

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

आयकर अपील सं./ITA No.77/SRT/2022

निर्धारणवर्ष/Assessment Year: (2017-18)

(Physical Court Hearing)

S. N. Tradelink Private Limited, 3010-3011 Momai Complex, Kadodra Road, Umarvada, Surat – 395010.	Vs.	Principal Commissioner of Income Tax-1, Room No. 114, 1 st Floor, Aaykar Bhawan, Majura Gate, Opp New Civil Hospital, Surat-395001
(Appellant)		(Respondent)
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.: AAKCS0060R		

निर्धारित की ओर से /Assessee by	Shri Rasesh Shah, CA
राजस्व की ओर से / Respondent by	Shri Ashish Pophare, CIT-DR
सुनवाई की तारीख /Date of Hearing	07/12/2022
घोषणा की तारीख /Date of Pronouncement	24/01/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

By way of this appeal, the assessee has challenged the correctness of the order dated 30.03.2022 passed by the Learned Principal Commissioner of Income-Tax (in short “the ld. PCIT”) under section 263 of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2017-18.

2. Grievances raised by the assessee, are as follows:

“1. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in passing the order u/s. 263, although the assessment order passed u/s. 143(3) of the I.T. Act, 1961 was neither erroneous nor prejudicial to the interest of Revenue.

2. It is therefore prayed that above order passed by Pr. CIT u/s. 263 may please be quashed or modified as your honors deem it proper.

3. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”

3. The brief facts and background of the case are that, regular return of income was filed by assessee u/s 139 for the assessment year 2017-18 on 31.10.2017, declaring total income at Rs.10,72,34,340/-. The assessee's case was selected for complete scrutiny and the assessment has been completed on 27.12.2019 and the assessed income was determined at Rs.10,74,36,178/-.

4. Later on, Learned Principal Commissioner of Income-Tax (in short "Ld PCIT") has exercised his jurisdiction under section 263 of the Income-Tax Act, 1961. On perusal of records, it was noticed by Ld PCIT that a survey action u/s 133A of the I.T. Act was carried out at the business and office premises of the company on 09/09/2016. During the course of survey u/s 133A of the Act, when the discrepancy was confronted, Shri Sajankumar S. Agarwal, one of the Directors, in his statement recorded u/s 131 of the I.T. Act on 09/09/2016, has admitted that the value of excess stock found during the course of survey proceedings was not accounted for in the regular books of accounts and accordingly an amount of Rs.4,24,15,665/- was disclosed as unaccounted income of the company for the year under consideration over and above its regular business income.

5. On perusal of the profit and loss account for the year under consideration, it was noticed by Ld PCIT that assessee has shown an amount of Rs.4,24,15,665/- as undisclosed income in the profit and loss account. Further, in the return of income filed by the company for the year under consideration also, it has shown the above amount of Rs.4,24,15,665/- as undisclosed income under the head "other operating revenues". However, it is found that the tax on the unaccounted income disclosed during the course of survey u/s133A of the Act has been calculated at the normal rate of 30% instead of the higher rate of 60%, as provided in Section 115BBE of the Act. It was also noticed by Ld PCIT that while finalizing the assessment, the Assessing Officer has accepted the same without verifying this fact. The amount of Rs.4,24,15,665/- was the undisclosed income of the company for the year under consideration. Further, it was noticed that the company has not furnished any details regarding the sources of the

above undisclosed income of Rs.4,24,15,665/- in respect of the stock found in excess during the course of survey u/s 133A of the Act, either during the course of survey or during the course of assessment proceedings.

6. Therefore, based on the above facts, it was held by Id PCIT that Assessing Officer had not made any verification/ inquiry regarding the nature and source of such undisclosed income of Rs.4,24,15,665/- which was invested in the stock of construction materials found during the course of survey u/s 133A of the Act and whether it was falling within the ambit of the provisions of Section 69C r.w.s. 115BBE of the Act and also the applicability of section 271AAC of the Act, which should have been made during the course of assessment proceedings. The Assessing Officer has passed the order u/s 143(3) of the Act dated 27.12.2019, without making inquiries which should have been made and without application of mind. This makes the order erroneous in so far as it is prejudicial to the interest of the Revenue. Therefore, Id PCIT issued a show cause notice dated 23.03.2022 to the assessee, u/s 263 of the Act.

7. In response to the above show-cause notice, the assessee- company submitted its reply electronically. Relevant portion of the reply of the assessee- company is reproduced as under:

"Arguments:

4. The income disclosed during the survey of Rs. 4,24,15,665/- was credited to Profit and Loss A/c. as per note 3.9 "Revenue From Operation". Accordingly the income declared during the survey was taken as business income as it represented the excess stock connected with the business. The assessee has not got any other source of income and always returned income from the business u/s. 28 of the I. T. Act, 1961. Accordingly, the amount declared in the course of survey is required to be considered as business income only and therefore S. 115BBE cannot be attracted.

5. In support of the above submission, the reliance is placed on the various decisions of Supreme Court and High Courts which are as under. 'Dr. T.A. Qureshi vs. CIT- 287 ITR 0547 (SC)

It has been held by Honourable Supreme Court that "The finding of fact of the Tribunal is that the assessee was engaged in manufacture and selling of heroin. Thus, the IT authorities themselves have recorded a finding that the assessee was engaged in manufacture and selling of heroin. No doubt the order of the Tribunal was subsequently recalled by the Tribunal, but since with ultimate

order the Tribunal has held that the heroin seized was the assessee's stock-in-trade. It is implicit that the Tribunal reiterated the view that the assessee was doing the business of manufacture and sale of heroin. Once the IT authorities record such a finding of fact, it follows that any loss from such a business is a business loss. The assessee was committing a highly immoral act in illegally manufacturing and selling heroin. However, cases are to be decided by Court on legal principles and not on one's own moral views. Law is different from morality. The Explanation to s. 37 has really nothing to do with the present case as it is not a case of a business expenditure, but of business loss. Business losses are allowable on ordinary commercial principles in computing profits. Once it is found that the heroin seized formed part of the stock-in-trade of the assessee, it follows that the seizure and confiscation of such stock-in-trade has to be allowed as a business loss. Loss of stock-in-trade has to be considered as a trading loss."

• *Lakhmichand Baiinaih v. CIT 35 ITR 416 (SC)*

It has been held by Honourable Supreme Court that "when an amount is credited in the business books, it is not an unreasonable inference to draw that it is a receipt from business. It was also observed that as the credits were found in the business accounts of the assessee and the explanation as to how the amounts came to be received was rejected by the Income-tax authorities, the Income-tax authorities were entitled to treat the credits as business receipts chargeable to tax."

• *Nalinikant Ambalal Mody v/s. CIT 61 ITR 428 (SC)*

It has been held by Honourable Supreme Court that "whether an income falls under one head or another has to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter."

• *CIT v/s. DP. Sandu Bros. Chembur (P.) Ltd. - 273 ITR 1 (SC)* It has been held by Honourable Supreme Court that "there cannot be any headless income. So the ratio of decision of *Fakir Mohmed Haji Hasan - 247 ITR 290* is not applicable."

- *CIT v. Shilpa Dyeing & Printing Mills (P.) Ltd. - 39 taxmann.com 3 (Guj.)*
- *J.K. Chokshi vs. ACIT- Tax Appeal 149 of 2003 (Guj.)*

It has been held by Honourable High Court that "once it was established that the assessee had no other source of income at the relevant time or in the past, it could be safely concluded that the assessee had not other income other than income from business."

Therefore, a finding of fact was recorded by the Tribunal that the assessee received additional income from business only. The High Court, held that once Tribunal had come to the conclusion that additional income was from business, remuneration paid to partners had to be deducted while considering profit and loss."

6. Without prejudice, it is submitted that the amendment to section 115BBE was made through Taxation Laws (2nd amendment Act 2016) which received the assent of the President on 15.12.2016 and was published vide gazette dt.

15.12.2016. The law is well settled that the Income Tax Act as it stands amended on the 1st day of April of any FY must apply to the assessments of that year. Any amendments in the Act which come into force after the 1st day of April of FY would not apply to the assessment to that year, even if the assessment is actually made after the amendments came into force. The assessee relies on the following judgments:

- *Karimtharuvi Tea Estate Ltd. Vs State of Kerala* as reported in [1966] 60 ITR 262 (SC)

The Hon'ble Apex Court in the case re-iterated a settled position of law and held that "10. Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into, force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force."

- *CIT Vs S.A. Wahab* as reported in [1990] 48 Taxman 362 (Kerala) The Hon'ble Kerala High Court held that:

"6. We are of the opinion that though the subject to the charge is the income of the previous year, the law to be applied is the law that is in force in the assessment year, unless the law is changed. In fact, what has to be looked into is the law of income-tax. The provision of the Act as it stands on the 1st April of a financial year must apply for that year. Further, since the law that has to be applied is the law as it stands on the 1st April of a financial year, any amendments in the Act, which come into force after 1st April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force. This position has been made clear by the Supreme Court in *CIT v. Scindia Steam Navigation Co. Ltd.* [1961] 42 ITR 589 and in *Karimtharuvi Tea Estate Ltd. v. State of Kerala* [1966] 60 ITR 262."

- *Avani Exports Vs CIT* as reported in [2012] 23 taxmann.com 62 (Guj.)

The Hon'ble Gujarat High Court in the case held that "Although in taxing statute laxity is permissible and after giving a benefit to the assessee based on some specific conditions, such benefit can definitely be curtailed out, the same must be effective from a future date and not from an earlier point of time. If after inducing a citizen to arrange his business in a manner with a clear stipulation that if the existing statutory conditions are satisfied, in that event, he would get the benefit of taxation and thereafter, the revenue withdraws such benefit and imposes a new condition which the citizen at that stage is incapable of complying whereas if such promise was not there, the citizen could have arranged his affairs in a different way to get similar or at least some benefit, such amendment must be held to be arbitrary and if not, an ingenious artifice opposed to law. In the instant case, the object of the amendment, as it appears from the statements of the Finance Minister while moving the bill, is to get rid of the alleged wrong decision of the Tribunal interpreting the then provision of the statute in a way beneficial to the assessee, which according to the Finance Minister, was never the intention of the legislature. If such be the position, the

revenue has definitely right to challenge the decision of the Tribunal as a wrong one before the higher forum, but on a plea of delay in disposal of appeal if filed, without challenging the decision of the Tribunal before the High Court or the Supreme Court, the revenue cannot curtail such benefits by proposing amendment, incorporating a new provision in the Statute from an anterior date. According to the existing law enacted by the Parliament itself, wrong orders passed by a Tribunal should be challenged by aggrieved party before the appropriate High Court and if such party is aggrieved, by order of the High Court, he should move to the Supreme Court."

- *CIT v. Vatika Township (P.) Ltd. [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 (SC).*

*It has been held by Honourable Supreme Court that "Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's background adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lexprospicit non respicit*: law looks forward not backward. As was observed in *Phillips v. Eyre*: a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law."*

- *CIT v. Walfort Shares & Stock Brokers (P.) Ltd. [2010] 326 ITR 1/192 Taxman 211(SC)*

It has been held by Honourable Supreme Court that "Retrospective operation of law should not be given so as to effect, alter or destroy an existing right and to create new liability or obligation. New liability cannot be created by a subsequent amendment in respect of a transaction when such law was not in the Statute book."

- *CIT v. Gold Coin Health Food (P.) Ltd. [2008] 304 ITR 308/172 Taxman 386 (SC). It has been held by Honourable Supreme Court that "It is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations."*

- *Sedco Forex International Drill Inc. v. CIT [2005] 279 ITR 310/149 Taxman 352 (SC).*

It has been held by Honourable Supreme Court that "Taxing provision imposing extra liability upon the assessee shall not be held as applicable retrospectively. A provision must be read subject to the rule that in the absence of an express

provision or clear implication, the Legislature does not intend to attribute the amending provision, a greater retrospectively than is expressly mentioned. It is settled law that a taking provision imposing liability is governed by the normal presumption that is not retrospective."

• *CIT v. Hindustan Electro Graphites Ltd. [200] 243 ITR 48/109 Taxman 342 (SC). It has been held by Honourable Supreme Court that "Retrospective Amendment of law could not compel the assessee to deposit tax on additional income."*

• *Govind Das v. ITO [1976] 103 ITR 123 (SC). It has been held by Honourable Supreme Court that "Now, it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."*

• *PCIT v Aacharan Enterprises (P.) Ltd [2020] 117 taxmann.com 745 (Rajasthan) It has been held by Honourable High Court that "Section 115BBE providing that no set off of any loss shall be allowed to assessee against deemed income under sections 68, 69, 69A to 69D could not be applied retrospectively."*

In view of the various judicial pronouncement, cited hereinabove, it is manifested that the provisions of section 115BBE of the Income Tax Act did not stand amended as on first day of April for the Financial Year 2016-17, it would not apply to the assessment for that year, even if the assessment is actually made after the amendments have come into force.

7. In view of the submission made, your honour is requested to drop the proceedings u/s. 263."

8. However, the Ld. PCIT rejected the contention of the assessee and held that during the course of survey, on physical verification of stock excess stock valued at Rs.4,24,15,665/- was found at the business premises of the assessee. On further verification, it was found that the assessee had not accounted the above stock of Rs.4,24,15,665/- in its regular books of accounts. When confronted on this issue, it was admitted by Shri Sajjankumar S. Agarwal, one of the directors of the assessee company that the above such excess stock of Rs.4,24,15,665/- was not accounted for in the regular books of accounts of the assessee company and the said stock was purchased in cash. Accordingly, Shri Sajjankumar S. Agarwal with the consent of the other directors of the assessee

company had admitted the above amount of Rs.4,24,15,665/- as undisclosed income of the assessee firm for the year under consideration over and above its regular business income. Therefore, it was quite evident that the above unaccounted materials forming part of the unaccounted stock were purchased out of the undisclosed income of the assessee company. Further, while filing the return of income for the A.Y.2017-18, the assessee itself has shown the income admitted during the course of survey as undisclosed income under the head “other operating revenue”. However, while computing the tax liability, the assessee has included the undisclosed income admitted during the course of survey in the normal business income and calculated the tax at the normal rate of 30% instead of at the higher rate of 60% as provided in Section 115BBE of the Act. During the course of assessment proceedings, the Assessing Officer has not made any verification or inquiry as to why the assessee has included the undisclosed income admitted during the course of survey in the normal business income while computing the tax liability especially when the assessee itself has shown the income disclosed during the course of survey as undisclosed income in the return of income filed for the year under consideration. On perusal of the case records, it was noticed that the assessee has not furnished any details regarding the exact nature and sources of the income of Rs.4,24,15,665/- invested in the excess stock found during the course of survey either during the course of survey or during the course of assessment proceedings and accordingly the above undisclosed income of Rs.4,24,15,665/- was liable to be taxed as per the provisions of section 69/69C r.w.s. 115BBE of the Act. The director of the assessee company himself accepted that such unaccounted stock was purchased by cash, but during the assessment proceedings the Assessing Officer has not asked for source of such cash generation. However, it was found that the Assessing Officer has failed to carry out any verification or inquiry in this regard which should have been made during the course of assessment proceedings.

9. In the reply furnished during the course of revision proceedings u/s 263 of the Act, the assessee has contended that the amendment to Section 115BBE of the Act substituting a higher rate of 60% for the erstwhile 30% was made with

effect from 15/12/2016 and accordingly the said amendment is not applicable in the case of the assessee company for the year under consideration. This contention of the assessee is found to be not correct as the amended provisions of Section 115BBE of the Act are applicable w.e.f. 01/04/2017 i.e. from the A.Y. 2017-18 and accordingly applicable from the F.Y.2016-17 (i.e. from 01/04/2016). The assessee has relied upon various decisions of the Hon'ble Courts in support of its` contention that the amended provisions of Section 115BBE of the Act is prospective effect and not retrospective effect. Here it is pertinent to mention that the amended provisions of Section 115BBE of the Act is applicable with effect from 01/04/2017 i.e. from the A.Y.2017-18. The undisclosed income of Rs.4,24,15,665/- in respect of unaccounted stock admitted during the course of survey is pertaining to the F.Y.2016-17 relevant to A.Y. 2017-18 and accordingly the amended provisions of Section 115BBE of the Act are clearly applicable in respect of the above undisclosed income of Rs.4,24,15,665/-. However, as stated in the foregoing paragraphs, while finalizing the assessment, the Assessing Officer has not made any verification or inquiry regarding the applicability of the provisions of Section 69/69C r.w.s. 115BBE of the IT. Act as also Section 271AAC of the Act in respect of the above undisclosed income of Rs.4,24,15,665/- disclosed by the assessee on account of unaccounted stock of construction materials found during the course of survey u/s 133A of the Act.

10. In view of the above facts, it was held that Assessing Officer has finalized the assessment without verification or inquiry on the above issues which should have been made during the course of assessment proceedings. Accordingly, the assessment order u/s 143(3) of the Act for the A.Y.2017-18 passed by the Assessing Officer on 27.12.2019 was treated by Id PCIT as erroneous in so far as it is prejudicial to the interest of revenue within the meaning of Section 263 of the Act.

11. Aggrieved by the order of Ld. PCIT, the assessee is in appeal before us.

12. Shri Rasesh Shah, Learned Counsel for the assessee submitted that during the survey proceedings, the assessee has submitted an explanation, the nature of the amount of undisclosed income as a business income and to substantiate these facts, the Ld. Counsel submitted an English translation copy of question and answer. The question No.30 of the statement recorded on 09.09.2016 under section 131(1A) of the Act of Sajjan Kumar Agarwal, is reproduce below:

“English translation of Q & A no. 30 of the statement recorded on 09.09.2016 u/s 131(1A) of Shri Sajjankumar Agarwal.

Que. During the course of survey at the godown of M/s. S. N. Tradelink Pvt. Ltd. situated opposite of gate of Hojiwala Ind. Estate, Sachin Palsana Road, the inventory of the stock maintained at the said premises has been prepared by your staff and Shri Kunjal R. Shah (CA). According to the same the quantity of the stock is 1,419 MT, however the stock as per the books of accounts is (- 12,046.29) MT. On the basis of this, there is additional stock of 13,465.29 MT, the value of the said stock at the rate of Rs.3,150/- per MT (inclusive expense of transportation etc.) is Rs.4,24,15,665/-. Explain the same.

Ans. The difference in the said stock is on account of cash purchases and the same has not been accounted in our books of accounts. The approximate value of the said difference is Rs.4,24,15,665/-, which I admit to be the undisclosed income of F.Y. 2016-17 and offer the same for taxation and my co-directors Shri Navin Suratwala and Shri Shailesh Agrawal also agree with the said declaration. I admit the additional stock of Rs.1,28,46,204/- of my proprietorship concern M/s Adarsh Lignite Suppliers as undisclosed income for current F.Y. 2016-17 and declare the same as additional income.”

13. Therefore, Ld. Counsel contended that nature of undisclosed income is a pure business income and hence does not fall in the provisions of section 115BBE of the Act, therefore the higher amount of taxation is not attracted in the assessee’s case under consideration.

14. Apart from this, the Ld. Counsel submits that during the assessment stage, the assessee has submitted its reply to the Assessing Officer, in response to the notice under section 142(1) of the Act, wherein the Assessing Officer has raised the question relating to the undisclosed amount of survey proceedings. Thus, an adequate reply has been submitted by the assessee during the assessment stage and Assessing Officer has applied his mind, therefore order passed by the Assessing Officer cannot be considered as erroneous and prejudicial to the interest of the Revenue. This way, ld Counsel prays the Bench that order passed by ld PCIT may be quashed.

15. On the other hand, Learned Departmental Representative (Ld. DR) for the Revenue took us through the order passed by the Assessing Officer under section 143(3) of the Act and stated that the assessment order passed by the Assessing Officer under section 143(3) of the Act, dated 27.12.2012 did not disclose the issue under consideration. The Assessing Officer has received the documents and the evidences from the assessee and merely kept on record and he did not discuss in the assessment order about allowability or otherwise of the amount disclosed by the assessee during the survey proceedings. Besides, during the survey, the assessee has offered undisclosed income which should be taxed at a higher rate. Therefore, Ld DR stated that Assessing Officer has blindly allowed the claim of the assessee without examining the facts, hence assessment order passed by the Assessing Officer under section 143(3) of the Act, dated 27.12.2019 is erroneous as well as prejudicial to the interest of Revenue.

16. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. PCIT and other material brought on record. We note that Assessing Officer issued notice under section 142(1) of the Act which is placed at paper book page nos. 46 to 48. The Assessing Officer asked the question from the assessee about the income disclosed in survey. The relevant part of notice so issued, under section 142(1) of the Act by the assessing officer is reproduced below (to the extent useful for our analysis) :

viii. The main reasons for selection through CASS is narrated hear in below, please justify and explain the same with proper supporting details and evidences.

* With respect to the survey disclosure you are requested to submit the following details:

- Details of the income disclosed during the survey.
- Accounting entries passed to incorporate the survey disclosure in books of accounts.
- GP/NP ratios with and without survey disclosure in the following format:

	Without Survey Disclosure	With Survey Disclosure
Turnover		
Gross Profit		
GP Ratio		
Net profit		

In case, you wish to authorize any other person to attend the hearing on your behalf, please provide legal Power of Attorney to him, other wise said person will not be allowed to attend the assessment proceeding in your case. In this regard, your hearing fixed on 06.12.2018 at 11:45 AM.

17. In response to the above notice, under section 142(1) of the Act, the assessee submitted its reply, which is placed at paper book page no.31. The assessee again submitted its reply before the assessing officer by way of letter dated 09.01.2019, stating as follows:

“...8) with respect to the survey disclosure, we are filing the following details.
a) Income amounting to Rs.4,24,15,665/- was disclosed during the survey.
b) Ledger accounts showing the accounting entries passed for the income disclosed during the survey proceedings are filed herewith....”

18. Thus, we note that during the assessment stage, the assessing officer made inquiry about the issue raised by Id PCIT. That is, disclosed amount during the survey at Rs.4,24,15,665/- was examined by the assessing officer by raising question through notice under section 142(1) of the Act and after getting the reply from the assessee, the assessing officer has applied his mind.

19. We note that nature of the amount disclosed during the survey was business income. The relevant question No.30 of the statement recorded on 09.09.2016 under section 131(1A) of the Act, of Shri Sajjan Kumar Agarwal, is reproduced above, which clearly shows that undisclosed amount pertains to

business income, therefore the provisions of Section 69/69C r.w.s. 115BBE of the I.T. Act, do not apply to the assessee under consideration.

20. We note that just because Assessing Officer has passed order in brief and did not bring these facts in the assessment order, does not mean that he has not applied his mind. We note that when there is an application of mind and a decision has been taken by the Assessing Officer therefore the assessment order cannot be said to be erroneous unless the same is potentially wrong or unlawful. For that we rely on the judgment of the Hon'ble Supreme Court in the case of M/s. Malabar Industrial Co. Ltd. Vs CIT (2000) 243 ITR 83 (SC).

21. Further, we note that the Hon'ble Delhi High Court in the case of CIT Vs. Sunbeam Auto Ltd. (227 CTR 133) drew the thin line of difference between "lack of inquiry" and "inadequate inquiry" and held that in the case of inadequate inquiry there cannot be 263 order. Therefore, without prejudice, even it is held that the AO had made inadequate inquiry then also powers u/s 263 of the Act cannot be invoked under the facts and circumstances of the case. This position is further supported by the following judicial pronouncements;

- (a) CIT Vs. Anil Kumar Sharma, 335 ITR 83 (Del HC);
- (b) CIT vs Gabriel India Ltd. 203 ITR 108 (1993);
- (c) CIT Vs. Vikash Polymers 341 ITR 537 (Del);

22. In this regard, we also place reliance on the judgment of Delhi High Court in the case of Fab India Overseas (P) Ltd. Vs. CIT, 201 Taxman 173 wherein under the similar facts and circumstances of the case the Hon'ble court observed as under:

"In view of aforesaid, it is reiterated that the Assessing Officer called for certain clarifications through the questionnaire of the assessee and that the same were furnished with the required details. This fact is even taken note of by the Commissioner himself in his order. The only grievance of the Commissioner was that the Assessing Officer should have made further enquiries rather than accepting the explanation given by the assessee. It cannot be said to be a case of

lack of enquiry. We accordingly, answer Question No. 2 in favour of the assessee and against the Revenue. " (Emphasis supplied)."

23. In view of the facts of the case and judicial pronouncements relied upon, it is well established that the impugned order passed u/s 143(3) of the Act dated 27.12.2019 was passed after calling for relevant information and after detailed examination of the same. The Assessing Officer has passed the assessment order after calling for details on the issue and after considering the reply and documents after verification of the same and after due application of mind passed the assessment order, so it cannot be termed as erroneous and prejudicial to the interest of the revenue. So, the Ld. PCIT's finding fault with the order of the Assessing Officer is erroneous as well as prejudicial to the interest of revenue on account of lack of inquiry has to fail. Therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the Ld. PCIT. Therefore, we quash the order of the Ld.PCIT dated 27.12.2019, being *ab initio void*.

24. In the result, appeal filed by the assessee is allowed.

Order pronounced on 24/01/2023 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

सूरत /Surat

दिनांक/ Date: 24/01/2023

SAMANTA /Dkp Out Sourcing Sr.P.S

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

By Order

// True Copy //

Senior Private Secretary / Private Secretary /
Assistant Registrar ITAT, Surat