आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा॰ एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 296/JP/2023
निर्धारण वर्ष/Assessment Years : 2016-17

Laxmi Narayan Agarwal 104, Ridhi Sidhi Apartment Ahinsa Circle, C-Scheme, Jaipur	बनाम Vs.	PCIT, Jaipur-02, Income Tax Department
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABSPA 1338 G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Manish Agarwal (C.A.)
राजस्व की ओर से/ Revenue by : Shri Arvind Kumar (CIT)

सुनवाई की तारीख/ Date of Hearing : 06/07/2023
उदघोषणा की तारीख/Date of Pronouncement : 29/08/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by the assessee aggrieved from the order of the Principal Commissioner of Income Tax, Jaipur-2 [Here in after referred as Ld. PCIT] for the assessment year 2016-17 dated 29.03.2023, which in turn arises from the order passed by the DCIT, Circle-04, Jaipur passed under Section 143(3) of the Income tax Act, 1961 (in short 'the Act') dated 31.12.2018.

2. The assessee has marched this appeal on the following

grounds:-

"1. On the facts and in the circumstances of the case ld PCIT has grossly erred in passing order u/s 263 of the Income Tax Act (the Act), issuing directions for Revision of order passed u/s 143(3) of the Act, arbitrarily.

1.1. That, ld. PCIT has grossly erred in exceeding jurisdiction is passing order u/s 263 of the Income Tax Act, in respect of Assessment order passed u/s 143(3), for which assessee had already filed application under Vivad Se Vishwas Scheme on 30.01.2021, which was accepted by the department (as Form 3 was also issued on 23.02.2021). Appellant prays that revision of assessment order already settled under Vivad Se Vishwas Scheme (the scheme) is not in accordance with legislative intention of the scheme and thus order u/s 263 giving such direction for revision of the assessment order deserves to be quashed.

1.2. That, ld. PCIT has further erred in brushing aside the decision of Hon'ble Madras High Court in the case of Gopalakrishnan Rajkumar Vs. PCIT reported in 445 ITR 577 which specifically holds that once assessee opts for Vivad Se Viivad Scheme 2020, proceedings initiated against him u/s 263 shall abate. Appellant prays that such action of ld. PCIT is against the principle of judicial hierarchy and order so passed deserves to be quashed.

Without prejudice to above, and in the alternative:"

2. On the facts and in the circumstances of the case and in law, PCIT grossly erred in holding that Ld. AO has failed to apply his mind and to verify unsecured loans. Appellant prays that all the necessary details, related to verification of unsecured loans, including party confirmations were sought and filed and only after recording satisfaction in assessment order in this regard, assessment was completed, thus order passed by ld.AO cannot be termed as erroneous by any stretch of imagination.

3. That the ld. Pr. CIT has further erred in setting aside the order u/s 263 when it is not clarified as to how the order is prejudicial to the interest of revenue, more particularly when the twin conditions needs to be satisfied cumulatively for invoking the provisions of section 263, thus the order so passed deserves to be held bad in law and be quashed.

4. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal."

3. The fact as culled out from the records is that the is a civil contractor and has been designated as an AA class contractor by various government departments and derives income from business of contractorship. The assessee e-filed his ITR for the A.Y 2016-17 on 14.10.2016 vide acknowledgement No. 495741741141016 thereby declaring total income of Rs. 9,11,36,210/-. The case was selected for scrutiny under compulsory manual selection therefore notice u/s 143(2) was issued through ITBA Portal with digital signature on 26.09.2017, fixing the case for hearing on 29.09.2017. Thereafter, to complete the assessment proceedings in this case, notices u/s 142(1) along with questionnaires were issued to the assessee through ITBA Portal. The order is passed u/s 143(3) of the I.T. Act by making disallowance of labour expenses for an amount of Rs. 50,00,000/-, Disallowance of vehicle and R&M Expenses for an amount of Rs. 50,000/-, Disallowance of staff welfare, conveyance, computer, and office expenses for an amount of Rs. 1,00,000/- and Rs. 3,00,000 disallowed out of the claim on site expenses.

4. On culmination of the assessment proceeding the ld. PCIT called for the assessment records and verification the PCIT observed that the assessee had taken unsecured loans from 34 lenders and during the assessment proceeding, these had not been examined with respect to the requirements namely, identity of the person, genuineness of the transaction and credit worthiness of the payer. Accordingly PCIT noted that the AO had not verified the issue of unsecured loans (USL) received while completing the assessment and therefore, a show cause notice u/s. 263 was issued to the assessee. The assessee in response not filed reply and thus, the order u/s. 263 of the Act to be done de-novo. The assessee filed an appeal before the ITAT against this order of the PCIT and the appeal of the assessee was decided by the ITAT on 28.10.2021 wherein the ITAT observed as under:

> *Considering the entirety of facts and circumstances of the case, we believe that the assessee deserves a reasonable and sufficient opportunity to put forth his submissions and supporting documentation in response to the show cause notice raised by the ld. Pcit. We therefore deem it fit and appropriate that the matter be set-aside to the file of the ld. Pcit to decide the matter a fresh as per law after providing reasonable opportunity to the assessee.*

4.1 In compliance to the direction of the ITAT, the notice was issued to the assessee and the assessee filed a detailed reply

contesting the revision of order vide reply dated 28.02.2023. After considering the issues raised and the reply filed by the assessee the ld. PCIT has passed an order u/s. 263 of the Act on 29.03.2023 where in the relevant finding of the PCIT is reiterated here in below:

> "I have gone through the assessment order and the case records and have also considered the submissions filed by the assessee. The issues raised by the assessee may be dealt with as under: the case
>
> 6.1 As regards the validity of revision proceeding u/s 263 despite the application of assessee having been finalized under Direct Tax Vivad se Vishwas (for short DTVSV Act) Act, 2020, the contentions of assessee is not in the spirit of the provisions of DTVSV Act, 2020. Rather the provisions of DTVSV Act go against the assessee. For the sake of convenience, relevant provisions of DTVSV Act, 2020 are given hereunder:
>
> Section 5(3)
>
> Every order passed under sub-section (1), determining the amount payable under this Act, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the Income-tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India.
>
> Section 8
>
> Save as otherwise expressly provided in sub-section (3) of section 5 or section 6. nothing contained in this Act shall be construed as conferring any benefit, concession or immunity on the declarant in any proceedings other than those in relation to which the declaration has been made.
>
> From a plain reading of the above provisions it is clear that the declaration filed under DTVSV Act, 2020 is conclusive as to those issues only which have been settled in such declaration i.e. the issues which have resulted into the arrears of demand settled by such declaration. In

the present case no addition on account of unsecured loans was made in the assessment order passed u/s 143(3) and hence the demand settled in the declaration under DTVSV Scheme does not relate to the Issue under consideration. In view of such fact and legal position, the contention of assessee in this regard is not accepted.

6.2 As regards the case law cited above, the same is distinguishable on facts. In the present case the issue of unsecured creditors has not been examined by the AO at all. Further, the above decision of the Hon'ble Madras High Court has not been accepted by the department & SLP has been filed before the Hon'ble Supreme Court.

6.3 Coming to filing of confirmation of lenders and other material regarding unsecured loans as already discussed in this order, the assessee had submitted reply on 21-12-2018 and 27-12-2018, however nothing regarding the unsecured loans had been discussed in those replies. Even the order sheet entries made during assessment proceedings have no mention about any material regarding the unsecured loans being submitted by the assessee.

6.4 A perusal of records shows that the assessee had taken unsecured loans from 34 lenders of an amount of Rs Rs.4,32,36,096/- and the AO has accepted the same without examining the basic requirements namely the identity of the person, genuineness of the transaction and credit worthiness of the payer. The case had been selected for scrutiny under compulsory manual selection and this aspect needed to be examined which the AO has not done. In the present proceedings the assessee in its reply has relied on the Page 7 of the assessment order wherein the AO has mentioned that all pending details such as confirmation of unsecured loan parties were produced. However, a perusal of records shows that the AO refers to the documents to be produced in two order sheet entries dated 22.12.2018 wherein reference is made to complete log books of vehicles and on 24.12.2018, where he mentions that logbooks are produced and refers to discrepancies found by him in the various Heads of Expenditure and passes the order on 31.12.1018. The assessee has filed two letters on 21.12.2018 and 27.12.2018 which do not speak anything about the unsecured loans. Further, the confirmations claimed to have been filed during assessment proceedings are also not on record. Since this information was not available with the AO, hence has not been examined by him also. The list of lenders as appearing in column 31(a) of Form 3CD includes 34 lenders and PAN are appearing for only 10 persons. In the present proceedings the assessee has filed confirmation letters but the same

were not before the AO. Lack of enquiry and failure to examine the issue has resulted in committing an error by the AO resulting in prejudice to the revenue.

7. From the above facts and circumstances of the case and having regard to the material available on record, the Assessing Officer has failed to consider/apply his mind to the information available on record with regard to verification of unsecured loans. This in turn has resulted in passing of an erroneous order by the Assessing Officer in the case due to non-application of mind to relevant material, reflecting non appreciation of facts and an incorrect application of mind to law which is prejudicial to the interest of the revenue. Thus, the order passed U/s 143(3) on 31.12.2018 is held to be erroneous and prejudicial to the interest of the revenue. The judgement of the Hon'ble Supreme Court in the case of Malabar Industrial Limited V/S CIT 243 ITR it has been held as under-

"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".

8. Accordingly, by virtue of powers conferred on the undersigned under the provisions of section 263 of the Income Tax Act 1961, I hold that the order under Section 143 (3) of the IT Act dated 31.12.2018 for AY 2016-17 passed by the Assessing Officer is erroneous in so far as it prejudicial to the interest of revenue as the said order has been passed by the Assessing Officer by without application of mind and verification of unsecured loans. The order of the Assessing Officer is therefore liable to revision under the explanation (2) clause (b) and clause (a) of section 263 of the Income Tax Act, 1961. Hence, the assessment order is set aside on the issue as discussed above and the AO is directed to examine the issue and pass suitable order after according opportunity of being heard to the assessee.

The order of the AO is, accordingly, set aside on the issue as discussed above."

5. Again, the assessee feeling dissatisfied with the order of the PCIT passed u/s. 263 of the Act, filed the present appeal before the

tribunal on the grounds as raised here in below. A propose to the grounds so raised the ld. AR appearing on behalf of the assessee has placed their written submission which is reproduced here in below;

> Brief facts of the case are that the assessee is an individual and is engaged in the business of civil contractor and the return of income was filed declaring total income of Rs. 9,11,36,210/- on 14.10.2016 and the assessment for the year under consideration was selected for scrutiny under compulsory manual selection. After obtaining requisite details, assessment was completed at a total income of Rs. 9,65,86,210/- by making various disallowances. The said order was challenged by the assessee before ld. CIT(A). Thereafter in order to settle the disputes and to avoid the prolonged litigation, the assessee opted to apply in the scheme announced by the Hon'ble Finance Minister in finance act, 2020 as "direct tax vivad se vishwas scheme act, 2020" and accordingly an application under form-1 and 2 was filed on 31.01.2021 (APB 45-55). In response to it form no. 3 on 23.02.2021 was issued by PCIT-2, Jaipur (APB 56-57) and in compliance thereto assessee had filed form no. 4 on 13.3.2021 (APB 58). Thereafter the final certificate under the scheme was issued i.e. Form no. 5 on 15.04.2021 (APB 59).
>
> After filing the form no. 4 by the assessee on 13.03.2021 (APB 58), a notice u/s 263 was issued by the office of PCIT-2, Jaipur for the first time on 26.3.2021 (APB 31-32) on the issue of non-verification of unsecured loans and an ex-parte order was passed on 31.03.2021 setting aside the assessment order so passed to be redone de-novo in terms of the directions given in para 9 of the said order (APB 1-9, relevant page 8).
>
> Such order of revision so passed u/s 263 was challenged by assessee before the Hon'ble ITAT, Jaipur bench where the assessee challenged said revision order on two grounds; *first* when the assessee opted for vivad se vishwas scheme-2020 thus order u/s 263 is without jurisdiction and *second*: proper time was not provided before passing the order u/s 263. Hon'ble itat, jaipur bench vide its order dt. 28.10.2021 addressed both the issues by making following directions in para 12 & 13 of its order (apb relevant pages 17-18):

"*12. We have heard the rival contentions and perused the material available on record. We find that this is clearly a case of lack of adequate opportunity being provided by the ld. Pcit. We find that the show-cause notice has been issued on 26.03.2021 at the fag-end of the limitation period, which was expiring on 31.03.2021, wherein the assessee has been provided effectively one working day to respond by 29.03.2021,*

and the order was thereafter pronounced on 31.03.2021. We understand that being a limitation period, the ld. Pcit could not have granted more time but the question is what stopped the ld. Pcit to at least initiate the proceedings earlier and why the proceedings were initiated at the fag-end of the limitation period. One possible reason could be the ongoing covid pandemic by virtue of which all activities were at standstill and offices were closed including that of the revenue authorities. At the same time, the revenue authorities cannot be oblivious of the orders pronounced by the hon'ble supreme court extending the limitation period and also the fact that the cbdt has also came out with directions extending the limitation period. Considering the entirety of facts and circumstances of the case, we believe that the assessee deserve a reasonable and sufficient opportunity to put forth his submissions and supporting documentation in response to the show cause notice raised by the ld. Pcit. We therefore deem it fit and appropriate that the matter be set-aside to the file of the ld. Pcit to decide the matter a fresh as per law after providing reasonable opportunity to the assessee.

13. *The ld. PCIT is also directed to examine the contentions so raised on behalf of the assessee in terms of exercise of jurisdiction u/s 263 in context of declaration of the assessee having been accepted under the direct taxes vivad se vishwas scheme act, 2020 prior to the issuance of the show-cause notice u/s 263 of the act. We find that since the ld. Pcit himself is the appropriate authority who has issued form 3 dated 23.02.2021 in the instant case and the fact that the said contentions have been advanced for the first time before us, it is relevant to afford an equal opportunity to the ld. Pcit to examine such contentions raised on behalf of the assessee challenging his exercise of jurisdiction u/s 263 of the act. Therefore, the contentions so advanced by both the parties are left open to be examined by the ld. Pcit as per law and have not been adjudicated upon by us.*

However, ld. PCIT vide notice dt. 09.02.2023 issued u/s 263/254 of the act (APB 20-21), provided opportunity only for making reply on the issue of unsecured loans and silent on the issue of validity of proceedings once the assessee has opted for vsv for that year. After considering the details and information furnished, ld. PCIT has confirmed the validity of issuance of notice u/s 263 as well as held that ld.ao had failed to examine the identity, creditworthiness and genuineness of unsecured loans and thus held that assessment order passed u/s 143(3) was erroneous in so far as it was prejudicial to the interest of the revenue.

Aggrieved of the order so passed by ld. Pcit, assessee has preferred the present appeal before the hon'ble bench. With the above background, submission in elaboration to the grounds of appeal is made as under:

GROUNDS OF APPEAL NO. 1 TO 1.2

In these grounds of appeal, assessee has challenged the action of ld. PCIT in exercising the Revisionary powers u/s 263 and thereby holding the order passed by ld.AO u/s 143(3) as erroneous and prejudicial to the interest of revenue in a scenario when assessee had already settled the disputes for the year under consideration by filing an application under Vivad Se Vishwas Scheme on 30.01.2021, which was accepted by the department (as Form 3 was also issued on 23.02.2021) (APB 45-57), thus revision of assessment order which has already been settled under Vivad Se Vishwas Scheme (the scheme) is not in accordance with legislative intention of the Scheme.

In this regard, as submitted above, it is reiterated that the assessee had opted to settle the dispute for the assessment year under consideration by making an application in Form 1 & 2 (APB 45-55) under Vivad Se Vishwas Scheme, 2020 and the necessary Form No.3 was issued by the appropriate authority i.e. the Pr. CIT – 2, Jaipur (APB 56-57) determining the amount of tax payable and after depositing the amount so determined assessee had filed Form NO. 4 before the PCIT-2, Jaipur (APB 58). It is relevant to state that all these events had taken place much prior to the initiation of the proceedings under section 263 where first notice was issued by ld. PCIT on 26.03.2021, (APB 31-32). It is submitted that once the assessment order sought to be revised stood settled by under VSV Scheme which was enacted by the Parliament with the intention to reduce the disputes in respect to tax saviors and to bring down the tax litigations, the action of ld. PCIT of initiating the proceedings u/s 263 is totally against the legislative intention of the Scheme to reduce the dispute and litigation. Under this scheme, the Government intended to reduce litigations and assessee promptly responded to such intentions by applying into the Scheme for buying the peace of mind and avoid litigation. Thereafter initiation of proceedings by issue of notice u/s 263 for revision of the said order is reviving the proceedings which have been settled under the scheme, being initiated after assessee's suo-moto action of filing application under VSV Scheme, therefore, the proceedings u/s 263 are not in accordance with law.

In this regard, reliance is placed on the decision of the Hon'ble Madras High Court in the case of Gopalakrishnan Rajkumar Vs. PCIT reported in 445 ITR 577 (APB 60-72) wherein it has been held as under:

"Direct Tax Vivad Se Vishwas Act, 2020 – Abatement of proceedings – Effect of settlement of dispute under Act – Revision proceedings initiated against assessee abate – Income Tax Act, 1961, s. 263 – Direct Tax Vivad Se Vishwas Act, 2020.

The intention of Parliament in enacting the Direct Tax Vivad Se Vishwas Act, 2020, is to bring a closure to disputes in respect of tax arrears. Taxpayers whose appeals are pending at any level are entitled to avail of the benefit of the scheme. Once an assessee

settles his or her case under the 2020 Act proceedings initiated against him or her under section 263 of the Income Tax Act, 1961, abate."

It is submitted that Hon'ble Madras High Court has very specifically held that once an assessee settles the case under Vivad Se Vishwas Scheme 2020, subsequent proceedings initiated against him/her u/s 263 shall abate and moreover decision is delivered in the light of legislative intention of VSV Scheme i.e. to reduce the litigation. However, ld. PCIT has simply brushed aside the above decision of Hon'ble Madras High Court by merely observing that the said case is factually distinguishable, however it has not been stated as to how the same is not applicable to the assessee. Moreover, ld. PCIT has further observed that department has filed SLP against the decision of Hon'ble Madras High Court. In this regard is submitted that so far the Hon'ble Supreme Court has not given any verdict on such judgement against the said assessee, and accordingly decision of Hon'ble Madras High Court would continue to be valid law.

Hon'ble Supreme Court in case of Killick Nixon Ltd. vs. DCIT 125 taxmann 1055 (SC) while considering the declaration under Kar Vivad Samadhan Scheme 1998 held as under (case laws compilation pages 160-165):

"As far as the provisions of KVSS are concerned, we agree with the contention of the learned Senior Counsel for the assessee that the order to be made by the Designated Authority under section 90 is a considered order which is intended to be conclusive in respect of tax arrears and sums payable after such determination towards full and final settlement to tax arrears. Once the declarant makes payment of the amount so determined under section 90, the immunity under section 91 springs into effect. We are also of the view that upon such declaration being made, tax arrears being determined, paid and certificate issued under the KVSS, there is no jurisdiction for the Assessing Officer to reopen the assessment by a notice under section 143 of the Act except where the case falls under the proviso (2) of sub-section (1) of section 90 as it is found that any material particular furnished in the declaration is found to be false.

In the present case, it is not the case of the revenue that any material particular furnished by the appellant-assessee in the declaration was found to be false.

Consequently, the Assessing Officer could not have re- opened the assessment by a notice under section 143 of the Act."

With the above, it is submitted that the Hon'ble ITAT while deciding the appeal of the assessee filed against the order passed u/s 263 dated 31.03.2021 in terms of para 13 (as reproduced above) has in a very categorical term given the direction to ld. PCIT to examine the issue of

exercising of jurisdiction u/s 263 in the light of the fact that assessee's declaration filed under VSVS was accepted prior to issuance of notice u/s 263.

It is further submitted that as per section 5(3) of the Direct Tax Vivad Se Vishwas Act, 2020, every order passed under sub section 5(1), determining the amount payable under this Act shall be conclusive as to the matter stated therein and no matter covered by such order reopened in any proceedings under the Income-Tax Act.

Hon'ble Bombay high court in the case of Laherchand Dhanji v. UOI reported in 135 ITR 689 wherein dealing with the VDIS 1976, held that once the certificate is issued the same cannot be withdrawn. Further hon'ble Bombay High court in the case of Uma Corporation v. ACIT & Ors. Reported in 284 ITR 67 also held that once income is disclosed under VDIS for which certificate is issued by the authority, reassessment proceeding in respect of such disclosed income is not valid.

Your honours would appreciate that the scheme of Vivad Se Vishwas is pari-matria with the VDIS schemes declared earlier as under VDIS, income was disclosed by the assessee and under VSV, income assessed and challenged in appeal is accepted by assessee by way of payment of tax and withdrawal of pending appeal, thus in both the schemes it is the assessee who came forward and settle the disputes.

In view of above facts, it is humbly prayed that revision proceedings u/s 263 as initiated by the same authority is not in accordance with law and consequent order passed by ld. PCIT holding the assessment order as erroneous and prejudicial to the interest of revenue deserves to be set aside.

Ground of Appeal No.2

In this ground of appeal, assessee has challenged the action of ld. PCIT in holding that ld.AO has failed to apply his mind and to verify unsecured loans thus the assessment order is erroneous and prejudicial to the interest of revenue.

In this regard, at the outset, it is submitted that during the course of assessment proceedings, assessee had submitted all the details as called for from time to time and also produced books of accounts maintained for examination before the ld.AO who after making verification of the same has made specific show cause vide order sheet entry dt. 24.12.2018 proposing to make disallowance out of various expenses claimed by the assessee and nowhere observed that assessee has not filed the details as asked for including the details of loans taken/ repaid. This fact is further established from the perusal of the observation made by ld.AO in Page No. 7 of the assessment order dated 31.12.2018, which are reproduced herein below for ready reference:

"In addition to the above reply, the assessee also produced all bank account statements, all ledger accounts, cash book (with complete narration), bank book, all original bills regarding purchase of all type raw materials, complete details alongwith justification of traveling expenses and all pending details such as confirmations of unsecured loan parties, bills / registers of addition to fixed assets. List of all type sundry creditors in required format, list of loans and advances persons in required format and detail reconciliation of receipts shown in ITR / Audit report and form 26AS."

It is thus submitted that complete details of the parties to whom loans were taken or repaid during the year alongwith the copies of confirmations were already submitted during the course of assessment proceedings. Ld.AO not only collected the confirmations but also applied his mind on the same and after satisfying himself about the genuineness of the transactions has proceeded not to take any adverse view on this issue.

These facts were communicated to ld. PCIT vide letter dated 20.03.2023 (APB 75-79), whereby it was submitted that the assessee has filed the details of unsecured loans containing complete name, address, PAN and amount of loan taken coupled with the confirmations to the ld. AO during the course of assessment proceedings and copies of the same were also submitted before ld. PCIT (APB 75-139). Thereafter, in reply dated 24.3.2023 filed before ld. PCIT, assessee furnished copies of ITR and / or bank statements of few parties. However, ld. PCIT has observed that on record of AO, there were two replies dated 21.12.2018 and 27.12.2018 and in those replies, nowhere anything is mentioned about the unsecured loans. It was further observed that in the assessment order, no discussion / findings on the issue of unsecured loans have been made by the ld. AO and further observed that in the assessment order, the ld. AO has made an error of making such observations. Finally, ld. PCIT directed assessee to file evidences of filing the details with regard to the lenders which were called by the ld. AO.

In response, assessee had filed a chart alongwith the confirmations which were filed during the course of assessment proceedings when the books of accounts and other documents including bills and vouchers were produced for examination which is evident from the order sheet entry dated 24.12.2018 wherein a show cause was given to the assessee proposing to make certain disallowances based on the physical examination of the books of accounts produced before the ld. AO. It was submitted before ld. PCIT that since the said details were submitted during the course of assessment proceedings therefore, the assessee do not have any acknowledgement / receipt of the same.

It is thus submitted that the AO after considering the confirmations has made the observations in the assessment order and it is not an error.

With regard to the observation of ld. PCIT regarding non-availability of the confirmations in the assessment record, it is submitted that the same is the departmental record and assessee cannot comment upon as to why the same are not available in the records despite the fact that ld. AO has categorically mentioned about it in the assessment order.

It is therefore submitted that the Ld. AO has taken a legal and correct view of the entire material available before him and after due application of mind as a duly instructed person on law and facts, he had reached to the conclusion and reasonable satisfaction of accepting the loan transactions as genuine, thus the order of Ld. AO is neither erroneous nor prejudicial to the interest of the revenue on any count. Indeed, in the instant case the Ld. AO has passed the assessment order after considering entire material available on record including the loan confirmations called for and submitted by assessee during the course of assessment proceedings. It is not the case where the ld. AO had passed the assessment order without conducting any inquiries about the loans taken. As a matter of fact, ld. AO had raised specific query in this regard by not only seeking details of the loans taken/ repaid but also asked the assessee to file the necessary confirmations. To this, necessary details were submitted before the Ld. AO alongwith ample evidences in the shape of confirmations containing complete name, address and PAN of the person. After considering this entire material submitted by assessee, ld. AO has framed his opinion that these loan transactions are genuine. Thus, the order of Ld. AO cannot at all be held as erroneous.

At this juncture, kind attention of Hon'ble bench is invited to Explanation 2 inserted in section 263 by Finance Act, 2015, w.e.f. 01.06.2015, which has widened the powers of CIT to revise the already completed assessment and in the present case ld, PCIT has taken shelter of clause (a) and (b) of the same, which reads as under:

Explanation 2.—*For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—*

*(*a*) the order is passed without making inquiries or verification which should have been made;*

*(*b*) the order is passed allowing any relief without inquiring into the claim;*

*(*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

*(*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*]

A perusal of above clarifies that order passed by assessing officer shall be "deemed to be erroneous and prejudicial to the interest of the revenue if (a) AO has passed such order without making *inquiries or verification which should have been made and (b) AO has passed the order allowing any relief without inquiring into the claim.*

It is worthwhile to note here that the phrase "*which should have been made"* here in no way means that enquiries should have been made in manner as desired by PCIT, rather it means that whether the AO has passed the order after carrying out enquiries or verification, which a reasonable and prudent officer would have carried out or not. In the instant case, ld AO has made proper enquiries as elaborated in earlier paras.

Further from the perusal of various details filed by the assesse it is evident that no claim of the assesse was allowed without making enquires. In this regard reliance is placed on the following decisions:

M/s Hariom Stones Vs. PCIT in ITA No. 534/JP/2016, wherein the hon'ble bench of Jaipur ITAT has held as under: (case law compilation pages 31-53):

"7. …Thus, these facts suggest that the Assessing Officer has taken into consideration the material before him and after due application of law and of facts and then reached at the conclusion to conclude the assessment U/s 143(3) of the Act. It was not a case where Assessing Officer completed the assessment without conducting necessary and proper enquiries. The issue raised by the ld. Pr.CIT has been considered by the Assessing Officer at the time of assessment and the assessee has submitted evidences and details in support of its claim made in P&L account. Therefore, in our considered view, the order passed by the Assessing Officer U/s 143(3) of the Act on 24/3/2014 was not an erroneous order, which could be said to be prejudicial to the interest of the revenue. Considering the ratio laid down in various case laws relied upon, we set aside the order passed by the ld. Pr.CIT.

Shri Narayan Tatu Rane vs ITO ITA No.2690 & 2691/Mum/16 (Case laws compilation pages 54-74) dated 06.05.2016 wherein hon'ble Mumbai bench of ITAT has held as under :

"20. *Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is*

whether the AO has passed the order after carrying out enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquiries or verification that would have been carried out by a prudent officer. Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant."

Sanjeev Kr. Khemka vs Pr. CIT (Kolkatta ITAT) (Case law compilation pages 75-86)

"5.1 In view of the above we find that Ld. CIT has passed impugned order u/s. 263 of the Act by holding the order of AO as erroneous in so far as prejudicial to the interest of revenue on account of inadequate enquiry made by AO while passing order u/s. 143(3) of the Act. However, we find that proper and sufficient enquiries were conducted by the AO at the time of assessment as evident from the order of AO. Therefore it cannot be concluded that no proper enquiry has been conducted by the AO at the time of assessment proceedings. The AO has taken conscious view after considering the facts and circumstances of the case and giving proper opportunity to the assessee. Thus, the view expressed by AO in the form in his assessment order cannot be replaced with the view of Ld. CIT u/s 263 of the Act. In holding so, we find support and guidance from the judgment of Hon'ble jurisdictional High Court in the case of *CIT vs. M/s. J.L. Morrison (India) Ltd.*(ITA No 168 of 2011) in GA No 1541 of 2012 dated 15.05.2014, wherein it was held as under:-

"By sections 3 and 4, the Indian Income-tax Act, 1922, imposes a general liability to tax upon all income. But the Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision."

We also rely on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Max India Limited reported in 295 ITR 282 wherein it was held as under :

"*When the CIT passed the impugned order under s. 263, two views were inherently possible on the word "profits" occurring in the proviso to s. 80HHC(3) and therefore, subsequent amendment of s. 80HHC made in the year 2005, though retrospective, did not render the order of the AO erroneous and prejudicial to the interest of the Revenue, and CIT could not exercise powers under s. 263."*

In view of the above proposition, and respectfully following principle laid down by the Hon'ble courts and keeping in view all these discussion, as also bearing in mind entirety of the case, we deem it fit and proper to uphold the grievance of the assessee and quash the impugned revision order as devoid of jurisdiction. The assessee gets the relief, accordingly."

It is thus submitted that when the ld.AO has made necessary enquires necessary for the completion of assessment, the action of the ld. PCIT in holding such assessment as erroneous and prejudicial to the interest of revenue in terms of clause (a) and (b) of Explanation 2 to section 263 is not permissible as in such situation there would be no end to the proceedings and in each and every case, PCIT will ask the AO to make the enquiry in the manner he likes irrespective of the fact that the reasonable and sufficient enquiries were already made by the AO .

It may be further noted that the instance case due, necessary and most pertinent enquiries to all the issues regarding Deduction u/s 80IA were conducted by the Ld. AO. Therefore, in view of such factual and legal position, no action u/s 263 could have been taken.

In this regard, further reliance is placed on the following:

CIT vs Ganpat Ram Bishnoi [2006] 152 Taxman 242 (Raj.) Para 11 of the decision is reproduced as under (case law compilation pages 111-113)

11. *Undoubtedly, the jurisdiction under section 263 is wide and is meant to ensure that due revenue ought to reach the public treasury and if it does not reach on account of some mistake of law or fat committed by the Assessing officer, the CIT can cancel that order and require the concerned Assessing Officer to pass a fresh order in accordance with law after holding a detailed enquiry. But when enquiry in fact has been conducted and the Assessing Officer has reached a particular conclusion, though reference to such enquiries has not been made in the order of the assessment, but the same is apparent from the record of the proceedings, in the present case, without anything to say how and why the enquiry conducted by the Assessing officer was not in accordance with law, the invocation of jurisdiction by the CIT was unsustainable. As the exercise of jurisdiction by the CIT is founded on no material, it was liable to be set aside. Jurisdiction under section 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.*

Jhunjhunu Kraya Vikraya Sahkari Samiti Ltd. vs PCIT ITA No. 150/JP/2022 (Jaipur ITAT) (Relevant extracts reproduced): (case law compilation pages 114-143)

11. *Clearly, therefore, as long as the action of the Assessing Officer cannot be said to be lacking bonafides, his action in accepting an explanation of*

the assessee cannot be faulted merely because it could have been lawful to make mere detailed inquiries or because he did not write specific reasons of accepting the explanation. As for learned PCIT's observations regarding accepting the explanation "in a routine and perfunctory manner", there is nothing to question the bonfides of the Assessing Officer or to elaborate as to what should have been 'appropriate' evidence. The fact remains that the specific issue mentioned and has been examined and the contention of the assessee accepted by the Assessing officer. Merely because the Assessing Officer did not write specific reasons for accepting the explanation of the assessee cannot be reason enough to invoke powers under section 263, and non-mentioning of these reasons do not render the assessment order "erroneous and prejudicial to the interest of the revenue".

12. *In view of the above discussions, as also bearing in mind entirety of the case we vacate the impugned revision order. The assessee gets the relief accordingly.*

It is further submitted that, the Hon'ble Bombay High Court in the case of CIT Vs. Gabrial India Ltd., reported in 203 ITR 108, has held that, "CIT cannot revise order merely because he disagrees with the conclusion arrived at by the ITO". Further, in the case of CIT Vs. Sunbeam Auto Ltd., reported in 227 CTR 133, the Hon'ble Delhi High Court drew a distinction between "Lack of inquiry" and "inadequate enquiry" and held that, 'in the case of inadequate enquiry, provisions under section 263 cannot be invoked.'

Hon'ble Bombay High Court in Moil Ltd. Vs. CIT [81 Taxmann.com 420] observed that if a query is raised during the assessment proceedings which was responded to by the assessee, the mere fact that the query was not dealt with in the assessment order then it would not lead to a conclusion that no mind has been applied to it and the Assessing Officer is not expected to raise more queries, if he was satisfied about the admissibility of claim on the basis of the material and the details supplied.

Reliance Industries Ltd. vs PCIT ITA No.578/Mum/2021 decision dated 01.09.2021 *(Mumbai ITAT)(Relevant extracts)* (case law compilation pages 144-159)

5. *In the present case, we find that the issue was duly considered by Ld. AO after considering assessee's detailed submissions. The view could not be said to be unsustainable view and it was one of the possible view. Therefore, on the given facts and circumstances, we find that the subject matter of proposed revision was already deliberated upon by Ld. AO and a possible was taken in the matter. That view could not be said to be contrary to law, perverse or unsustainable in law, in any manner and the same would be a possible view keeping in mind the assessee's submissions during reassessment proceedings. This being the case, the*

assessment order could not be subjected to revision u/s 263 and the action of Ld. Pr.CIT in invoking jurisdiction u/s 263 could not be sustained in the eyes of law. Similar is the view of the Tribunal in assessee's group concern i.e. M/s Reliance Corporate IT Park Ltd. V/s Pr. CIT (ITA No.2748/Mum/2015 dated 08/03/2017) wherein it has been observed by the coordinate bench that when Ld. AO had applied his mind on the given facts and material on record and took a possible view then such an assessment order could not be cancelled u/s 263 unless it was shown that the view was not tenable either in law or on facts.

6. *The Ld. CIT-DR has relied upon the decision of Hon'ble Allahabad High Court in the case of CIT V/s Bhagwan Dass (272 ITR 367) which is a case wherein it was held that the order was passed without application of mind by Ld. AO. The same is not the case here. The case law of Chennai Tribunal in Bharat Overseas Bank V/s CIT (152 TTJ 546) was a similar case wherein no inquiry was made by Ld.AO during the course of assessment proceedings. Therefore, these case laws are distinguishable on facts and not applicable to the facts of the present case.*

7. *Finally, on the facts and circumstances of the case, we quash the order passed by Ld. Pr. CIT in terms of settled legal position as enumerated by us in opening paragraphs. Ground nos. 1 to 3 stands allowed which render adjudication of ground no.4 merely academic in nature.*

8. *The appeal stands allowed in terms of our above order."*

Torrent Pharmaceuticals Ltd. vs DCIT: Ahmedabad ITAT I.T.A. No. 164/Ahd/2018

9.5 *We thus find merit in the plea of the assessee that the Revisional Commissioner is expected show that the view taken by the AO is wholly unsustainable in law before embarking upon exercise of revisionary powers. The revisional powers cannot be exercised for directing a fuller inquiry to merely find out if earlier view taken is erroneous particularly when a view was already taken after inquiry. If such course of action as interpreted by the Revisional Commissioner in the light of the Explanation 2 is permitted, Revisional Commissioner can possibly find fault with each and every assessment order without himself making any inquiry or verification and without establishing that assessment order is not sustainable in law. This would inevitably mean that every order of the lower authority would thus become susceptible to Section 263 of the Act and, in turn, will cause serious unintended hardship to the tax payer concerned for no fault on his part. Apparently, this is not intended by the Explanation. Howsoever wide the scope of Explanation 2(a) may be, its limits are implicit in it. It is only in a very gross case of inadequacy inquiry or where inquiry is per se mandated on the basis of record available before the AO and such inquiry was not conducted, the revisional power so conferred can be exercised to invalidate the action of*

AO. The AO in the present case has not accepted the submissions of the assessee on various issues summarily but has shown appetite for inquiry and verifications. The AO has passed the order in great detail after making several allowances and disallowances on the issues involved impliedly after due application of mind. Therefore, the Explanation 2 to Section 263 of the Act do not, in our view, thwart the assessment process in the facts and the context of the case. Consequently, we find that the foundation for exercise of revisional jurisdiction is surely missing in the present case. Resultantly, the order of the Pr.CIT passed under s.263 of the Act is set aside and cancelled and the order of the AO under s.143(3) is restored."

Indus Best Hospitality & Realtors Pvt. Ltd vs. PCIT (ITAT Mumbai) ITA No. 3125/JP/2017

S. 263 Revision: Explanation 2 to s. 263 inserted by the FA 2015 (which confers power upon the CIT to revise assessments where inadequate inquiries have been conducted by the AO) is prospective in nature and does not apply even to a case where the CIT passed the order after Explanation 2 came on the statute. The CIT should show that the view taken by the AO is unsustainable in law. The action of the CIT in directing the AO to conduct enquiry in a particular manner is contrary to the law interpreted by the Delhi High Court in CIT v. Goetze (India) Ltd 361 ITR 505. If such course of action is permitted, the CIT can find fault with each and every assessment order without making any enquiry or verification in order to establish that the assessment order is not sustainable in law.

Amira Pure Foods Pvt. Ltd vs. Pr CIT (ITAT Delhi) ITA No. 3205/Del/2017

S. 263 Revision: Explanation 2 to s. 263 inserted w.e.f. 01.06.2015 does not override the law as interpreted by the various High Courts whereby it is held that the CIT cannot treat the AO's order as being erroneous and prejudicial to the interest of revenue without conducting an enquiry and recording a finding. If the Explanation is interpreted otherwise, the CIT will be empowered to find fault with each and every assessment order and also to force the AO to conduct enquiries in the manner preferred by the CIT, thus prejudicing the mind of the AO, This will lead to unending litigation and no finality in the legal proceedings which cannot be the intention of the legislature in inserting the Explanation.

Small Wonder Industries vs. CIT (ITAT Mumbai) ITA No. 2464/Mum/2013

S. 263: There is a distinction between "lack of enquiry" and "inadequate enquiry". If the AO has called for the necessary details and the assessee has furnished the same, the fact that the AO is silent in the assessment order does not mean that he has not applied his mind so as to justify exercise of revisional powers by the CIT u/s 263.

In view of above, it is submitted that order has been passed after due application of mind and is neither erroneous nor prejudicial to the interest of the revenue, therefore order passed by ld. PCIT is not in accordance with law and deserves to be quashed.

Ground of Appeal No.3:

In this ground of appeal, assessee has challenged the action of ld.AO in setting aside the order u/s 263 when it is not clarified as to how the order is prejudicial to the interest of revenue, more particularly when the twin conditions needs to be satisfied cumulatively for invoking the provisions of section 263.

In this regard, it is submitted that a bare reading of section 263 makes it clear that for making revision of an assessment u/s 263, twin conditions as provided in section 263 mandates the order to be revised should be :-

i) Assessment order should be erroneous and

ii) It is prejudicial to the interest of revenue

As explained above, the ld.AO refrained from making any addition on account of Unsecured loans only after obtaining all the necessary details, therefore, the order so passed cannot be treated as erroneous nor it is prejudicial to the interest of revenue and since the twin conditions are not satisfied, assessment completed u/s 143(3) cannot be revised by taking recourse u/s 263. In this regard, reliance is placed on the following case laws:

243 ITR 83 (SC) Malabar Industrial Co. Ltd. Vs. CIT

"*A bare reading of section 263 of the Income Tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo-motu under it, is that the order of the Income Tax Officer is erroneous is 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 th Revenue or if it is not erroneous but is prejudicial to the Revenue – recourse cannot be had to section 263(1) of the Act."*

295 ITR 282 (SC) CIT v. Max India Ltd.

The phrase "prejudicial to the interests of the Revenue" in section 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.

Hon'ble Jurisdictional High Court (2014) 51 TW (IV) 186 (Raj HC) in the case of CIT Vs. M/s Deepak Real Estate Developers P. Ltd. has held as under :

It is no longer res-integra that the revisional jurisdiction available to a Commissioner u/s 263 of the Act, is essentially circumscribed by the determinant that the order of the Assessing Officer is erroneous so much so that it is prejudicial to the interest of the revenue. This statutory enjoinment carves out an extremely constricted ambit of such discretionary jurisdiction. The word 'considers' applied in the statutory provision involved, signifies a genuine satisfaction of that authority that the order of the Assessing Officer is erroneous and that the interest of revenue is prejudicing thereby. Any exercise of the revisional jurisdiction, bereft of such satisfaction and / or finding that the order of the Assessing Officer is erroneous and that it is prejudicial to the interest of the revenue and that too, based on tangible materials on record, is impermissible rendering the resultant order void.

314 ITR 81 (SC) CIT Vs. Green World Corporation

The Income-tax Officer, while passing an order of assessment performs a judicial function. A revision application lies before the Commissioner. It is trite that the jurisdiction exercised by the revisional authority pertains to his appellate jurisdiction. The jurisdiction under section 263 can be exercised only when both the following conditions are satisfied (i) the order of the Assessing Officer should be erroneous, and (ii) it should be prejudicial to the interests of the Revenue. These conditions are conjunctive. An order of assessment passed by the Assessing Officer should not be interfered with only because another view is possible.

It is therefore, submitted that though without admitting even if the contention of ld. PCIT that assessment order as passed by ld.AO is erroneous, ld. PCIT has failed to establish as to how the same is prejudicial to the interest of revenue, thus no action u/s 263 is legally warranted. Though for the sake of clarification and at the cost of repetition it is submitted that twin conditions as laid down u/s 263 i.e. erroneous and prejudicial to the interest of the revenue have to be cumulatively satisfied and the absence of one of the twin conditions, not being attracted the other would become ineffective and nonest in the

eyes of law for the purposes of revising an order u/s 263, therefore it is requested that order passed by ld. PCIT deserves to be set aside."

6. The ld. AR of the assessee in addition to the written submission so filed a detailed paper book containing the following evidence / judgments in support of the contentions so raised.

S. No.	Particulars	Page No.
1.	Copy of Order u/s 263 dated 31.03.2021 passed in first round	1-9
2.	Copy of order dated 28.10.2021 passed by Hon'ble ITAT in first round of 263 proceedings	10-19
3.	Copy of notice dated 09.02.2023 issued during 263 proceedings (2nd round)	20-22
4.	Copy of reply dated 28.02.2023filed in response to notice dated 09.02.2023 alongwith:	23-30
(i)	Copy of notice u/s 263 dated 26.03.2021	31-32
(ii)	Copy of grounds of appeal taken before Hon'ble ITAT	33-34
(iii)	Copy of order of Hon'ble ITAT, Jaipur in ITA No. 51/JP/21 dated 28.10.2021	35-44
(iv)	Copy of application filed in Form No. 1 & 2 of VSV Scheme dated 30.01.2021	45-55
(v)	Copy of Form No. 3 issued by the PCIT-2, Jaipur dated 23.02.2021	56-57
(vi)	Copy of Form No. 4 filed by the assessee dated 13.03.2021	58
(vii)	Copy of Form No. 5 issued by the PCIT – 2, Jaipur dated 15.04.2021	59
(viii)	Copy of order of Hon'ble Madras High Court in the case of Gopalakrishnan Rajkumar Vs. PCIT	60-72
5.	Copy of notice u/s 263 dated 21.03.2023	73-74
6.	Copy of reply dated 20.03.2023filed in response to notice dated21.03.2023 with	75-79

(i)	Details of unsecured loans and confirmations	80-112
7.	Copy of reply dated 24.03.2023 filed before ld.PCIT alongwith:	113-116
(i)	ITRs and bank statements of lenders	117-139

S. No.	Particulars	Page No.
1.	Copy of order of the Hon'ble ITAT Jaipur in the case of Dharmendra Mehta Vs. PCIT vide ITA No. 201/JPR/2022	1-30
2.	Copy of order of the Hon'ble ITAT Jaipur in the case of M/s Hari Om stones Vs. PCIT vide ITA No. 534/JP/2016	31-53
3.	Copy of order of the Hon'ble ITAT Mumbai bench in the case of Shri Narayan Tatu Rane vs ITO vide ITA No. 2690 & 2691/Mum/16	54-74
4.	Copy of order of the Hon'ble ITAT Kolkata in the case of Sanjeev Kr. Khemka vs Pr. CIT vide ITA No. 1361/Kol/2016	75-86
5.	Copy of order of the Hon'ble ITAT Jaipur in the case of Radha Govind Lashkari Vs. PCIT vide ITA No. 32/JP/2021	87-110
	Copy of order of the Hon'ble Rajasthan High Court in the case of CIT Vs. Ganpati Ram Bishnoi [2006] (2006)152 Taxman242(Raj)	111-113
	Copy of order of the Hon'ble ITAT Jaipur in the case of Jhunjunu Kraya Vikraya Sahkari Samiti Ltd. Vs. PCIT vide ITA No. 105/JP/2022	114-143
	Copy of order of the Hon'ble ITAT Mumbai in the case of Reliance Industries Ltd. Vs. PCIT vide ITA No. 578/Mum/2021	144-159
	Copy of order of the Supreme Court of India in the case of Killick Nixon Ltd., Mumbai vs Deputy Commissioner Of Income Tax reported in 125 Taxmann 1055	160-165

6.1 Relying on the all the evidence and judgment cited by the ld. AR he has further argued before us that the assessee is in second round of litigation for proceeding u/s. 263 of the Act. The assessee has filed his return of income declaring income of Rs. 9,11,36,210/-

and was assessed at Rs. 9,65,86,210/-. Pursuant to the assessment order passed the assessee filed form no. 1 on 30.01.2021 opting for “Direct Tax Vivad Se Vishwas Scheme Act, 2020 [here in after referred as VSVS]. In accordance with the scheme the assessee was issued form no. 4 on 13.03.2021 and final form of settlement of dispute under VSVS was issued on 15.04.2021. In the meantime, on 26.03.2021 the proceeding were initiated u/s. 263 of the Act and the order pursuant that revision proceeding was passed on 31.03.2021 ex-party. That order was set a side by the ITAT as the PCIT has not given the sufficient opportunity and has not appreciated the fact that the assessee has also opted on the VSVS scheme and whether on filling the VSVS form whether the order can be revised u/s. 263 of the Act or not. In this set a side proceeding the ld. PCIT has not appreciated the legal point of view that once the assessee opted for VSVS no jurisdiction lies for revision u/s. 263 on that order. On merits of the case the only issue that has been flagged by the PCIT is of USL and for that the relevant submission was made before the assessing officer and at page 7 there is a satisfaction that confirmation of unsecured loan parties filed by the assessee. After taking into consideration the ld. AO has passed an order that

cannot be revised u/s. 263 merely the in the opinion of the ld. PCIT the ld. AO has not recorded the detailed investigation in the order. So far as the legal issue that once the assessee opted under VSVS then by the same PCIT who is looking into the VSVS can revise the same order u/s. 263, the ld. AR of the assessee relying the judgment of Madras High Court in the case of Gopalkrishnan Rajkumar vs. PCIT submitted that "The intention of the Parliament in enacting the Direct Tax Vivad Se Vishwas Act, 2020 it to bring a closure to disputes in respect of tax arrears. Taxpayers whose appeals are pending at any level are entitled to avail of the benefit of the scheme. Once an assessee settles his or her case under the 2020 Act proceedings initiated against him or her u/s. 263 of the income tax act, abate." The ld. PCIT has not followed the ratio of the judgment merely stating that the revenue has filed the SLP against that order but in fact there is no SLP pending in that case. So based on the facts as well as on legal issue the revision order passed by the ld. PCIT is without jurisdiction and required to be quashed.

7. The ld. DR is heard who has relied on the findings of the PCIT that section 8 & 5(3) of the VSVS does not restrict the power of the PCIT u/s. 263 of the Act. As regards the case law relied upon the same is not accepted by the revenue and therefore, the same was not considered. So far as the merits is concerned the ld. PCIT has given a detailed finding at para 6.4 and therefore, even on merits the ld. DR supported the contentions of the ld. PCIT.

8. We have heard the rival contentions, perused the material placed on record and have also gone through the judicial precedent cited by both the parties to drive home to their contentions so raised before us. The brief facts of this case is that the assessee is a civil contractor and e-filed his ITR for the A.Y 2016-17 on 14.10.2016 declaring total income of Rs. 9,11,36,210/-. The case was selected for scrutiny under compulsory manual selection therefore notice u/s 143(2) was issued to complete the assessment proceedings in this case. The order is passed u/s 143(3) of the I.T. Act by making disallowance of labour expenses for an amount of Rs. 50,00,000/-, Disallowance of vehicle and R&M Expenses for an amount of Rs. 50,000/-, Disallowance of staff welfare, conveyance, computer, and office expenses for an amount of Rs. 1,00,000/- and Rs. 3,00,000 disallowed out of the claim on site expenses. During

the pendency of the appeal the assessee opted for "Direct Tax Vivad Se Vishwas Scheme Act, 2020. In accordance with that form the form no. 1 filed by the assessee and final form no 5 was also issued to the assessee by the same PCIT who issued the notice to the assessee u/s. 263 and that order is under attack before us. Therefore, it would be appropriate to list the sequence of even in this case here in below:

a) The order of the assessment passed on 31.12.2018.

b) In accordance with the VSVS scheme the assessee the assessee filed form no. 1 & 2 on 31.01.2021.

c) In response form no. 3 was issued on 23.02.2021

d) In compliance assessee filed form no. 4 on 13.03.2021

e) Final Certificate in form no. 5 issued on 15.04.2021

f) In the meantime notice u/s. 263 of the Act was issued on 26.03.2021 and the order consequent to that proceeding passed on 31.03.2021.

8.2 The assessee challenged that order of the PCIT before the tribunal and tribunal set a side the order directing to decide the issue after giving opportunity to the assessee. The relevant observation of the bench on the issue is reproduced here in below :

The ld. PCIT is also directed to examine the contentions so raised on behalf of the assessee in terms of exercise of jurisdiction u/s 263 in context of declaration of the assessee having been accepted under the direct taxes vivad se vishwas scheme act, 2020 prior to the issuance of the show-cause notice u/s 263 of the act. We find that since the ld. Pcit himself is the appropriate authority who has issued form 3 dated

23.02.2021 in the instant case and the fact that the said contentions have been advanced for the first time before us, it is relevant to afford an equal opportunity to the ld. Pcit to examine such contentions raised on behalf of the assessee challenging his exercise of jurisdiction u/s 263 of the act. Therefore, the contentions so advanced by both the parties are left open to be examined by the ld. Pcit as per law and have not been adjudicated upon by us.

8.3 We find from the order of PCIT in the second round wherein PCIT has not accepted the contention of the assessee on merits and on legal issue. He has also distinguish the case law relied upon by the assessee of Madars High court stating that the revenue has preferred a SLP against that order. So, the contention raised by PCIT on legal issue decided as against the assessee. As regards the merits of the case he hold as under:

> "8. Accordingly, by virtue of powers conferred on the undersigned under the provisions of section 263 of the Income Tax Act 1961, I hold that the order under section 143(3) of the IT Act dated 31.12.2018 for AY 2016-17 passed by the Assessing Officer is erroneous in so far as it prejudicial to the interest of revenue as the said order has been passed by the Assessing Officer by without application of mind and verification of unsecured loans. The order of the Assessing Officer is therefore liable to revision under the explanation (2) clause (b) and clause (a) of section 263 of the Income Tax Act, 1961. Hence, the assessment order is set aside on the issue as discussed above and the AO is directed to examine the issue and pass suitable order after according opportunity of being heard to the assessee.
>
> The order of the AO is, accordingly, set aside on the issue as discussed above."

8.4 Apropos to the grounds so taken by the assessee we note from the order of the assessment that the ld. AO has made detailed

enquiry on the various issues and has made the addition on merits after examining the records of the assessee. As regards the unsecured loan there is a following noting in the assessment order:

> Complete details along with justification of travelling expenses and all pending details such as confirmations of unsecured loan parties. Bills/register of addition to fixed assets. List of all type sundry creditors in required format. List of loans and advances persons in required format and details reconciliation of receipts shown in ITR/audit report and form 26AS.

8.5 Thus, it very much clear that the assessee has placed on record the details related the unsecured loans. There is no fault on the part of the assessing officer, not only that after submitting details to the PCIT did not bring anything on record so as to establish that the order of the assessing officer is erroneous or prejudicial to the interest of the revenue. There are various judicial instances wherein the court held that the PCIT in proceeding u/s. 263 cannot insist that the ld. AO should have acted on the issue the way PCIT wants. We have gone through the list of persons who have given unsecured loans to the assessee (APB-80) wherein name, address and PAN number and how the amount is accepted is mentioned. The assessee also submitted the confirmation of these depositors (APB-81-112) and the copy of bank statement

and ITR of parties (APB117-139) where in the all the relevant details is available. These details itself shows that the primary onus casted upon the assessee stands discharged and based on this evidence placed on record the ld. AO has taken a plausible view on the matter. There is a reference of the furnishing the details of the unsecured loans by the assessee in the assessment order. Thus, once the assessment is completed the PCIT has also limited power to invoke the provision of section 263 of the Act and has to pass a reasoned order and has to demonstrate that how the clause (a) or (b) to explanation 2 of section 263 of the Act is applicable in the particular facts. Thus, power of review and power of revision are two different actions once the issue is examined by the ld. AO and without bringing anything contrary on record power to revision is nothing but to review and the same is not permitted in the absence of the clear finding about the error in the order. There is no evidence placed on record by the PCIT that though the assessment order is referring to the confirmation how the PCIT takes a view that the same was not on record. There is nothing contrary placed on record to disbelieve the finding recorded in the assessment order. Mere suspicion does not give power to enlarge the scope in the assessment proceeding once it is completed. Thus, what

cannot be done by the ld. AO cannot be done by the PCIT u/s. 263 of the Act. To support this contention the assessee relied upon the decision of the jurisdiction High Court in the case of CIT Vs. Ganpat Ram Bishnoi [153 Taxman 242(Raj)] wherein it is 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 suspicious 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.

8.6 On this issue in 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."*

8.7 The bench further note that the prerequisite exercise of jurisdiction by the learned PCIT under section 263 of the Act is that the order of the AO is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The ld. PCIT has to be satisfied of twin conditions, namely (i) the order of the AO 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, provision of section 263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous as also prejudicial to Revenue's interest, then 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. It is pertinent to mention that 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 PCIT does not agree, it cannot be treated as an erroneous order and it is prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. In this process even the AO has no power to review his own order. In this regard, we draw strength from the

decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1: (2000) 243 ITR 83 (SC). We also draw strength from the decision of the Hon'ble Supreme Court in the case of CIT vs. Max India Ltd. (2007) 213 CTR (SC) 266: (2007) 295 ITR 282 (SC) wherein it was held that:

> "The phrase 'prejudicial to the interests of the Revenue' in s. 263 of the IT Act, 1961, has to be read in conjunction with the expression 'erroneous' order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. For example, when the AO adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law."

Thus, based on this decision it is also noteworthy to mention that one of the pre-requisite before invoking S. 263 and the allegation of the Ld. PCIT is that there has been incorrect assumption of fact and law by the Assessing Officer. However, despite our deep and careful consideration of the material on record including the finding recorded in the subjected Assessment order and in the findings recorded in the order under challenge, we do not find any incorrectness and incompleteness in the appreciation of facts made by the AO who satisfied about the unsecured loan accepted by the assessee. In the light of these observations, we do not agree on this aspect to this extent with ld. PCIT. Even on facts we have

discussed that on the issues raised there is no error or prejudice caused to the revenue and does not attract the clause (a) or (b) to explanation 2 of section 263 of the Act and thus, it is nothing but a change of opinion and ld. PCIT intend that the enquiry should have been done in the light of the his view which is not permitted in the eyes of the law. In the light of the aforesaid discussion, we hold that the order of the PCIT is not in accordance with the provisions of section 263 of the Act and thus the same is quashed.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 29/08/2023

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judcial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 29/08/2023
*Ganesh Kumar, PS
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Laxmi Narayan Agarwal, Jaipur
2. प्रत्यर्थी / The Respondent- PCIT, Jaipur-2, Income Tax Department
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 296/JP/2023}

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar