आयकर अपीलीय अधिकरण, कोलकाता पीठ 'बी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाल, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.459/Kol/2023
Assessment Year: 2018-19

Venerable Advertising Pvt. Ltd.....Appellant
6, Kali Krishna Tagore Street,
Jorbagan, Kolkata- 700007.
[PAN: AAACV8673M]

vs.

PCIT, Kolkata-1, Kolkata…..... Respondent

Appearances by:
Shri Aayush Kedia, CA, appeared on behalf of the appellant.
Shri S. Datta, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : November 30, 2023
Date of pronouncing the order : January 16, 2024

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the revision order dated 14.03.2023 of the Principal Commissioner of Income Tax, Kolkata [hereinafter referred to as 'PCIT'] u/s 263 of the Income Tax Act (hereinafter referred to as the 'Act'). The assessee in this appeal has agitated against the action of the Pr. CIT in exercising his revision jurisdiction u/s 263 of the Act and thereby directing the Assessing Officer to frame the assessment afresh.

2. The brief facts of the case are that the assessee vide its return of income for the assessment year under consideration i.e. A.Y 2018-19 declared total income of Rs.1,09,24,210/- which was accepted by the Assessing Officer in the assessment carried out u/s 143(3) of the Act. However, later on, the ld. Pr. CIT in exercising of his revision

jurisdiction u/s 263 of the Act, observed from the record that the assessee had shown short term capital gain on shares of Rs.40,94,308/- whereas from the schedule CG of ITR, it was seen that the assessee computed the said short term capital gain (STCG) as (-) Rs. 1,36,35,922/-. The LD Pr. CIT observed that the assessee was required to pay tax on STCG of Rs. 40,94,308/- and that the carry forward of short term capital loss of Rs. 1,36,35,922/- was not allowable since the same was not claimed by the assessee in its ITR. The ld. Pr. CIT show-caused the assessee, in this respect, and asked the assessee to furnish the various details as mentioned in the impugned order. The assessee submitted its reply before the LD Pr. CIT on 04.01.2023, wherein, the assessee cited a factual error in the show cause notice of the LD Pr. CIT by stating that the LD Pr. CIT has only considered the short-term capital gain reported under 'Note 12: Other Income' of the Audited Financial Statement but has completely ignored the Short-Term Capital Loss of Rs 76,37,68,695/- reported under 'Note 16: Other Expenses' of the Audited Financial Statements. The assessee therein also submitted the details/calculation of net short-term capital loss of Rs 1,36,35,922/-. A copy of the reply filed by the assessee is placed on pages "68" to "72" of the paper book. The ld. Pr. CIT-1, Kolkata then issued a revised show-cause notice on 03.02.2023 requiring the assessee to submit complete details regarding long-term capital gain, short-term capital loss and dividend income by way of a questionnaire. The assessee submitted its reply wherein, the assessee submitted all the information/documents as required by the ld. Pr. CIT. Thereafter, a final show-cause notice was issued by the ld. Pr. CIT on 24.02.2023, wherein, the ld. Pr. CIT asked the assessee to again furnish complete details of short-term capital loss amounting to Rs.76,37,68,696/-. The assessee replied to the said show-cause notice on 02.03.2023, thereby,

submitting the information and documents required by the ld. Pr. CIT. The sum and substance of the replies/details furnished by the assessee during the year under consideration was that the assessee had earned Long Term Capital Gain amounting to Rs. 95,51,48,662/- on the sale of equity shares of 'Lux Industries Limited'. The same was claimed exempt u/s 10(38) by the assessee in its Return of Income. During the year under consideration, the assessee incurred a short-term loss of Rs. 76,37,68,696/- on the sale of units of 'JM Financial Mutual Fund'. However, dividend amounting to Rs. 74,60,38,465/- was earned on the said mutual fund. The units of 'JM Financial Mutual Fund' being purchased and sold within 3 months of the dividend being declared, the assessee calculated short-term capital loss of only Rs. 1,77,30,230/- (Rs. 76,37,68,696 - Rs. 74,60,38,465) on the sale of JM Financial Mutual Fund in view of the provisions of section 94(7) of the Income Tax Act, 1961. Besides this, the assessee earned a short-term capital gain of Rs. 40,94,308/- on the sale of other securities. Thus, the net short-term capital loss of Rs. 1,36,35,922/- (Rs. 1,77,30,230-Rs. 40,94,308) was claimed by the assessee in its return of income. However, the ld. Pr. CIT despite all the above explanations given by the assessee observed that the Assessing Officer had not properly examined all the issues during the assessment proceedings. The operating part of the order of the ld. Pr. CIT is reproduced as under:

> *"In this case, the assessee filed the return of income for the A.Y. 2018-19 and the assessment order was passed on 22.02.2021 wherein the returned income of Rs.1,09,24,210/- was accepted as assessed income. From the inspection of the records, it was observed that the assessee had shown short term capital gain on shares of Rs.40,94,30/- whereas from the Schedule-CG of the Income-tax Return, it was seen that the assessee had computed net short term capital gain on shares as (-)Rs. 1,36,35,922/-. Further, a carry forward loss of Rs. 1,36,35,922/- was allowed which was not claimed by the assessee. It was also seen that the assessee had claimed long term capital gain of Rs.95,51,48,622/- which was claimed as exempt income u/s. 10(38) of the IT Act, and had*

also shown Dividend Income of Rs.74,60,38,466/- which was claimed as exempt u/s.94(7) of the IT Act and short term capital loss of Rs.76,37,68,696/-. All these issues were not examined by the Assessing Officer during the course of the assessment proceedings. In view of this, various notices were issued to the assessee vide this office's letter dated 19.12.2022, 02.01.2023, 09.01.2023 and 03.02.2023. The assessee had filed necessary details during the course of proceedings u/s.263 of the Act.

The submission of the assessee and the facts of the case have been carefully perused. From the assessment records it is observed that the long term capital gain, short term capital gain, the short term capital loss and the dividend income earned by the assessee have not been investigated and enquired upon by the A.O. There has been no application of mind and the assessment order has been passed without the necessary and required enquires."

3. The ld. Pr. CIT relying upon certain case laws held that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue. He, therefore, set aside the assessment order for de novo assessment.

4. Being aggrieved by the said order of the ld. Pr. CIT, the assessee has come in appeal before us.

5. We have heard the rival contentions and gone through the record. In this case, earlier the Ld. Pr. CIT vide his show-cause notice dated 21.12.2022 asked the assessee that though, the assessee in his profit and loss a/c had shown short-term capital gain of Rs.40,94,308/- on shares, whereas, in the return of income, the assessee had computed the short-term capital loss of Rs.1,36,35,922/-. The assessee duly explained that during the year, the assessee had not only earned short-term capital gain but also long-term capital gain amounting to Rs.95,51,48,662/- from the sale of equity shares of 'Lux Industries Limited'. The assessee also explained that during the year, the assessee had received dividend amounting to Rs.74,60,38,466/- from 'JM Financial Mutual Fund'. The assessee also explained that the assessee

also incurred loss of Rs.76,37,68,696/- on sale of the units of 'JM Financial Mutual Fund'. However, the provisions of section 94(7) of the Act were attracted in this case, therefore, net loss was computed by the assessee at Rs.1,36,35,922/- after deducting the same out of the dividend income. A perusal of the impugned order passed by the ld. Pr. CIT u/s 263 of the Act shows that the ld. Pr. CIT himself has noted that the assessee had furnished requisite details as were sought by the ld. Pr. CIT. Each and every query raised by the ld. Pr. CIT (through show-cause notices) was answered by the assessee by filing respective replied and details. The ld. Pr. CIT, without pointing out any error or infirmity in the details furnished by the assessee, has simply noted that the Assessing Officer has not made the requisite enquiries. A perusal of the impugned revision order of the ld. Pr. CIT would reveal that the ld. Pr. CIT himself had made adequate enquiries and sought details and documents from the assessee which were duly replied to and furnished by the assessee. Under the circumstances, the ld. Pr. CIT was supposed to go through the said details and should have pointed out as to which of the fact or explanation needs what further enquiries. At this stage, it will be relevant to reproduce the relevant provisions of section 263 of the Act as under:

> *"Section 263(1) of the Income- Tax Act reads as under:*
>
> *(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he, may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. ……"*
>
> *9.2. The sum and substance of the above reproduced section 263(1) can be summarized in the following points:*

1) The Commissioner may call for and examine the record of any proceeding under the Act;

2) If he considers that the order passed by the AO is

(i) erroneous; and

(ii) is prejudicial to the interest of Revenue;

3) He has to give an opportunity of hearing in this respect to the assessee; and

4) He has to make or cause to make such enquiry as he deems necessary;

5) He may pass such order thereon as the circumstances of the case justify including,

(i) an order enhancing or,

(ii) modifying the assessment or

(iii) cancelling the assessment and directing a fresh assessment."

6. As per the provisions of section 263, as enumerated above, after getting the explanation from the assessee, the Ld. Pr. CIT was supposed to examine the contention of the assessee. Before passing an order of modifying, enhancing or cancelling the assessment, he was supposed either to himself make or cause to make such an enquiry as he deems necessary. The words "as he deems necessary", in our view, do not mean that the Ld. Pr. CIT is left with a choice either to make or not to make an enquiry. As per the relevant provisions of section 263, it was incumbent upon the Ld. Pr. CIT to make or cause to make such an enquiry. So far as the words "as he deems necessary" are concerned, the said words suggest that the enquiries which are necessary to form a view as to whether the order of the AO is erroneous and prejudicial to the interest of Revenue or not? A perusal of the impugned order of the ld. Pr. CIT reveals that the Ld. Pr. CIT had asked the assessee about the details and evidences relating to short-term capital loss and long-term capital gains etc. to which the assessee had given a detailed reply. Once

a point wise reply was given by the assessee, then a duty was cast upon the Ld. Pr. CIT to examine the reply of the assessee and form a prima-facie opinion as to whether the order of the AO was erroneous so far as it was prejudicial to the interest of Revenue. We further note that the Ld. Pr. CIT did not raise any query as to what enquiries were made by the AO before proceeding to pass the assessment order in question. In our view, once the Ld. Pr. CIT had proceeded to make an enquiry regarding the genuineness of the claim of the assessee, he was supposed to make a prima-facie opinion which may not be a concluding opinion to hold that the order of the AO in his view was erroneous so far as it was prejudicial to the interest of Revenue. The opinion of the Commissioner that the AO had not made proper enquiries or verifications should be based on his objective satisfaction and not a subjective satisfaction from the assessment order. Merely because, the assessment order in question is not a detailed order that itself, does not mean that the AO had not made enquiries in this respect. Admittedly, the AO asked the assessee to furnish the necessary details from time to time which were duly furnished by the assessee and after considering the same the AO passed the assessment order.

7. It is pertinent to mention here that a deeming fiction has been created in section 263 of the Act by the amendment made by Finance Act, 2015 w.e.f. 01.06.15, wherein, it has been mentioned that where the Commissioner is of the opinion that the AO had passed the order without making enquiries or a claim has been allowed without enquiring into the claim or that the same is not in accordance with any order or direction or instruction issued by CBDT, that shall be deemed to be erroneous in so far as it is prejudicial to the interest of Revenue. However, a perusal of the revision order passed by the ld. Pr. CIT shows that the ld. Pr. CIT has not pointed out any error or discrepancy in the

explanations and details furnished by the assessee and without examining such evidence and without counter questioning the assessee on the relevant points and even without considering the submission of the assessee furnished in reply to the show-cause notice, the ld. Pr. CIT, in our view, was not justified in setting aside the order, simply stating that in his view more enquiries were needed to be carried out by the AO.

The ld. Pr. CIT, taking shelter in Explanation 2(c) to Section 263(1) of the Act, held that the order of the AO was erroneous and prejudicial to the interest of the revenue on the ground of lack of enquiry, which, in our view, is a general observation and no specific observation has been made in respect of any of the details or evidence furnished by the assessee and as to why the ld. Pr. CIT was not satisfied about such details/replies furnished by the assessee. Simply because the ld. Pr. CIT felt that the AO should have made further enquiries on the same issue or that the case was to be examined from some another angle, the same, in our view, cannot be a valid ground to set aside the assessment order. If such an action is allowed by the ld. Pr. CIT in his revision jurisdiction then, there would be no end to litigation and there would not be any finality to the assessment. The Explanation 2(c) to Section 263(1) of the Act does not give unbridled powers to the ld. Pr. CIT to simply set aside the assessment order by saying that the AO was required to make further enquiries without pointing out as to what was lacking in the enquiries made by the AO and why the ld. Pr. CIT was not satisfied with the reply and evidence furnished by the assessee.

8. We further note that the issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench of ITAT Kolkata in the case of Amritrashi Infra (P) Ltd. vs PR. CIT in ITA No.

838/Kol/2019; Assessment Year 2012-13; order dt. 12/08/2020, wherein, the Tribunal in almost identical circumstances, while relying upon the various decisions of the Higher Courts, has concluded as follows:-

> *"56. To sum up, we find from the above said facts that the Second AO has conducted enquiry as directed by the First Ld. Pr. CIT on the specific subject matter i.e. share capital and premium collected by the assessee-company. Therefore, the finding of Second Pr. CIT that the Second AO has not conducted enquiry is incorrect and is flowing from suspicion only. And as discussed, the allegation/fault pointed out by the Second Ld. Pr. CIT that the Second AO failed to collect total facts also cannot be accepted for the simple reason that Ld. Pr. CIT has not spelt out in the impugned order what he meant by total facts or in the alternative when the assessee has discharged its onus, as required by the law in force in this AY 2012-13, then the Ld. Pr. CIT ought to have called for which ever additional documents/materials or issued summons or issued notices and collected those facts which according to Second Ld. Pr. CIT, the AO omitted to collect and then demonstrated that those actions/documents which he collected in that process gave result to a different finding of fact which will turn upside down the claim of the assessee and thus able to show that the actions/omission of AO in conducting the investigation was erroneous, which unfortunately is not the case before us. And equally bad is the bald allegation/fault that second AO has not collected total facts cannot be accepted being vague and based on conjectures and surmises and so meritless. Since the assessee company has discharged its onus as discussed supra, and still if the Second Pr. CIT had to find the order of Second AO erroneous for lack of enquiry or for not collecting the entire facts, then the Second Pr. CIT ought to have called for the additional facts which he thinks that the Second AO has not collected from the assessee or the shareholders and then explained in his impugned order as to what effect those additional documents would have made on the second assessment order/reassessment order or in other words the impact on the decision making process of framing the second assessment order due to the failure of second AO's omission to collect the additional documents. However, we note that the Second Pr. CIT has not carried out any such exercise or even spelled out in his impugned order, which all documents the second AO failed to collect for considering the total facts; and even if we presume he has conducted such an exercise, then he has not been able to bring out any adverse factual finding to upset the view of Second AO. So we find no merit in the vague allegation of second Pr. CIT that the second AO has not collected the full facts necessary to decide the issue of share capital & premium. So we note that the Second AO, the assessing authority who is a quasi- judicial office has discharged his dual role as an investigator as well as an adjudicator. Looking from another angle of doctrine of merger canvassed before us, we note from the facts of this case that the second Ld. Pr. CIT - 4 by passing the second revisional order dated 14.03.2019 has substituted the First Pr. CIT's order passed u/s. 263 of the Act dated 23.08.2016 with his own order which he cannot do since the second assessment order/re-assessment of the Second AO dated 07.12.2016 was pursuant to the first revisional order of the First Ld. Pr. CIT and on the very same subject matter on which specific directions/instructions were given by the First Ld. Pr.CIT, which direction since having been complied by the AO, brings into operation the doctrine of merger the subject matter i.e. share capital & premium collected by assessee company. Resultantly the second Ld. Pr.CIT, again cannot rake-up the same subject matter without the second Ld. Pr.CIT in the second revisional order spells out where the error happened to second AO as an investigator or adjudicator, which exercise the Second Ld. Pr.CIT has not done, so the second Ld. Pr. CIT cannot*

be permitted to again ask the AO to start the investigation in the way he thinks it proper on the very same subject on which merger has taken place by virtue of the order of First Ld. Pr. CIT. And if this practice is allowed, then there will be no end to the assessment proceedings meaning no finality to assessment proceedings and that is exactly why the Parliament in its wisdom has brought in safe-guards, restrictions & conditions precedent to be satisfied strictly before assumption of revisional jurisdiction. Be that as it may be, as discussed above, we find that the Second Ld. Pr. CIT without satisfying the condition precedent u/s 263 of the Act has invoked the revisional jurisdiction (second time), so all his actions are ab initio void."

9. Further, the Coordinate Mumbai Bench of the Tribunal in the case of Narayan Tatu Rane v. ITO reported in [2016] 70 taxmann.com 227 (Mum. – Trib.) has held that Explanation 2(a) to section 263 of the Act does not authorise or give unfettered power and to revise each and every order on the ground that the Assessing Officer should have made more enquiries and verifications. The relevant part of the order of the Tribunal is reproduced 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 A.O 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 our 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 enquires 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."

10. In view of the above discussion and above referred to decisions, we do not find justification on the part of the ld. Pr. CIT in setting aside the assessment order for de novo assessment. The impugned order of the Ld. Pr. CIT is not sustainable as per law and the same is accordingly quashed.

11. In the result, the appeal of the assessee stands allowed.

Kolkata, the 16th January, 2024.

Sd/-	Sd/-
[गिरीश अग्रवाल /Girish Agrawal]	**[संजय गर्ग /Sanjay Garg]**
लेखा सदस्य/**Accountant Member**	न्यायिक सदस्य/**Judicial Member**

Dated:16.01.2024.
RS

Copy of the order forwarded to:
1. Venerable Advertising Pvt. Ltd
2. PCIT, Kolkata-1, Kolkata
3.CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches