANJAY GARG)
न्यायिक सदस्य / JUDICIAL MEMBER
MEMBER
AG
Date: 28/10/2022

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar