

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

आयकर अपील सं./ITA No.68/SRT/2023

(निर्धारणवर्ष / Assessment Year: (2018-19)

(Virtual Court Hearing)

Umadevi Shivnarayan Garg, 513, Sai Darshan Market, Ring Road, Surat-395002	Vs.	Principal Commissioner of Income- tax-1, Surat, Room No.123, 1 st Floor, Aayakar Bhawan, Majura Gate, Surat-395003
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ABCPG 0885 A		
(अपीलार्थी /Appellant)		(प्रत्यर्थी /Respondent)

निर्धारिती की ओर से /Assessee by : Shri Ramesh Malpani, C.A

राजस्व की ओर से /Respondent by: Shri Ashok B. Koli, CIT-D.R

सुनवाई की तारीख/ Date of Hearing : 02/05/2023

घोषणा की तारीख/ Date of Pronouncement : 31/05/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

By way of this appeal, the assessee has challenged the correctness of the order passed by the Learned Principal Commissioner of Income Tax-1, Surat (in short "ld. PCIT"] dated 12.01.2023 under section 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for assessment year 2018-19.

2. Grounds of appeal raised by the assessee are as follows:

"1) That on the facts and in the circumstances of the case as well as law in law, the Hon'ble Principal Commissioner of Income Tax, Surat-1, Surat (PCIT), has erred in initiating and passing the order u/s 263 of the Income Tax Act, 1961 ("the Act"). The order so passed u/s 263 of the Act is wrong, invalid, beyond the scope of law and contrary to the law. Appellant prays for quashing the same.

2) That on the facts and in the circumstances of the case as well as in law, the Hon'ble PCIT has erred in taking the view that the addition made by the AO u/s 68 of the Act of Rs.1,82,46,940/- is short by Rs.44,03,060/- and thereby setting aside the assessment order passed by the A.O with the direction to pass the fresh assessment order after considering above view, whereas above view of ld. PCIT is clearly a case of taking another possible view and whereas the issue of impugned addition u/s 68 is already subject matter of appeal before the CIT(A) [doctrine of merger]. The order passed by ld. PCIT is not only based on

incorrect view but is also beyond the scope of S. 263 of the Act. Appellant pray for quashing the order passed u/s 263 of the Act.

3) The appellant craves leave to add, alter, or delete or modify any grounds of appeal.”

3. The facts necessary for disposal of the appeal are stated in brief. The assessee before us is an individual and filed her return of income for assessment year (A.Y.) 2018-19 on 31.10.2018, declaring total income at Rs.4,87,080/-. Subsequently, assessee's case was selected for complete scrutiny to verify the issue of unsecured loan and transactions with the company whose registration has been cancelled by the MCA. Scrutiny assessment u/s 143(3) r.w.s. 143(3A) r.w.s. 143(3B) of the Act has been completed on 30.03.2021 determining the total income at Rs.1,87,34,020/- by making addition of Rs.1,82,46,940/- on account of unexplained cash credits.

4. Later on, Ld PCIT exercised his jurisdiction u/s 263 of the Act. It was observed by ld PCIT from the audit report of the assessee that she has taken/accepted loan of Rs.2,07,46,940/- during the year under consideration from “Ashish Dying & Printing Mills Pvt. Ltd.”. During the assessment proceedings, the assessee had furnished the ledger of unsecured loan taken from the said party. On perusal of the confirmation ledger, it was observed that during the year under consideration, the assessee had obtained loan of Rs.2,26,50,000/- from Ashish Dying & Printing Mills Pvt. Ltd. There was a debit balance of Rs.19,03,607/- in the said loan account and after repayment of loan of Rs.25,00,000/- balance at the end of the year was at Rs.1,82,46,940/-.

5. The Ld PCIT noted that during the assessment proceedings, the AO has given sufficient opportunities of being heard to the assessee and to prove the creditworthiness and genuineness of the loan taken by the assessee from Ashish Dyeing & Printing Mills Pvt. Ltd. The assessee has found that registration of Ashish Dyeing & Printing Mills Pvt. Ltd had been cancelled by MCA and this company had filed its last balance sheet on 31.03.2006 for financial year 2005-06. Since Ashish Dyeing & Printing Mills Pvt. Ltd. was not in existence in the A.Y

2018-19 and had not filed its return of income (ROI) for the year under consideration, so genuineness of the loan taken by the assessee from Ashish Dyeing & Printing Mills Pvt Ltd was not established by the assessee. Therefore, the Assessing Officer treated this transaction as non-genuine and made addition of Rs.1,82,46,940/- on account of unexplained cash credit and added it to the total income of the assessee, for the year under consideration.

6. However, on perusal of confirmation ledger furnished by the assessee, during the revision proceedings, it was observed by Id PCIT that total transaction of unsecured loan/repayment made by the assessee with Ashish Dyeing & Printing Mills Pvt Ltd., during the year under consideration was Rs.2,26,50,000/-. Since the transaction carried out by loan giving entity i.e., Ashish Dyeing & Printing Mills Pvt Ltd has been found to be non-genuine, therefore the entire amount of Rs.2,26,50,000/- being the loan taken, during the year under consideration was required to be treated as unexplained cash credit and added to the total income of the assessee for the year under consideration. However, the Assessing Officer has made addition of Rs.1,82,46,940/- only i.e. being the balance at the end of the year. **Therefore, Assessing Officer ought to disallow the balance amount of Rs. 44,03,060/- (Rs.2,26,50,000- Rs.1,82,46,940).** Since the Assessing Officer has not disallowed the amount of Rs.44,03,060/- therefore Id PCIT noted that Assessing Officer has passed the assessment order without proper verification on the above mentioned issue of unsecured loan from a company whose registration was cancelled by MCA, without application of his mind. This makes the assessment order passed for A.Y 2018-19 u/s 143(3) r.w.s. 143(3A) r.w.s. 143(3B) of the Act dated 11.02.2021 erroneous in so far as it is prejudicial to the interest of the Revenue within the meaning of Section 263 of the Act.

7. Therefore, Id PCIT issued a show cause notice bearing DIN No.ITBA/COMF/17/2022-23/1047657169(1) dated 25.11.2022 to the assessee to explain the transaction.

8. In compliance with the show cause notice so issued by Id PCIT, the assessee has furnished her reply on 06.12.2022. The assessee has contended and argued before Id PCIT that he had filed appeal before the Ld. CIT(A) against the addition made u/s 68 of the Act in respect of unsecured loan received from Ashish Dyeing and Printing Mills Pvt Ltd, which is pending before Id CIT(A) and therefore no order u/s 263 of the Act can be passed on the matter, as it is already subject matter of appeal before the Ld. CIT(A).

9. However, Id PCIT rejected the contention of the assessee and observed that the provisions of section 263 of the Act has been invoked to bring to tax the amount of Rs.44,03,060/-, which has erroneously not been added by the Assessing Officer in the assessment order dated 30.03.2021. This shows that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of Revenue. Accordingly, the assessment order passed u/s 143(3) r.w.s. 143(3A) & 143(3B) of the Act dated 30.03.2021, in the assessee`s case was set aside by the Id PCIT with a direction to the Assessing Officer to pass fresh assessment order after taking into consideration the issues as may have been already considered together with the issue discussed herein above also.

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

11. Shri Ramesh Malpani, Learned Counsel for the assessee, begins by pointing out that the issue raised by the Ld. PCIT, has already been subject matter in appeal before Ld. CIT(A). The Ld. Counsel pointed out that Assessing Officer made addition to the tune of Rs.1,82,46,940/- and against the said addition, the assessee has filed an appeal before Ld. CIT(A), which is pending before Id CIT(A). However, Ld. PCIT in his order pointed out that instead of making addition of Rs.1,82,46,940/-, the Assessing Officer has to make addition of Rs.2,26,50,000/-. Therefore, Assessing Officer has made less addition to the tune of Rs.44,03,060/- (Rs.2,26,50,000–1,82,46,940/-), hence Id PCIT exercised his jurisdiction to enhance the addition by Rs.44,03,060/-. Thus, Ld. Counsel pointed out that Ld. PCIT has mainly exercised his jurisdiction u/s 263 of the Act for

enhancement of the addition, which can be enhanced by Id CIT(A) u/s 251 of the Act. Since the assessee has filed the appeal before Id CIT(A) against the addition of Rs.1,82,46,940/- and Id CIT(A) by exercising his power u/s 251 of the Act may enhance the assessment. Hence, Id PCIT by exercising his jurisdiction u/s 263 of the Act, need not to enhance the assessment especially when the appeal of assessee is pending for adjudication before Id CIT(A). Therefore, the issue which is subject-matter of adjudication by Ld.CIT(A) should not have been revised u/s 263 of the Act, hence Id Counsel stated that jurisdiction exercised by Id PCIT u/s 263 of the Act is bad in law.

12. The Id Counsel also pointed out that Assessing Officer has already considered the issue about struck off the company's name from the Registrar of Companies. The assessee-company's name was struck off by MCA after the assessment order framed by the Assessing Officer. Therefore, assessee-company was in existence at the time when the assessment proceedings were going on.

13. On merit, Ld. Counsel submitted that Ld. PCIT has taken a different view than the possible view taken by the Assessing Officer. The Ld. PCIT invoked the jurisdiction on such issue which has been properly examined by the Assessing Officer. During the assessment stage, the Assessing Officer has issued notice u/s 142(1) of the Act and in response the assessee has submitted the relevant documents and evidences. Therefore, the Assessing Officer has conducted sufficient enquiry on the issue which was raised by the Ld. PCIT by issuing notice u/s 142(1) of the Act. Therefore, the issue which was examined by the Assessing Officer and the view taken by the Assessing Officer is sustainable in the eye of law hence revisional proceedings u/s 263 of the Act may be quashed.

14. On the other hand, Learned CIT-DR for the Revenue submitted that Assessing Officer has passed the assessment order without proper verification of the issue of unsecured loan, from a company, whose registration was cancelled by MCA. Thus, Assessing Officer has framed the assessment order without application of his mind. The Ld. CIT-DR also submitted that Ld. PCIT has invoked the jurisdiction only on differential amount of Rs.44,03,060/-

(Rs.2,26,50,000–1,82,46,940/-), which was not examined by the Assessing Officer. Therefore, Id CIT-DR prayed the Bench that order of Ld. PCIT may be upheld.

15. We have heard the Learned Counsel appearing on behalf of the respective parties at length. The Ld. Counsel for the assessee, relied upon the judgment of Hon'ble Jurisdictional High Court of Gujarat in the case of Haryana Paper Distributors (P) Ltd. Vs. PCIT [2019] 412 ITR 515 (Guj), wherein the Hon'ble jurisdictional High Court held that Ld. PCIT cannot exercise the jurisdiction on the disputed amount which is subject-matter of appeal before Ld. CIT(A), that is, when the assessment order has been merged with order passed by commissioner (appeals), the Id PCIT should not pass order under section 263 of the Act. The findings of the Hon`ble Court is reproduced below:

“7. Appearing for the petitioner, counsel Mr. Hemani raised two principal contentions:

- (i) That the Commissioner was wrong in observing that the Assessing Officer had held that the purchases were bogus. This was contrary to the findings of the Assessing Officer and the impugned notice thus, proceeded on erroneous factual premises;*
- (ii) That the Assessing Officer had made part additions on this very issue. The assessee had carried the matter before the Appellate Commissioner who had deleted such additions. In terms of clause (c) to Explanation 1 of section 263 of the Act and on the principal of merger, the respondent now cannot exercise revisional powers. Counsel relied on the decision of this Court in case of Commissioner of Income tax v. Nirma Chemicals Works (P.) Ltd. [309 ITR 67](#).*

8. On the other hand, learned counsel Ms. Bhatt opposed the petition contending that the petitioner has approached at a stage where the Commissioner has merely issued a show-cause notice. Prima facie it emerges from the record that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. She lastly contended that the issue of the purchases made by the petitioner from M/s. Tarini Trading Pvt. Ltd. being bogus, was not part of the proceedings before the Appellate Commissioner.

9. We have recorded the broad controversy and the different stages through which the matter proceeded. To recapitulate, relevant facts, in the reassessment proceedings the assessee's purchases from M/s. Tarini Trading Pvt. Ltd. to the tune of Rs. 4.33 crores came up for detailed examination by the Assessing

Officer. He examined the Director of the said seller who appeared before him and confirmed the sales. The Assessing Officer did not dispute this transaction any further while accepting this factum of the genuineness of the purchases made by the petitioner. He noticed that the goods were delivered directly to the petitioner's purchaser and the petitioner was not billed for such transportation. In his opinion therefore, the petitioner should have disclosed higher profit since he was rid of the transportation charges. He put the petitioner to notice and made addition @ 4% GP on the gross turnover. In the process, he gave benefit of the profit already disclosed by the petitioner.

10. Two things thus immediately become clear. First that the Assessing Officer did not hold that petitioner's purchases from M/s. Tarini Trading Pvt. Ltd. were bogus. In fact, he held to the contrary accepting the evidence produced by the petitioner mainly in the form of the statement of the Director of M/s. Tarini Trading Pvt. Ltd. that the purchases were made. It was only after Assessing Officer had believed that the purchases were made that the question of transportation of the goods by the assessee or some one else would arise. Secondly, he made limited addition on the premise that when the petitioner was not required to bear the transportation cost, his profit from such dealings would be higher than normal.

11. The Commissioner in the impugned show-cause notice thus committed an error in recording that the Assessing Officer had held that the purchases were bogus. This very foundation for issuance of the notice was incorrect. His further observations were merely consequential in nature. In his opinion, when the Assessing Officer had found the purchases to be bogus, there was no question of limiting the addition on the basis of GP ratio. When we find that the Commissioner was wrong in its very foundational fact, the consequential observations, which are more in the nature of corollary, cannot survive.

12. Equally importantly, the issue itself had travelled before the Appellate Commissioner at the hands of the assessee. To the extent, the Assessing Officer rejected the assessee's request for making no additions, the assessee carried the matter in appeal. Appellate Commissioner deleted even the limited additions made by the Assessing Officer. The limited additions made by the Assessing Officer and the larger additions proposed by the Commissioner in the impugned notice are inextricably inter linked. The Commissioner argues that the entire purchases were bogus. The Assessing Officer accepted the purchases as genuine but added certain amount on the premise that the assessee's profit from such dealings would have been higher than disclosed. The entire issue was at large before the Appellate Commissioner. It is well known that the Commissioner (Appeals) while hearing the assessee's appeal has powers to even enhance the assessment. If he was of the opinion that not only limited additions made by the Assessing Officer but much larger additions were justified, he could have certainly exercised such powers, of course after putting the assessee to notice. In

this context, we may refer to clause (c) of Explanation 1 to sub-section (1) of section 263 of the Act. As is well known sub-section (1) of section 263 of the Act empowers the Principal Commissioner or the Commissioner to call for and examine the record of any proceeding and revise the same if he considers that the order passed therein by the Assessing Officer was erroneous insofar as it is prejudicial to the interest of the Revenue. Clause (c) of Explanation 1 of sub-section (1) provides that for removal of doubts it is hereby declared that, for the purpose of the said sub-section,—

"(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]"

13. Clause (c) of Explanation 1 may be worded in a manner as suggesting the extent of the powers of the Commissioner for taking an order in revision, its effect is of circumscribing such powers in cases where the order passed by the Assessing Officer has been subject matter of any appeal and such subject matter has been considered and decided in such appeal. This provisions thus statutorily recognizes the principle of merger and avoids any conflict of opinion between two quasi judicial authorities of the same rank. This issue has been considered at length by Division Bench of this Court in case of CIT v. Nirma Chemicals Works (P.) Ltd. [2009] 182 taxmann.com 183/309 ITR 67 (Guj.). It was held as under:

"20. The stand of the revenue that the assessment order was silent as regards eligibility or otherwise of section 80-I of the Act cannot thus be accepted. As noted hereinbefore the entire section lays down a complete codified scheme in itself for deciding not only the eligibility but also for the computation of the relief to which the assessee is entitled. When the section talks of profits and gains derived from an industrial undertaking the requirement is in relation to the industrial undertaking to which the section applies and which fulfills all the conditions laid down in sub-section (2) of section 80-I of the Act. It is not possible to read the provisions in any other manner whatsoever. Hence, the contention that the eligibility or otherwise u/s.80-I of the Act was never the subject matter of Appeal requires to be rejected. The Tribunal thus committed an error in law in coming to the conclusion that the prohibition imposed by Explanation (c) to section 263 of the Act would not be applicable."

14. When we therefore hold that the Commissioner had no jurisdiction to exercise revisional powers, asking the petitioner to submit to said impugned notice does not arise. Impugned notice is therefore set aside.

15. The petition is disposed of accordingly."

16. On identical facts, Hon'ble Jurisdictional High Court of Gujarat in the case of Nirma Chemicals Works (Pvt) Ltd, 182 Taxmann 183 (Guj) held as follows:

“19. Therefore, when the deduction under section 80-I of the Act was granted by the Assessing Officer after disallowing a part of the claim which was carried in appeal before Commissioner (Appeals), the appellate authority was duty bound to examine whether the claim made by the assessee was in accordance with and subject to the provisions of section 80-I of the Act. The requirement of fulfilment of conditions stipulated by sub-section (2) of section 80-I of the Act is, therefore, very much subject-matter of the appeal in relation to the income from warehousing which had been disallowed by the Assessing Officer.”

17. Our view is also fortified by the judgment of Hon`ble High Court of Allahabad in the case of Vam Resorts & Hotels Pvt. Limited, 111 taxmann.com 62 (Allahabad) wherein it was held that when an appeal is pending before commissioner (Appeals), exercise of jurisdiction under section 263 by the Id PCIT would be barred. The detailed findings of the Hon`ble Court is reproduced below:

“14. We heard Sri Shubham Agarwal, learned counsel for the Department, Sri Suyash Agarwal, learned counsel for the respondent-assessee and have perused the record.

15. The revenue in this appeal has tried to establish that ITAT was not correct in setting aside the order passed by the Commissioner under Section 263 of the Act, on the ground, that assessee had not furnished entire details regarding the contracts, which was cancelled and also the A.O. not looking into the provisions of Section 40(a)(i-a) of the Act whereby such expenses on which the T.D.S. was liable to be deducted, but was not actually deducted were required to be disallowed and added back under the said provisions of the Act.

*16. On the other hand, the contention of assessee that the A.O. after considering the entire books of account and the reply furnished by the assessee passed the assessment order under Section 143(3) of the Act. Further, from perusal of the assessment order dated 18.11.2010, it is clear that the A.O. had considered **all** the books of account and further on 13.5.2010 it had required the assessee, the entire information for the relevant assessment years along with copy of bank statement, narration of debit and credit entries, and other details.*

*17. On 7.7.2010, the assessee had replied the said notice and made available **all** the documents as required by the A.O. The Tribunal being the last fact finding Court, in paragraph 7 of its judgment, had noted that details of the documents produced before the A.O. included computation of income along with return and details of TDS, copy of balance sheet, trading and profit and loss*

account, details of sundry debtors as well as copies of the orders issued by the debtors to the assessee.

18. Thus, the case in hand is not a case where the CIT found that the assessment order was erroneous and it is prejudicial to the interest of the revenue, as the A.O. after the case of the assessee was selected in scrutiny had required the assessee to furnish **all** the documents and only after the production of the said documents and his satisfaction the assessment order was passed under Section 143(3) of the Act. The Apex Court in the case of *Malabar Industrial Co. Ltd.* (*supra*) while considering the pre-requisite for exercising power by the Commissioner under Section 263 of the Act, held as under:

"A bare reading of Section 263 of the Income Tax Act, 1961 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i). the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to Section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted."

19. Similar view has been taken by the Bombay High Court in the case of *CIT v. Development Credit Bank Ltd.*, [\[2011\] 196 Taxman 329/\[2010\] 323 ITR 206](#) relevant paragraph of the same is extracted below:

"Held, dismissing the appeal, that there was no basis or justification for the Commissioner to invoke the provisions of Section 263. The Assessing Officer after making an enquiry and eliciting a response from the assessee came to the conclusion that the assessee was entitled to depreciation on the value of securities held on the trading account. The Commissioner could not have treated this findings to be erroneous or to be prejudicial to the interests of the Revenue. The observation of the Commissioner that the Assessing Officer had arrived at a finding without conducting an enquiry was erroneous, since an enquiry was specifically held with reference to which a disclosure of details was called for by the Assessing Officer and furnished by the Assessing Officer and furnished by the assessee. The Tribunal was justified in holding that recourse to the powers under Section 263 was not warranted in the facts and circumstances of the case."

20. In the case of CIT v. Arvind Jewellers, [\[2002\] 124 Taxman 615/\[2003\] 259 ITR 502 \(Gujrat\)](#), it was held that once the A.O. after issuing notice had considered **all** the material on record, there was no basis for invocation of jurisdiction under Section 263 of the Act. Relevant paragraph of the said judgment is extracted hereunder:

"Held, that the finding of fact by the Tribunal was that the assessee had produced relevant material and offered explanation in pursuance of the notices issued under Section 142(1) as well as section 143(2) of the Act and after considering the material and explanations, the Income-tax Officer had come to a definite conclusion. Since the material was there on record and the said material was considered by the Income-tax Officer and a particular view was taken, the mere fact that different view can be taken should not be the basis for an action under Section 263. The order of revision was not justified."

21. The Bombay High Court in the case of CIT v. Gabriel India Ltd., [\[1993\] 71 Taxman 585/203 ITR 108 \(Bombay\)](#), held that the order of the A.O. would not become erroneous simply because he did not make elaborate discussion. The relevant paragraph of the said judgment is extracted hereunder:

*"Held, that 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 were 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. This decision of the Income-tax Officer could not be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That was not permissible. The Tribunal was justified in setting aside the order passed by the Commissioner of Income-tax under Section 263."*

22. The Division Bench of this Court in the case of J.P.Srivastava & Sons (Kanpur) Ltd. v. CIT, [\[1978\] 111 ITR 326 \(All.\)](#) had taken a similar view. The relevant paragraph is extracted hereunder:

"We are of opinion that the approach of the Commissioner is erroneous. The failure of the Income-tax Officer to deal with the claim of the assessee in the assessment order may be an error, but an erroneous order by itself is not enough to give jurisdiction to the Commissioner to revise it under Section 33B. It must further be shown that the order was

prejudicial to the interests of the revenue. It is not each and every order passed by the Income-tax Officer which can be revised under Section 33B.

Section 33B contemplates a notice to the assessee. In response to the notice the assessee may show to the Commissioner that the order sought to be revised is not prejudicial to the interests of the revenue. In that event, the Commissioner would have no jurisdiction to take any further action. He would be competent to take action only if he rejects the plea of the assessee. It thus becomes necessary for the Commissioner to examine the merits of the objection raised by the assessee. He cannot delegate that power to the Income-tax Officer by setting aside the assessment order and directing him to make a fresh assessment after taking into consideration the objection of the assessee."

*23. In the present case, the Tribunal rightly arrived at the finding that **all** the material in regard to land development expenses was before the Assessing Officer who had required the assessee to produce **all** the documents in relation to the same and after inquiring about the details of contract and the contract executed by assessee, the bill submitted and payment schedule made, the Assessing Officer accepted the books of account and only disallowed Rs.1,20,000/- and added to the income of the assessee, which was also set aside by order of the CIT(A) while exercising the power under Section 263 of the Act CIT did not have any material for invoking the said provision and it merely did the same on suspicion and presumption. The Punjab and Haryana High Court in the case of CIT v. Ram Narain Goel, [\[1997\] 92 Taxman 259/224 ITR 180 \(Punj. & Har.\)](#) held that suspicion however drawn cannot take place on evidence or proof. This case was followed in the case of CIT v. Faqir Chand Chaman Lal, [\[2003\] 133 Taxman 947/262 ITR 295 \(Punj. & Har.\)](#).*

24. The argument raised by counsel for the revenue that the Tribunal should have send back the matter to the assessing authority to decide afresh is a fallacy, as the CIT itself on 5.6.2013, while deciding the appeal of the assessee under Section 250 of the Act set aside the assessment order dated 18.11.2010 to the extent of addition of Rs.1,20,000/- made in the assessment proceedings. Further, the appeal before the Tribunal emanated from the order of the Commissioner of Income Tax exercising power under Section 263 of the Act, as such the Tribunal was correct in limiting its scope to decide whether the exercise of power made by the Commissioner was in consonance with provision of Section 263 and relied upon the decision of Malabar Industrial Co. Ltd. (supra).

25. As, Clause (c) of Explanation 1 to Section 263 of the Act provides that when an appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act by CIT is barred. Thus, in the present case, the CIT wrongly exercised jurisdiction under Section 263 of the Act by remanding back the matter to assessing authority on 25.3.2013, while the appeal was decided by

CIT (A) on 5.6.2013. Thus, the order passed by the ITAT does not suffer from any irregularity and needs no interference.

26. As far as the word "record" appearing in Clause (b) of Explanation-1 to Section 263 is concerned, it means the record available at the time of examination by the Commissioner of Income Tax and not any material or record available subsequent to his examination or exercise of power under Section 263. Thus, any order passed by the AO in the assessment proceedings after the remand by the CIT cannot be looked upon and the argument made by the counsel for the revenue for relying upon the fresh assessment order made on 7.3.2004 under Section 263/143(3) of the Act cannot be accepted in view of the above provision of law.

27. In the present case, the Tribunal had recorded specific finding of fact that the assessing authority had examined each and every aspect of the case on which the remand order hinges, as such the remand order was not sustainable in the eyes of law.

28. Considering the facts and circumstances of the case, we are of the considered opinion, that the revenue has failed to make any case for interference in the order of the ITAT, as the CIT had proceeded to remand the matter back to the assessing authority while the appeal of the assessee was pending under Section 250 and the power of exercise under Section 263 was barred by Clause (c) to Explanation 1 of Section 263 of the Act. Further, the remand order by the CIT was based merely on suspicion and presumption.

29. The appeal is devoid of merit and is hereby dismissed. The question of law is, therefore, answered against the revenue and in favour of the assessee."

18. By following the above legal precedents, we note that in the assessee's case under consideration, Ld. PCIT has mainly exercised his jurisdiction u/s 263 of the Act for enhancement of the addition, which can be enhanced by Id CIT(A) u/s 251 of the Act. Since the assessee has filed the appeal before Id CIT(A) against the addition of Rs.1,82,46,940/- and Id CIT(A) by exercising his power u/s 251 of the Act may enhance the assessment. Hence, Id PCIT by exercising his jurisdiction u/s 263 of the Act, need not to enhance the assessment especially when the appeal of assessee is pending for adjudication before Id CIT(A). Therefore, respectfully following the above legal precedents, the order of Id PCIT u/s 263 of the Act should be quashed.

19. The Ld Counsel submitted before the Bench, the following documents and evidences: (i) Account confirmation in respect of unsecured loan with Ashish Dyeing & Printing Mills Pvt Ltd as submitted to AO as well as Ld. PCIT (page 1 of paper book) (ii) Form 35 in respect of appeal filed with the CIT(A) (pages 2-3 of paper book) (iii) Notice u/s 250 of the Act issued by the CIT(A) (pages 4-5 of paper book) (iv) Acknowledgement of appeal submission filed (page 6 of paper book); (v) Show cause notice u/s 263 of the Act (pages 7-8 of paper book) and (vi) reply to above referred notice u/s 263 filed by assessee (pages 9-11 of paper book). Based on the above documents and evidences, Ld Counsel pleaded that Assessing Officer made adequate enquiry during the assessment proceedings about the issue raised by Ld PCIT.

20. Thus, from the assessee's facts, it is abundantly clear that during the assessment stage, the Assessing Officer asked the assessee to furnish the details and documents. In response, the assessee submitted reply with evidences before Assessing Officer. Thus, all the documents, details and the explanations required by the Assessing Officer were submitted by the assessee. Just because the Assessing Officer does not bring these documents and details in his assessment order does not mean that assessing officer has not conducted proper enquiry during the assessment stage. In fact, Assessing Officer has applied his mind. The Ld 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 u/s 263 of the Act, merely because he has different opinion in the matter. 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. Therefore, in the assessee's case, it cannot be said that it is a case of '***lack of inquiry***'. In view of the facts of the case and judicial pronouncements relied upon, it is well established that the impugned assessment order passed u/s. 143(3) dated 11.02.2021, was passed by Assessing Officer, after

calling for relevant information and after detailed examination of the same. The Assessing Officer has passed the assessment order after calling for details on the issue and after considering the reply and documents and after verification of the same and after due application of mind passed the assessment order, so it cannot be termed as erroneous and prejudicial to the interest of the revenue. So, the Ld. PCIT's finding fault, with the order of the Assessing Officer is erroneous as well as prejudicial to the interest of revenue, on account of lack of inquiry, has to fail. Based on these facts and circumstances, we quash the order dated 12.01.2023 passed by the ld PCIT under section 263 of the Act.

21. In the result, appeal of the assessee is allowed.

Order is pronounced on 31/05/2023 by placing record on notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

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

सूरत /Surat

दिनांक/ Date: 31/05/2023

Dkp Outsourcing Sr.P.S

Copy of the Order forwarded to

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

By Order

// True Copy //

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