IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE Ms. MADHUMITA ROY, JUDICIAL MEMEBR
& SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 59/Ind/2022
(**निर्धारण वर्ष /** Assessment Year : 2017-18)

Smt. Anupama Asawa, Indore	**बनाम/** Vs.	**PCIT-I,** Indore
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AIHPA 0322 N		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/**Appellant by** :	Shri S.N. Agrawal & Shri Bhavesh Agrawal, CAs
प्रत्यर्थी की ओर से / **Respondent by :**	Shri P.K. Mishra & Shri P.K. Mitra, CIT-DRs

सुनवाई की तारीख/**Date of Hearing**	20.09.2022 & 19.12.2022
घोषणा की तारीख /**Date of Pronouncement**	24.01.2023

<u>O R D E R</u>

<u>PER Ms. MADHUMITA ROY, JM:</u>

The instant appeal filed by the assessee is directed against the order dated 03.02.2022 passed by the Ld. Principal Commissioner of Income Tax-1, Indore (M.P.) (hereinafter referred to as 'Ld. PCIT') arising out of the order dated 03.06.2019 passed by the ITO-2(2), Indore (hereinafter referred to as 'Ld. AO') under Section 143(3) of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act') for Assessment Year (hereinafter referred to as 'A.Y.') 2017-18.

2. The assessee has raised the following grounds of appeal:

"1. That on the facts and in the circumstances of the case and in law, the Ld Pr. CIT erred in setting-aside the order as passed by the assessing officer under section 143(3) of the Income-tax Act, 1961 by invoking the provisions of section 263 of the Income-tax Act, 1961 even when the order as passed by the assessing officer was neither erroneous nor prejudicial to the interests of the revenue.

2. That on the facts and in the circumstances of the case and in law, the Ld Pr. CIT erred in setting-aside the order as passed by the assessing officer by invoking the provisions of section 263 of the Income-tax Act, 1961 even when the assessment order was passed by the assessing officer under section 143(3) of the Act after conducting necessary enquiries and after due application of mind.

3. That on the facts and in the circumstances of the case and in law, the Ld Pr. CIT erred in setting-aside the order as passed by the assessing officer by invoking the provisions of section 263 of the Act and directing the assessing officer to disallow the deduction as claimed by the appellant under section 54B and 54F of the Income-tax Act, 1961 even when the appellant has rightly claimed deduction of Rs. 91,35,500/- and Rs. 85,86,419/- and under section 54B and 54F of the Income-tax Act, 1961 respectively.

4. The appellant reserves the right to add, alter and modify the grounds of appeal as taken by her."

3. Brief facts as culled out from the records are that the income-tax return of the assessee for the A.Y. 2017-18 was filed on 27.03.2018 declaring total income at Rs.14,63,470/-. The case of the assessee was selected for Limited Scrutiny through CASS for examination of issue related to 'Deduction/ Exemption from capital gains'. The Ld. AO completed the assessment and passed assessment order u/s 143(3) of the Act on 03.06.2019 assessing total income at Rs.14,63,470/-. Subsequently, the Ld. PCIT invoked the provisions of section 263 of the Act and issued the following show cause notice to the assessee (relevant extract is reproduced below):

"03. On perusal of the details on record of the relevant year, it is seen that, the notice u/s 143(2) of the Income Tax Act, 1961 was issued by the AO on 11.08.2018 to produce any evidence on which the assessee may rely in support of the said return of income by 21.08.2018. Further, the notice under sub section (1) of Section 142 of the Income Tax Act, 1961 was issued to the assessee on 10.04.2019 for furnishing the relevant documents. On examination of the records, following discrepancies are noted.

3.1. On perusal of the submission on record, it is seen that you had submitted the computation of income in the case of assessee for A.Y. 2017-18 wherein you have claimed the deduction u/s 54F of the IT Act of Rs. 85,86,419/- and deduction u/s 54B of Rs. 91,35,500/- A.Y. 2017-18. However, no conclusive evidence and supporting documents had been furnished before the assessing officer to establish the admissibility and correctness of the claim for the deduction u/s 54F of the IT Act of Rs. 85,86,419/- and deduction u/s 54B of Rs. 91,35,500/- in A.Y. 2017-18 made by the assessee during the period under consideration. Further, neither the assessing officer had made sufficient inquiries in this regard nor made any verification. Thus, you have not filed relevant supporting details to justify the admissibility and correctness of the above claim the deduction u/s 54F of the IT Act of Rs. 85,86,419/- and deduction u/s 54B of Rs. 91,35,500/- in A.Y. 2017-18. Therefore, the assessing officer has failed to verify the admissibility and correctness of the same.
3.2 On perusal of the record, following facts emerge:

Assessee has sold an agricultural land situated at survey no. 77/1, 82/8 and 82/9 'Village-Chhota Bangarda, Indore to M/s Vakratund Real Infra Pvt, on 12/04/2016 for a consideration of Rs. 2,20,40,000/-. Copy of sale deed is placed on record. Further perusal of computation of income, it is noted that out of this sale consideration the assessee claimed indexed cost of acquisition amounting to Rs. 28,54,612/-. Offered long term capital gain amounting to Rs. 1,91,85,388/- and claimed exemption/deduction u/s 54F amounting to Rs. 85,86,419/- and u/s 54B amounting to Rs. 91,35,500/- and shown taxable income from long term capital gain amounting to Rs. 14,63,469/-.

3.2(a) Wrong claim u/s 54B

The assessee has purchased an agriculture land at 'Village-Abu Khedi Tahsil Dhar at Rs. 85,10,000/- on 23/03/2018 and claimed exemption u/s 54B amounting Rs. 91,35,500/-. For claiming deduction u/s 54B, the land transferred should be agricultural land and the agriculture land should be used by the individual for agricultural purpose at least for the period of two years immediately preceding the date of transfer. In this regard, a query was raised by the A.O. on 30-05-2019 asking the assessee to submit Form No. B1/P2, sale-bills of agricultural Produce, Bills of related expenditure for earning agricultural income. This query was asked because deduction u/s 54B can be claimed and can be allowed only if the relevant land is being used for agricultural purposes, not otherwise. But in this case evidence of using the land for agriculture purpose such as B1/p2, sales bill of agricultural produce, bills of related expenditure for earning agriculture income was not submitted by the assessee.

Vide reply dated 31-05-2019, the assessee has claimed that land was given on "BATAI". But this statement is unsupported by any evidences.. As per "Anuband Lekh" (i.e Agreement-Deed) placed on record, it is noted that the land was given on 'Batai' for 6 Quintals of wheat, as rent to be paid to the assessee which is also not supported by any evidences on record to show that any agricultural activity was being undertaken even by the 'Bataidar'. On further perusal of the income tax returns on ITBA filed by the assessee for the last two year i.e. 2015-16 and 2016-17 no agricultural income has been offered by the assessee. This clearly indicated that no agricultural activities have been carried out on the land. Hence the land transferred is not an agricultural land and the assessee has not fulfilled the basic condition to claim the exemption/deduction u/s 54B and not eligible to claim the exemption which resulted in under assessment of income of 91,35,000/-.

3.2(b) Wrong claim u/s 54F

The assessee has purchased a plot no. 15 and 14 situated in Mahesh Nagar on 13/12/2016 amounting to Rs. 67,33,200/- as per the purchase deed placed on record. The cost of the plot with other expenses shown at Rs. 73,64,000/-. The assessee has further claimed Rs. 25,00,000/- towards construction of house. In total the assessee has claimed Rs. 85,86,419/- as exemption u/s 54F.

But, corroborated evidences, such as MAP passed by town and country planning, bills for construction-expenses of house to substantiate the submission of the assessee has not been submitted by the assessee. As the land situated at Chhota Bangada, Indore (M.P.) was sold on 12/04/2016 and prescribed period of 3 years u/s 54 of IT Act 1961 is lapsed on 12/04/2019 and documents related to construction/under construction on above mentioned purchased property/plot is not available won record. Therefore it is apparent that the assessee has not constructed any residential house property and made wrong claim of exemption u/s 54F of the Income Tax Act, 1961 to the tune of Rs. 85,86,419/- which resulted in under assessment of income of Rs. 85,86,419/-. The exemption U/s 54F is allowable for investment of capital gain in purchase /construction of residential house property and not allowable for investment in Plot.

Therefore, total under assessment of income is Rs. 1,77,21,919/- (Rs. 91,35,500/- and Rs. 85,86,419/-).

3.3 Thus, during the course of assessment proceedings, you have neither furnished any details nor explained the issues involved with relevant documentary evidence with regard to issues narrated above. It appears that submission and details available on records was not enough to verify the reasons for Selection of scrutiny under CASS. The Assessing Officer has not at all verified these issues and relevant facts involved therein while completing the assessment and accepted the income returned without any application of mind, without conducting proper inquiries and due verification. As such, the assessment is erroneous in the sense that it is prejudicial to the interest of revenue.

> *4. For the reasons stated herein above, the order u/s 143(3) dated 19/12/2019 passed by the Assessing Officer in your case for the A.Y. 2017-18 appears to be erroneous in so far as it is prejudicial to the interest of the revenue. Accordingly, by virtue of the power vested in the undersigned as per the provisions of section 263 of the Income Tax Act 1961, the said order is proposed to be revised under the said section."*

4. In reply to the said show cause notice, the assessee made detailed submissions and also filed various documentary evidences before the Ld. PCIT to demonstrate the fact that the case of the assessee was selected for Limited Scrutiny for examination of issue related to 'Deduction/ Exemption from capital gains' and that the Ld. AO raised specific queries during the course of assessment proceedings requiring the assessee to justify the deduction claimed u/s 54B and 54F of the Act as filed at Page Nos. 38 & 39 of the Paper Book. It was further submitted that the assessee furnished all the requisite details along with supporting documentary evidences before the Ld. AO at Page Nos. 40 & 41 of the Paper Book and the Ld. AO allowed the claim of deduction u/s 54B and 54F of the Act only after examining all the relevant material placed on record thereby leaving no scope to usurp the revisionary jurisdiction vested with the Ld. PCIT. However, the Ld. PCIT was not convinced and was of the view that the Ld. AO should have examined this issue related to 'Deduction/ Exemption from capital gains' in detail and accordingly, the assessment order was held to be erroneous and prejudicial to the interest of Revenue by the Ld. PCIT.

5. Now the assessee is in appeal before the Tribunal challenging the jurisdiction of Ld. PCIT assumed u/s 263 of the Act.

6. Before us, the Ld. Counsel for the assessee submitted that the Ld. AO made detailed inquiries during the course of assessment proceedings requiring the assessee to substantiate the deduction claimed u/s 54B and 54F of the Act in her income-tax return for the A.Y. 2017-18. The Ld. Counsel vehemently argued that the Ld. PCIT was not justified in alleging that the order passed by the Ld. AO was erroneous and prejudicial to the interest of the Revenue since the Ld. AO conducted adequate and proper inquiry, duly examined the details furnished before him and framed the assessment only after making due verification. The Ld. Counsel further submitted that the Ld. AO specifically required the assessee to justify the deduction claimed u/s 54B and 54F of the Act in her income-tax return which was duly replied to and

explained with the help of ample corroborative documentary evidences. Hence, the Ld. Counsel submitted that there was no justification for invoking the revisionary jurisdiction vested u/s 263 of the Act.

7. Per contra Ld. Departmental Representative vehemently argued supporting the order of Ld. PCIT.

8. We have heard rival contentions and perused the records placed before us and carefully gone through submissions made by both the sides and the decisions referred and relied by both the parties. We find that the case of the assessee was selected for scrutiny for examination of deduction claimed by the assessee u/s 54B and u/s 54F of the Act. We further observe that the Ld. AO vide query raised in the notice dated 07.05.2019 and vide query no. 1 raised in the notice dated 30.05.2019 required the assessee to substantiate the deduction claimed by her u/s 54B and 54F of the Act. We also observe that the assessee vide para no. 1.3 and 1.4 of the submission dated 21.05.2019 and vide para no. 1 of the submission dated 31.05.2019 justified the claim of deduction u/s 54B and 54f of the Act along with supporting documentary evidences. It was in this backdrop that the Ld. AO accepted the deduction claimed by the assessee u/s 54B and 54F of the Act.

9. We have carefully considered these documents and we do not find any iota of doubt in respect of submission of all these documents before the Ld.AO and further examination of the same by the Ld.AO which is reflecting from paragraph 2 of assessment order.

10. Under these circumstances, we need to examine the maintainability of the proceedings under Section 263 of the Act, the statutory provision exercised by the Ld.PCIT in interfering with the order passed by the Ld.AO. In fact, it is to be examined whether the order passed by the Ld.AO can be interfered with by the revisional power of the Commissioner of the Income Tax unless the said order is found to be really erroneous and prejudicial to the interest of the Revenue.

11. The phrase "prejudicial to the interest of the Revenue" has to be read in conjunction with an erroneous order passed by the Ld. AO. Moreso, every order of Revenue cannot be treated as prejudicial to the interest of the Revenue as a consequence of an order of the Ld.AO. Apart from that where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous or prejudicial to the interest of the Revenue unless the view taken by the ITO is unsustainable in law. On this ground, the Ld. A.R. has relied upon the judgment passed by the Hon'ble High Court of Gujarat in the case of CIT vs. Nirma Chemicals Works Pvt. Ltd. Reported in (2009) 182 taxman 183 (Gujarat). It was further argued by him that upon considering the entire documents, and upon examining different memos issued by different authorities clarifying the distance of the land and upon exhaustive enquiry, the Ld. AO has finalized the assessment accepting the return filed by the assessee which is evident from the assessment order itself and also from the noting made the Ld. AO in the regular order sheet entries, the same cannot be interfered with by the Ld. PCIT. On the contrary, the Revenue pointed out that the same is not reflecting from the order passed by the Ld.AO. In reply, it was submitted by the assessee's Counsel that the assessment order cannot give detailed reasons in respect of each and every item of deduction, which would cause impossible burden on the AO. On this count, he has further relied upon the judgment passed by the Hon'ble High Court of Gujarat in the case of CIT vs. Kamal Galani, reported in (2018) 95 taxmann.com 261 (Gujarat) and CIT vs. Nirma Chemicals Works (P.) Ltd., reported in [2009] 309 ITR 67 (Guj.), wherein Hon'ble High Court held as under:

> *"22. The contention on behalf of the revenue that the assessment border does not reflect any application of mind as to the eligibility or otherwise under section 80-1 of the Act requires to be noted to be rejected. An assessment order cannot incorporate reasons for making/granting a claim of deduction. If it does so, an assessment order would cease to be an order and become an epic some. The reasons are not far to seek. Firstly, it would cast an almost impossible burden on the Assessing Officer, considering the workload that he carries and the period of limitation within which an order is required to be made; and, secondly, the order is an appealable order. An appeal lies, would be filed, only against disallowances which an assessee feels aggrieved with.*
>
> *23. As far as absence of discussion in the assessment order is concerned, this is what has been laid down by this court in the case of Rayon Silk Mills v. CIT [1996] 221 ITR 155 :—*
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> > *"In the first instance it was contended by learned counsel for the assessee that the very premise on which order under section 263 was made against the assessee, namely, that the Income-tax Officer has not at all examined the goodwill account is not existent.*

According to him, it is apparent from the record that the goodwill account was thoroughly examined by the Income-tax Officer before making the assessment and after examining when he accepted the contention of the assessee its discussion did not find place in the assessment order, as no additions were going to be made or no modifications in the return filed by the assessee were required to be made in that regard.

This contention of the assessee appears to be well-founded. It is true that the assessment order does not speak about the examination of goodwill account as such. However, as we have noticed above, the assessee in his reply to the show-cause notice under section 263 had specifically mentioned that the entire matter was scrutinised and accepted while passing the assessment order. Our attention was also drawn to annexure 'D'. A submission made by the assessee to the Income-tax Officer, Surat, dated 18-10-1976, regarding the assessment year 1974-75 giving detailed chronological data of the constitution of the firm on November 11, 1968, induction of four more partners on 7-11-1972, the creation of goodwill in the books of account of the firm by debiting the goodwill account and crediting the old partners' capital accounts in their profit sharing ratio on that date, formation of a private limited company in the name of Rayon Silk Mills (P.) Ltd., and its induction into the firm as partner by the deed of partnership dated 27-10-1973, and the dissolution of the partnership firm on 23-2-1974, leaving the private limited company as a sole proprietor thereof and the valuation of the business at the book value as on that date. After giving the chronological sequence of events, the assessee also contended in his submission before the Income-tax Officer that there was no actual transfer of any asset inasmuch as when a partner is admitted into the firm no transfer takes place. It was also contended that no cash transfer took place from person to person and the transfer and the dissolution of the firm also did not result in accrual of capital gains. In the face of this material on record, it is difficult to explain that the assessment order was made without making any enquiry into the goodwill account of Rs. 10,75,000. . . ." (p. 158)

[Except the fact to be pleaded separately in this particular paragraph]

12. So far as the jurisdiction of the Ld.PCIT under Section 263 of the Act is concerned, we have carefully considered the judgment relied upon by the assessee in the case of CIT vs. Nirma Chemicals Works (P.) Ltd. (supra). We find, while holding the Tribunal committed an error in upholding the exercise of powers under section 263 of the Act by the Ld. CIT(A) to be valid in the facts and circumstances of the case, the Hon'ble Court has been pleased to observe as follows:

24. There is another aspect of the matter. The assessee had challenged jurisdiction of the Commissioner of Income-tax to exercise powers under section 263 of the Act. For an order of the Assessing Officer to be interfered with in exercise of revisional powers the Commissioner of Income-tax has to find in the first instance that the order is erroneous and, secondly, the order is prejudicial to the interests of the revenue. The conditions are twin condition's as held by the Apex Court and both of them have to be fulfilled before the Commissioner of Income-tax can exercise jurisdiction under section 263 of the Act. In the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 the Apex Court has held (headnote) : "The phrase 'prejudicial to the interests of the revenue1 has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an

Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue, unless the view taken by the Income-tax Officer is unsustainable in law."

25. Applying the aforesaid tests to the facts of the case it is not possible to uphold the order of the Tribunal as regards jurisdiction after considering the law enunciated by the Apex Court. The Assessing Officer after making due inquiries, as noted hereinbefore, adopted one view and granted partial relief under section 80-1 of the Act. The Commissioner of Income-tax takes a different view of the matter. However, that would not be sufficient to permit the Commissioner of Income-tax to exercise powers under section 263 of the Act because when two views are possible and the Commissioner of Income-tax does not agree with the view taken by the Assessing Officer, the assessment order cannot be treated as erroneous and prejudicial to the interests of the revenue unless the view taken by the Assessing Officer is unsustainable in law. That is not the position in the present case. In fact even the partial denial of relief under section 80-1 of the Act has been found to be incorrect by the appellate authority. Therefore, existence of two views stands established. In the aforesaid circumstances, the Commissioner of Income-tax could not have exercised jurisdiction under section 263 of the Act as per settled legal position.

26. The view expressed by this court in the case of Shashi Theatre (P.) Ltd. (supra), therefore, is in consonance with not only the requirement of law but concludes the issue insofar as the present case is concerned. Just as it is not possible to decide grant of investment allowance in relation to one or the other item without considering the eligibility thereof, similarly deduction under section 80-1 of the Act cannot be considered without deciding whether a particular portion of profits and gains has been derived from an industrial undertaking which fulfils the requisite conditions stipulated by the section.

27. In the aforesaid set of facts and circumstances of the case and the view that the court has adopted, it is not necessary to enter into any discussion as regards merits of the controversy which has been brought before this court by the other questions at the instance of the assessee and the question at the instance of the revenue. The reference is answered accordingly by holding that the Tribunal committed an error in upholding the exercise of powers under section 263 of the Act by the Commissioner of Income-tax to be valid in the facts and circumstances of the case, when not only was there a prohibition as stipulated by Explanation (c) of section 263 of the Act but even the twin requirements, viz., pre-conditions for exercise of jurisdiction under section 263 of the Act were not fulfilled.

28. The reference stands disposed of accordingly. There shall be no order as to costs."

13. It is also held in several decisions that the said Explanation does not give unlettered power to the PC1T to assume revisional-jurisdiction to revise every order of the Assessing Officer to re-examine the issues already examined during assessment-proceeding. It is judicially interpreted in several decisions that the intention of legislature behind introduction of Explanation 2 could not have been to enable the PCIT to find fault with each and every assessment-order in unlimited terms, since such an interpretation would lead to unending litigation and there would not be any point of finality of assessment-proceeding done by Ld. AO.

14. At this stage, we refer a recent decision of ITAT, Rajkot in M/s Pramukh Realty, Junagadh, ITA No. 93/Rjt/2022 dated 30.06.2022, where the Hon'ble Bench has extensively dealt a similar case where (i) the assessee had filed details / documents to Assessing Officer during assessment-proceeding; (ii) the AO had considered the same and passed assessment-order thereafter; (iii) Ld. PCIT has made revision invoking Explanation 2 to Section 263 of the Act. After a thorough analysis, the Hon'ble Bench has held that in such circumstances, revision u/s 263 of the Act cannot be done. The relevant paragraphs of the decision are reproduced below:

> *"5. The learned AR before us filed a paper hook running from pages 1 to 157 and contended that all the necessary details about the advances received from the parties, sales shown in the financial statement and details of the service tax returns were filed during the assessment proceedings. The learned AR further contended that the assessment was framed by the AO after considering the, necessary details and verification and application of mind. The learned AR in support of his contention drew our attention on pages 151 to 153 of the paper hook where the copy of the notice under section 142(1) of the Act was placed. Likewise, the learned AR also drew our attention on pages 154 to 157 of the paper book where the reply of the assessee in response to the notice issued under section 142(1) of the Act was placed. Thus, the learned AR contended that there cannot he said that the assessment order is erroneous and causing prejudice to the interest of Revenue in the given facts and circumstances on account non-verification.*
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> *6. On the contrary, the learned DR before us contended that reconciliation of the amount shown in the service tax return and financial statement was not available before the AO during the assessment proceedings. Accordingly the learned DR vehemently supported the order of the learned PCIT.*
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> *7. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates whether the assessment order has been passed by AO without making inquiries or verification with respect to the difference in the figures as discussed above and hence the assessment is erroneous insofar prejudicial to the interest of the Revenue. Thus, requiring revision by Pr. CIT u/s 263 of the Act.*
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> *7.1 An inquiry made by the Assessing Officer, considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case. As far as adequacy of inquiry is considered, there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding of the extent of inquiry. There were a number of judgments by various Hon'ble High Courts in this regard.*
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> *7.2 Delhi High Court in the case of CIT Vs. Sunbeam Auto 332 ITR 167 (Del.), made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 of the Act on the ground of inadequate inquiry. The relevant observation of Hon'ble Delhi High Court reads as under:*

> *"12. …. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open.———*
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> *From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.*
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> *15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquires rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'."*

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

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

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

> *"20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provison shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquries or verification that would have been carried out by a prudent officer. Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant."*

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

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

7.6 The Supreme Court in the another recent case of Principal Commissioner of Income-tax-2, Meerut v. Canara Bank Securities Ltd[2020] 114 taxmann.com 545 (SC), dismissed the Revenue's SLP holding that 263 proceedings are invalid when AO had made enquiries and taken a plausible view in law, with the following observations:

> *"Having heard learned counsel for the parties and having perused the documents on record, we see no reason to interfere with the view of the Tribunal. The question whether the income should be taxed as business income or as arising from the other source was a debatable issue. The Assessing Officer has taken a plausible view. More*

importantly, if the Commissioner was of the opinion that on the available facts from record it could be conclusively held that income arose from other sources, he could and ought to have so held in the order of revision. There was simply no necessity to remand the proceedings to the Assessing Officer when no further inquiries were called for or directed"

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

7.8 Now in the facts before us, in the case of the assessee the AO during the course of assessment proceedings, made enquiries on this issue and after consideration of written submissions filed by the assessee and documents / evidence placed on record, framed the assessment under section 143(3) of the Act without making the addition of the amount as note above. This fact can be verified from the notice under section 142(1) of the Act by the AO and submission in reply of the assessee against such notice.

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7.9 From the above it is revealed that it is not the case that the AO has not made any enquiry. Indeed the Pr. CIT initiated proceedings under section 263 of the Act on the ground that the AO has not made enquiries or verification which should have been made in respect of cash deposited during the demonization period. It is not the case of the Pr. CIT that the Ld. AO did not apply his mind to the issue on hand or he had omitted to make enquiries altogether. In the instant set of facts, the AO had made enquiries and after consideration of materials placed on record accepted the genuineness of the claim of the assessee.

7.10 At this juncture, it is also important to note that the learned PCIT in his order passed under section 263 of the Act has made reference to the explanation 2 of section 263 of the Act. It was attempted by the learned PCIT to hold that there were certain necessary enquiries which should have been made by the AO during the assessment proceedings but not conducted by him. Therefore, on this reasoning the order of the AO is also erroneous insofar prejudicial to the interest of revenue. In this regard, we make our observation that the learned PCIT has also not specified the nature and the manner in which the enquiries which should have been conducted by the AO in the assessment proceedings. Thus, in the absence of any specific finding of the learned PCIT with respect to the enquiries which should have been made, we are not convinced by his order passed under section 263 of the Act."

15. We are in respectful agreement with the aforesaid decision of Hon'ble ITAT which is on the similar set of facts and law as in the present appeal. Therefore, we too hold that the revision order passed in present case by Ld. PCIT is not a valid order in terms of Section 263 of the Act.

16. After going through the settled judicial precedents and the principles laid down by the Hon'ble Courts and examining the facts of the case in light thereof, we observe that the assessee purchased an agricultural land in respect of which deduction was claimed u/s 54B of the Act. We also observe that the assessee made investment towards construction of residential house in respect of which deduction was claimed u/s 54F of the Act. We find that the case of the assessee was selected for Limited Scrutiny for examination of the issue related to 'Deduction/ Exemption from Capital Gains'. We further find that the Ld. AO raised specific queries during the course of assessment proceedings itself requiring the assessee to justify the deduction claimed u/s 54B and 54F of the Act. The queries raised by the Ld. AO were duly replied to by the assessee and ample corroborative documentary evidences were also filed to substantiate the veracity of deductions claimed by the assessee in her income-tax return. The aforesaid facts are duly verifiable on perusal of the notices issued and submissions filed during the course of assessment proceedings which have been placed on Page No. 163-174 of the Paper Book. We also find that the decisions relied upon by the Ld. Counsel including the decisions of the *Hon'ble Gujarat High Court in the case of CIT v. Nirma Chemicals Works (P.) Ltd. – [2009] 182 Taxman 183 (Gujarat) and Hon'ble Bombay High Court in the case of CIT v. Nirav Modi – [TS-5523-HC-2016(Bombay)-O* support the case of the assessee.

17. Thus, considering the entire aspects of the matter, we find that when the original assessment order has been passed under Section 143(3) of the Act by the Ld.AO after due verification of the same issue as raised in the order impugned passed under Section 263 of the Act and that too upon causing exhaustive enquiry and finalising the same after taking a possible view, the invocation of provision of Section 263 of the Act on the basis of change of opinion is, thus, not found to be sustainable. We have also found substance in the arguments advanced by the Ld. AR that the original order needs not to give detailed reason. Further that, when one possible view has been taken by the Ld.AO the said cannot be treated as erroneous and prejudicial to the interest of the Revenue. In this regard, we are also inspired by the ratio laid down by the Hon'ble Gujarat High Court in the judgment passed in the matter of CIT vs. Nirma Chemicals Works (P.) Ltd. (supra) and CIT vs. Kamal Galani (supra). Under this circumstance, we

find the order passed by the Ld. PCIT under Section 263 of the Act is not sustainable and thus quashed.

18. In the result, assessee's appeal is allowed.

This Order pronounced on 24/01/2023

Sd/-	Sd/-
(BHAGIRATH MAL BIYANI)	(MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Indore; Dated 24/01/2023

S. K. Sinha, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Indore
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

(Sr.PS)
ITAT, Indore

1. Date of taking dictation:
2. Date of typing & draft order placed before the Dictating Member:
3. Date on which the approved draft comes to the Sr. P.S./P.S.: ………
4. Dt. on which the fair order is placed before the Dictating Member for Pronouncement:
5. Date on which the file goes to the Bench Clerk: …………………….
6. Date on which the file goes to the Head Clerk: ..…………………...
7. The dt. on which the file goes to the Astt. Registrar for signature on the order:
8. Date of despatch of the Order: ....