

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 1785/DEL/2023 [A.Y. 2021-22]

Shri Rama Shanker Khemka
4428, Ganesh Bazar Cloth Market
New Delhi

Vs.

Pr. CIT
Delhi - 1

PAN: AAJPK 8457 D

(Applicant)

(Respondent)

Assessee By : Shri Gautam Jain, Adv

Department By : Shri P.N. Barnwal, CIT- DR

Date of Hearing : 25.09.2023

Date of Pronouncement : 27.09.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated NIL framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] by the PCIT, Central -1, New Delhi pertaining to A.Y. 2021-22.

2. The sum and substance of the grievance of the assessee is that the PCIT erred in assuming jurisdiction u/s 263 of the Act and further erred in holding that the assessment order dated 30.03.2022 framed u/s 143(3) of the Income-tax Act, 1961 [the Act, for short] is not only erroneous but also prejudicial to the interest of the Revenue.

3. The representatives of both the sides were heard at length, the case records carefully perused. Relevant documentary evidences and judicial decisions brought on record duly considered in light of Rule 18(6) of ITAT Rules.

4. Briefly stated, the facts of the case are that a search and seizure action was taken in the Khemka Group of cases on 14.01.2021 and the assessee was also covered by the search warrant. The assessee is in the business of trading in gold/bullion and providing loans on interest.

5. Return for the year was filed on 09.12.2021 declaring an income of Rs. 1,85,28,910/-. Return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee.

6. Returned income was assessed u/s 143(3) of the Act after making addition of Rs. 12,93,500/- and Rs. 2,56,55,636/-. Assuming jurisdiction conferred upon him by provisions of section 263 of the Act, the PCIT issued a show cause notice which reads as under:

"NOTICE FOR THE HEARING

M/s/Mr/Ms

Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the THE INCOME TAX ACT, 1961 - Assessment Year 2021-22.

In this regard, a hearing in the matter is fixed on 19/01/2023 at 11 :30 AM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option -to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in

Sub: Show cause notice for initiating action under section 263 of the Income Tax Act, 1961 in the case of Sh. Rama Shanker Khemka for the A_Y. 2021-22 (Date of assessment order: 31.05.2022) for revision of the assessment order, which is erroneous and prejudicial to the interest of revenue - reg.

It is noted from the assessment records that a search u/s 132 of the Income Tax Act 1961 was conducted on 14.01.2021 on the Khemka Group of Cases in which your residential premises as well as bank lockers were also covered. Assessment u/s 143(3) of the Income-tax Act, 1961 was completed on 31.05.2022 at an income of Rs.4,54,78,046/-.

2. During the course of the above said search operations at your and your family members premises total cash amounting to Rs. 3,64,93,000/- was found out of which cash of Rs. 3,58,00,000/- was seized. cash was found and seized.

3. During the assessment proceedings in explanation regarding the above cash receipts and payments, you have submitted that these cash payments were made from sale of inherited assets being gold jewellery and loose diamonds.

4. During the assessment proceedings you failed to provide following details/documents

i. Proof of purchase of diamonds/jewellery during FY 2000-01 ,

ii. The diamonds/jewellery were in existence and you were in the possession of these diamonds/jewellery for almost last 20 years,

iii. Wealth tax return was filed by the assessee disclosing these diamonds/jewellery.

iv. Proof of sale of these diamonds/jewellery for total amount of Rs. 4.19 crores.

v. Details of parties to whom these diamonds/jewellery were sold.

5. The AO accepted the submission of the assessee regarding the above receipts and payments in cash without making any enquiry regarding genuineness of the above claim of the assessee.

6. In view of above facts, I am in opinion that Assessment order dated 31.05.2022 in your case for A.Y. 2021-22 is erroneous in so far as it is prejudicial to the interests of the revenue. Therefore, you are required to explain as to why proceedings under section 263 of the Income-tax Act, should not be initiated for revision of Assessment Order for A.Y. 2021-22. Further, you are required to show as to why cash expenditure and cash receipts discussed above should not be added as unexplained income.

7. Your reply in this regard should reach this office by 19.01.2023 at 11:30 A.M. You may also personally or through AR attend to the hearing of the case. In case nothing is heard from you by 19.01.2023, then it will be presumed that you have nothing to say / submit in this matter and the matter will be decided on the basis of details available on record and merits of the issue, without any further opportunity to you.

MALATHI R SRIDHARAN
PCIT (Central) Delhi -1"

7. The PCIT was of the firm belief that cash of Rs. 3,64,93,000/- found at the premises of the assessee, at the time of search, was not recorded in the books of account of the assessee and the assessee has failed to prove the nature and source of acquisition of this cash. Therefore, the same should have been taxed as unexplained u/s 69A of the Act r.w.s 115BBE of the Act, absence of which makes the assessment order dated 30.03.2022 erroneous and prejudicial to the interest of the Revenue.

8. Moving forward on the above premise, the PCIT, interestingly, observed as under:

"The draft assessment in the case was submitted to the Addl CIT by AO on 28.03.2022 seeking approval u/s 153 D of the 1 T Act, 1961. The approval in the case was given by the Additional CIT within a day on 29.03.2022 and the order was passed on 30.03.2022. Hence, the approval u/s 153D granted by the Additional Commissioner, Income Tax, Central Range-2 dated 29.03.22, Delhi is also set aside as the approval was given without proper examination, being a time barring matter."

9. The above remarks by the PCIT shows that approval granted u/s 153D of the Act was without any application of mind making the assessment order non-est. In our considered opinion, when the PCIT has declared the approval granted u/s 153 of the Act as devoid of any application of mind, making the assessment order non rest, then a non est-order cannot be the subject matter of revision u/s 263 of the Act.

10. Be that as it may, the question is whether the Assessing Officer has made any enquiry in respect of the allegation made by the PCIT. It would be pertinent to refer to the following findings/observations made by the Assessing Officer in the impugned assessment order:

provided hereunder:

<i>S. No.</i>	<i>Premises</i>	<i>Name in Warrant</i>	<i>Cash Found</i>	<i>Cash Seized</i>
<i>1</i>	<i>4, Sriram Road, Civil Lines, Delhi</i>	<i>Rama Shanker Khemka, Mayank Khemka, Rajesh Rani Khemka & Payal Khemka</i>	<i>14,00,000</i>	<i>10,00,000</i>

Rama Shanker Khemka

2021-22

S. No.	Premises	Name in Warrant	Cash Found	Cash Seized
2	A-44, Pushpanjali Enclave, Pitampura, Delhi	Varun Aggarwal, Isha Aggarwal, M/s. Nector Agro Pvt. Ltd., M/s. Shresth Properties Pvt. Ltd., M/s. Orbit Infratech Pvt. Ltd.	1,65,50,000	1,65,00,000
3	6-D, Atma Ram House, 1, Tolstoy Marg, Connaught Place, New Delhi	Rama Shanker Khemka, Mayank Khemka, PMK Impex Pvt. Ltd., Virtue Financial Services Pvt. Ltd., Shri Badri Vishal Associates LLP, Sale Developers Pvt. Ltd, Scientific Real Estate Developers Pvt. Ltd., Orbit Infratech Pvt. Ltd.	2,03,000	Nil
4	1171, Kucha Mahajani, Chandni Chowk, Delhi	Rama Shanker Khemka, Mayank Khemka & M/s. Atma Ram Amar Nath	1,83,40,000	1,83,00,000
TOTAL			3,64,93,000	3,58,00,000

11. At Para 6.3, the Assessing Officer further observed that during post search investigation proceedings, the assessee explained the source of such cash as being generating from sale of inherited assets being gold jewellery and loose diamond which devolved upon him from his mother late Smt Shakuntala Devi Khemka. At para 6.4, the

assessee refers to the issuance of notice requiring the assessee to explain the source of the said cash which was replied by the assessee as mentioned in Para 6.5 of the order.

12. All these categorical remarks by the Assessing Officer, in his assessment order, go on to show that a specific enquiry was made by the Assessing Officer in respect of the cash found at the time of search to which, specific reply was given by the assessee explaining the source of cash being long term capital gains on sale of jewellery.

13. Observation of the PCIT that the Assessing Officer has not made any enquiry is baseless. Further, the PCIT alleged that the documents referred to by the Assessing Officer and considered by him are not available in the assessment record. Such blatant remarks would tarnish the image of the Revenue because the PCIT is making strong allegations against his Assessing Officer regarding removal of documents from the assessment record, because it is the Assessing Officer who is in the possession of the assessment records. However, we do not want to make any comment on the observations of the PCIT at Para 6 of his order.

14. A perusal of the assessment order clearly shows that the Assessing Officer has made enquiry in respect of availability of cash in hand. In the light of the afore-stated facts the Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:

"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 in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-- recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order 7 is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous ".

15. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

"The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and 8 practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles". 12. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries,

applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. We, therefore, hold that in order to exercise power under sub-section (1) of section 263 of the Act there must be material before the Commissioner to consider that the order passed

by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the 10 record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in

the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income- 11 tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

16. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by

the 12 decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 Taxmann.com 272 (Bombay)".

17. The Hon'ble High Court of Gujarat in the case of CIT vs. Nirma Chemical Works Ltd. 309 ITR 67 has observed as under:

"if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing . A.Y. 2009-10 Officer issued a query memo to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the creditworthiness/capacity of the donors, the source from where these funds have come and also the creditworthiness/ capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue cannot be accepted."

18. We find that the Hon'ble Delhi High Court in the case of CIT Vs Sunbeam Auto reported in 332 ITR 167 has held as held as under:

"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the CIT under s. 263 of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission 14 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 s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open".

19. Considering the facts of the case in totality in light of judicial decisions discussed hereinabove, we set aside the order of the PCIT and restore that of the Assessing Officer dated 30.03.2022 framed u/s 143(3) of the Act. We order accordingly.

20. In the result the appeal of the assessee in ITA No. 1785/DEL/2023 is allowed.

The order is pronounced in the open court on 27.09.2023.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 27th SEPTEMBER, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	