

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डॉ. एस.सीता लक्ष्मी, न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA. No. 284/JPR/2022
निर्धारणवर्ष / AssessmentYear : 2017-18

Parshavnath Builders Shop No. 1 Ballabhbari Shopping Complex, Gumanpura, Kota.	बनाम Vs.	PCIT, Udaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AAQFP 2488 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby : Shri MahendraGargieya ,Adv. &
Shri Devang Gargieya, Adv.
राजस्व की ओरसे / Revenue by : Shri James Kurian, CIT

सुनवाई की तारीख / Date of Hearing : 28/03/2023
उदघोषणा की तारीख / Date of Pronouncement : 20/06/2023

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This is an appeal filed by the assessee against the order of the learned Principal Commissioner of Income Tax, Udiapur [hereinafter referred to as "PCIT"], dated 15.02.2021 for the assessment year 2017-18 raising therein following grounds:-

"1. The Ld. Pr. CIT, Udaipur seriously erred in law as well as on the facts of the case in invoking the provisions of S.263 of the Act and therefore, the impugned order dated 15.02.2021 u/s 263 of the Act kindly be quashed.

2. The ld. Pr. CIT, Udaipur seriously erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly holding that the

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subjected assessment order passed u/s 143(3) dated 28.03.2019, was without considering the cash deposits made during the year and the loan squared up during the year. The assumption of jurisdiction u/s 263 being contrary to the provisions of law and facts on record, hence, the proceedings initiated u/s 263 of the Act and the impugned order dated 15.02.2021 deserves to be quashed.

3. The Id. Pr. CIT, Udaipur erred in law as well as on the facts of the case in wrongly setting aside the assessment order dated 28.03.2019 despite there being complete application of mind by the AO on the subjected issues and it was nothing but a case of change of opinion, based on which, assumption of jurisdiction u/s 263 is not permissible. The impugned order dt. 15.02.2021 therefore, lacks valid jurisdiction u/s 263 of the Act and hence, the same kindly be quashed.’’

2.1 At the outset of hearing, the Bench observed that there is delay of 462 days in filing of the appeal by the assessee for which the Id. AR of the assessee filed an application for condonation of delay with following prayers and the assessee to this effect also filed an affidavit :-

“ 1. That in the aforesaid matter, the Id. PCIT passed the impugned order u/s 263 on dated 15.03.2021, Accordingly, the appeal was to be filed on/before 15.05.2021 however, the same has been filed on dated 22.07.2022.

2. In this connection, it is humbly submitted that due to Covid-19 there was complete lockdown in Jaipur and all the offices including the applicant's office and the consultant's office were closed. The Appellant could not file the appeal within the stipulated limitation period of sixty days due to the prevention measures implemented by the Government.

3.1 That keeping in view the difficulties faced by lawyers and litigants across the country in filing appeals/applications etc. due to the lockdown, the Apex court of India passed an order dated 23.03.2020 in Suomotu Writ Appeal (Civil) No. 3 of 2020 on the issue of law of limitation by observing as follows:

"To obviate such difficulties and to ensure that the lawyers/ litigants do not have to come physically to file such proceedings in respective Courts/ Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under general law or Special Laws

whether condonable or not shall stand extended w.e.f. 15 March, 2020 till further orders to be passed by this Court in present proceedings."

It was further observed vide order dated 22.05.2020 by the Hon'ble Court that "in the case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown."

Even thereafter, the Hon'ble Court had been extending time limits again and again for all the concerned to complete their actions which were getting barred by limitation as also time limit for filing replies and making compliance for the notices were also extended. Recently the Hon'ble Court passed an order dated 10.01.2022 in Suomotu Writ Petition (C) No. 3 of 2020 on the issue of law of limitation by observing as follows:-

"Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, Supreme Court has directed as under:

- The period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.
- In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3- 2022 is greater than 90 days, that longer period shall apply.
- The period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

3.2 Accordingly after giving effect to the said order/direction of the Apex Court by further excluding the time limit by reckoning a period of 90 days from 01.03.2022, the due date of filing of the appeal falls on 29.05.2022. Still however, since the appeal could be filed only on 22.07.2022, thus, a minor delay of 53 days has occurred. However, behind such delay there was neither any intention to delay the filing of the appeal nor things were

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within the control of the assessee and there did exist a reasonable cause in the peculiar facts of the present case, which has contributed to this further minor delay.

4.1 That before the due date approaching as per the above mentioned Supreme Court order, the impugned order was sent to the counsel at Jaipur and even appeal was duly prepared. However, when the appeal papers were collected by an employee of the assessee Shri Manoj Porwal for signature of the assessee, Shri Manoj Porwal proceeded on medical leave. In the meanwhile, unfortunately he kept the papers somewhere and completely forgot about those papers so received. On the other hand, the assessee remained under a bonafide belief that such appeal papers have been received and the needful has been done. However, when, the counsel situated at Jaipur, was discussing some other matters of the assessee, it came to surface that those appeal papers, which were duly sent for signature had been misplaced somewhere, and were not received back by him. Hence, when even after, an intensive search Shri Manoj Porwal could not trace back such papers, accordingly the appeal papers were prepared once again and sent to the assessee. Thereafter, the same were immediately signed and sent to Jaipur for filing thereof.

4.2. That in support of the aforesaid facts, affidavits of the assessee and of Shri Manoj Porwal are enclosed with this application. It is thus, evidently clear that things were beyond the control of the directors of the said company.

5. That the applicant is a layman and not very conversant with the complex tax laws and because of the circumstances stated above, the delay so caused was beyond his control but was bonafide and unintended which is established from the fact that the assessee has already deposited the requisite filing fees much before the due date being 28.04.2022. The assessee was not going to gain any benefit because of the delayed finding and his conduct was not contumacious.

6. Supporting Case Laws:

6.1 It is submitted that the Hon'ble Supreme Court in the case of Collector, Land & Acquisition v. Mst. Katiji & Others (1987) 167 ITR 471 (SC) has advocated for a very liberal approach while considering a case for condonation of delay. The following observations of the Hon'ble Court are notable:

"The legislature has conferred the power to condone delay by enacting section

5 of the Limitation Act 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on merits. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful

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manner which sub serves the ends of justice that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But, the message does not appear to have percolated down to all the other Courts in the hierarchy."

Prayer: It is, therefore, humbly prayed that this application may kindly be allowed by condoning the minor delay of 53 days, taking a sympathetic view, in the interest of justice.

Any other order, which this Hon'ble ITAT deems fit and proper, be also passed in favour of applicant assessee."

To this effect, the assessee has filed an affidavit as to the condonation of delay in filing the appeal

2.2. During the course of hearing, the ld. DR objected to assessee's application for condonation of delay and prayed that Court may decide the issue as deem fit and proper in the interest of justice.

2.3 We have heard the contention of both the parties and perused the materials available on record. The prayer as mentioned above by the assessee for condonation of delay of 462 days has merit for the reason that there was complete lockdown in Jaipur on account of COVIND-19 and all the offices including the office of assessee's consultant were closed and we concur with the submission of the assessee. Thus the delay of 462 days in filing the appeal by the assessee is condoned in view of the decision of Hon'ble Supreme Court in the case of

Collector, land Acquisition vs. Mst. Katiji and Others, 167 ITR 471 (SC) as the assessee is prevented by sufficient cause.

3.1 Now we take up the appeal of the assessee for adjudication relating to Section 263 of the Act. The brief facts of the case are that assessee filed its return of income for A.Y. 2017-18 on 27.05.2017 declaring total income of Rs. 65,87,590/-. Thereafter, the case was selected for scrutiny through CASS. Assessment u/s 143(3) of the I.T. Act for the A.Y. 2017-18 was completed on 28.03.2019 by the ACIT, Kota at total income of Rs. 71,70,120/-, thereby making an addition of Rs. 82,533/- on account of disallowance of unverifiable expenses and Rs. 5,00,000/- on account of disallowance of unverifiable material expenses. Thereafter, on examination of records, it is seen that the case of the assessee for A.Y. 2017-18 was selected for scrutiny through CASS. The AO in his order stated that the assessee has not submitted anything specific in response to the notice. As stated, various expenses claimed by the assessee are not subject to verification for want of proper vouchers and also due to cash payment of these expenses. Therefore a lumps sum disallowance of Rs. 5,00,000/- is made and added to the total income of the assessee. Subject to the above discussion and decision, total income of the assessee is computed as under:-

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Income declared by the assessee in ITR	Rs. 65,87,590/-
Add:	
Disallowances on account of unverifiable Expenses	Rs. 82,533/-
Disallowance on account of unverifiable Material expenses	Rs. 5,00,000/-
Total income	Rs. 71,70,123/-
Total income R/o	Rs. 71,70,120/-

3.2 On examination of the records, the ld. PCIT has found the order of the AO as erroneous and prejudicial to the interest of the revenue on the issues (supra), and the relevant findings of the ld. PCIT are reproduced as under:-

“ 3.1.....I have carefully examined the written submission of the assessee. The contentions of the assessee have been considered. It is pertinent to mention here that the various additional documentary evidences which have been furnished in compliance to notice u/s 263 of the I.T. Act were not produced before the A.O. This becomes all the more important in view of the fact that one of the key reason of scrutiny selection is ‘Large squared up loan during the year’. Since the AO has not examined the documentary evidences in respect of this issue and has not conducted the requisite verification, due to which the assessment order u/s 143(3) of the I.T. Act is found to be erroneous in so far as it is prejudicial to the interest of revenue.

However, in view of the facts and submission offered by the assessee, this issue requires thorough verification. Therefore, the AO is directed to conduct necessary examination and verification to find out the identity and creditworthiness of the lender and genuineness of transactions of unsecured loans and its squaring up with its supporting evidences as discussed in earlier paragraphs of this order by calling for relevant details and documents from the assessee as well as from the lender in respect of squared up loans during the year and based on such verification and examination of this issue and if squared up loan or any part of squared up loan is not found to be genuine, then he is directed to make addition to the total income of the assessee in accordance with the law by modifying the assessment order u/s 143(3) of the I.T. Act for A.Y. 2017-18.

3.2.....

I have carefully examined the written submission of the assessee. The assessee has failed to furnish any credible documentary evidence in his support hence contentions offered by the

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assessee are not fully acceptable. Further, on careful examination of the cash book of the assessee furnished during the course of assessment proceedings, it is seen that the assessee has deposited Rs. 35 Lakhs in State Bank of Patiala on 12.11.2016 (in old currency during the demonetization period) and has shown closing cash bank balance of Rs. 36,56,466/- as on 11.11.2016. Also, closing cash in hand as on 11.09.2016 has been shown at Rs. 22,79,335/- and as on 04.10.2016 of Rs. 30,84,017/-. Now, further scrutiny/examination of the above referred cash book reveals that following cash withdrawals have been made by the assessee: -

<i>S.No</i>	<i>Date</i>	<i>Cash withdrawals</i>	<i>Opening cash balance</i>
1.	12.09.2016	Rs.5,00,000/-	Rs.22,79,335/-
2.	26.09.2016	Rs.5,00,000/-	Rs.29,26,743/-
3.	05.10.2016	Rs.4,00,000/-	Rs.30,84,017/-
4.	20.10.2016	Rs.5,00,000/-	Rs.32,77,951/-
5.	25.10.2016	Rs.1,00,000/-	Rs.37,71,658/-

From the above it is seen that the assessee has made cash withdrawal on various dates despite the fact that as per the so called cash book furnished during the course of assessment proceedings, the assessee has shown substantial opening cash in hand on those dates. There seems to be no justification for such cash withdrawals, if any assessee is already having substantial cash in hand on a particular date. This becomes all the more important in view of the fact that the assessee has shown substantial interest expenses in the P&L account and no assessee would like to pay interest by holding huge cash in hand. Hence, if the assessee was having cash in hand as shown in the cash book in reality then there can be no justification for additional cash withdrawals on various dates as mentioned above, especially in view of the fact that no major expenses have been incurred in cash during the above period as per the cash book. Hence the submissions of the assessee on this issue cannot be accepted as such. Therefore, the AO is directed to thoroughly verify and examine this issue and based on such verification, make necessary addition to the total income of the assessee as required as per the Income Tax Act., 1961.

4. *The assessment order u/s 143(3) of the I.T. Act for the A.Y. 2017-18 dated 28-03-2019 was passed by the Assessing Officer in this case, without making proper enquiries or doing any verification of the issues as discussed in preceding para. Thus, these issues have remained*

unverified and requires detailed examination. Hence, assessment order u/s 143(3) of the I.T. Act for the A.Y. 2017-18 ated 28-03-2019 has thus been rendered erroneous and prejudicial to the interest of Revenue in these issues. In view of the detailed discussion made in preceding para, the AO is directed to conduct proper verification and enquiries and based on such verification and enquiries make addition to the total income of the assessee as per law wherever required by modifying the assessment order u/s 143(3) of the I.T. Act dated 28-03-2019 for A.Y. 2017-18. However, an opportunity of being heard should be given to the assessee before passing the order.

3.3 Aggrieved from the finding of the ld. PCIT the assessee preferred the present appeal before the Tribunal. To support the grounds so taken by the assessee, the ld. AR for the assessee has submitted his written submission and the same is reproduced as under:-

GOA 1 to 4: Order passed u/s 263 – Invalid

Submissions:

1. Legal Position on Sec.263 – Judicial Guideline: Before proceeding, we may submit as regards the judicial guideline, in the light of which, the facts of this case are to be appreciated.

1.1 The pre-requisites to the exercise of jurisdiction by the CIT u/s 263, is that the order of the Assessing Officer is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The CIT 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 any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, Sec.263 cannot be invoked. This 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 as also prejudicial to revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase '*prejudicial to the interest of the revenue*' has to be read in conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by

the AO is totally unsustainable in law. Kindly refer Malabar Industrial Co. Ltd. v/s CIT (2000) 243 ITR 83 (SC).

1.2 Also kindly refer CIT v/s Max India Ltd. (2007) 295 ITR 282 (SC) wherein it is held that:
"The phrase "prejudicial to the interests of the Revenue" in S. 263 of the Income Tax Act, 1961, has to be read in conjunction with the expression "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 the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."

Ratio of these cases fully apply on the facts of the present case in principle.

2. Due application of mind - Verification as required made:

2.1 It is submitted that the AO had raised very specific and relevant queries/called for explanation and evidences w.r.t. cash credit and cash deposits made during demonetization period, sale, purchases or expenses made, opening & closing stock maintained during the yearetc. to the extent he was supposed to act in law. The AO after making a detailed enquiry relating to the issues in hand and examination of books of account, for the current year and other records took a possible view that the assessee was admittedly (impugned order u/s 263) having sufficient cash balance of Rs.36,56,466/- on 11.11.2016 available immediately prior to the subjected cash deposits (i.e. 12.11.2016 and onwards) and completed the subjected assessment. The relevant para of the assessment order, wherein the AO has examined each and every documents submitted by assessee during scrutiny proceedings, is reproduced below:

"The case was selected for scrutiny through CASS and issued notice u/s 143(2) on 13.08.2018, which was duly served by e-mail. Notice u/s 142(1) along with query letter to the assessee was issued on 28.01.2019. In response thereto, Shri Vishal Gupta, CA & AR attended from time to time and furnished online submission & required documents and details. The case was heard and discussed with him."

2.2 This is also evident from queries raised and the replies given thereto, reproduced hereunder:

2.2.1 Through the Notice/s u/s 142(1) dated 28.01.2019 (PB 5-11), certain information was called for through Annexure (PB 6-11). The relevant extracts from the required information are reproduced herein below:

"7. Details of the unsecured loans inclusive of the squared up accounts may be furnished along with the confirmation of the creditors & documentary evidence regarding the credit worthiness & genuineness in the following format for the loans taken:

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S.No	Name, address, PAN & the A.O.	Opening balance as on 01.04.16	Addition/payment made during the year	Mode of receipt/ payment	Interest paid	Rate of interest	Amount of TDS	Date of deposit of TDS

19. Please furnish the details of cash deposits during demonetization period with source of cash along with supporting documentary evidences. Please furnish the details of demonetized currency and legal currency also.

x-----x-----x-----

21. Photocopies of bank accounts /statements narrating debit and credit entries above Rs. 50,000/- in each case may be furnished. Please also file the bank reconciliation statements as well. Further details of any new account opened as on date of issue of notice may also be given.

x-----x-----x-----
 ----x

26. Please produce all the books of accounts and other relevant registers etc. along with supporting documents and vouchers for verification as prescribed.”

2.2.2. Replies dated 14.03.2019 and 22.03.2019 were filed in response to the above notice/s (PB 12-24) wherein all the required information and documents were submitted by the assessee. The extracts from the reply dated 14.03.2019 are reproduced as under:

7. There are only two unsecured loan obtain by the assessee during the year and we are enclosing with this letter copy of confirmation of account of unsecured loan as ‘Annexure-E’.

x-----x-----x-----

19. Details will be submitted later.

x-----x-----x-----

21. Assessee has two bank account in State Bank of Patiala during the year and we are enclosing with this letter copy of both the bank statement as ‘Annexure-P’

x.....x.....x.....x

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26. As annexure are more than 5MB and not possible to upload the same and the same will be submitted manually to the department. Rest information is under preparation and will be submitted on next hearing.

'The relevant extracts from the reply dated 14.03.2019 are reproduced as under:-

"3. During demonetization period assessee has deposited old currency of Rs. 35,00,000/- on dated 12.11.2016 in bank out of cash balance available in hand. For your reference we are enclosing with this letter complete cash book for the period 01.04.2016 to 31.03.2017 as "Annexure-A"

4. As Annexure are more than 5MB and not possible to upload the same and the same will be submitted manually to the department."

2.3 The ld. AR attended time to time, produced books of account, copies of accounts of unsecured loans, sundry Advances taken (Creditors), Copy of Cash Book, and filed various other details as required, stated above and also those even though not required, which were duly examined.

The AO made all the inquiries, sought clarifications on all the relevant issues to the extent he was supposed looking to the nature of the issue involved, the past accepted history of the case and the evidences and material already available therein together with the material provided during the assessment proceedings. Thus, ld. AO framed the assessment in accordance with the available judicial guideline.

Hence, it cannot be said that the impugned assessment order was erroneous and therefore prejudicial to the interest of the revenue, for want of enquiry by the AO.

2.4 Kindly refer CIT v/s Rajasthan Financial Corporation (1996) 134 CTR 145 (Raj).held that:

"Once Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the Assessing Offer allowed the claim being satisfied with the explanation of assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order not make an elaborate discussion in that regard."

2.5 In CIT v/s Ganpat Ram Bishnoi (2005) 198 CTR (Raj) 546 held that from the record of the proceedings, in the present case, no presumption can be drawn that the AO had not applied its mind to the various aspects of the matter. In such circumstances, without even prima facie laying foundation for holding that assessment order is erroneous and prejudicial to interest in any matter merely on spacious ground that the AO was required to make an enquiry, cannot be held to satisfy the test of existing necessary condition for invoking jurisdiction u/s 263. Jurisdiction u/s 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something.

3. Beyond the scope of enquiry contemplated u/s 263:

3.1 Requisite Details already available – Cash Credit - allegation is Factually Incorrect: The allegation by the Ld. CIT that the AO did not properly verify is not factually correct. The

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admitted and undisputed facts are that the assessee did file the confirmation (PB-24) which was bearing the complete address of the creditor Sh. Shambhu Kumar with his complete PAN No. Needless to say that with reference to PAN, the present assessing officer could have and rather had made enquiry directly in the Income Tax Return and the Assessment records of the creditor Shambhu Kumar. There is nothing on record to show contrary thereto. The apparent and admitted facts are the receipt of the amount as also repayment through banking channels. Even interest of Rs.7,15,891/- was also paid through Cheque and TDS of Rs. 71,589/- was also deducted. Thus, all the requisite details which prove the identity of the creditor, capacity of the creditor as also the genuineness of the transactions were already available on record, when he passed the subjected Assessment Order.

3.2 AO acted as per Judicial Guidelines:

This all the more holds good when binding decisions of the Hon'ble jurisdictional High Court in various cases (infra) have propounded the principle in the context of S.68 being only the examination of the identity of the money lender concerned his/her the confirmation of the fact of providing/ transferring subjected amount to the assessee but the AO is not legally bound to examine source of source, once the immediate source is available.

3.3 Following decisions of Hon'ble Rajasthan High Court are directly relevant for the purpose.

3.3.1 Kindly refer Labhchand Bohra V/s ITO (2008) 8 DTR 44 (Raj.) held that

“Cash credit- burden of proof- identity of the creditors established and the confirmed the credit. This discharged the burden of appellant to prove genuineness. However, capacity of the lender to advancement money to appellant was not a matter which the appellant could be required to establish and that would amount to calling upon him to establish the source of source. Hence addition cannot be sustained.”

3.3.2 In Aravali Trading Co. v/s ITO (2008) 8 DTR 199 (Raj) (DPB 1-5) held that:

“Once the existence of the creditors is proved and such persons own the credits which are found in the books of the appellant, the appellant's onus stand discharged and the latter is not further required to prove the sources from which the creditors could have acquired the money deposited with him and, therefore the addition u/s 68 cannot be sustained in the absence of anything to establish that the sources of the creditors deposits flew from the appellant itself.”

3.4 Accordingly, the AO raised very specific and directly relevant queries/called for explanation and evidences w.r.t. source of amount received and the creditworthiness of the person who lends money, means to the extent he was supposed to act in law and in accordance with the above decisions.

3.5 The Ld. CIT merely alleged but completely failed to establish that the three ingredients which are requisite for examining the case u/s 68, were not fulfilled. Identity was established by the very fact that he was a regular income tax assessee with PAN no and he was also a customer of the bank which was not possible otherwise if the identity was not fully established. The Capacity stands proved when the AO has seen in the assessment records of the creditor with the

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help of the PAN No. Thirdly the genuineness already stands proved by the fact that the amount was received and repaid through cheque. Moreover, TDS was deducted on the interest payment. Thus, in absence of anything adverse arising suspicion of the AO on the record with respect to the said creditor Sh. Shambhu Kumar, the AO was not supposed to have made addition further inquiry or addition which the Learned CIT wanted him to make simply because the quantum of the amount was huge. In view of the binding judicial guideline, the AO was not obliged still to ask the assessee to provide source of source under the pretense of examination of the creditworthiness of the money lender. It was nothing but a mere case of suspicion and substitution of opinion by the CIT who wanted the AO to do something more which was not otherwise warranted in the eyes of law. The AO has done everything which he was supposed to have done.

3.6.1 Before the Ld. CIT also, the appellant admittedly submitted various evidences being the copies of the ledger A/c of Shambhu Kumar, his Bank Passbook, his ITR along with computation of total income and financial Statements of Shambhu Kumar to establish the Creditworthiness of the Lender (PB 12-24). And once he was satisfied with their transaction did not make any adverse observation after considering the entire record available before him on the date of examination u/s 263, he was not supposed yet to continue with the proceeding u/s 263 and sending it back to the AO to make a futile and duplicate exercise, which has already been done. In other words, the Ld. CIT having all the record before him and felt satisfied, should have dropped the issue in hand there itself.

3.6.2 In *Gabriel India Ltd.* [1993] 203 ITR 108 (Bom) (DPB 38-43), law on this aspect was discussed in the following manner (page 113): “. . . From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. It is not an arbitrary or unchartered power; it can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.

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3.6.3 In the case of Abdul Hamid v. Income-tax Officer [2020] 117 taxmann.com 986 (Gauhati - Trib.) it was held that only probability and likelihood to find error in assessment order is not permitted u/s 263.

3.6.4 Interestingly, in the re-assessment order passed u/s 143(3)/263 dated 29.03.2022, no addition has been made by the AO u/s 68 in relation to the same unsecured loan received from Sh. Shambu Kumar of Rs.1 crore and it can be found from Para 2 of Pg.2 of the re-assessment order that all those details were again discussed by the AO. Hence, no action u/s 263 was warranted on this issue.

4. Cash Deposits in Bank A/c:

4.1.1 The allegation by the Ld. CIT that the AO did not verify cash deposits of Rs.35,00,000 in the form of old currency notes in the bank account on a single day as per the SOP of CBDT during demonetization period and also the genuineness of the transactions of loan taken from Shambhu Kumar was not examined, appears factually incorrect in as much as one cannot presume that the Assessing Officer while passing the scrutiny Asst. Order, must not have seen or looked upon the past asst. records. It is pertinent to note that the assessee in its replies made specific reference to the cash deposited of Rs.35,00,000/- in the period of demonetization on 12.11.2016 and the source of cash deposited was also explained through Annexure-A cash book attached with reply dated 22.03.2019 in response to notice u/s 142(1) dated 28.01.2019.

4.1.2 It is now well settled that where assessee has regularly maintained books of accounts is an admissible evidence under Indian Evidence Act, 1872. This holds good more particularly, when the Ld. CIT did not disbelieve or did not doubt or even did not reject the same. Since, availability of cash balance in the regularly maintained cashbook, which were duly and admittedly submitted before the AO in the subjected assessment proceedings, there was no reason as to why the AO should have doubted.

4.2 It is submitted that the AO raised very specific and relevant queries/called for explanation and evidences w.r.t. cash deposits made during demonetization, to the extent he was supposed to act in law. Hence, the allegation and the expectation of the Ld. CIT from the AO that he has failed to verify source cash deposits of Rs.35,00,000 in the form of old currency notes in the bank account on a single day as per the SOP of CBDT and also failed to verify the sources of the cash deposits, is clearly beyond the scope of S. 263, in as much as he was supposed, only to the extent of examination of the fact of availability of sufficient cash in hand lying immediately before 12.11.2016. Thus, it was fully established beyond all reasonable doubts that there was sufficiency of cash available and in absence of any evidence of utilization thereof elsewhere by the Ld. CIT, the same could be deposited in the bank a/c.

4.3 Further, the Ld. CIT in para 3.2 has made a sweeping and vague remark that the AO did not act upon as per SOP however, he himself did not point out in what manner there has been such

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violation. Interestingly, the assessee is a real estate developer. During the year also he completed a multi-story building. Admittedly, the assessee was in receipt of Rs.8,34,46,000/- as shown in the P&L A/c (PB 21) substantial amount was received in cash. The Id. CIT did not doubt the genuineness of the cash receipts entries made in the cash book nor the accounts was rejected. Moreover, he was bound by his own admission that on 11.11.2016 there was a cash balance of Rs.36,56,466/- (PB 58-59).

4.4Ld. CIT could not successfully rebut the above facts, availability of cash in the cash book but merely proceeded on suspicion by saying that there were cash withdrawal on various dates even though they were not required. Law is well settled that business man is the best judge to take care of its interest and the revenue cannot put itself into the shoe of the business man as stated in J.K. Woollen Manufacturers Vs. Commissioner of Income Tax(1969) 72 ITR 612 (SC).It is for the assessee business man, to take a decision who may be required to keep sufficient cash keeping in mind the possible/forthcoming opportunities.

5.1 Fairly speaking, from the point of a quasi-judicial authority (the AO), the past history of the case the documents submitted in the response to notices before the Ld. AO, the books of accounts are not rejected and therefore, having a binding value, which included cash book of the current year with the opening balances of Rs.3,54,587/-as on 01.04.2016, there being no indication even remotely to raise a suspicion warranting an inquiry, were all the sufficient facts, material & evidences, to take a possible decision. He was not supposed to examine with a microscope.

5.2 In the instant case, the AO was having regularly maintained cash book on day to day basis and opening cash in hand showing sufficient cash balance immediately prior to the subjected bank deposits and more particularly, when all along in the past the availability of the cash, bank balances, investments and creditors stood accepted by the Dept. as stated above, the AO was not supposed to doubt the explanation of the assessee until and unless there was some contrary evidence available on record, arousing his suspicion.

6. Supporting Case Laws on Cash Deposit beyond scope s.263:

6.1 In another case of PCIT vs. Dilip Kumar Swami [(2019) 264 Taxman 33 (Raj)(DPB 6-8) it was held that Assessee filed his return declaring certain taxable income - In course of assessment, Assessing Officer noted that assessee had deposited certain amount in his bank account - On being enquired about source of said deposit, assessee explained that it represented amount received from various purchasers against sale of goods i.e., tractors and accessories thereof - Assessing Officer accepted assessee's explanation and completed assessment - Commissioner taking a view that cash deposits not being satisfactorily explained, passed a revisional order setting aside assessment - Tribunal, however, set aside revisional order so passed

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- It was noted that order passed by Assessing Officer that deposits stood reconciled was preceded by a proper inquiry - It was also found that assessee had produced statement of bank account, copies of bills issued to purchasers of tractors as also books of account showing entries of deposits made in bank - Moreover, Assessing Officer had recorded a categorical finding that entries in bank account were verifiable from cash book and also bills produced by assessee - Whether in view of aforesaid, Tribunal was justified in setting aside revisional order passed by Commissioner - Held, yes.

6.2 In the case of Rameshwar Prasad Shringi Vs. PCIT (2021)214 TTJ 257 (Jp) held as under: (DPB 9-14)

“ Assessee having explained the cash deposits in his bank accounts on the basis of recovery of old outstanding advances from debtors, and the AO having accepted the said explanation after thoroughly examining the relevant financial statements and tax records of the assessee pertaining to the preceding years, the order passed under s. 143(3) cannot be held to be erroneous insofar as prejudicial to the interests of the Revenue and, therefore, the impugned order passed by the Principal CIT under s. 263 is not sustainable.”

6.3 In the case of Bharat Tirtha Rice Mills Vs. PCIT, Kolkata (2022) 220 TTJ 1057(Kol) held as under: (DPB 15-37)

“ AO having raise a specific query about the cash deposit made by the assessee in its bank account during the demonetization period and the assessee having submitted complete details and explained that the large deposit in the bank was made out of the unutilized withdrawals made out of its CC facility before the declaration of demonetization, it is clear that the AO made due enquiry on this issue and, therefore, the impugned order passed by the CIT under s. 263 on the ground that the AO did not verify the said issue property is not sustainable.”

6.4 Also refer Paramjit Singh Vs. Principal Commissioner of Income Tax (2016) 48 CCH 0199 ChdTrib/ (2013) 12 NYPTTJ 2316 (Chd) (DPB 44-53)

The principal propounded in the above cases directly apply in the present case.

7. Supporting case laws on availability of funds:

7.1 In CIT v/s P.V. Bhoopathy (2006) 205 CTR 495 (Mad) held:

“Appeal (High Court)—Substantial question of law—Income from undisclosed sources—AO did not accept various sources of income explained by the assessee and made additions under ss. 68 and 69 in respect of difference between the investments and the sources accepted by him—Tribunal accepted the explanation of the assessee vis-a-vis availability of funds with the assessee from the sale proceeds of jewellery belonging to his mother- in-law, receipt from a party and

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also the amount of opening balance and savings from earlier years and deleted all the additions—Findings recorded by the Tribunal are purely findings of fact—There is no reason to interfere with the same—No substantial question of law arises—CIT vs. Pradeep Shantaram Padgaonkar (1983) 143 ITR 785 (MP) relied on”

7.2 In CIT vs Kulwant Rai (2007) 210 CTR 380 (Delhi) para 16-17

Read held “Search and seizure—Block assessment—Computation of undisclosed income—Cash found during search—Assessee had withdrawn Rs. 2 lakh from bank some time back and there is no material with the Department to show that this money had been spent and was not available with the assessee—Tribunal has found that the withdrawals shown by the assessee are far in excess of cash found during the course of search— In the absence of any material to support the view that the entire cash withdrawals must have been spent by the assessee, Tribunal was justified in holding that the addition was not sustainable—Order of the Tribunal does not give rise to a substantial question of law”

In this case, cash was found on search carried out on 04.02.2001 and was explained to be out of the cash withdrawal in Dec-2000.

7.3 Also refer Anand Prakash soni v/s DCIT (2006) 101 TTJ 97 (Jd) para 5-6

“Search and seizure—Block assessment—Computation of undisclosed income—Cash found during search—Assessee is entitled to furnish cash flow statement to explain the transactions when no books of account are maintained—In such circumstances it becomes the duty of the AO to verify the balance sheet and cash flow statement with the necessary material including the details already filed along with the returns in the past—Assessee explained that the cash found at the time of search was withdrawn from the bank some time back which was partly used for purchasing gold and part of the amount was given by the assessee to his wife—There is nothing to suggest the utilization of the withdrawal amount elsewhere—Said withdrawal is duly reflected in the cash flow statement and closing cash balance is more than the amount found at the time of search—Thus, addition cannot be sustained”

7.4 in CIT v. G.M. Mittal Stainless Steel (p) Ltd. (2003) 263 ITR 255 (SC)

“Precedent—Binding nature of judgment—Decision of the jurisdictional High Court—Where the decision of the jurisdictional High Court has not been set aside or at least has not been appended from it would be binding—In view of this CIT proceeding on the basis of the High Court other than jurisdictional High Court on the basis that jurisdictional High Court was erroneous and that the AO who had acted in terms of the High Court’s decision had acted erroneously, was not justified”

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8.1 *It is not the case of CIT that there was a complete/total lack of inquiry. Law is well settled that the assessment order cannot be held to be erroneous simply on the allegation of inadequate enquiry. Unless there is an established case of total lack of enquiry. Kindly refer CIT vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (del), wherein Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held that one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between 'lack of inquiry' and 'inadequate inquiry'. If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of 'lack of inquiry' that such a course of action would be open.*

The Ld. CIT himself admits that the AO did make enquiries however, in his view it was insufficient and in adequate enquiries, which is not a good basis, more probably, when he did not invoke explanation (Expl. 2(a) to Sc. 263.

8.3 *In CIT vs. Chemsworth Pvt. Ltd. (2020) 275 Taxman 408 (Kar),, it was held that:*

Revision—Erroneous and prejudicial order—AO taking plausible view—AO completed the assessment without considering expenditure which was not allowable under s. 14A—CIT held that non-consideration of disallowable expenditure under s. 14A was erroneous and is prejudicial to the interest of the Revenue—Not correct—CIT has held that the enquiry conducted by the AO was inadequate and has assumed the revisional jurisdiction—Assessee has filed all the details before the AO and AO has accepted the contention of the assessee that no expenditure was attributable to the exempt income during the relevant assessment year—Thus, while recording the said finding, the AO has taken one of the plausible views in allowing the claim of the assessee— Therefore, CIT could not have set aside the order of assessment merely on the ground of inadequacy of enquiry—Order passed by the CIT was not sustainable in law hence, the Tribunal rightly set aside the impugned order of the CIT.

The Ld. CIT is completely silent on this aspect.

9. *Moreover, discretion conferred upon the AO u/s 69/69A has been exercised judiciously w.r.t. both the issues as held and in accordance with CIT vs. Smt. P.K. Noorjahan (1999) 237 ITR 0570 (SC); as under:*

“As pointed out by the Tribunal, in the corresponding clause in the Bill which was introduced in Parliament, the word "shall" had been used but during the course of consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word "may". This clearly indicates that the intention of Parliament in enacting s. 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been

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satisfactorily explained by the assessee as the income of the assessee and the ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. The question whether the source of the investment should be treated as income or not under s. 69 has to be considered in the light of the facts of each case. In other words, a discretion has been conferred on the ITO under s. 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case. In the instant case, the Tribunal has held that the discretion had not been properly exercised by the ITO and the AAC in taking into account the circumstances in which the assessee was placed and the Tribunal has found that the sources of investments could not be treated as income of the assessee. The High Court has agreed with the said view of the Tribunal. There is no error in the said finding recorded by the Tribunal. There is thus no merit in these appeals and the same are accordingly dismissed. — CIT vs. Smt. P.K. Noorjehan (1980) 15 CTR (Ker) 138: (1980) 123 ITR 3 (Ker):42R.1622, affirmed.”

In view of the above submissions and the judicial guideline, the impugned order passed u/s 263 deserves to be quashed.”

3.4 On the other hand, the ld. DR supported the order of the ld. PCIT, Udaipur.

3.5 We have heard the rival contention and perused the material available on record. Brief facts of the case are that the assessee is a builder and during the year under consideration constructed a multistory building. During the course of assessment proceedings, the AO noticed that the assessee had debited following expenses.

i.	Site expenses	Rs.5,23,263/-
Ii	Vehicle Running & Maintenance Exp.	Rs. 8,043/-
Iii	Petrol & diesel expenses	Rs. 34,593/-
Iv	Telephone & Mobile expenses	Rs. 15,875/-
V	Office expenses	Rs. 2,43,559/-
	Total	Rs.8,25,333/-

The AO noted that the above expenses are not properly vouched or supported by self prepared vouchers and such expenses were made mostly in cash. The above expenses claimed by the assessee are not subject to verification for want of proper vouchers and also due to cash payment of these expenses. Thus the AO out of total expenses of Rs.8,25,333/- disallowed 10% expenses which comes to Rs.82,533/- and added the same to the total income of the assessee. The AO further during the course of assessment proceedings noticed that the assessee had debited following manufacturing expenses.

i.	Material purchase	Rs.4,81,83,817/-
ii	Labour expenses	1,64,10,234
	Total	Rs.6,45,94,051

The ld. AR of the assessee submitted a written submission that the assessee has done construction work during the year. In the construction, Gitti and Sand are the main consumable items. The bills of sand is not available as it is purchased from the truck wala on cash basis and Gitti is also taken from small workers on cash payment basis. The payment made for Gitti and Sand is to genuine person and they are small suppliers. The submissions of the ld. AR was found unsatisfactory by the AO and the AO noted that expenditure made on account of Gitti and Sand Bajri were not properly vouched or self vouched and also these expenses were

incurred in cash. The AO also observed during assessment proceedings that the Id AR of the assessee has not submitted anything specific in this regard and various expenses claimed by the assessee are not subject to verification for want of proper vouchers and also due to cash payment of these expenses and thus the AO made a lumpsum disallowance of Rs. 5.00 lacs and added to the total income of the assessee. The Id. PCIT during the proceeding of Section 263 of the Act did not find merit in the assessment order of the AO and held that the order of the AO is erroneous and prejudicial to the interest of the Revenue as the AO has not made proper verification and enquires in the case of the assessee. The Id. PCIT has also observed that the assessee had deposited cash of Rs.35.00 lacs in the form of old currency notes in bank account on a single day i.e. 12-11-2016 during demonetization period for which the AO was required to verify as per guidelines of SOP of CBDT Circular in this matter including calling of information u/s 133(6) of the Act including demonetized currency. The Id. PCIT also noted that the AO had failed to verify the cash deposits of Rs.35 lacs in the form of old currency notes in the bank account on a single day and also failed to verify the sources of this cash deposits of Rs.35 lacs and therefore the assessment order in the case of the assessee for the assessment year under consideration was found to be erroneous in so far as it is prejudicial to the interest of the revenue.

Consequently, the Id. PCIT observed that *due to lack of enquiries and also due to incorrect and incomplete appreciation of facts and law, the assessment order u/s 143(3) of the Act for the A.Y. 2017-18 has been rendered erroneous in so far it is prejudicial to the interest of Revenue.* It is noteworthy to mention from the order of Id. PCIT, Udaipur that *various additional documentary evidences which have been furnished in compliance to notice u/s 263 of the I.T. Act were not produced before the AO. This becomes all the more important in view of the fact that one of the key reason of scrutiny is ‘Large squared up loan during the year’.* Since the AO has not examined the documentary evidences in respect of this issue and has not conducted the requisite verification due to which the assessment order u/s 143(3) of the I.T. Act is found to be erroneous in so far it is prejudicial to the interest of revenue. Hence, taking into consideration the above facts and circumstances, we find that the Id. PCIT is justified in holding that that the assessment order u/s 143(3) made by the AO for the A.Y. 2017-18 dated 28-03-2019 had been rendered erroneous and prejudicial to the interest of the revenue and we concur with the findings of the Id. PCIT taking into consideration the written submissions of the assessee. Thus the appeal of the assessee is dismissed.

4.0 In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on 20 /06/2023.

Sd/-

(राठोडकमलेशजयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-

(डॉ.एस.सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 20/06/2023.

*Santosh

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Parshavnath Builders, Jaipur.
2. प्रत्यर्थी / The Respondent- PCIT, Udaipur.
3. आयकरआयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
5. गार्डफाईल / Guard File {ITA No. 284/JPR/2022}

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar