

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 18/Kol/2023
Assessment Year: 2015-16

Kanoi Tea Private Limited 3, Williams Jones Sarani Transport Depot Road Khidderpore Kolkata - 700088 [PAN : AABCK2868E]	Vs	Principal Commissioner of Income-tax-2, Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri S.K. Tulsian, Advocate & Ms. Puja Somani, A/R
Revenue by :	Shri Abhijit Kundu, CIT, D/R

सुनवाई की तारीख/Date of Hearing : 09/05/2023
घोषणा की तारीख /Date of Pronouncement: 06/06/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

This is an appeal preferred by the assessee against the order of the Learned Principal Commissioner of Income Tax - 2, Kolkata (hereinafter referred to as the 'Id. Pr. CIT'), passed u/s 263 of the Income-tax Act, 1961 (hereinafter the 'Act'), dated 11/05/2020 for the Assessment Year 2015-16.

2. The Registry has pointed out that there is a delay of 963 days in filing of this appeal. The assessee has filed a petition for condonation of delay. It is submitted by the Id. Counsel for the assessee that out of the said delay of 963 days, 707 days are attributable to Covid pandemic, being the limitation period from March 15th, 2020 till

February 28th, 2022 and are to be excluded as held by the Hon'ble Apex Court's vide order dt. 10/01/2022. As far as the remaining delay of 256 days is concerned, it was submitted that the assessee was never served the showcause notice u/s 263 of the Act on its registered e-mail id camac@kanoitea.com and same was the situation for the service for the impugned order u/s 263 of the Act which was also never served upon the assessee on its registered e-mail id. Further the assessee company was also unaware about the subsequent proceedings initiated giving effect to the order passed u/s 263 of the Act, as again there was no service of the same on the e-mail id of the assessee. The assessee came to know about the impugned order only when it received the demand letter dt. 14/11/2022 for Assessment Year 2015-16 on its e-mail id and thereafter the relevant papers in relation to the above matter were handed to the tax consultant. Under these given facts and also in view of the decision of this Tribunal in the case of *Shri Mohan Chandra Das vs. PCIT* in ITA No. 766/Kol/2022; Assessment Year 2014-15; order dt. 18/04/2023, the Id. Counsel for the assessee prayed that the delay be condoned and the appeal be admitted for adjudication on merits.

2.1. On the other hand, the Id. D/R, opposed the request and submitted that the delay outside the Covid period is also huge and the reasons cited by the Id. Counsel for the assessee are not sufficient to explain the said delay.

3. We have heard rival contentions and perused the record placed before us.

4. After excluding the limitation period on account of Covid-19 restrictions, the effective delay in filing of the present appeal is 256 days. The assessee has submitted that it was neither served notice u/s 263 of the Act, nor the assessee was aware of any proceedings subsequent to the order passed u/s 263 of the Act as there was not communication on its registered e-mail id camac@kanoitea.com.

5. In support of the reasons, the assessee filed an affidavit mentioning all the above reasons regarding the same on oath. The impugned proceedings u/s 263 of the Act and perusal of the impugned order shows that the assessee did not appear on the dates of hearing. Before us, the assessee has prayed for condonation of the delay for the appeal to be admitted for adjudication on merits.

6. Sub-section 5 of Section 253 contemplates that the Tribunal may admit an appeal or permit filing of memorandum of cross-objections after expiry of relevant period, if it is satisfied that there was a sufficient cause for not presenting it within that period. This expression "sufficient cause" employed in this Section has also been used identically in sub-Section 3 of Section 249 of the Act, which provides power to the Id. Commissioner to condone the delay in filing of the appeal before the Commissioner. Similarly, it has been used in Section 5 of the Indian Limitation Act, 1963. Whenever interpretation and consideration of this expression has fallen for consideration before the Hon'ble High Courts as well as before the Hon'ble Supreme Court then, the Hon'ble Courts were unanimous in their conclusion that this expression has to be construed liberally. We may make reference to the

following observations of the Hon'ble Supreme court from the decision in the case of *Collector Land Acquisition Vs. Mst. Katiji & Others, 1987 AIR 1353*:

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a 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 that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

7. Similarly, we would like to make reference to authoritative pronouncement of Hon'ble Supreme Court in the case of *N.Balakrishnan Vs. M. Krishnamurthy (supra)*. It reads as under:

"Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

*A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under [Section 5](#) of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari* [AIR 1969 SC 575] and *State of West Bengal Vs. The Administrator, Howrah Municipality* [AIR 1972 SC 749]. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred a large litigation expenses. It would be a ITA No.201, 202 and 203/Ahd/2020 salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."*

8. We do not deem it necessary to re-cite or recapitulate the proposition laid down in other decisions. It is suffice to say that the Hon'ble Courts are unanimous in their approach to propound that whenever the reasons assigned by an applicant for explaining the delay, then such reasons are to be construed with a justice oriented approach.

9. In light of the above, if we examine the explanation of the assessee then, it would reveal that basically the delay has occurred because the assessee was completely unaware of the appellate proceedings and the assessee did not have any *malafide* intention to cause the delay. Therefore, cumulative setting of all these factors would suggest that there is no deliberate delay at the end of the assessee because the assessee was not going to gain anything from delaying this appeal. It is also pertinent to note that the Hon'ble Supreme Court in the case of *N.Balakrishnan Vs. M. Krishnamurthy* (*supra*) has observed that period of delay does not matter. It is the

quality of the explanation. If some valid reason is there, then any period can be condoned. In this case delay was caused due non-receipt of intimations by the assessee on his registered e-mail id. Taking into consideration all these factors, we condone the delay of 963 days and admit this appeal for adjudication.

10. The assessee has raised the following grounds of appeal:-

"1. That, on the facts and in the circumstances of the case, the Ld. Pr. C.I.T.-2, Kolkata erred in law in assuming jurisdiction u/s.263 of the Act in order to impose his own views on the Ld. A.O. when the Ld. A.O. after examining the impugned loan of Rs. 1,70,00,000/- taken from M/s. Aakansha Tradevin Pvt. Ltd. during the relevant assessment year, balance of which was continuing from previous assessment year and after being satisfied with the details and explanations submitted during the original assessment proceeding, had taken a plausible and judicious view, which did not suffer from lack of independent and adequate enquiry.

2. That, the Ld. Pr. C.I.T erred in holding the assessment order u/s. 143(3) of the Act erroneous and prejudicial to the interest of the revenue for alleged non-compliance of clause (a) of Explanation 2 to sec. 263(1) of the Act in spite of the fact that the impugned assessment was not a case of no enquiry and after thorough examination of the issues for which the case of the relevant assessment year was selected under CASS, taking cognizance of the related documents submitted in course of the original proceedings, the Ld. A.O. took a judicious view in the matter and accepted the genuineness of the impugned loan transaction and as well accepted the discrepancy in receipts as appearing in the return of income and as reflected in Form 26AS.

3. That, the Ld. Pr. C.I.T. has acted against the Explanation 2 to sec.263 of the Act, inasmuch as the assessment order was passed after making proper enquiries/verification which the A.O. was required to make with respect to the issues selected under CASS and hence the order passed u/s.263 of the Act is liable to be quashed.

4. That, on the facts and in the circumstances of the case, the Ld. Pr. C.I.T. erred in law in assuming jurisdiction u/s.263 of the Act and setting aside the assessment order u/s. 143(3) of the Act for fresh assessment, totally ignoring the explanation of the assessee that the above issue was already examined at the time of original assessment proceeding and it is after being

satisfied with the details and explanations submitted by the assessee that the original assessment was completed u/s.143(3) of the Act on 25/07/2017 accepting the genuineness of the impugned loan transaction and alleged discrepancy in receipts between the return of income and Form 26AS.

5. *That, the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/or rescind any or all of the above grounds."*

11. Brief facts as culled out from the record is that assessee is a Private Limited company and is engaged in the business of warehousing of tea chests. Income of Rs. 60,34,350/- declared in the e-return filed on 30/09/2015. Case selected for scrutiny followed by serving of notices u/s 142(1) of the Act requiring the assessee to file various details and also notices u/s 143(2) of the Act duly served upon the assessee. Books of accounts, bills and vouchers were produced and examined on test check basis. Assessment completed and the returned income was accepted. Subsequently, the Id. Pr. CIT called for the assessment records and after examining the records issued the following showcause notice u/s 263 of the Act, dt. 12/03/2020, stating the following issues:-

"On examination of the assessment records of above mentioned assessment year 2015-16, it appears prima facie that there was failure on part of the A.O to assess the income correctly and as such, the instant order u/s 143(3) is erroneous in so far as it is prejudicial to the interest of the revenue within the ambit of sec. 263 of the Income Tax Act, 1961.

In this regard the following discrepancies have been observed:

In this case, the assessee filed return of income on 30.09.2015 declaring total income of Rs.60,34,500/-. The case has been selected under CASS for following reasons:

- 1. Unsecured loans from persons who have not filed their Return of Income*
- 2. Receipts u/s. 194C and 194J (As per 26AS) are more than the Receipts shown in ITR*
- 3. Tax Credit claimed in the ITR is less than tax credit available in 26AS*
- 4. Mismatch in sales turnover reported in Audit Report and ITR*

1. *In respect of unsecured loan, it is apparent from the record that the assessee has filed only a ledger account of the loan creditor M/s. Aakansha Tradevin Pvt Ltd., from whom the assessee had taken loan of Rs.1.70 Cr. during the year, sans loan confirmation from the creditor. Further, no evidence of filing return of income by the loan creditor was submitted by the assessee. The Officer also did not gather any other material regarding credit-worthiness of the said party and accepted this issue without verifying the purported transactions with the creditor.*
2. *In respect of tax credit mismatch in the ITR and 26AS, it is seen from the ITS details available on record that the tax credit available with the assessee as per 26AS was Rs. 11,23,228/- whereas the assessee claimed Rs. 11,16,805/- in ITR.*
3. *In regard to other two CASS points, no submission/clarification/ reconciliation had been filed by the assessee, but the officer had not taken any adverse view on those issues.*

In the course of assessment proceedings, the A.O had passed the order without proper verification/examination of the issues mentioned above and accordingly making disallowance/addition in this regard."

11.1. In response to the notice dt. 12/03/2020, no one appeared and the ld. Pr. CIT without giving any further opportunity concluded the proceedings on 23/03/2020, discussing judicial pronouncements and without giving any finding on the issues raised in the showcause notice held that the order of the Assessing Officer dt. 25/07/2017 is erroneous insofar as it was prejudicial to the interest of the revenue.

12. Aggrieved, the assessee is now in appeal before the Tribunal.

13. The ld. Counsel for the assessee submitted that all the issues raised in the showcause notice u/s 263 of the Act already stands addressed by the assessee in reply to the questionnaire issued u/s 142(1) of the Act by the Assessing Officer. Reference was made to the paper book dt. 27/02/2023 containing 63 pages wherein it has been stated that the reply of the assessee u/s 142(1) of the Act was filed enclosing therewith all the relevant details which has been thoroughly

examined by the Assessing Officer. Further he submitted that it is not the case of no enquiry or incomplete enquiry and in view of the settled judicial precedents, wherein it has been consistently held that where the issue raised in the showcause notice u/s 263 of the Act has already been examined by the Assessing Officer by conducting detailed enquiry and a legally permissible view has been taken then, on such issues revisionary proceedings cannot be initiated.

13.1. So far as the issue raised by the Id. Pr. CIT regarding the loan credit from M/s. Aakansha Tradevin Pvt. Ltd., observing that there is no evidence of filing of return of income by the loan creditor, it was submitted by the Id. Counsel for the assessee that in its reply to the Assessing Officer dt. 14/07/2017, the A/R of the assessee submitted documents comprising, confirmation of accounts, ledger accounts, balance sheet of profit and loss account of M/s Aakansha Tradevin Pvt. Ltd., copy of ITR acknowledgement for Assessment Year 2015-16.

13.2. On the other hand, the Id. D/R vehemently argued supporting the finding of the Id. Pr. CIT and stated that the assessee failed to appear and most of the issues raised in the showcause notice have not been addressed by the Id. Assessing Officer and he ought to have conducted detailed enquiry and should not have concluded the hearing only by receiving the reply to the questionnaire and thereafter not raising any further queries which *prima facie*, the Id. Assessing Officer ought to have raised during the course of assessment proceedings. Therefore, Id. Pr. CIT has rightly held the order of the Id.

Assessing Officer erroneous and prejudicial to the interest of the revenue.

14. We have heard rival contentions and perused the material placed before us. Before us, the assessee has challenged the assumption of jurisdiction u/s 263 of the Act and also the finding of the Id. Pr. CIT holding that the assessment order framed u/s 143(3) of the Act on 25/07/2017 is erroneous in so far as it is prejudicial to the interest of the revenue. In the impugned order, the Id. Pr. CIT has held that reasons for which the case of the assessee was selected for scrutiny under CASS has not been examined by the Assessing Officer properly and most of the issues have not been addressed by the assessee and, therefore, there was no occasion for the Assessing Officer to examine those issues and therefore, there was no enquiry.

15. We find that the provision of Section 263 of the Act has direct bearing on the issue raised before us, therefore, it is pertinent to take note of this section which reads as under:

"263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(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 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.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

16. On a bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of

those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the Id. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263.

16.1. Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd. vs. CIT* (2000) 243 ITR 83 (SC) has laid down following ratio with regard to provisions of section 263 of the Act:

"There can be no doubt that 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. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the

principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC). [Emphasis Supplied]"

16.2. The Hon'ble Andhra Pradesh High Court in the case of *Spectra Shares and Scrips Pvt. Ltd. V CIT (AP) 354 ITR 35* had considered a number of judgments on this issue of exercise of jurisdiction u/s 263 of the Act by the Principal Commissioner of Income Tax and culled the principles laid down in the judgments as below :

"24. In Malabar Industrial Co.Ltd. (2 Supra), the Supreme Court held that a bare reading of Sec.263 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suomotu under it, is the order of the Income Tax Officer is erroneous in so far 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 it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act. It also held at pg-88 as follows:

"The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view

taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. *Rampyaridevi Saraogi v. CIT* (1968) 67 ITR 84 (SC) and in *Smt. Tara Devi Aggarwal V. CIT* (1973) 88 ITR 323 (SC)".

25. In **Max India Ltd.** (3 Supra), reiterated the view in **Malabar Industrial Co.Ltd.** (2 Supra) and observed that every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. On the facts of that case, Sec.80HHC(3) as it then stood was interpreted by the Assessing Officer but the Revenue contended that in view of the 2005 Amendment which is clarificatory and retrospective in nature, the view of the Assessing Officer was unsustainable in law and the Commissioner was correct in invoking Sec.263. But the Supreme Court rejected the said contention and held that when the Commissioner passed his order disagreeing with the view of the Assessing Officer, there were two views on the word "profits" in that section; that the said section was amended eleven times; that different views existed on the day when the Commissioner passed his order; that the mechanics of the section had become so complicated over the years that two views were inherently possible; and therefore, the subsequent amendment in 2005 even though retrospective will not attract the provision of Sec.263.

26. In **Vikas Polymers** (4 Supra), the Delhi High Court held that the power of *suomotu* revision exercisable by the Commissioner under the provisions of Sec.263 is supervisory in nature; that an "erroneous judgment" means one which is not in accordance with law; that 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 differently or more elaborately; that the section does not visualize the substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with the law; that to invoke *suomotu* revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and

must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suomotu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

27. In **Sunbeam Auto Ltd.** (5 Supra), the Delhi High Court held that the Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc.; that whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the 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. In that case, the Delhi High Court held that the Commissioner in the exercise of revisional power could not have objected to the finding of the Assessing Officer that expenditure on tools and dies by the assessee, a manufacturer of Car parts, is revenue expenditure where the said claim was allowed by the latter on being satisfied with the explanation of the assessee and where the same accounting practice followed by the assessee for number of years with the approval of the Income Tax Authorities. It held that the Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. Merely because the Assessing Officer in his order did not make an elaborate discussion in that regard, his order cannot be termed as erroneous. The opinion of the Assessing Officer is one of the possible views and there was no material before the Commissioner to vary that opinion and ask for fresh inquiry.

28. In **Gabriel India Ltd.** (6 Supra), the Bombay High Court held that a 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. It held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted; that to do so is to divide one argument into two and multiply the litigation. It held that cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes inquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the account or by making some estimate himself; that the Commissioner, on perusal of the record, may be of the opinion that the estimate made by the Officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income Tax Officer; but that would not vest the Commissioner with power to reexamine the accounts and determine the income himself at a higher figure; there must be material available on the record called for by the Commissioner to satisfy him prima facie that the order is both erroneous and prejudicial to the interests of the Revenue. Otherwise, it would amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh inquiry in matters which have already been concluded under law.

29. In **M.S. Raju**(15 Supra), this Court has held that the power of the Commissioner under Sec.263 (1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interests of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

30. In **Rampyari Devi Saraogi**(21 Supra), the Commissioner in exercise of revisional powers cancelled assessee's assessment for the years 1952-1953 to 1960-61 because he found that the income tax officer was not justified in accepting the initial capital, the gift received and sale of jewellery, the income from business etc., without any enquiry or evidence whatsoever. He directed the income tax officer to do fresh assessment after making proper enquiry and investigation in regard to the jurisdiction. The assessee complained before the Supreme Court that no fair or reasonable opportunity was given to her. The Supreme Court held that there was ample material to show that the income tax officer made the assessments in undue hurry; that he had passed a short stereo typed assessment order for

each assessment year; that on the face of the record, the orders were prejudicial to the interest of the Revenue; and no prejudice was caused to the assessee on account of failure of the Commissioner to indicate the results of the enquiry made by him, as she would have a full opportunity for showing to the income tax officer whether he had jurisdiction or not and whether the income tax assessed in the assessment years which were originally passed were correct or not"

31. From the above decisions, the following principles as to exercise of jurisdiction by the Commissioner u/s.263 of the Act can be culled out:

a) 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 erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act.

b) Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.

c) To invoke *suomotu* revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the order must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his *suomotu* revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

e) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted

f) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the 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.

g) The power of the Commissioner under Sec.263 (1) is not Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

16.3. The Hon'ble Delhi High Court in the case of *Income tax Officer vs. DG Housing Projects Ltd* 343 ITR 329 (Delhi), has held as follows:-

"Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. S. 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.

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.

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 s. 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 s. 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.

This distinction must be kept in mind by the CIT while exercising jurisdiction under s. 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. It may be noticed 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. 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.

17. Now, examining the facts of the case, in the light of the above judicial pronouncements, we notice that the issues raised in the notice u/s 263 of the Act, are as follows:-

“On examination of the assessment records of above mentioned assessment year 2015-16, it appears prima facie that there was failure on part of the A.O to assess the income correctly and as such, the instant order u/s 143(3) is erroneous in so far as it is prejudicial to the interest of the revenue within the ambit of sec. 263 of the Income Tax Act, 1961.

In this regard the following discrepancies have been observed:

In this case, the assessee filed return of income on 30.09.2015 declaring total income of Rs.60,34,500/-. The case has been selected under CASS for following reasons:

- 1. Unsecured loans from persons who have not filed their Return of Income*
- 2. Receipts u/s. 194C and 194J (As per 26AS) are more than the Receipts shown in ITR*
- 3. Tax Credit claimed in the ITR is less than tax credit available in 26AS*
- 4. Mismatch in sales turnover reported in Audit Report and ITR*

1. In respect of unsecured loan, it is apparent from the record that the assessee has filed only a ledger account of the loan creditor M/s. Aakansha Tradevin Pvt Ltd., from whom the assessee had taken loan of Rs.1.70 Cr. during the year, sans loan confirmation from the creditor. Further, no evidence of filing return of income by the loan creditor was submitted by the assessee. The Officer also did not gather any other material regarding credit-

worthiness of the said party and accepted this issue without verifying the purported transactions with the creditor.

2. In respect of tax credit mismatch in the ITR and 26AS, it is seen from the ITS details available on record that the tax credit available with the assessee as per 26AS was Rs. 11,23,228/- whereas the assessee claimed Rs. 11,16,805/- in ITR.

3. In regard to other two CASS points, no submission/clarification/ reconciliation had been filed by the assessee, but the officer had not taken any adverse view on those issues.

In the course of assessment proceedings, the A.O had passed the order without proper verification/examination of the issues mentioned above and accordingly making disallowance/addition in this regard.”

18. Now, we have to first see whether these issues were raised by the Assessing Officer during the course of assessment proceedings u/s 143(3) of the Act. The details of the same are available on paper book page no. 7 and the same is extracted below:-

“ Particulars of Accounts and/or documents required

1. *Short resume of all business activities along with full addresses of all business premises, godowns, branch office etc.*
2. *Copies of Income Tax Return, acknowledgement of return. Tax Audit Report for the A.Y. 2015-16 and relevant Profit and Loss Account and Balance Sheet.*
3. *Names of all the Directors with complete address, telephone number, PAN and copies of their I.T. return for A.Y. 2015-16 along with relevant Profit and Loss Account and Balance Sheet.*
4. *Names and complete addresses, telephone number, PANs of all the share holders along with their shareholding. Also mention the percentage of shareholdings.*
5. *Details of all Bank accounts maintained alongwith all Bank Statement for the F.Y. 2014-15.*
6. *Details in connection i) Unsecured loans from persons who have not filed their Return of Income (From 3CD) ii) Receipts u/s 194C and 194J (as per 26AS) are more than the receipts show in ITR 4/5/6 and iii) Tax credit claimed in ITR is less than tax credit available in 26AS.*

Further we notice that the assessee gave a detailed reply to the notice u/s 142(1) of the Act dt. 29/06/2017, which was filed on 14/07/2017, which is extracted for ready reference:-

“With reference to your above Notice asking to file certain particulars in connection with the above assessment, we beg to submit as under:-

1. *The assessee's business mainly includes Warehousing of Tea Chests and earning Investment from advancing Loan.
The Warehouse is located at No. 3, Transport Depot. Road, Kidderpur, Kolkata 700 088 with Head Office at Shree Manjuri, 8/1-A, Middleton Row, Kolkata - 700 071.*
2. *Copy of Acknowledgement of I.T. Return filed along with (a) Computation of Income, (b) Audited Accounts and (c) Tax Audit Report in Form No 3CA are filed herewith.*
3. *Details of Directors along with their individual I.T. Return Receipts; Computation of Income and Profit and Loss Account and Balance Sheets are filed herewith, as asked for.*

4. Details of Share holders duly mentioning their Address; P.A. No; No. of Shares held and Percentage of Share holding are enclosed.
5. Details of Bank Accounts maintained with copy of Bank Statements are enclosed.
6. In support of Unsecured Loans taken for Rs. 2,45,20,585/-, Copy of Account with M/s. Aakansha Tradevin (P) Ltd., being the only loan taken earlier and also during the year is enclosed and the said Party has duly filed their I.T. Return, being regular Income-tax payee.
- So far as mis-match of TDS claimed in the I.T. Return for Rs.11,16,796/- and that as per Form No 26AS of Rs. 11,13,126/- or Rs. 3,679/-, it is noted that TDS to the extent of Rs. 3,679/- may not have been deposited within the time of filing I.T. Return on 30.09.2015.
- Otherwise, the TDS claimed in the I.T. Return for Rs.11, 16,796/- was almost accepted by the system and Rs. 11,16,805/-, as was deposited within that time of filing I.T. Return on 30.09.2015 was allowed by the system.
- For your kind information, Form No 26AS as was up-dated on 11.09.2015 showing total TDS of Rs. 11,13,126/- is enclosed."

19. Further we also notice that a copy of the order sheet has been filed wherein also ld. Assessing Officer has firstly referred to the date of issuing notice u/s 142(1) of the Act. Thereafter, a reply has been filed by the assessee on 14/07/2017 and on the very same day assessee was asked to produce the books of accounts and other bills and vouchers. Then on 19/07/2017, the A/R of the assessee appeared and submitted the documents which were filed on record and also produced the books of accounts, bills and vouchers etc., which were test checked and returned back to the assessee and finally on 25/07/2017, case was completed as assessed.

20. From the reply given by the assessee extracted (*supra*) on 14/07/2017, we notice that the complete detail of the unsecured loan taken from M/s. Aakansha Tradevin Pvt. Ltd. has been filed along with copy of the income tax return which clearly contradicts the finding of the ld. Pr. CIT stating that no evidence of filing the return of

income of M/s. Aakansha Tradevin Pvt. Ltd., is available on record. Similarly, all the remaining issues including TDS mismatch has also been duly addressed. Thus, we find that the ld. Assessing Officer has raised specific queries to all of the issues referred in the showcause notice u/s 263 of the Act and they have been replied by the assessee in detail providing various documents in order to explain the transactions which were referred in the notice u/s 142(1) of the Act. Even the unsecured loan taken from M/s. Aakansha Tradevin Pvt. Ltd., has been addressed to by the assessee by filing the relevant details and creditworthiness of the cash creditor and genuineness of the transactions and the nature and source of the said cash credit was duly explained to the Assessing Officer to his satisfaction. Thus, we find that the detailed enquiries were made by the Assessing Officer during the course of assessment proceedings with regard to the various issues including those referred to u/s 263 of the Act, and once the ld. Assessing Officer has applied his mind on the details called for by him and has taken a view permissible under the four corners of law, and ld. Pr. CIT has not carried out any independent enquiry to support the finding given in the impugned order, the ld. Pr. CIT ceases to exercise jurisdiction on the very same issues which have already passed through a complete enquiry during the assessment proceedings.

21. In view of the above discussion and under the given facts and circumstances of the case, and applying the propositions of law laid down in the above judicial precedents, to the facts of this case, we

uphold the contention of the assessee that the exercise of powers by the Id. Pr. CIT u/s 263 of the Act, is bad in law. Hence, we quash the impugned order passed under section 263 of the Act and restore this assessment order passed u/s 143(3) of the Act dated, 25/07/2017.

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

Order pronounced in the Court on 6th June, 2023 at Kolkata.

Sd/-

**(SANJAY GARG)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 06/06/2023

**SC S.P.*

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

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

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata