

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'A' BENCH: CHENNAI**

श्री वी. दुर्गा राव, माननीय न्यायिक सदस्य एवं  
श्री मंजूनाथा .जी, माननीय लेखा सदस्य के समक्ष  
**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND**  
**SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.1852 & 2298/Chny/2018 &  
**ITA No.2803/Chny/2019**  
निर्धारण वर्ष /Assessment Year: **2010-11**

M/s.Saravana Stocks –  
Investments (P) Ltd.,  
New No.11, Old No.5,  
Bishop Wallers Avenue (West),  
Mylapore, Chennai-600 004.

v. The DCIT / ACIT,  
Company Circle-VI(1),  
Chennai-34.

[**PAN: AAICS 7328 C**]  
(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/ Appellant by

: Mr.M.S.Syali, Sr.Adv.  
For Mr.Tarandeep Singh, Adv.

प्रत्यर्थी की ओर से /Respondent by

: Mr.R.Mohan Reddy, CIT-DR

सुनवाई की तारीख/Date of Hearing

: 14.03.2023

घोषणा की तारीख /Date of Pronouncement

: 12.04.2023

**आदेश / ORDER**

**PER MANJUNATHA.G, AM:**

These three appeals filed by the assessee are directed against separate orders of the Commissioner of Income Tax (Appeals)-15, Chennai, dated 26.02.2018 and the Commissioner of Income Tax (Appeals)-VI, Chennai, dated 26.02.2014 passed u/s.263 of the Income Tax Act, 1961 (in short "the Act") and pertains to assessment year 2010-11. Since, the facts are identical and issues are common, for the sake of convenience,

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these appeals were heard together and are being disposed off, by this consolidated order.

**ITA No.2298/Chny/2018:**

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

1. *That on facts and in law the Commissioner of Income Tax, Chennai - VI {hereinafter referred to as "CIT"} erred in assuming jurisdiction u/s 263 of the Income Tax Act, 1961 {hereinafter referred to as "Act"} in as much as the order dated 25th April, 2012 passed by Asst. Commissioner of Income Tax, Company Circle, Chennai {hereinafter referred to as "AO"} u/s.143(3) of the Act was neither erroneous nor prejudicial to the interest of Revenue.*

2. *That on facts and in law the CIT erred in holding that the AO has not verified transaction of sale / purchase of shares offered to tax as Income from Capital Gain.*

3. *That on facts and in law the CIT has erred in setting aside the assessment and directing the AO to modify the same.*

4. *That on facts and in law the CIT erred in directing the AO to disallow deduction of Rs.2,20,000/- claimed by the appellant u/s 35D of the Act.*

*That the appellant prays for leave to add, alter, amend and/or vary the ground(s) of appeal at or before the time of hearing.*

**3.** At the outset, we find that there is a delay of 1526 days in filing of the appeal before the Tribunal, for which, a petition for condonation of delay along with Affidavit explaining reasons for such delay has been filed. The Ld.Counsel for the assessee referring to petition filed by the assessee submitted that the delay in filing of the appeal is mainly due to wrong professional advice given by Mr.K.V.Srinivasan, CA, who was the Auditor & Tax Consultant of the assessee's company, where he had advised the assessee's company not to file any appeal against the order of the Commissioner of Income Tax passed u/s.263 of the Act, dated 26.02.2014, because, the assessee would have alternate remedy by way of

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consequential proceedings before the AO, where, the case can be argued on merits. He further submitted that to add to his ignorance of law, Mr.K.V.Srinivasan, has pursued the matter before the AO in consequential proceedings and also filed appeal against the assessment order passed by the AO u/s.143(3) r.w.s.263 of the Act. Further, he had also appeared before the Ld.CIT(A) and represented the case of the assessee. He had also filed appeal before the Tribunal against the order of the Ld.CIT(A) dated 26.02.2018. From the above, it is clear that Mr.K.V.Srinivasan, CA, was not aware of remedy available under the Act, and filing the appeal against the order of the Ld.CIT u/s.263 of the Act. In this regard, Mr.K.V.Srinivasan, has filed Affidavit and admitted that he had given incorrect professional advice and instructed them not to file appeal against order passed u/s.263 of the Act. However, when the assessee approached Sr.Counsel to represent their case before the Tribunal, the Sr.Counsel has advised the assessee to file appeal before the Tribunal against the order of the Ld.CIT u/s.263 of the Act, and in that process, there is a delay of 1526 days in filing of the present appeals. He further referring to Affidavit of Mr.D.Sathyamoorthi, Director of the assessee's company, submitted that this fact has been confirmed by the Director of the assessee's company in their Affidavit dated 14.03.2023. Therefore, the Counsel for the assessee submitted that there was **bona fide** and genuine mistake from the Counsel in not filing the appeals, which resulted in huge delay, but such delay is neither intentional nor for wanton of any undue benefit. Therefore, delay

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in filing of the present appeal may be condoned in the interest of natural justice. In this regard, he relied upon the decision of the Hon'ble Bombay High Court in the case of Vijay Vishin Meghani v. DCIT reported in [2017] 398 ITR 250 (Bom.).

**3.1** The Id.CIT-DR, R.Mohan Reddy, strongly opposing the petition filed by the assessee for condonation of delay submitted that there is no merit in the petition filed by the assessee and also Affidavit filed by the CA and Director of the assessee's company, because, the assessee is a NBFC and is subject to statutory & tax audit since its incorporation. Further, the assessee was advised by qualified team of professionals. Therefore, it cannot be said that the assessee got wrong professional advice, which is reason for not filing the appeals before the Tribunal within time allowed under the Act, is vague and beyond imagination. He further referring to Affidavit filed by Mr.K.V.Srinivasan submitted that the assessee is aware of filing petition before the Hon'ble High Court & the Hon'ble Supreme Court and at the same time, claims that it does not know filing appeal before the Tribunal against the order passed u/s.263 of the Act. Further, from the sequence of events, it is very clear that the assessee was pursuing alternate remedy available under the Act, when it does not get favourable results from the AO, has decided to file appeal against the order of the Ld.CIT passed u/s.263 of the Act. Therefore, he submitted that there is no merit in petition filed by the assessee and same should be rejected. In this

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regard, he relied upon the decision of ITAT Chennai Bench in the case of Smt.Jumma Khan Pathar Nisha v. ITO in ITA No.983/Chny/2020 order dated 23.05.2022 and also in the case of Mrs.Preeti Madhok v. ITO in ITA No.752/Chny/2020 order dated 17.06.2022.

**3.2** We have heard both the sides and gone through the contents of petition filed by the assessee for condonation of delay in filing of the appeal. From the contents of petition filed by the assessee, we find that there is a delay of 1526 days in filing of the appeal before the Tribunal, for which, the assessee has given reasons, as per which, Mr.K.V.Srinivasan, Tax Auditor & Consultant of assessee's company, given wrong professional advice under the ignorance of law that there is no provision under the Act to challenge the order of the CIT passed u/s.263 of the Act. We have gone through the reasons given by the assessee in their petition and also Affidavit filed by Mr.K.V.Srinivasan, CA & Mr.D.Sathyamoorthi, Director of the assessee's company and from the contents we find that there is a **bona fide** and reasonable cause for the assessee in not filing the appeal before the Tribunal within time allowed under the Act, which is evident from the fact that the assessee was pursuing alternate remedy available under the Act, and appeared before the AO for consequential assessment proceedings. The assessee had also filed appeal against assessment order passed by the AO u/s.143(3) r.w.s.263 of the Act, without any delay. The assessee had also filed appeal against the order of the Ld.CIT before the Tribunal and

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pursuing the case with utmost care. From the above, it is very clear that it is not a case of negligence of the assessee that it is not filed appeals or not pursuing alternate remedy available under the Act to challenge the order of the Ld.CIT u/s.263 of the Act, because, no person will derive any undue benefit by not preferring appeal against any assessment order or other orders passed under the Act. In this case, if you go by the conduct of the assessee, the assessee was promptly responding to alternate remedy available under the Act, and pursuing their case before the AO & the Ld.CIT(A). From the above, it is very clear that there is a merit in Affidavit filed by Mr.K.V.Srinivasan, CA, that he gave a wrong professional advice and advised his client not to file appeal against the order passed by the Ld.CIT u/s.263 of the Act, appears to be **bona fide** & genuine. It is not a case of the Revenue, the assessee was not at all pursuing their case either on 263 proceedings or consequential assessment proceedings. In case, the assessee was not pursuing the matter at all, then, the Revenue's contention that the assessee has filed appeals deliberately with a delay of 1526 days appears to be correct. Because, as we have already discussed in our earlier paragraphs of this order, no person would get any benefit by not filing appeal against any assessment order or order passed u/s.263 of the Act, rather, he or she would be in adverse position, if an appeal is not filed and challenged the assessment order or 263 order passed by the Ld.CIT. Therefore, we are of the considered view that there is a merit in the reasons given by the assessee in the petition for condonation of delay in filing of

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the appeals and which is supported by Affidavit filed by Mr.K.V.Srinivasan, CA, who had represented their case before the AO and the Ld.CIT.

**3.3** Having said so, let us come back to legal precedents on the issue of condonation of delay. It is a well settled principle of law by the decision of various courts including the Hon'ble Supreme Court in the case of Collector Land Acquisition Vs. Mst. Katiji & Ors. reported in [1987] 167 ITR 471 (SC), where, the Hon'ble Supreme Court clearly laid down the law in condonation of delay and held that ordinarily a litigant does not stand to benefit by lodging an appeal late. Further, refusing to condone delay result in meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is cause would be decided on merits after hearing the parties. At the same time, the Hon'ble Supreme Court made it clear that every day of delay must be explained. In case, the applicant explains the delay in filing of the appeal and such delay is **bona fide** and reasonable, then, the Courts must take a liberal approach and condone the delay in filing of the appeal. In this case, the reasons given by the assessee appears to be **bona fide** and genuine and further reasonable. Therefore, we are of the considered view that it is a fit case for condonation of delay in filing of the appeal.

**3.4** At this juncture, it is relevant to refer to the decision of the Hon'ble Bombay High Court in the case of Vijay Vishin Meghani v. DCIT reported in

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[2017] 398 ITR 250 (Bom.). The Hon'ble Bombay High Court very categorically held that wrong professional advice given by CA, which is supported by Affidavit of concerned CA, comes under the reasonable cause for condonation of delay and when the Revenue authorities was not contested said claim, Tribunal was not justified in refusing to condone delay in filing of the appeals. The Hon'ble Madras High Court in the case of United Christian Celebration Committee Charitable Trust v. ITO reported in [2017] 249 Taxmann.com 372 (Mad) had considered an identical issue and held that where assessee's institution engaged Chartered Accountant who was unaware of fact that as a result of amendment made in Sec.253(1)(c), an appeal could be filed against the order of the Commissioner rejecting application u/s.12AA of the Act, delay in filing of appeal against Commissioner's order was to be condoned.

**3.5** The sum and substance of ratio laid down by various Courts is that no appeal should be thrown out of judicial scrutiny on technical reasons, and further, if there is a genuine reason for not filing appeals in time, the Courts and Tribunals should condone the delay and decide the appeals on merits. Therefore, we are of the considered view that the appeals filed by the assessee with a delay of 1526 days deserved to be condoned and thus, we condone the delay in filing of the appeals and admit appeals filed by the assessee for adjudication.

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**4.** The brief facts of the case are that the assessee is a Non-Banking Finance Company (in short "NBFC") engaged in the business of investment in shares and Mutual Funds and also trading in shares & securities. The assessee company had filed its return of income for the AY 2010-11 on 08.09.2010 declaring total income of Rs.5,77,99,170/-. The case was taken up for scrutiny and notice u/s.143(2) of the Act, dated 05.09.2011 & notice u/s.142(1) dated 07.02.2012, was issued calling for certain information. In response, Mr.K.V.Srinivasan, CA/Authorized Representative was present, from time to time, and furnished the information called for. The assessment has been completed u/s.143(3) of the Act, on 25.04.2012, and accepted the income returned as per return of income, where the AO observed that as per the AIR information, the assessee company has invested in various Mutual Funds & Shares, and the same was verified with the copies of bank statements and found to be correct, and after examining the information furnished, the assessment is completed accepting the income returned.

**5.** The case has been, subsequently, taken up for revision proceedings and notice u/s.263 of the Act, dated 17.12.2013 was issued and served on the assessee. In the said show cause notice, the Ld.CIT was of the opinion that the assessment order passed by the AO u/s.143(3) of the Act, dated 25.04.2012, is appears to be erroneous in so far as it is prejudicial to the interest of the Revenue. The Ld.CIT has taken up two issues for revision

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proceedings and according to the Ld.CIT, the AO has not verified the issue of 'short term capital gains' declared by the assessee from sale of investments, even though, the assessee company has purchased and sold certain shares during the same Financial Year in light of relevant provisions of the Act. The Ld.CIT further observed that the assessee company has earned huge dividend income and also disallowed a sum of Rs.7,00,217/- u/s.14A of the Act r.w.r.8D of the Income Tax Rules, 1962. However, the AO has not properly computed disallowance u/s.14A of the Act. The assessee has claimed deduction u/s.35D of the Act, being 1/5<sup>th</sup> of total expenditure towards ROC fees. The assessee company was incorporated on 31.10.2008 and as per Sec.35D of the Act, deduction is allowable for five years from the year in which the business has commenced. Previous year relevant to AY 2010-11 is the 6<sup>th</sup> year of the business of the assessee from the year of incorporation. The AO without verifying the above facts simply allowed the claim of the assessee. Therefore, called upon the assessee to explain 'as to why' the assessment order passed by the AO should not be revised in terms of provisions of Sec.263 of the Act. In response, the assessee submitted that the assessment order passed by the AO dated 25.04.2012 is neither erroneous nor prejudicial to the interest of the Revenue, because, the very purpose of taking up for scrutiny assessment is to verify purchase & sale of shares as reported in AIR information. The assessee has filed all details and the AO during assessment proceedings has verified the details filed by the assessee and

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has accepted 'short term capital gains' declared from purchase & sale of shares. The assessee had also submitted details with regard to deduction claimed u/s.35D of the Act, and computation of disallowance u/s.14A of the Act r.w.r.8D of the Income Tax Rules, 1962 and argued that all details have been furnished to the AO and the AO has verified the same and accepted the claim of the assessee. Therefore, it cannot be said that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue.

**6.** The Ld.CIT after considering relevant submissions of the assessee and also taken note of certain judicial precedents, including the decision of the Hon'ble Andhra Pradesh High Court in the case of Spectra Shares & Scrips (P.) Ltd. v. CIT-III reported in [2013] 36 Taxmann.com 348 and also the Circular of CBDT dated 15.06.2007, opined that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue on the issue of assessment of profit derived from purchase & sale of shares under the head 'short term capital gains', disallowance u/s.14A of the Act r.w.r.8D of the Income Tax Rules, 1962, and deduction claimed u/s.35D of the Act, towards preliminary expenses. Therefore, set aside the assessment order passed by the AO and direct the AO to re-frame the assessment in accordance with law. The relevant findings of the Ld.CIT are as under:

6. *There are three issues involved in this case. The issues are discussed as under: -*

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i) The assessee had claimed deduction of Rs.2,20,000/- u/s 35D of the Income Tax Act, 1961 being 1/5th of the pre-operative expenditure of Rs.11,00,000/-. As per the provisions of Sec. 35D, the pre-operative expenses are allowable for five years from the year of commencement of the business. In the case of the assessee, previous year 2009-10 relevant to the assessment year is the sixth year of business and hence, deduction u/s 35-D is not allowable. In the written submission, the assessee company has submitted as under -

*"the company incurred Rs.11 lakh during the FY 2007-08 relevant to the AY 2008-09 towards increase in the authorized Capital from Rs.10 Crore to Rs.32 Crore. The assessee company has paid Rs.11 lakh towards Fees to Registrar of Companies for increase of the authorized capital during the FY 2007-08. ROC Fee paid has been disallowed in the AY 2008-09 and the assessee started cleaning 1/5 th Rs.11 lakh from AY 2008-09 onwards. The claim made in the above referred assessment years is for the third year."*

and hence, the assessee company argued that the claim of Rs.2,20,000/- is allowable and hence, the assessee's claim of Rs.2,20,000/- u/s 35-D is not allowable and the assessing officer is hereby directed to modify the assessment order dt.25-04-2012 accordingly. For this issue, the decision of Hon'ble Delhi High Court in the case of CIT v Hindustan Insecticides Limited (2001) 250 UR 338.

(ii) The assessee company disallowed a sum of Rs.7,00,217/- u/s.14A of the Income Tax Act r.w. Rule 8D of the Income Tax rules. A perusal of investments made by the assessee as per the details filed by the assessee is as under:

Value of investments as on the first day of the P.Y.	155982702(A)
Value of investments as the last day of the P.Y.	280086839(B)
Average of the value of investments [(A) + (B)]/2	218034771(C)
<b>One half percent of the average [(C)*0.5%]</b>	<b>10,90,174</b>

The disallowance u/s 14-A r.w. Rule 8D is Rs.10,90,174/-.

The assessee company in its written submission has argued as under: -

*"During the financial year 2008-09, the assessee invested in HDFC cash management fund Saving Plan Growth. The assessee had a profit of Rs.6,78,761/- on redemption which has been offered for tax and assessed. The profit on redemption is thus not an exempted income. Therefore, the assessee has taken opening investment as '0' and closing investment as Rs.28,00,86,8397- arriving at average investment of Rs.14,00,43,420/-" and hence, the assessee company had argued that the disallowance made by the assessee company in the Return of Income for the AY 2010-11 is correct.*

The Assessing Officer is hereby directed to verify the assessee's claim and arrive at the correct disallowance as per the provisions of Sec. 14-A of the Income Tax Act, 1961 r.w. Rule 8D of the Income Tax Rules.

(iii) The assessee company has declared a sum of Rs.6,07,02,655/- under Short-Term Capital Gain, being the gain on sale of investments. A perusal of the details filed by the assessee during the course of assessment proceedings, for profit on sale of investments, it is observed that the assessee company during the previous year, has purchased 84,18,000 numbers of shares in various companies and has sold the entire 84,86,000 numbers of shares during the previous year i.e., the assessee has sold all the shares bought during the year, in the same year. From the Profit & Loss A/c filed by the assessee, the only item appearing on the side of the profit, other than the profit on sale of shares is dividend income. The assessee company, during the previous year, has admitted loss to the tune of Rs.28,36,287/-. The assessee claimed this loss as business loss. Here, also, on perusal of

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*the details filed by the assessee, the assessee company has purchased 10,05,000 numbers of shares and sold the entire shares during the same day.*

*The assessee company has argued in its written submission that*

- (a) The company has in its objects clause, the investment activity.*
- (b) The shares purchased are held as investments right at the time of purchase.*
- (c) The assessee has been preparing accounts under the Companies Act, following the prescribed accounting standards classifying the investments as long term and values them at cost.*
- (d) For Income Tax purpose also, they are carried at cost without making any claim for diminution in the value of investment, on a consistent basis.*
- (e) The surplus on sales is returned as income from Capital Gain-Short Term/Long Term as the case may be.*
- (f) Assessment for the years 2006-07, 2008-09 and 2009-10 have been completed assessing the profit on sale of shares under the head 'Capital Gains' accepting the treatment consistently followed by the company.*
- (g) The assessee's entire investment is out of own funds and not out of borrowed funds.*

*The assessee company is also relying on the decision of the Hon'ble Andhra Pradesh High Court in Spectra Shares & Scrips (P) Ltd v Commissioner of Income Tax - III 219 Taxmann 61/36 Taxmann.com 348.*

*The assessing officer is directed to verify the claim of the assessee company and modify the assessment order on this issue accordingly on the line of Circular No.4/2007 dt.15-06-2007.*

**7.** The Ld.Counsel for the assessee submitted that the Ld.CIT erred in invoking jurisdiction u/s.263 of the Act, and set aside the assessment order passed by the AO u/s.143(3) of the Act, dated 25.04.2012 without appreciating the fact that the assessment order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue. The Ld.Counsel referring to assessment order passed by the AO and notice issued u/s.143(2) of the Act, dated 05.09.2011 and u/s.142(1) of the Act, dated 07.02.2012 submitted that the AO has called for various details in respect of purchase & sale of shares. The assessee has filed all details in respect of computation of 'short term capital gains' from purchase & sale of shares.

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The AO verified details filed by the assessee with reference to AIR information and accepted the claim of the assessee with regard to 'short term capital gains'. Therefore, it cannot be said that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue. The Ld.Counsel for the assessee further submitted that the assessee is a NBFC involved in investment in shares & Mutual Funds and also trading in shares & securities right from beginning. The Department has accepted two portfolios i.e. one for investment and another for trading. The assessee is declaring 'short term capital gains' and business profits for earlier assessment years also, and the Department has accepted the claim of the assessee. Further, the assessment for the AY 2006-07 has been re-opened by the Department and the assessee has challenged notice issued u/s.148 of the Act, in Writ before the Hon'ble High Court and the Hon'ble High Court has held that transactions of purchase & sale of shares is assessable under the head 'short term capital gains'. Further, the assessee had clearly demarcated between trading and investment portfolios. There is no borrowed capital was employed in investment segment. There are no repetitive transactions of a particular shares, and the holding period is more than three months. Therefore, from the above, it is very clear that the portfolio under investment segment is assessable under the head 'short term capital gains' and the assessee has rightly declared so. In this regard, he relied upon the decision of the Hon'ble Delhi High Court in the case of ITO v. D.G. Housing Projects Ltd. reported in 343 ITR 329 (Delhi). The

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assessee had also relied upon the decision of the Hon'ble Calcutta High Court in the case of CIT v. Merlin Holding (P) Ltd. reported in 374 ITR 118 (Calcutta) and the decision of the Hon'ble Madras High Court in the case of Virtusa Consulting Services (P) Ltd. reported in [2022] 442 ITR 385 (Mad.).

**8.** The Ld.Counsel for the assessee further submitted that on other two issues i.e. disallowance u/s.14A of the Act r.w.r.8D of the Income Tax Rules, 1962 and deduction u/s.35D of the Act, on these two issues, the order of the Ld.CIT u/s.263 of the Act, survives and thus, the order may be suitably amended as per law.

**9.** The CIT-DR, Mr.R.Mohan Reddy, supporting the order of the Ld.CIT submitted that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue, because, the AO has failed to carry out required enquiries he ought to have been carried out in the given facts and circumstances of the case, which is evident from the fact that the AO simply accepted submissions of the assessee and completed the assessment, even though, the assessee has made purchase and sale of few shares in same Financial Year. The CIT-DR further submitted that no doubt, the case was taken up for scrutiny to verify purchase & sale of shares as reported in AIR information, but fact remains that the AO has not discussed the issue in light of relevant provisions of the Act and Circular of CBDT, where it has been clearly laid down procedure for verification of share transactions. In this case, the assessee has made

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repetitive transactions of purchase & sale of shares within the same Financial Year, which needs to be assessed under the head 'profits gains of business & profession'. The AO failed to apply his mind to relevant facts in right perspective of law which rendered the assessment order to be erroneous in so far as it is prejudicial to the interest of the Revenue, and thus, the CIT has rightly set aside the assessment order passed by the AO and their order should be upheld.

**10.** We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The Ld.CIT has set aside the assessment order passed by the AO, u/s.143(3) of the Act, dated 25.04.2012 in exercising his powers u/s.263 of the Act, on the ground that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue. The Ld.CIT has taken up three issues for revision proceedings and according to the Ld.CIT, the AO has failed to carry out necessary enquiries with regard to capital gains declared by the assessee from purchase & sale of shares disallowance of expenditure relatable to exempt income u/s.14A of the Act r.w.r.8D of the Income Tax Rules, 1962 and deduction claimed u/s.35D of the Act, towards preliminary expenses. In so far as disallowance u/s.14A of the Act r.w.r.8D of the Income Tax Rules, 1962, and deduction u/s.35D of the Act, the Ld.Counsel for the assessee fairly agreed that the order passed by the Ld.CIT u/s.263 of the Act, survives on these two issues and thus, we are

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inclined to uphold the findings of the Ld.CIT on the issue of disallowance u/s.14A of the Act, and deduction u/s.35D of the Act.

**11.** In so far as larger issue of assessment of profit derived from purchase & sale of shares, the assessee has declared profit under the head 'short term capital gains'. The Ld.CIT was of the opinion that profit derived from sale of shares is assessable under the head 'profits & gains of business and profession'. The Ld.CIT has given various reasons to come to the conclusion that profit derived from purchase & sale of shares, is assessable under the head 'profits & gains of business and profession'. According to the Ld.CIT, the assessee has purchased 84,18,000 shares in various companies and has sold entire 84,18,000 shares during the previous year in which such shares have been purchased. The CIT further was of the opinion that the assessee has declared loss from profits & gains of business from purchase & sale of shares. Therefore, he was of the opinion that when the assessee has made purchase & sale of shares in the same Financial Year and further, holding period of shares is less than one-year, profit derived from sale of such shares, should be assessed under the head 'profits & gains of business and profession'.

**12.** We have given our thoughtful consideration to the reasons given by the Ld.CIT in light of various arguments advanced by the Counsel for the assessee and we ourselves do not subscribe to the reasons given by the Ld.CIT(A) to treat the assessment order passed by the AO as erroneous

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and prejudicial to the interest of the Revenue for simple reason that, the very purpose of taken up the case scrutiny assessment is to verify purchase & sale of shares transactions reported in AIR information. During the course of assessment proceedings, the AO has called for various details by issuance of notice u/s.143(2) of the Act, dated 05.09.2011 and notice u/s.142(1) of the Act dated 07.02.2012. In response, the assessee has submitted various details, including details of purchase & sale of shares, computation of 'short term capital gains', relevant bank statements, etc. The AO has verified the transactions reported in AIR information with reference to various details filed by the assessee and has recorded categorical findings that the assessment has been completed after examining the information furnished with reference to income declared under the head 'short term capital gains'. From the above, it is very clear that it is not a case of the Ld.CIT that the AO has not verified the issue at all. In fact, the Ld.CIT himself admits the fact that the AO called for necessary information and verified the details filed by the assessee with reference to AIR information reported in Income Tax Data Base. Therefore, we are of the considered view that the Ld.CIT erred in assuming jurisdiction u/s.263 of the Act, because, it is not a case of lack of enquiry. No doubt, various courts, including the Hon'ble Delhi High Court in the case of ITO v. D.G.Housing Projects Ltd., (supra) very clearly held that in a case of lack of enquiry, the powers of the Ld.CIT is wide, where he can set aside the assessment order. But, in a case of inadequate enquiry, the Commissioner

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cannot assume his jurisdiction and set aside the assessment order. In this case, from the details available on record, it is very clear that it is not a case of lack of enquiry, but at best, it can be said that it is a case of inadequate enquiry. In a case of inadequate enquiry, even if such enquiry is incomplete, there is no power to the CIT to set aside the assessment order u/s.263 of the Act.

**13.** Having said so, let us come back to the issue on hand. The assessee being a NBFC was maintaining two portfolios, i.e. one for investment and another for trading portfolio. The assessee has clearly demarcated investment portfolio and trading portfolio in their books of accounts. Profit derived from investment portfolio has been declared under the head 'capital gains' right from the beginning and the Department has accepted the claim of the assessee for earlier assessment years. Profit or loss in trading portfolio has been declared under the head 'profits & gains of business or profession' and Department has accepted the same. In fact, the Department has re-opened the assessment for the AY 2006-07 and the assessee has challenged the notice issued u/s.148 of the Act, in a Writ before the Hon'ble High Court of Madras, where, the Hon'ble Madras High Court has accepted the claim of the assessee under the head 'capital gains'. Further, the assessee has filed all evidences to prove that there are no borrowed funds employed in investment portfolio. The assessee has also clarified that there are no repetitive transactions of single script. Further, holding period of shares is more than three months. From the above, it is

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very clear that the assessee was maintaining two portfolios i.e. one for investment and another for trading and there was a clear demarcation in the books of accounts of the assessee in respect of both segments. Therefore, we are of the considered view that the assessee has rightly declared profit derived from purchase & sale of shares under the head 'short term capital gains'. But, it is only the Ld.CIT wrongly invoked his jurisdiction u/s.263 of the Act, without pointing 'how & why' assessment order passed by the AO on the issue of profit derived from purchase & sale of shares is incorrect and erroneous in so far as it is prejudicial to the interest of the Revenue. This, position is clarified by the CBDT in their Circular No.4/2007 dated 15.06.2007, where, various parameters have been prescribed for verification of share transactions and none of parameters prescribed by the Board is adversely affecting the transactions of the assessee. Further, the Board has very clearly stated that the tax payers can have two portfolios i.e. one for investment and another for trading, but there should be clearly demarcation in the books of accounts in respect of both portfolios. In this case, the assessee has filed all evidences to prove that it was having two portfolios and maintaining separate records for investment portfolios and trading portfolio. Therefore, we are of the considered view that the assessee has rightly declared 'short term capital gains' towards profit derived from purchase & sale of shares, and thus, the assumption of jurisdiction by the Ld.CIT fails on this issue.

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**14.** At this stage, it is relevant to refer to certain judicial precedents. The assessee has relied upon the decision of the Hon'ble Delhi High Court in the case of ITO v. D.G. Housing Projects Ltd., where, the Hon'ble Delhi High Court had considered the issue and held as under:

*10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression „prejudicial to the interest of the Revenue“ is of wide import and is not confined to merely loss of tax. The term „erroneous“ means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.*

*11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word „erroneous“ includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.*

*12. Delhi High Court in Gee Vee Enterprises vs. Additional Commission of Income-Tax, Delhi-I & Ors.,(1975) 99 ITR 375, has observed as under:-*

*"The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer 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 Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order 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."*

*13. In the said judgment, Delhi High Court had referred to earlier decisions of the Supreme Court in Rampyari Devi Sarogi vs. CIT (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal vs. CIT (1973) 88 ITR 323 (SC), wherein it has been held that where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. After reference to these two decisions, the Delhi High Court observed:-*

*"These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return."*

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14. The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry.

15. In the case of Commissioner of Income Tax vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del), Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held as under:-

"We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. 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 a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113):

". . . From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is „erroneous in so far as it is prejudicial to the interests of the Revenue“. It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). 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. (See Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC) at page 10) . . . 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

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*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 a conclusion and such a conclusion cannot be formed 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 . . . We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be „ erroneous“ simply because in his order he did not make an elaborate discussion in that regard.”*

16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT vs. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

18. It is in this context that the Supreme Court in *Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax*, (2000) 243 ITR 83 (SC), had observed that the phrase

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*„prejudicial to the interest of 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 interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue.*

*19. In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondents computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not.*

**15.** The assessee had also relied upon the decision of the Hon'ble Bombay High Court in the case of CIT v. Nirav Modi reported in [2017] 390 ITR 292 (Bom.). The Bombay Hon'ble High Court in light of provisions of Sec.263 of the Act, held as under:

- *It is a settled position of law that powers under section 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions viz. the assessment order should be erroneous and prejudicial to the revenue. By erroneous is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no occasion to exercise powers of revision can arise. Nor can revisional power be exercised for directing a fuller inquiry to find out if the view taken is erroneous, when a view has already been taken after inquiry. This power of revision can be exercised only where no inquiry as required under the law is done. It is not open to enquire in cases of inadequate inquiry. [Para 6]*
- *In this case, during the assessment proceedings, the Assessing Officer issued a query memos to the assessee, calling upon him to justify the genuineness of the gifts. The assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their bank accounts.*

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*On perusal, the Assessing Officer was satisfied about the identities of the donors, the source from where these funds have come-and also the creditworthiness/ capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the assessment order passed thereon. Thus, this objection on the part of the revenue, cannot be accepted. [Para 7]*

*It is next submitted that the donor had not been examined by the Assessing Officer. It is not in every case that every evidence produced has to be tested by cross examination of the person giving the evidence. It is only in cases where the evidence produced gives rise to suspicion about its veracity that further scrutiny is called for. If there is nothing on record to indicate that the evidence produced is not reliable and the Assessing Officer was satisfied with the same, then it is not open to the Commissioner to exercise his powers of revision without the Commissioner recording how and why the order is erroneous due to not examining the donors. Thus, this objection to the impugned order by the revenue is also not sustainable. [Para 8]*

- *It was next submitted that no enquiry was done by the Assessing Officer to find out whether the donor had received money from one 'C' as claimed. Nor any inquiry was done to find out whether the sister had in fact earned amounts on account of foreign exchange transactions as claimed by her. The enquiry of a source of source is not the requirement of law. Once the Assessing Officer is satisfied with the explanation offered on inquiry, it is not open to the Commissioner in exercise of his revisional power to direct that further enquiry has to be done. At the very highest, the case of the revenue is that this is a case of inadequate inquiry and not of 'no enquiry'. It is well settled that the jurisdiction under section 263 can be exercised by the Commissioner only when it is a case of lack enquiry and not one of inadequate enquiry.*

- *It is very important to note that the Commissioner in his order under section 263 has recorded the fact that there has been no adequate inquiry. Thus, this is not a case of no inquiry, warranting order under section 263. Thus, this objection on the part of the revenue, is also not sustainable. [Para 9]*

- *In the present facts, the Assessing Officer was satisfied, consequent to making an enquiry and examining the evidence produced by assessee, establishing the identity and creditworthiness of the donor as also the genuineness of the gift. The Commissioner in his order of revision, did not indicate any doubt in respect of the genuineness of the evidence produced by the assessee. The satisfaction of the Assessing Officer on the basis of the documents produced was not shown to be erroneous in the absence of making a further enquiry. This is a case where a view has been taken by the Assessing Officer on enquiry. Even if this view, in the opinion of the Commissioner not correct, it would not permit him to exercise power under section 263. [Para 12]*

- *In view of above, revenue's appeal is dismissed.*

**16.** The assessee had also relied upon the decision of the Hon'ble Calcutta High Court in the case of CIT v. Merlin Holding (P) Ltd., where, the Hon'ble Calcutta High Court held as under:

*The facts and circumstances of the case go to show that the assessee primarily was in the business of dealing in shares rather than in the business of investment. The frequency of transaction highlighted by the revenue is not decisive on either side. Frequency alone cannot show that the intention was not to make an investment. The legislature has not made any distinction on the basis of frequency of transaction. The benefit of short-term capital gain*

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*can be availed for any period of retention up to 12 months. Although a ceiling has been provided but there is no indication as regards the floor, which can be as little as one day. When that is the position in law and the investor has adduced proof to show that some transactions were intended to be business transaction, some transactions were intended to be by way of investment and some transactions were by way of speculation and the revenue has not been able to find fault from the evidence adduced, then the mere fact that there were 1000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the Managing Director of the assessee is also a Managing Director of a firm of share brokers cannot have any decisive value. The question essentially is a question of fact. The views entertained by the Commissioner (Appeals) or the Tribunal were a possible view. [Para 6]*

**17.** The assessee had also relied upon the decision of the Hon'ble Madras High Court in the case of Kumar Rajaram v. ITO [International Transaction-2(1)] reported in [2020] 423 ITR 185 (Madras), where, the Hon'ble Madras High Court has considered an identical issue and held as under:

*Certain factual aspects need to be looked into, more particularly, the intention of the testator in his will and testament. As noticed above, the assessment was completed by the Assessing Officer. The order was passed under section 143(3) after the assessee's case was selected for scrutiny and notice under section 143(2) was issued. The Assessing Officer issued notice to the assessee-under section 142(1) along with a questionnaire. In response to the said notice, the assessee had submitted the details including the last will and testament executed by his father, a copy of the sale deed legal opinion obtained from his counsel regarding eligibility for exclusion of payments to charitable institutions -and-remuneration to the executor-in-computing-the -long term capital gains on sale of property. AH these documents were forwarded to the Assessing Officer through the assessee's Chartered Accountant along with their letters. After perusal of all the records placed by the assessee and after noting the submissions of the Chartered Accountant of the assessee, the assessment was completed and the stand taken by the assessee was accepted by the Assessing Officer. However, the plea raised by the assessee with regard to the cost of indexation benefit was not accepted and the Assessing Officer held that the assessee is allowed cost of indexation benefit only from the financial year 2011-12 as per Explanation (Hi) in section 48. The Commissioner had issued show cause notice under section 263. In the show cause notice, the Commissioner states that the figures mentioned by the assessee were culled out from the records, thus there was no other independent material which formed the basis of the show cause notice. The Commissioner opined that the expenses claimed by the assessee towards payment to the charitable institutions and others were not incurred wholly and exclusively in connection with the transfer of property and the same is not allowable. According to the Commissioner, the order passed by the Assessing Officer under section 143(3) is erroneous and prejudicial to the interest of revenue and therefore, he proposed to revise the assessment under section 263.*

*The power under section 263 can be invoked in cases where the twin conditions stipulated therein are combinedly satisfied, namely, the order of the Assessing Officer should be erroneous and prejudicial to the interest of revenue. Every erroneous order may not be prejudicial to the interest of revenue and every order prejudicial to the interest of. revenue-'may not be erroneous. The Commissioner while issuing show cause notice points out that the expenses claimed by the assessee were not incurred wholly and exclusively.in connection with the transfer of the property. In the preceding paragraphs, the manner in which the Assessing Officer proceeded with the assessment has been noted. To be noted the assessment was under section 143(3). The Assessing Officer issued notice under section 142(1) along with the questionnaire which had been complied with by the assessee by*

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*submitting necessary particulars along with documents which includes the last will and testament of his father dated 30-10-2008. After examining the same, the Assessing Officer accepted the stand taken by the assessee towards expenses. The Commissioner while issuing the show cause notice did not rely upon any independent material nor on any interpretation of law but on perusal of the records was of the view that the expenditure cannot be allowed as deduction. Along with the filled in questionnaire, the assessee had filed the copy of the last will and testament of his father, sale deed of the property and the legal opinion given by the assessee. After perusal of the same, the Assessing Officer has taken a stand and passed the order. Therefore, it cannot be stated that the Assessing Officer did not apply his mind to the issue, after all the Assessing Officer cannot be expected to write a judgment. Admittedly there was an inquiry conducted by the Assessing Officer and it is not the case of the Commissioner that there was a lack of inquiry or inadequate inquiry. [Para 5]*

*Section 263 does not visualize 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. Merely because the Commissioner is not fully satisfied with the conclusion of the Income Tax Officer, the order cannot be turned to be erroneous. On a reading of the order passed under section 263 one can easily form an opinion that the order is based upon the interpretation which the Commissioner has given to the terms and conditions of the last will and testament of the assessee's father. Thus, it is evident that the Commissioner has made a roving enquiry and substituted his view to that of the view taken by the Assessing Officer who had done so after conducting an enquiry into the matter and after calling for all documents from the assessee, one of which is the last will and testament executed by the assessee's father. Therefore, this is not a case where the Commissioner could have invoked the power under, section 263. [Para 6] "*

*The last will and testament of the assessee's father has been gone through. He had appointed MSN. Advocate as the executor to give effect to the terms and conditions of the will and dispose of his properties-as stated-by him in the will. The executor was entitled to a sum of Rs.50,000 as professional fee and all expenses for the due execution of the will from and out of the estate of the deceased testator. After setting out the details of his family and the property possessed by him, the testator states that he bequeaths the sale consideration received from the sale of the immovable property absolutely to the assessee, his second son. Then the testator proceeds to state that the executor of the will shall arrange to sell the property after a period of one year from the date of his demise so as to accommodate his wife for her stay and after she vacates the property, the executor shall sell the property as already mentioned and distribute the sale proceeds by effecting payments in favour of the four charitable institutions specifying the amount to be paid to each of them and defray the necessary expenses towards stamp duty, etc., fees to the executor and the remaining sale consideration be paid to the assessee who shall repatriate the said amount so received for the education of his children as per RBI rules. To gather the intention of the testator the will has to be read in its entirety and not in bits and pieces as done by the revenue. The word 'absolutely' in the will is heavily relied on by the assessee to state that the entire sale consideration has been bequeathed to the assessee absolutely and the payments to the charitable institution is from and out of the said amount and therefore it is only the application of the said sale consideration and not diversion of income by creating overriding title. What has been lost sight of by the revenue is that the usage of the expression 'absolutely' occurring in the will is to disinherit the testator's third wife from being entitled to any portion of the funds and all that the testator stated was not to sell the property for one year till his wife vacates the same. The Tribunal found fault with the assessee for having sold the property much earlier. The sale deed clearly records that the step mother of the assessee had in unequivocal terms agreed for the sale and she vacated from the property and also granted No objection for transfer of "Kama" of the property. Therefore, the interpretation given by the Tribunal is wholly erroneous. In the impugned order passed by the Tribunal, it has been stated that "the entire sale consideration received from the sale of immovable property absolutely to his second son i.e. KR and thereafter he said he has to distribute the sale proceeds after paying property taxes if found due and shall make payment out of the sale consideration and also said how to distribute the sale consideration". The word 'thereafter' used in the order of the Tribunal nowhere occurs in the will. However, the testator's direction to sell the property was to the executor of the will and there was a specific*

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*direction, to the executor to pay specific sums of money to the charitable institutions, clear the property tax arrears, claim his professional fee, meet the stamp duty expenses and the remaining amount shall be paid to the assessee. Therefore, the misinterpretation of the intention of the testator in his will has resulted in an erroneous order passed by the Commissioner which order was erroneously confirmed by the Tribunal by the impugned order. [Para 8]*

*The case on hand requires to be interpreted based on the intention of the testator for which purpose we have read the will as a whole to gather the intention of the testator which is clear and lucid. The testator bequeathed only portion of the sale consideration left over after effecting payments directed to be made by him. If the executor failed to honour the commitments, then the sale itself would be invalid. Furthermore, in the recitals in the sale deed, it has been clearly mentioned about the payments effected to all the charitable organizations which are all through bankers cheques drawn in the name of the concerned organizations by the purchaser. [Para 10]*

*The factual position clearly shows that the amounts were specifically earmarked by the testator to the charitable institutions and other expenses. The sum of monies so allocated were to reach the respective charitable institutions/entity before the remainder of sale consideration reaches the assessee. In other words, the assessee at no point of time was entitled to receive the entire sale consideration. The sale was to be executed by the executor of the will who was directed to distribute the money to the respective organizations, defray the expenses, pay the property tax, deduct his professional fee and the remaining amount was directed to be paid to the assessee. Therefore, to interpret the will in any other fashion would be doing injustice to the intention of the testator and the interpretation given by the Commissioner is wholly erroneous as the Commissioner appears to have done the same "cherry picking" in the last will and testament which is not the manner in which a will -needs to-be interpreted. The intention -of the testator was very clear as the assessee was not entitled to the entire sale consideration. In fact, if the interpretation of the Commissioner and the Tribunal were to be accepted, the last will and testament would be rewritten. The testator did not bequeath the property but bequeathed part of the sale consideration which was left behind after meeting the commitments mentioned in the will to be truly and faithfully performed by the executor of the will. Thus, the major portion of the sale consideration on being received from the purchase of the property stood diverted before it reached the assessee and under the will there was no obligation cast upon the assessee to receive the sale consideration and distribute the same in the manner desired by the testator. For the above reasons, the substantial question of law is answered in favour of the assessee. [Para 12]*

*Another substantial question of law is with regard to the expenditure claimed by the assessee. The assessee had produced documents before the Assessing Officer who had scrutinized the same and accepted the genuinity of the claim and granted the benefit. The Commissioner disallowed the expenses on the ground that the Assessing Officer did not make an in-depth inquiry. As mentioned in the preceding paragraphs, the assessee has responded to the notice issued under section 142 and produced documents and records including their statement of total income wherein they had given the entire details including the receipts issued by the respective persons to whom payments were effected, all of which were through banking channels. Therefore, the finding rendered by the Commissioner was perverse which ought not to have been affirmed by the Tribunal more so for the reason that there was no evidence with regard to the expenses like professional fee, etc. The Tribunal failed to note that the assessee had produced the copies of the receipts signed by the respective party before the Assessing Officer who was satisfied with the same and in the absence, of any fraud being alleged with regard to the authenticity of those documents, the Commissioner could not have revised the assessment by invoking section 263. [Para 13]*

*In the result, the appeal filed by the assessee is allowed and the substantial questions of law are answered in favour of the assessee. [Para 14]*

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**18.** Let us come back to case laws relied upon by the Ld.CIT-DR. The Ld.DR relied upon the decision of the Hon'ble Supreme Court in the case of Daniel Merchants (P) Ltd., v. ITO reported in [2018] 95 taxmann.com 366 (SC) and also the decision in the case of Rajmandir Estates (P.) Ltd. v. PCIT reported in [2017] 77 taxmann.com 285 (SC). We have gone through two case laws relied upon by the Ld.DR and find that in both the cases, it was the case of the Revenue that there was no enquiry at all from the AO on the issue taken up by the Ld.CIT for revision proceedings. Under those facts, the Hon'ble High Court & the Hon'ble Supreme Court came to the conclusion that order of the Ld.CIT u/s.263 of the Act, is valid, in case, there is no enquiry at all. In this case, as we have already stated that it is not a case of lack of enquiry. Therefore, case law relied upon by the Ld.DR does not apply to the facts of the present case. The Ld.CIT-DR had also relied upon by the decision of the Hon'ble Madras High Court in the case of Ashok Leyland Ltd. v. CIT reported in [2002] 125 taxmann.com 965 and we find that in the said case, the Hon'ble Madras High Court held that when the AO was supposed to examine the issue and his failure to do so, is erroneous in so far as it is prejudicial to the interest of the Revenue. In this case, it is not a case of failure of the AO to verify the issues. Therefore, case law relied upon by the Ld.DR does not apply to the facts of the present case.

**19.** In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that the

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assessment order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue. The Ld.CIT without appreciating the facts simply invoked his jurisdiction and set aside the assessment order passed by the AO u/s.143(3) of the Act dated 25.04.2012. Thus, we quashed the order of the Ld.CIT u/s.263 of the Act.

**20.** In the result, appeal filed by the assessee in ITA No.2298/Chny/2018 is allowed.

**ITA No.1852/Chny/2018**

**21.** This appeal filed by the assessee is against the order of the Ld.CIT(A)-15, dated 26.02.2018 and pertains to consequential assessment order passed by the AO u/s.143(3) r.w.s.263 of the Act, dated 19.02.2015. The AO has passed consequential assessment order in pursuant to direction of the Ld.CIT u/s.263 of the Act. Since, we quashed the order of the Ld.CIT u/s.263 of the Act, the present appeal filed by the assessee against the order of the Ld.CIT(A) in pursuant to consequential assessment order passed by the AO u/s.143(3) r.w.s.263 of the Act, becomes infructuous and thus, appeal filed by the assessee in ITA No.1852/Chny/2018 has been dismissed as infructuous.

**ITA No.2803/Chny/2019**

**22.** The present appeal filed by the assessee against the order of the Ld.CIT dated 26.02.2014 passed u/s.263 of the Act, relevant to AY 2010-11 is a duplicate appeal, because, the assessee has filed a fresh appeal when the Tribunal has dismissed the appeal filed by the assessee in ITA

**:: 31 ::**

No.2298/Chny/2018 against the order of the Ld.CIT u/s.263 of the Act. Since, the Tribunal has recalled its order in ITA No.2298/Chny/2018 dated 26.08.2019 and decided the appeal filed by the assessee, the duplicate appeal filed by the assessee against the order of the Ld.CIT u/s.263 of the Act, dated 26.02.2014 becomes infructuous and thus, the same has been dismissed as infructuous.

**23.** In the result, appeal filed by the assessee in ITA No.2298/Chny/2018 is allowed and ITA Nos.1852/Chny/2018 & ITA No.2803/Chny/2019 are dismissed as infructuous.

Order pronounced on the 12<sup>th</sup> day of April, 2023, in Chennai.

**Sd/-**

(वी. दुर्गा राव)

**(V. DURGA RAO)**

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 12<sup>th</sup> April, 2023.

**TLN**

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)

**Sd/-**

(मंजूनाथा.जी)

**(MANJUNATHA.G)**

लेखा सदस्य/**ACCOUNTANT MEMBER**

4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF