आयकर अपीलीय अधिकरण, कोलकाता पीठ 'ए', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.1121/Kol/2019
Assessment year: 2012-13

Animesh Autocorp (P) Ltd.....……..…Appellant
C/o Subash Agarwal & Associates,
Advocates, Siddha Gibson,
1, Gibson Lane, Suite-213,
2nd Floor, Kolkata-700069.
[PAN: AAJCA9228J]

vs.

PCIT-4, Kolkata……...….....…….....……..…..…..Respondent

Appearances by:
Shri Subash Agarwal, Advocate, appeared on behalf of the appellant.
Shri Biswanath Das, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : November 02, 2022
Date of pronouncing the order : December 01, 2022

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 08/03/2019 of the Learned Principal Commissioner of Income Tax, Kolkata – 4, Kolkata, (hereinafter referred to as the 'ld. Pr. CIT') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). The assessee in this appeal has taken the following grounds of appeal:

> *"1. (a) For that on the facts and in circusmtances of the case, the order passed by the Ld. Principal CIT u/s 263 of the Act is bad in law and is liable to be quashed.*
>
> *(b) For that on the facts and in the circumstances of the case the Ld. Principal CIT was not justified in initiating proceedings u/s 263.*

2. (a) For that the Ld. Principal CIT erred in excercising the power of revision for the purpose of directing the A.O. to hold another investigation when the A.O. had complied with the directions of the predecessor Principal CIT, Kolkata- 4 in the preceding order u/s 264 passed on 11.03.2016.

3. For that the appellant craves leave to add, alter or delete all or any of the grounds of appeal."

2. The assessee in this appeal has assailed the revision order passed by the ld. Pr. CIT u/s 263 of the Act on the ground that the ld. Pr. CIT has wrongly and illegally exercised his revision jurisdiction for the second time, whereby, he has given the directions to the AO (in short the 'AO') to re-examine the same issue which was already subjected to examination and verification during the earlier revision proceedings carried out u/s 264 of the Act vide order dated 11/03/2016 of the then ld. Pr. CIT and whereby, the then ld. Pr. CIT had directed the AO to pass the assessment order afresh, culminating to the impugned assessment order.

3. The ld. A/R submitted that pursuant to the directions given by the ld. Pr. CIT vide order dated 11/03/2016 passed u/s 264 of the Act, the AO re-examined the issue and verified the details and evidence on record and thereafter passed the impugned assessment order dt. 29/04/2016 accepting the claim of the assessee. The ld. A/R further submitted that the ld. Pr. CIT has wrongly exercised the revision jurisdiction second time to direct the AO to re-examine the same issue which has already been duly examined and verified by the AO. The ld. A/R in this respect has placed reliance on various judicial decisions, copies of which has been placed on record.

4. The ld. D/R, on the other hand, has relied on the impugned second revision order passed by the ld. Pr. CIT and has submitted that failure on part of the AO to conduct proper enquiries given revision jurisdiction to the ld. Pr. CIT u/s 263 of the Act.

5. We have heard the rival contentions and gone through the record and have also considered the various judicial decisions cited during the course of hearing.

5.1. The chronology of events in this case is that the assessment order was passed by the AO u/s 143(2) of the Act on 23/03/2015, whereby, the AO made additions of Rs.2,69,25,000/- on account of share capital money and share premium received. Thereafter, the assessee moved to the ld. Pr. CIT u/s 264 of the Act submitted that the AO while passing the assessment order dated 23/03/2015 has not considered the detailed submissions and evidence furnished by the assessee to prove the identity and creditworthiness of the share subscribers and genuineness of the transactions. The ld. Pr. CIT called for the remand report from the AO in this respect. After considering the remand report sent by the AO, the ld. Pr. CIT observed that it was apparent from the records, and also from the remand report furnished by the AO, that the case of the assessee was not properly examined and that the assessment was completed in a hurried manner with a predetermined mind-set without appreciating all the evidence and details on the file. The ld. Pr. CIT accordingly set aside the assessment order dated 23/03/2015 and directed the AO to pass a speaking assessment order after verification facts and details.

5.2. Thereafter, the consequential assessment order dated 29/04/2016 was passed by the AO whereby the AO accepted the claim of the assessee of share

application money and share premium received during the year holding that the assessee has successfully established the identity and creditworthiness of the share subscribers and genuineness of the transactions.

6. Thereafter, the ld. Pr. CIT vide impugned order dated 08/03/2019 exercising his revision jurisdiction u/s 263 of the Act, set aside the assessment order dated 29/04/2016 holding that the above stated issue relating to share application money and share premium received, needs further verifications and that the assessment order passed by the AO was erroneous and prejudicial to the interest of the revenue on the ground of lack of adequate enquiries by the AO. He directed the AO to frame the assessment afresh after making due enquiries and verifications and after giving the assessee a reasonable opportunity to produce documentary evidence which it may choose to rely on for substantiating its own claim.

7. At the outset, the ld. Counsel for the assessee invited our attention to the various details furnished by the assessee, not only during the original assessment proceedings but also, during the subsequent assessment proceedings. The ld. Counsel for the assessee has further submitted that even all the share subscribers had duly responded to the notice issued u/s 133(6) of the act and acknowledged the investment and further they have furnished the details including board resolution along with master data of the companies, copies of the ITR, copies of the bank statement and balance sheet etc., with complete address and PAN Nos. The ld. Counsel for the assessee further invited our attention to the revision order passed u/s 264 of the Act dated 11/03/2016, by the then ld. Pr. CIT, copy of which has been placed at page 10 of the paper book. A perusal of the said order reveals that the ld. Pr. CIT had asked the AO to furnish his response after due verifications in respect of each of the issues, in

response to which the AO has duly made observations regarding each of the issues relating to the identity of the assessee, its business, the details of share application money and premium received and relating to the identity, creditworthiness of the share subscribers and genuineness of the transactions etc. The ld. AO has duly reported that the identity, creditworthiness of the share subscribers and even the source of share application money was duly verified. The AO also duly verified that the share application money was received from relatives and promoters and that the share application money was needed to run business of automobile dealership by the assessee and to increase its profitability. As the future of dealership of automobiles was good, therefore, the share applicants who had acquaintance and faith in the assessee, having considered the growth aspect in the automobiles sector, had invested in the assessee company.

7.1. In relation to the disallowance u/s 40(a)(ia) of the Act, it was explained that the payments were made to transporters who were in the business of plying, hiring and delivery of goods and after receiving the payment, they had duly furnished their PAN Nos.. As per the relevant provisions of Section 194C of the Act, as applicable for the Assessment Year under consideration since the assessee had obtained the PAN Nos. from the concerned transporters, therefore, the assessee was not liable to deduct TDS on such payments.

8. The ld. Counsel for the assessee had submitted that, despite all the verification done during the assessment proceedings, the ld. Pr. CIT again referred the matter to the AO for examination and verification and pass a fresh assessment order. The AO in the assessment order dated 29/04/2016 has duly mentioned that the assessee's submission has been verified from the assessment records and further that the identity, creditworthiness of the subscribers and the

genuineness of the transactions were well established and that the source of the share application money was duly explained. The AO also verified the issue relation to disallowance u/s 40(a)(ia) of the Act.

9. We have also gone through the impugned revision order passed u/s 263 of the Act and found that the entire order of the ld. Pr. CIT is a general order and the ld. Pr. CIT has not pointed out specifically as to why he was not satisfied and to which of the details, furnished by the assessee. The ld. Pr. CIT has neither mentioned the name and details of the share subscribers nor has he mentioned why he did not believe the identity or creditworthiness of a particular share subscriber, for directing the AO to make further enquiries.

9.1. At this stage, it will be relevant to discuss the relevant provisions of Section 263 of the Act.

"**Section 263(1) of the Income- Tax Act reads as under:**

> *(1) The 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 [2] Assessing] Officer 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. ……"*

9.2. The sum and substance of the above reproduced section 263(1) can be summarized in the following points:

1) The Commissioner may call for and examine the record of any proceeding under the Act;

2) If he considers that the order passed by the AO is

   (i) erroneous; and

(ii) is prejudicial to the interest of Revenue;

3) He has to give an opportunity of hearing in this respect to the assessee; and

4) He has to make or cause to make such enquiry as he deems necessary;

5) He may pass such order thereon as the circumstances of the case justify including,

(i) an order enhancing or,

(ii) modifying the assessment or

(iii) cancelling the assessment and directing a fresh assessment.

10. As per the provisions of section 263 as enumerated above, after getting the explanation from the assessee, the Ld. Pr. CIT was supposed to examine the contention of the assessee. Before passing an order of modifying, enhancing or cancelling the assessment, he was supposed either to himself make or cause to make such an enquiry as he deems necessary. The words "as he deems necessary", in our view, do not mean that the Ld. Pr. CIT is left with a choice either to make or not to make an enquiry. As per the relevant provisions of section 263, it was incumbent upon the Ld. Pr. CIT to make or cause to make an enquiry. So far as the words "as he deems necessary" are concerned, the said words suggest that the enquiries which are necessary to form a view as to whether the order of the AO is erroneous and prejudicial to the interest of Revenue or not? A perusal of the impugned order of the ld. Pr. CIT reveals that the Ld. Pr. CIT had asked the assessee about the validity of the assessment order for want of necessary enquiries and verifications by the AO relating to share application money and premium, to which the assessee had given a detailed reply. Once a point wise reply was given by the assessee, then a duty was cast

upon the Ld. Pr. CIT to examine the reply of the assessee and form a prima-facie opinion as to whether the order of the AO was erroneous so far as it was prejudicial to the interest of Revenue. We further note that the Ld. Pr. CIT did not raise any query as to what enquiries were made by the AO before proceeding to pass the assessment order in question. In our view, once the Ld. Pr. CIT had proceeded to make an enquiry regarding the genuineness of the claim of the assessee, he was supposed to make a prima-facie opinion which may not be a concluding opinion to hold that the order of the AO in his view was erroneous so far as it was prejudicial to the interest of Revenue. The opinion of the Commissioner that the AO had not made proper enquiries or verifications should be based on his objective satisfaction and not a subjective satisfaction from the assessment order. Merely because, the assessment order in question is not a detailed order that itself, does not mean that the AO had not made enquiries in this respect. Admittedly, the AO asked the assessee to furnish the necessary details from time to time which were duly furnished by the assessee and after considering the same the AO passed the assessment order.

11. It is pertinent to mention here that a deeming fiction has been created in section 263 of the Act by the amendment made by Finance Act, 2015 w.e.f. 01.06.15 wherein it has been mentioned that where the Commissioner is of the opinion that the AO had passed the order without making enquiries or a claim has been allowed without enquiring into the claim or that the same is not in accordance with any order or direction or instruction issued by CBDT, that shall be deemed to be erroneous in so far as its prejudicial to the interest of Revenue. The said deeming provisions, in our view, are not applicable for the assessment year under consideration i.e., A.Y. 2012-13

11.1. Even otherwise, a perusal of the revision order passed by the ld. Pr. CIT shows that the ld. Pr. CIT has not pointed out any error or discrepancy in the evidence furnished by the assessee and without examining such evidence and without counter questioning the assessee on the relevant points and even without considering the submission of the assessee furnished in reply to the showcause notice, the ld. Pr. CIT, in our view, was not justified in setting aside the order, simply stating that in his view more enquiries were needed to be carried out by the AO. As observed above, the ld. Pr. CIT without examining the details of the share applicants and the evidence furnished by the assessee has passed a general order observing that in his view the order passed by the AO was on an incorrect assumption of facts or incorrect application of law without mentioning as to what facts were incorrect what was the incorrect law, that was applied by the Assessing Officer.

11.2. The ld. Pr. CIT, taking shelter in Explanation 2(c) to Section 263(1) of the Act, held that the order of the AO was erroneous and prejudicial to the interest of the revenue on the ground of lack of enquiry, which, in our view, is a general observation and no specific observation has been made in respect of any of the details or evidence furnished by the assessee and as to why the ld. Pr. CIT was not satisfied about such details/replies furnished by the assessee. Simply because the ld. Pr. CIT felt that the AO should have made further enquiries on the same issue or that the case was to be examined from some another angle, the same, in our view, cannot be a valid ground to set aside the assessment order. If such an action is allowed by the ld. Pr. CIT in revision jurisdiction then, there would be no end to litigation and there would not be any finality to the assessment. The Explanation 2(c) to Section 263(1) of the Act does not give unbridled powers to the ld. Pr. CIT to simply set aside the assessment order by

saying that the AO was required to make further enquiries without pointing out as to what was lacking in the enquiries made by the AO and why the ld. Pr. CIT was not satisfied with the reply and evidence furnished by the assessee.

12. We further note that the issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench of ITAT Kolkata in the case of *Amritrashi Infra (P) Ltd. vs PCIT in ITA No. 838/Kol/2019; Assessment Year 2012-13; order dt. 12/08/2020*, wherein the Tribunal in almost identical circumstances, while relying upon the various decisions of the Higher Courts had concluded as follows:-

> *"56. To sum up, we find from the above said facts that the Second AO has conducted enquiry as directed by the First Ld. Pr. CIT on the specific subject matter i.e. share capital and premium collected by the assessee-company. Therefore, the finding of Second Pr. CIT that the Second AO has not conducted enquiry is incorrect and is flowing from suspicion only. And as discussed, the allegation/fault pointed out by the Second Ld. Pr. CIT that the Second AO failed to collect total facts also cannot be accepted for the simple reason that Ld. Pr. CIT has not spelt out in the impugned order what he meant by total facts or in the alternative when the assessee has discharged its onus, as required by the law in force in this AY 2012-13, then the Ld. Pr. CIT ought to have called for which ever additional documents/materials or issued summons or issued notices and collected those facts which according to Second Ld. Pr. CIT, the AO omitted to collect and then demonstrated that those actions/documents which he collected in that process gave result to a different finding of fact which will turn upside down the claim of the assessee and thus able to show that the actions/omission of AO in conducting the investigation was erroneous, which unfortunately is not the case before us. And equally bad is the bald allegation/fault that second AO has not collected total facts cannot be accepted being vague and based on conjectures and surmises and so meritless. Since the assessee company has discharged its onus as discussed supra, and still if the Second Pr. CIT had to find the order of Second AO erroneous for lack of enquiry or for not collecting the entire facts, then the Second Pr. CIT ought to have called for the additional facts which he thinks that the Second AO has not collected from the assessee or the shareholders and then explained in his impugned order as to what effect those additional documents would have made on the second assessment order/reassessment order or in other words the impact on the decision making process of framing the second assessment order due to the failure of second AO's omission to collect the additional documents. However, we note that the Second Pr. CIT has not carried out any such exercise or even spelled out in his impugned order, which all documents the second AO failed to collect for considering the total facts; and*

even if we presume he has conducted such an exercise, then he has not been able to bring out any adverse factual finding to upset the view of Second AO. So we find no merit in the vague allegation of second Pr. CIT that the second AO has not collected the full facts necessary to decide the issue of share capital & premium.So we note that the Second AO, the assessing authority who is a quasi- judicial office has discharged his dual role as an investigator as well as an adjudicator. Looking from another angle of doctrine of merger canvassed before us, we note from the facts of this case that the second Ld. Pr. CIT - 4 by passing the second revisional order dated 14.03.2019 has substituted the First Pr. CIT's order passed u/s. 263 of the Act dated 23.08.2016 with his own order which he cannot do since the second assessment order/re-assessment of the Second AO dated 07.12.2016 was pursuant to the first revisional order of the First Ld. Pr. CIT and on the very same subject matter on which specific directions/instructions were given by the First Ld. Pr.CIT, which direction since having been complied by the AO, brings into operation the doctrine of merger the subject matter i.e. share capital & premium collected by assessee company. Resultantly the second Ld. Pr.CIT, again cannot rake-up the same subject matter without the second Ld. Pr.CIT in the second revisional order spells out where the error happened to second AO as an investigator or adjudicator, which exercise the Second Ld. Pr.CIT has not done, so the second Ld. Pr. CIT cannot be permitted to again ask the AO to start the investigation in the way he thinks it proper on the very same subject on which merger has taken place by virtue of the order of First Ld. Pr. CIT. And if this practice is allowed, then there will be no end to the assessment proceedings meaning no finality to assessment proceedings and that is exactly why the Parliament in its wisdom has brought in safe-guards, restrictions & conditions precedent to be satisfied strictly before assumption of revisional jurisdiction. Be that as it may be, as discussed above, we find that the Second Ld. Pr. CIT without satisfying the condition precedent u/s 263 of the Act has invoked the revisional jurisdiction (second time), so all his actions are ab initio void.

57. Lastly, coming to the observations of the Second Ld. Pr.CIT that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue in accordance with Explanation 2(c) to section 263(1) of the Act.[For ready reference it is reproduced.] Explanation 2 under section 263 of the Act reads as under:- For the purpose of this section, it is hereby declared that an order passed by the Assessing Officer 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 Commissioner or Commissioner,-

(a).....

(b).....

(c)the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

58. However, we note that the Ld. CIT(A) has made a bald statement that the AO's assessment order attracts Explanation 2(c) u/s. 263 of the Act. However, he failed to spell out in his impugned order how the action of AO while framing the assessment order is not in accordance to any order, direction or instruction issued by the Board under section 119 of the Act. So, the deeming fiction as envisaged in Explanation (2) u/s. 263 of the Act cannot be used to interfere with the order of AO. This action of Ld. Pr. CIT is bad for non- application of mind. In the light of the aforesaid discussion and case laws cited supra, we find merit in the appeal filed by the assessee, therefore, we allow the appeal of assessee on the ground that since the Ld. Pr CIT has exercised his revisional jurisdiction u/s. 263 without satisfying the condition precedent as stipulated in section 263 of the Act. Therefore, we hold that the impugned action of the Ld. Pr. CIT is without jurisdiction and, therefore, is null in the eyes of law and consequently it is quashed and since we allowed ground number 2&3 of the original grounds raised by the assessee, the other additional grounds are left open. As discussed the impugned order of Ld Pr CIT is quashed."

13. In view of the above discussion and consistent with the view taken by the Co-ordinate Bench of ITAT Kolkata in the case of *Amritrashi Infra Private Ltd. (supra)*, we do not find justification on the part of the ld. Pr. CIT in setting aside the impugned assessment order which was passed by the AO on the directions of the ld. Pr. CIT issued u/s 264 of the Act. The impugned order of ld. Pr. CIT is not sustainable as per law, the same is accordingly quashed.

14. In the result, appeal of the assessee stands allowed.

Kolkata, the 1st December, 2022.

Sd/-	*Sd/-*
[डॉक्टर मनीष बोरड /Dr. Manish Borad]	**[संजय गर्ग /Sanjay Garg]**
लेखा सदस्य /**Accountant Member**	न्यायिक सदस्य /**Judicial Member**

Dated: 01.12.2022.
SC, SPS

Copy of the order forwarded to:
1. Animesh Autocorp (P) Ltd
2. PCIT-4, Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches