

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

आयकर अपील सं./ITA No.105/SRT/2022

निर्धारण वर्ष/Assessment Year: (2017-18)

(Physical Hearing)

Ramanlal Raghobhai Patel, Near Check Post, Dabhel, Daman – 396210, Daman & Diu (UT).	Vs.	The PCIT, Valsad.
(Appellant)		(Respondent)
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACCPP2952J		

Appellant by	Shri Shri Jayraj Naik, CA and Shri Darshit Naik, CA
Respondent by	Shri Ashok B. Koli, CIT(DR)
Date of Hearing	02/03/2023
Date of Pronouncement	21/03/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

By way of this appeal, the assessee appellant has called into question correctness of impugned order passed by the learned Principal Commissioner of Income Tax under section 263 of the Income tax Act, 1961, dated 30.03.2022, in the matter of assessment under section 143(3) of the Act for the assessment year 2017-18, on the following grounds:

- “1. The learned Pr.CIT erred in passing an order u/s. 263, when the jurisdictional conditions were not satisfied.*
- 2. The learned Pr.CIT erred in assuming jurisdiction u/s 263 even though a detailed inquiry was carried out by the Assessing Officer on the issue pertaining to income declared by the appellant during the course of survey.*
- 3. The learned Pr.CIT erred in assuming jurisdiction u/s 263 merely on the basis of a difference of opinion with the Assessing Officer.*
- 4. On the facts and in the circumstances of the case as well as law on the subject, the learned Pr.CIT has erred in invoking his powers/ authority under section 263 of the Income Tax Act, 1961, and the order passed by him u/s.263 is without jurisdiction.*

5. *On the facts and in the circumstances of the case as well as law on the subject, the learned Pr. CIT has failed to appreciate that the assessment order passed by the ACIT, Vapi Circle, Vapi (hereinafter referred to as the AO) was neither "erroneous" nor "prejudicial to the interest of the revenue" and thus the very invocation of power under section 263 is wholly illegal and beyond jurisdiction.*

6. *On the facts and in the circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in invoking powers under section 263 and passing order holding the assessment order to be "erroneous" and "prejudicial" without even justifying, which of the two phraseology used in section 263 is applicable and as to how the order of assessment is "erroneous" causing "loss to the revenue".*

7. *On the facts and in the circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in holding that the AO has failed to make proper enquiry into the facts of the case and on that ground in further holding that the assessment order dated 06.12.2019, passed by the AO u/s. 143(3), is erroneous as well as prejudicial to the interest of Revenue and in cancelling the assessment with the direction to the AO to reframe the assessment.*

8. *On the facts and in the circumstances of the case as well as law on the subject, the learned Pr. CIT has failed to appreciate that assessment order dated 06/12/2019, as had been passed by the AO in accordance with the law and the learned CIT could not have held the said order to be "erroneous and prejudicial to the interest of Revenue" within the meaning of Section 263.*

9. *On the facts and in the circumstances of the case as well as law on the subject, in any event, in response to the notice under Section 263, the appellant had made detailed submissions on the issue that had been taken up in the notice u/s.263 and for the reason that the learned Pr. CIT has failed to carry out his statutory obligation to deal with and decide such issue, the order under Section 263 stands wholly vitiated and the same deserves to be quashed.*

10. *For various reasons and on different grounds, the order u/s.263 passed by the Pr. CIT is bad in fact and law of the case and requires to be cancelled.*

11. *The above Grounds of Appeal are without prejudice to and are independent of each other.*

12. *Your Appellant craves, leave to amend, alter, delete and/or add to foregoing Grounds of Appeal any time before the appeal is decided."*

2. Although, this appeal filed by the Assessee for Assessment Year 2017-18, contains multiple ground of appeals. However, at the time of hearing we have carefully perused all the grounds raised by the Assessee. We find that most of the grounds raised by the Assessee, are either academic in nature or contentious in nature. These grounds of appeal are kind of written submission. However, to

meet the end of justice, we confine ourselves to the core of the controversy and main grievances of the Assessee. These grounds are being disposed as one.

3. Brief facts *qua* the issue are that the assessee is an individual and running a restaurant by the name of M/s Rohan Bar & Restaurant in Daman. The assessee filed his return of income for A.Y.2017-18 on 21.03.2018 declaring total income of Rs.88,24,930/-. Thereafter, the case was selected for complete scrutiny through CASS being a survey case. The assessment order u/s 143(3) was passed on 06/12/2019 accepting the returned income of Rs. 88,24,930/-. In view of the above factual position, Ld. PCIT exercised his jurisdiction under section 263 of the Act and issued a show cause notice vide DIN No. ITBA/REV/F/REV1/2021-22/1040981291(1) dated 17.03.2022. The show cause notice dated 24.03.2022 issued by Ld. PCIT is reproduced below:

***“To,
Shri RamanlalRaghavbhai Patel
Near Check Post, Dabhel, Daman-396210
Daman and Diu (UT).***

Sir,

*Sub: Action u/s. 263 of the Income Tax Act, 1961, in the case of **Shri RamanlalRaghavbhai Patel (PAN :ACCPP2952J)**A.Y. 2017-18 - Show Cause notice – Regarding*

Please refer to the above.

2. The assessee is an individual and running a restaurant by the name of "M/s. Rohan Bar & Restaurant" in Daman. The assessee filed his return of income for A.Y.2017-18 on 21.03.2018 declaring total income of Rs. 88,24,930/-. Thereafter, the case was selected for complete scrutiny through CASS being a survey case. The assessment order u/s 143(3) was passed on 06/12/2019 accepting the returned income of Rs.88,24,930/-.

3. On perusal of the assessment records for the year under consideration, it is observed that a survey action was conducted at the premises of the assessee and during the course of survey action, the assessee made declaration of undisclosed income of Rs.31,57,211/-. Further, it is also noticed that the assessee had debited the said undisclosed income to the purchase A/c of P&L as URD purchase and also credited that amount to capital a/c of Balance Sheet. The assessee included the income declared during survey in computation of income as "Income" and the same amount was added as expenses of URD purchase in P & L A/c. :

Rohan Bar & Restaurant
Dabhel,
Nani Daman
Ramanbhai R. Patel Capital A/c
Ledger Account

1-Apr-2016 to 31-Mar-2017

Date	Particulars	Vch Type	Vch No.	Debit	Credit
1-4-2016	By Opening Balance				2,32,64,861.82
31-3-2017	To T.C.S. 1%	Journal	33	2,49,901.90	
	By Bank SB Interest	Journal	43		5,208.00
	By Share Dividend	Journal	44		14,000.00
	To Withdrawal During Year	Journal	45	2,19,53,715.00	
	By Profit & Loss A/c	Journal	46		15,16,398.95
	By Income Declare During Survey	Journal	47		31,57,211.00
	To Closing Balance			2,22,03,816.90	2,79,57,477.87
				87,53,860.97	
				2,79,57,477.87	2,79,57,477.87

Page 1 / 1

Thus, the assessee had not paid any tax on that amount and also increased his capital by the same amount. As the income declared during the course of survey action was unaccounted, therefore, it was required to be treated as per the provisions of Sections 68/69/69 A/69B/69C of the I.T. Act and rate of tax was to be applied as prescribed u/s.115BBE the IT Act without adjusting it with any losses as per CBDT circular No. 11/2019 and declared amount of Rs.31,57,211/- should have treated at rate of tax as prescribed u/s 115BBE (1)."

4. In view of the above, Ld. PCIT noted that the AO has passed the assessment order without verification and enquiry. Therefore, the assessment made by the AO in the case of the assessee for AY 2017-18 is not only erroneous but also prejudicial to the interest of revenue. The Ld. PCIT asked the assessee to explain each unregistered purchase along with invoice, name, address of the party and how the payment was made along with cash book/bank book for each URD purchase and other entries separately and clearly establish why this order dated 06.12.2019 is neither erroneous nor prejudicial to the interest of Revenue.

5. In reply to the show cause notice, the assessee filed its submission on ITBA portal on 24.03.2022 as annexed as Annexure-A. The Ld. PCIT has gone through the reply filed by the assessee and observed that in assessee's case, there was a survey at the premises of the assessee during which excess stock was found. On being asked, it was explained by the assessee that the **stock has been purchased from the unregistered dealers and the payment has been made through unaccounted income** which has been disclosed during the survey. **The assessee has not explained as to how this unaccounted income was earned by the assessee.** Clearly at the time of survey it was noted that assessee has incurred certain expenditure in purchasing the stock which was found at the premises of the assessee. At this point, it was a case of unexplained expenditure incurred to procure stocks which was covered under section 69C of the Income Tax Act. **The assessee was asked to explain source of such expenditure and while explaining the same it was stated by the assessee that it is out of unaccounted income. It is to be noted that even this unaccounted income was not recorded in the books of accounts and therefore even this unaccounted income is covered under section 69B of the Income Tax Act.** It has not been explained by the assessee as to how this unaccounted income was earned even though the assessee has claimed ownership of this unexplained money. In view of the above, the Ld PCIT was of the view that disclosure made by the assessee falls within section 69B of the Act and therefore requires to be taxed under section 115BBE of the Act. As the Assessing Officer has not considered these vital aspects therefore the assessment order in the case of **Ramanbhai Raghobhai Patel (assessee)** for A.Y. 2017-18 passed on 06.12.2019 by the Assessing Officer is erroneous in so far it is prejudicial to the interest of revenue. Therefore, the assessment order u/s 143(3) of the Income tax Act, 1961 dated 06.12.2019 for A.Y.2017-18 in the instant case was set-aside by Ld PCIT with the direction to frame the assessment **De novo** after making proper enquiries on aforesaid issues.

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

7. At the outset, Learned Counsel for the assessee admitted that Assessing Officer has not issued any notice to conduct enquiry in respect of the issue raised by the Ld. PCIT and neither the assessee has replied to the Assessing Officer in respect of the issue raised by Ld PCIT. However, the entire information was there before the Assessing Officer in respect of survey documents impounded by Department and moreover the assessee has declared in the return of income, the impugned amount on which the Ld. PCIT has exercised his jurisdiction under section 263 of the Act. Therefore, Ld. Counsel submitted that once the income declared in the return of income, the Assessing Officer might have examined the same and applied his mind, therefore no revision proceedings under section 263 of the Act should be exercised by Ld PCIT. The Ld. Counsel also submitted before the Bench a compilation of legal case laws, which we have gone through.

8. However, on the other hand, Ld. Departmental Representative (Ld. DR) for the Revenue submitted that in the assessment order, the Assessing Officer has not discussed the issue at all which was raised by the Ld. PCIT in his order. The Assessing Officer did not conduct any enquiry in respect of the issue raised by Ld. PCIT by issuing notices under section 263 of the Act. Moreover, the assessee has also not filed any reply during the assessment stage in respect of the issue raised by the Ld. PCIT. Therefore, Ld. DR contended that Assessing Officer has not verified/examined the issue raised by Ld. PCIT and there is no discussion on the said issue in the assessment order. The excess stock is not recorded in the books of account, therefore, assessee has not explained the manner in which the assessee has purchased such excess stock and how the assessee has earned the excess stock, has not explained by the assessee. The Assessing Officer has not made enquiry about applicability of section 115BBE of the Act. The Assessing Officer simply accepted the undisclosed income and did not discuss the applicability of section 115BBE of the Act, therefore order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue. The Ld. DR also pointed out that the assessee has also not submitted the Central Excise Records in respect of excess stock (liquor). The alcohol (liquor) is subject to Excise control and assessee has not submitted any Central Excise Records in

respect of excess stock (liquor). How the excess stock has been earned by the assessee, has not been explained by assessee and neither the Assessing Officer made any enquiry in respect of issue raised by the Ld. PCIT, whether it is assessable under the normal provisions of the Act, or under section 115BBE of the Act, therefore clearly the order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue, hence order of Ld. PCIT may be upheld.

9. 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 ld. PCIT and other material brought on record. First, we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedents laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or **(iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order.** Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case

of Malabar Industries (supra) held that this phrase i.e. “*prejudicial to the interest of the revenue*” has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **“unless the view taken by the Assessing Officer is unsustainable in law”**.

10. Taking note of the aforesaid dictum of law laid down by the Hon’ble Apex Court, let us examine whether order passed by the assessing officer is erroneous and prejudicial to the interest of Revenue. First of all we shall examine the assessment order passed by assessing officer, which is reproduced below:

“In this case the assessee filed his return of income for the AY.2017-18 on 21.03.2018, declaring a total income at Rs.88,24,930/-. Thereafter, the case was selected for scrutiny for compulsory selection of survey case. Notice u/s 143(2) of the I. Tax Act was issued on 20.09.2018, which was duly served on the assessee through e-mail. Thereafter, a notice u/s 142(1) of the I. Tax Act, along with a detailed questionnaire, calling for details and explanations was issued on 10.11.2019 and served on the assessee through e-mail.

2. In response to notices, the assessee has e-filed his submission in response to various notices issued to him and furnished the required details on 25.11.2019, 27.11.2019, 02.12.2019.

3. The assessee is an individual running a restaurant by the name “M/s Rohan bar & Restaurant” in Daman. During the year, the assessee has earned income from house property, business & profession and other sources.

4. Subject to the above remarks, the total income of the assessee as per returned income filed is accepted.

<i>Total income as per return</i>	<i>Rs.88,24,930/-</i>
<i>Assessed Income</i>	<u><i>Rs.88,24,930/-</i></u>

5. Assessed u/s 143(3) of the I.T. Act, 1961. Given credit to pre-paid taxes after due verification. Charged interest u/s 234A, 234B, 234C & 234D as applicable. Issued DN/Challan accordingly.”

11. From the above assessment order, it is vivid that assessing officer has not examined the issue raised by Id PCIT (Excess stock of liquor), hence, assessing officer has neither applied his mind nor did any enquiry, therefore order passed by the assessing officer is erroneous and prejudicial to the interest of Revenue.

12. We note that assessing officer has not issued any notice under section 142(1) of the Act, to conduct enquiry about the issue raised by Id PCIT, hence it is a case of “no enquiry”. Therefore, as per the judicial precedent laid down by the Hon’ble Apex Court in Malabar Industries Ltd (supra), the following conditions are not satisfied:

“..... (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order....”

13. The Ld. Counsel heavily relied on the judgment of Co-ordinate Bench of ITAT, Ahmedabad in the case of Nelaykumar & Bros, Jewellers in ITA No. 146/SRT/2022, order dated 11.01.2012. He also relied on the judgment of ITAT (SMC-Bench), Pune in ITA No.77/Pun/2021, order dated 31.01.2022. In these judgments, it is mentioned that Assessing Officer had relevant material with him, and therefore the Assessing Officer might have examined the issue. We note that object of section 263 of the Act is to ensure that leakage of Revenue is plugged and tax due to the state not reaching the coffers of the state is prevented by exercise of revisional jurisdiction by the Principal Commissioner/Commissioner. Besides just obtaining the information by Assessing Officer/and just having documents and material in assessment file, in respect of the issue raised by the Ld. PCIT cannot be taken as akin to enquiring about the information in respect of the issue raised by the Ld. PCIT. In appropriate cases, the assessing officer should conduct further enquiry also. In the assessee’s case under consideration, what the talk about further enquiry, the Assessing Officer has not made any enquiry and accepted the return of income filed by the assessee, as it is, without enquiring about the issue raised by the Ld. PCIT. The Assessing Officer did not issue any notice under section 142(1) of the Act to conduct enquiry. Besides, no any reply

was given by assessee. Whatever return of income filed by the assessee has been accepted by Assessing Officer, blindly and without conducting any enquiry, hence order passed by the Assessing Officer is erroneous as well as prejudicial to the interest of Revenue. Therefore, both the judgments cited by Ld. Counsel are distinguishable on the basis of the facts narrated above, as these judgments did not consider the principles laid down by the Hon'ble Apex Court in Malabar Industries Ltd (supra).

14. Under section 263 of the Act, the Ld. PCIT exercise his jurisdiction to ensure that items mentioned in the return of income filed by assessee have been examined by Assessing Officer by issuing notices under section 142(1) of the Act, by calling information or explanation from assessee and to examine them in accordance with law. Thus, this is supervisory power of Ld. PCIT under section 263 of the Act, to make sure that Assessing Officer has conducted inquiry/or conducted further enquiry in appropriate cases to ensure that leakage of the Revenue prevented.

15. It is important to remember that the AO is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word 'erroneous' in section 263 emerges out of this context. It is because it is incumbent on the AO to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word 'erroneous' in the section 263 includes the failure to make such an inquiry becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. We note that ld PCIT has relied on the decision of the Hon'ble High Court of KARNATAKA in the case of CIT vs. Infosys Technologies Ltd. 341 ITR 293 dated 04.01.2012, wherein it was held as under:

"Section 263 is a section which enables the Commissioner to have a look at the orders or proceedings of the lower authorities and to effect a correction, if so needed, particularly if the order or proceeding is erroneous and prejudicial to

the interest of the revenue. This provision occurs in a taxing statute, the object of which is to raise revenue for the State, and section 263 is an enabling provision conferring jurisdiction on the Commissioner to revise the order of the authorities below in certain circumstances particularly when it is erroneous and prejudicial. One can at once realize that the provision is intended to plug leakage to the revenue by an erroneous order passed by the lower authorities, whether by mistake or in ignorance or even by design. It makes little difference as to for what reasons the order is passed by the lower authority, so long as it becomes erroneous and prejudicial to the interest of the revenue. Ultimately, the object is to ensure that leakage of the revenue is plugged and some tax due to the State not reaching the coffers of the State is prevented by exercise of revisional jurisdiction of the Commissioner."

16. The Id PCIT also relied on the judgment of Hon'ble Delhi Bench of ITAT vide its order dated 25.01.2019 in the case of Ramesh Kumar in ITA No. 1982/Del/2018 for A.Y. 2014-15, wherein it was held as follows:

"In the instant case there has been an information with the department which has been passed on to the Assessing Officer for verification and failure of the Assessing Officer to verify the transactions in the light of the information available makes the order erroneous and also prejudicial to the interest of the Revenue. The Assessing Officer has mentioned about inputs from investigation wing in assessment order but has not examined absolutely anything regarding the genuinity of the transactions. The Ld. PCIT had enough material in his custody to prima facie to show that the tax which was lawfully exigible has not been imposed. Similarly in the case of Sunbeam Auto the courts have held that in the case of lack of enquiry course of action under section 263 is valid. In this case on the facts of the record it can be observed that the Assessing Officer has not applied his mind regarding the allowability of the exemption of the Long Term Capital Gain. This is not the case of inadequate enquiry but is a clear case of lack of enquiry which makes it different from the case of Nirav Modi (supra). Obtaining of the information about the transaction cannot be taken as akin to enquiring about the information. This is a clear case of no enquiry for which the Ld. PCIT has rightly invoked the provisions of Section 263. We also find that the Ld. PCIT has clearly brought about the error in the assessment order and has also directed the Assessing Officer to take remedial action to take action as per the law after providing due opportunity to the assessee. Thus, it can be said that the Ld. PCIT has not exceeded his jurisdiction nor directed the Assessing Officer to pass the assessment order in any particular way thus not interfering in the judicial function of the Assessing Officer."

17. Considering the above facts and circumstances, and the precedents applicable to the facts, we uphold the order of Id PCIT and dismiss the appeal of the assessee.

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

Order pronounced on 21/03/2023 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

सूरत /Surat

दिनांक/ Date: 21/03/2023

SAMANTA

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 //

Assistant Registrar/Sr. PS/PS
ITAT, Surat