IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI

BEFORE SH. G. S. PANNU, PRESIDENT AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.1081/Del/2022
(Assessment Year : 2017-18)

Bhushan Kumar Gupta House No.130, Sector-11, Panipat, Haryana -132 103 **PAN No. AATPG 2846 D**	Vs.	Pr. CIT Rohtak
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Ruchesh Sinha, Adv.
Revenue by	Shri Zafarul Haque Tanweer, CIT-D.R.

Date of hearing:	03.10.2023
Date of Pronouncement:	06.10.2023

PER CHANDRA MOHAN GARG, JM :

This appeal filed by the assessee is directed against the order of the Pr. Commissioner of Income Tax (PCIT) - Rohtak dated 22.03.2022 for Assessment Year 2017-18.

2. Assessee has challenged invocation of revisionary provision of Section 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") with following grounds of appeal :

> *"1. That on the facts and circumstances of the case, the Pr. CIT has erred in law in invoking the provisions of section 263 of the Income tax Act, 1961.*
>
> *2. That on the facts and circumstances of the case, the Pr. CIT has erred, both on facts and in law, in forming the view that the income surrendered by the appellant, during the survey proceedings shall not*

be considered as normal business income and is required to be taxed as per the special provisions.

3. *That the PCIT has erred in law & on facts in applying the provisions of Section 115BBE in the instant case, ignoring that the same is not applicable in the given case, as the amended provisions of the Statue, came into operation by Taxation Second Amendment Act 2016, w.e.f 15.12.2016 and hence could not be considered as applicable prior to 08.11.2016, in the present case the income was surrendered during the survey proceedings which was conducted in the case of the appellant on 17.8.2016.*

4. *That the view taken by the PCIT while invoking the provision of 263 is against the settled jurisprudence that when two views are possible, the one which is beneficial to an assessee shall be taken.*

5. *That the appellant craves leave to add, amend, alter, vary and/or withdraw any or all the above grounds of appeal before or at the time of hearing of the appeal."*

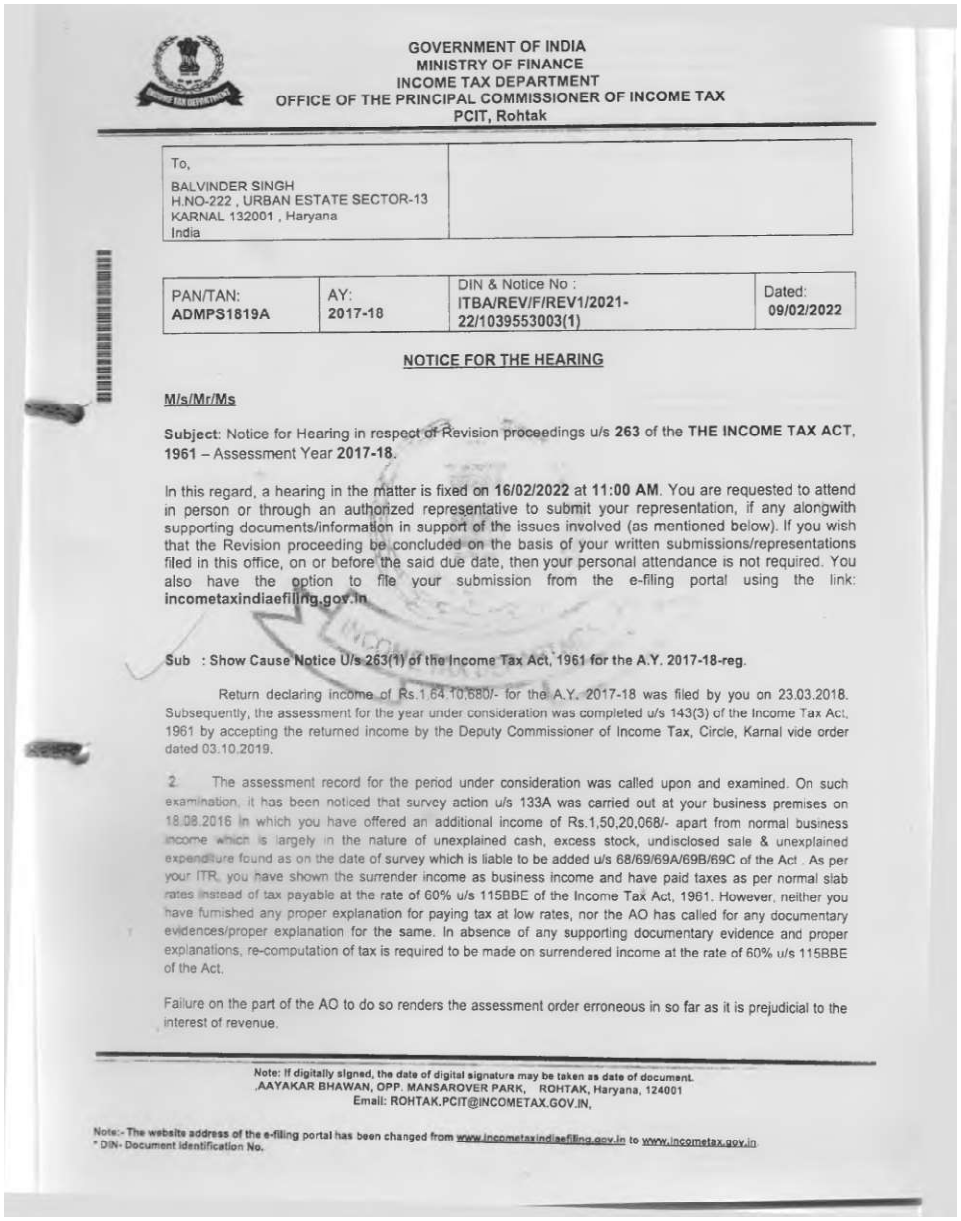
3. The Learned Counsel placing reliance on the orders of ITAT Delhi Benches in the cases of Balvinder Singh, Haryana vs. PCIT, Rohtak in ITA No.570/Del/2022 and Yogesh Kumar vs. PCIT, Rohtak in ITA No.589/Del/2022 submitted that the survey operation was held on 17.08.2016 wherein the assessee voluntarily surrendered Rs.30,00,000/- and included the same in the return of income for A.Y. 2017-18. The Learned Counsel submitted that since the provision of Section 115BBE of the Act was brought into statue was introduced by way of Taxation Laws (Second Amendment) Act, 2016 w.e.f 01.04.2017 after the date of survey, therefore, the issue has become debatable and on debatable issue, the PCIT is not empowered to invoke revisionary provision of Section 263 of the Act. The Learned Counsel also submitted that from the assessment as well as First Appellate order, it is clear that the AO has not made any addition either u/s 68 or u/s 69 of the Act. Therefore, provision of Section 115BBE of the Act charging higher rate of tax could not be applied to the surrendered amount of assessee, which was included in the

return of income and taxes were also paid thereon. Finally, the Learned Counsel submitted that the assessment order on debatable issue cannot be alleged as erroneous and prejudicial to the interest of the Revenue and therefore, the revisionary order may kindly be quashed. The learned Counsel submitted that the issue is squarely covered in favour of the assessee by the orders of ITAT, Delhi Benches in the cases of Balvinder Singh vs. PCIT (supra) and Yogesh Kumar vs. PCIT (supra).

4. Replying to the above, the learned CIT-DR supported the order of revisionary order and submitted that the provision of Section 115BBE of the Act is applicable to the A.Y. 2017-18 under consideration onwards. Therefore, not charging higher rate of interest u/s 115BBE of the Act by the AO has made the assessment order erroneous and prejudicial to the interest of the Revenue. Therefore, the learned PCIT rightly invoked revisionary provision of Section 263 of the Act.

5. On careful consideration of the above submissions, first of all, we note that identical issue was placed before ITAT 'A' Bench in the case of Balvinder Singh vs. PCIT (supra). The Tribunal adjudicated the issue in favour of the assessee quashing the revisionary order u/s 263 of the Act with following observations and findings:

> *"4. Briefly stated, the facts of the case are that the assessee filed return of income on 23.03.2018 declaring income of Rs. 1,64,10,680/–. Return was selected for scrutiny assessment and, accordingly, statutory notices were issued and served upon the assessee.*
>
> *5. Returned income was assessed as such vide order dated 03.10.2019. Assuming jurisdiction cast upon him by provisions of section 263 of the Act, the PCIT issued show cause notice dated 09.02.2022 which is as under:*



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
PCIT, Rohtak

To,
BALVINDER SINGH
H.NO-222 , URBAN ESTATE SECTOR-13
KARNAL 132001 , Haryana
India

PAN/TAN:	AY:	DIN & Notice No :	Dated:
ADMPS1819A	2017-18	ITBA/REV/F/REV1/2021-22/1039553003(1)	09/02/2022

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 **2017-18**.

In this regard, a hearing in the matter is fixed on **16/02/2022** at **11:00 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 U/s 263(1) of the Income Tax Act, 1961 for the A.Y. 2017-18-reg.

Return declaring income of Rs.1,64,10,680/- for the A.Y. 2017-18 was filed by you on 23.03.2018. Subsequently, the assessment for the year under consideration was completed u/s 143(3) of the Income Tax Act, 1961 by accepting the returned income by the Deputy Commissioner of Income Tax, Circle, Karnal vide order dated 03.10.2019.

2. The assessment record for the period under consideration was called upon and examined. On such examination, it has been noticed that survey action u/s 133A was carried out at your business premises on 18.08.2016 in which you have offered an additional income of Rs.1,50,20,068/- apart from normal business income which is largely in the nature of unexplained cash, excess stock, undisclosed sale & unexplained expenditure found as on the date of survey which is liable to be added u/s 68/69/69A/69B/69C of the Act . As per your ITR, you have shown the surrender income as business income and have paid taxes as per normal slab rates instead of tax payable at the rate of 60% u/s 115BBE of the Income Tax Act, 1961. However, neither you have furnished any proper explanation for paying tax at low rates, nor the AO has called for any documentary evidences/proper explanation for the same. In absence of any supporting documentary evidence and proper explanations, re-computation of tax is required to be made on surrendered income at the rate of 60% u/s 115BBE of the Act.

Failure on the part of the AO to do so renders the assessment order erroneous in so far as it is prejudicial to the interest of revenue.

Note: If digitally signed, the date of digital signature may be taken as date of document.
,AAYAKAR BHAWAN, OPP. MANSAROVER PARK, ROHTAK, Haryana, 124001
Email: ROHTAK.PCIT@INCOMETAX.GOV.IN,

Note:- The website address of the e-filing portal has been changed from www.incometaxindiaefiling.gov.in to www.incometax.gov.in
" DIN- Document identification No.

3. In view of the above, the assessment completed by the AO is, prima facie erroneous in so far as it is prejudicial to the interest of revenue. The same is, therefore, required to be suitably amended/modified u/s 263 of the Income Tax Act, 1961. You are, therefore, required to show cause as to why an appropriate order u/s 263(1) of the Act setting aside the assessment order passed as on 03.10.2019 should not be passed. In this connection, you may send your written reply along-with supporting documentary evidences on the email-id(rohtak.pcit@incometax.gov.in) or through e-proceedings by 16.02.2022. In case of no reply is received, it shall be assumed that you do not wish to say anything in the matter and the matter would be decided as per material on record without any further notice/intimation to you."

6. A perusal of the above shows that the PCIT was of the firm belief that the assessment order passed by the Assessing Officer is not only erroneous but prejudicial to the interest of the revenue, in as much as, the income has been assessed at normal slab rates instead of tax payable @ 60% under section 115BBE of the Act.

7. Facts on record show that pursuant to the survey operation, statement of the assessee was recorded on 17.08.2016 in which the assessee surrendered an income of Rs.1.50 crores, which included cash Rs.9.50 lakhs, stock Rs.22.50 lakhs, renovation of building Rs.20 lakhs and undisclosed sales Rs.98 lakhs.

8. The assessee honored the surrendered amount in his return of income and paid taxes there on.

9. An amendment has been brought in section 115BBE w.e.f 2017–18 but the same was not there in the statute on the date of survey. Taking a leaf out of the amended provisions, the PCIT was of the opinion that the tax rate should have been 60% instead of 30% because of which the assessment order has become prejudicial to the interest of the revenue.

10. The moot point is whether the amendment is prospective or retrospective, as on the date of survey, the amended provisions were not there in the statute. In our considered opinion, this is a highly debatable issue, which cannot be subject matter of assumption of jurisdiction under section 263 of the Act. Moreover, a perusal of the assessment order clearly shows that the assessing officer has nowhere invoked the provisions of sections 68/69 of the Act to impute the tax rate of section 115BBE of the Act.

11. A perusal of section 115BBE of the Act shows that where the total income of the assessee includes any income referred to in sections 68, 69, 69A, 69B, 69C or 69D, the income tax payable shall be @ 30% on income so referred to in the said sections. Further, in terms of amended provisions of section 115BBE of the Act by Taxation Laws, Second Amendment Act 2016, it provides that where the total income of the assessee includes any income referred to in sections 68, 69, 69A, 69B, 69C, and 69D and reflected in the return of income furnished under section 139 or total income of the assessee determined by the assessing officer, any income referred to in sections 68, 69, 69A, 69B, 69C, or 69D if such income is not reflected in the return of income furnished under section 139 of the Act, income tax payable shall be @ 60% on income so referred in the said section.

12. Change which has been brought about in the provisions relates to income so referred to in the afore-stated sections so defined which is either not reflected in the return of income or determined by the assessing officer and in both the cases it will be covered by the provisions of section 115BBE of the Act and the rate of taxation has been increased from 30% to 60% on such specified income.

13. There is, therefore nothing stated in the pre-amended or post amended provisions of section 115BBE of the Act that where the assessee surrenders undisclosed income during search action for the relevant year, the tax rate has to be charged as per provisions of section 115BBE of the Act. Therefore, the applicability of the amended provisions which prompted the PCIT to assume jurisdiction under section 263 of the Act is highly debatable issue, and therefore, in our understanding of the law, the PCIT has wrongly assumed jurisdiction.

14. 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 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 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 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-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

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."*

> *29. 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 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".*
>
> *30. Considering the facts of the case in totality from all possible angles, we failed to persuade ourselves to accept the contention of the ld. DR who had strongly supported the findings of the PCIT. We are of the considered view that the order framed u/s 263 of the Act deserves to be set aside and that of the Assessing Officer deserves to be restored. We order accordingly."*

18. Considering the facts of the case in hand, in totality, in light of judicial decisions discussed here in above, we set aside the order of the PCIT and restore that of the Assessing Officer dated 02.10.2019 framed under section 143C of the Act."

6. The sole basis of revising assessment order taken by the learned PCIT u/s 263 of the Act was that AO was failed to apply the provision of Section 115BBE of the Act on the surrendered amount of Rs.30,00,000/-. As per learned PCIT, the AO should have charged tax at maximum tax rate of 60% as prescribed u/s 115BBE of the Act on the amount surrendered during the survey proceedings on 17.08.2016. Undisputedly, the assessee had surrendered an amount of Rs.30,00,000/- during the course of survey proceedings and offer it to tax as normal business income by way of inclusion in the return of income and assessee had also paid due taxes etc. thereon before filing return of income. It is also not undisputed that the AO has not made any addition either u/s 68 of the Act or Section 69 of the Act as the surrendered amount was already included by the assessee in his return of income. From the findings of learned PCIT in the impugned order, it is clear that the learned PCIT has also not specified any specific charging section under which charging section the AO should have treated the surrendered amount. It is also pertinent to mention that nothing has been stated either in the pre-amended or in the post-amended provisions of section 115BBE of the Act that where the assessee surrendered undisclosed income during search action for

the relevant year, the tax rate has to be charged as per provisions of Section 115BBE of the Act. Therefore, the applicability of the amended provision of section 115BBE of the Act, which prompted the PCIT to assume jurisdiction u/s 263 of the Act is highly debatable issue, and therefore, in our humble understanding of the law, the PCIT wrongly assumed jurisdiction u/s 263 of the Act and thus, the assessment order cannot be alleged as erroneous and prejudicial to the interest of the Revenue by way of picking up the debatable issue.

7. In view of findings of Co-ordinate Bench of ITAT, Delhi Benches in the case of Balvinder Singh vs. PCIT (supra) and Yogesh Kumar vs. PCIT (supra), we are inclined to hold that the facts and circumstances of the present case are quite similar and identical to the facts and circumstances in the said cases. Hence, the contentions of Ld. Counsel of appellant, challenging the invocation of revisionary provision of section 263 of the Act, get support.

8. Considering the facts and circumstances of the present case in totality, in the light of judicial precedents discussed above, particularly orders of Co-ordinate Bench of Tribunal in the cases of Balvinder Singh vs. PCIT (supra) and Yogesh Kumar vs. PCIT (supra), we hold that the learned PCIT was not correct and justified in invoking revisionary provision of Section 263 of the Act on debatable issue thus, the assessment order dated 16.12.2019 for A.Y. 2017-18 passed u/s 143(3) of the Act cannot be alleged as erroneous and prejudicial to the interest of Revenue. Consequently, we hold that the invocation of revisionary provision of section 263 of the Act and all consequent proceedings and order of learned PCIT deserve to be quashed and we hold so. Accordingly, grounds of assessee are allowed

setting aside the revisionary order dated 22.03.2022 passed under section 263 of the Act and restoring the assessment order dated 16.12.2019 for A.Y. 2017-18.

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

Order pronounced in the open court on 06.10.2023

Sd/-	**Sd/-**
(G. S. PANNU) **PRESIDENT**	**(CHANDRA MOHAN GARG)** **JUDICIAL MEMBER**

Date:- 06.10.2023

*Priti Yadav, Sr. PS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI