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

Before Shri Sanjay Garg, Judicial Member and Shri Sanjay Awasthi, Accountant Member

I.T.A. No.1336/Kol/2023
Assessment Year : 2013-14

Ramotar Choudhari HUF……..…….....…..……....Appellant
7th Floor, R.N 25
Fortuna Tower,
23A N.S. Road,
Kolkata-1.
[PAN: AANHR9093K]

vs.

PCIT-5, Kolkata…….….....….…..... Respondent

Appearances by:
Shri S. K. Pransukha, FCA, appeared on behalf of the appellant.
Shri Abhijit Kundu, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : May 06, 2024
Date of pronouncing the order : May 09, 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 18.10.2023 of the Principal Commissioner of Income Tax, Kolkata [hereinafter referred to as 'Pr. CIT'] passed 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 filed return of income for the year under consideration declaring total income of Rs.2,55,970/- on 21.01.2014. Thereafter, an information was received by the Assessing Officer from Investigation Wing that the assessee has

received accommodation entry in the form of bogus long term capital gain through share transaction of a penny stock company namely 'Blue Print Securities Limited' during the assessment year under consideration. The assessment of the assessee was, therefore, reopened and assessment proceedings u/s 147 r.w.s 144B of the Act were completed on 30.03.2022 determining total income at Rs.2,55,970/-. Thereafter, the ld. PCIT found some discrepancies in the assessment order and he accordingly exercised his revision jurisdiction u/s 263 of the Act and observed that the assessment order passed u/s u/s 147 r.w.s 144B dated 30.03.2022 was erroneous and prejudicial to the interest of revenue. The ld. Pr. CIT, accordingly, issued show-cause notice to the assessee on 15.02.2023 as to why the assessment order be not revised, the same being erroneous and prejudicial to the interest of revenue. The relevant part of show-cause notice is reproduced as under:

> *"4.1. The assessment record in the case of M/s. Ramotar Choudhari HUF(PAN-AANHR9093K) for A. Y. 2013-14 was called for and examined by the undersigned. In the instant case assessment order was passed u/s 147 r.w.s. 144B on 30/03/2022 determining total income of Rs.2,55,970/- accepting the return income of the assesse.*
>
> *4.2 On examination of the assessment record, it is observed from the accounts filed that the assessee has claimed exempt Long Term Capital Gain amounting u/s 10(38) of the Income Tax Act, 1961 to the tune of Rs. 11,87,718/- on account of sale of shares of M/s. Blueprint Securities Limited (Scrip Code: 012630). Investigation was carried out by the Investigation Directorate which unearthed that the share price of M/s. Blueprint Securities Limited was artificially rigged in an abnormal manner which does not commensurate with the financials of the aforesaid concern. It is evident that the claim of LTCG on sale of shares of M/s. Blueprint Securities Limited(Scrip Code : 012630) is nothing but unaccounted income of the assessee brought back in the books in the form of bogus LTCG. Considering the above facts, the assessment order is erroneous so far as it is prejudicial to the interest of revenue. Accordingly, the assessment order is required to be revised.*
>
> *4.3 In view of the above, you are requested to explain as to why the assessment order in your case M/s. Ramotar Choudhari HUF(PAN-*

AANHR9093K) for AY 2013-14 should not be revised u/s 263 of the Income Tax Act, 1961 as the assessment order passed in the aforesaid case is erroneous so far as it is prejudicial to the interest of revenue."

2.1 In reply to the notice issued by the ld. Pr. CIT, the assessee made detailed submissions before the ld. Pr. CIT, wherein, it was pleaded that the reopening of the assessment was done by the Assessing Officer on the same issue i.e. relating to the capital gains on the sale of equity shares of a company namely M/s Blueprint Securities Limited. It has been submitted that reassessment was done by National Faceless Assessment Centre (NFAC). That notices u/s 142(1) and 143(2) were issued on various dates by the NFAC which were duly complied and all the required details were submitted on the issue of capital gains relating to the transaction done in shares of M/s Blueprint Securities Ltd. That all the documents were checked and verified by the NFAC and the NFAC being satisfied about the matter, hence, no additions were made on this issue. The assessee also referred to the various documents submitted to the NFAC for the purpose of proving the genuineness of the transactions. The reply of the assessee filed before the ld. Pr. CIT has also been reproduced in the impugned order of the Pr. CIT in para 5 running from page 3 to 7.

2.2 However, the ld. Pr. CIT did not get satisfied with the submissions of the assessee observing that from the record and reply of the assessee, it was found that the evidences gathered against the assessee including the statement of entry operators and other relevant materials to prove M/s Blueprint Securities Ltd. was penny stock company, were not properly confronted by the Assessing Officer to the assessee and therefore, the assessment order was erroneous and prejudicial to the interest of revenue, the same being passed without making enquiry and verifications which should have been made. The operating part of the order of the ld. Pr. CIT is reproduced as under:

"6. The submission/reply of the assessee dated 14.10.2023 was considered. The assessee has also filed reply submitted to the A.O. during the assessment proceedings with respect to show cause notice dated 22.03.2022. There is no dispute on the fact that the assessee has claimed exemption on LTCG on sale of shares of the listed company M/s Blue Print Securities Limited. The assessee claims that sale was made through a SEBI recognized stock broker on online trading platform of CSE on which STT was paid. As per assessee, the payment of purchase of shares was also made through banking channels. The assessee also claimed that he was not aware of any investigation by Income Tax Department on basis of which the aforesaid stock was termed as penny stock. The assessee placed reliance on several decisions including the decision of Kolkata ITAT in case of Balaram Gupta vs ITO (Date of order 05.10.2018) wherein the ITAT has decided the issue of LTCG on the same scrip in favour of assessee.

6.1 The assessee has further submitted that during the reassessment proceedings he has filed supporting evidences of genuine exempt income u/s 10(38) and has also attended the video conference and merely a third-party information cannot be relied upon. As per assessee, nothing has been brought by the A.O. to show any nexus between the assessee and the entry operator. The assessee has placed reliance on the decision of Supreme Court in case of Malabar Industrial Co. Ltd. and decision of Gujarat High Court in case of CIT Vs Arvind Jeweller 259 ITR 502.

6.2 On examination of records, it is found that the A.O. issued show cause on 22.03.2022 wherein the detailed modus operandi has been mentioned by the A.O. based on the investigation conducted by the Investigation Wing of the Department wherein the entry operator Praveen Agarwal has confirmed that M/s Blue Print Securities Ltd. was controlled by him and the said company is engaged in providing bogus LTCG/STCL. The paper companies which were amalgamated with M/s Blue Print Securities Ltd. for the purpose of increasing the paid-up capital before listing it at a recognized stock exchange etc. has also been narrated in the said show cause notice along with the fact that CSE and SEBI has taken action against M/s Blue Print Securities Ltd.

6.3 From the record and reply of the assessee, it is found that the evidences gathered against the assessee including the statements of the entry operators and other relevant materials to prove M/s Blue Print Sec Ltd. as penny stock was not confronted properly by the A.O. to the assessee and the assessment order was passed without making inquiry or verification which should have been made. Further, the order has been passed allowing relief to the assessee without inquiring into the claim."

2.3 The ld. Pr. CIT thereafter referred certain case laws and held that the reassessment order passed by the Assessing Officer u/s 147 of the

Act was erroneous and prejudicial to the interest of revenue and therefore set aside the assessment order dated 30.03.2022 with a direction to the Assessing Officer to pass a fresh assessment order.

3. We have heard the rival contentions and gone through the record. At the outset, the ld. Counsel for the assessee has invited our attention to the reasons recorded u/s 148 of the Act for reopening of the assessment, wherein, the reasons for the reopening of the assessment have been mentioned that *"...as per the information furnished in the report, the assessee had transacted in shares of 'BLUE PRINT SECURITIES LIMITED' during* ***F.Y 2012-13*** *and is one of the said beneficiaries. The information furnished by the Directorate of investigation is showing transaction in shares of '****BLUE PRINT SECURITIES LIMITED****' at a trade value of* ***Rs.12,30,000/-*** *by the assessee and the said information is also suggesting accommodation entry in the guise of bogus LTCG by the assessee on such transactions..."* The ld. Counsel in this respect has submitted that the reopening of the assessment was made only on the reason that the Assessing Officer had received information from the investigation wing that the assessee was beneficiary of a transaction from Blue Print Securities Limited. That the Assessing Officer in the reopened assessment proceedings thoroughly examined this issue. The assessee during the assessment proceedings submitted all the necessary documents to prove the genuineness of the transaction which are also reflected in the submissions made by the assessee before the ld. Pr. CIT as reproduced above. The ld. Counsel has also relied upon the paper-book to submit that the assessee company filed reply dated 28.12.2021 with enclosure of copy of ITR acknowledgement dated 05.12.2021 for A.Y 2013-14, copy of computation of income for A.Y 2013-14, copy of profit and loss a/c for F.Y 2012-13 before the Assessing Officer in response to the notice

issued by him u/s 142(1) of the Act in the course of reassessment proceedings. Apart from that, the assessee also furnished details and evidences before the NFAC relating to the claim of exemption of long term capital gain u/s 10(38) on account of sale of shares of M/s Blueprint Securities Limited as under:

1. Purchase Bill and contract note for purchase of Shares of Blueprint Securities Ltd.

2. Copy of physical share certificiates being the name of the assessee

3. Copy of demat acknowledgement of the Eureka Stock and Share Broking Borker through whom assessee sold the shares in the F.Y 2012-13 relevant to A.Y 2013-14

4. Copy of contract notes, account payee cheque and account confirmation of broker through whom the assessee sold the shares in the assessment year under consideration.

5. Bank statement showing receipt of the sale consideration of shares from the broker by account payee cheque.

6. Demat statement showing delivery of shares on event of sale.

The Assessing Officer/NFAC after examining all the details and evidences furnished by the assessee accepted the transaction as genuine and the claim of the exemption u/s 10(38) of the Act was accepted by the Assessing Officer and no addition was made u/s 68.

4. A perusal of the impugned order of the ld. Pr. CIT u/s 263 of the Act would reveal that the ld. Pr. CIT in the impugned order has not discussed about a single document or explanation furnished by the assessee during the reassessment proceedings u/s 147 of the Act. The ld. Pr. CIT has set aside the reassessment order passed u/s 147 of the

Act solely on the ground that the information was received from Investigation Wing that the assessee has received an accommodation entry from Blue Print Securities Ltd. It is pertinent to mention here that the reopening of the assessment was also done on the basis of same information. However, after examining and scrutinizing the details and evidences furnished by the assessee to prove the genuineness of the transaction, the Assessing Officer accepted the said transaction and did not make any addition in this respect. Under the above facts and circumstances, the legal question raised by the ld. counsel is as to whether ld. Pr. CIT was justified in setting aside the assessment order citing the same reason for which the assessment was reopened, even without examination and pointing out any defect, error or infirmity in the evidences furnished by the assessee before the Assessing Officer and without making any further enquiries in this respect. 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."

5. 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 Assessing Officer is erroneous and prejudicial to the interest of Revenue? 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 Assessing Officer 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 Assessing Officer before proceeding to pass the assessment order in question. The opinion of the Commissioner that the Assessing Officer had not made proper enquiries or verifications should be based on his

objective satisfaction and not a subjective satisfaction from the assessment order. The reopening in this case was held on the basis of some information received from Investigation Wing, whereby, the Assessing Officer 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 Assessing Officer passed the assessment order. 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 Assessing Officer.

5.1 The ld. Pr. CIT, taking shelter in Explanation 2 to Section 263(1) of the Act, held that the order of the Assessing Officer 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 Assessing Officer 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 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 Assessing Officer was required to make further enquiries without pointing out as to what was lacking in the enquiries made by the Assessing Officer and why the ld. Pr. CIT was not satisfied with the reply and evidence furnished by the assessee.

6. Further, the Coordinate Kolkata Bench of the Tribunal in the case of 'M/s Rani Sati Agro Tech Pvt. Ltd. vs. ITO' in ITA No.85/Kol/2022 order dated 19.06.2023 while analysing the provisions of section 263 of the Act has considered various case laws, the relevant part of the order of the Coordinate Bench of the Tribunal is reproduced as under:

> *"10.1. On a bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the ld. Pr. CIT taken u/s 263.*
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> *11. Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC) has laid down following ratio with regard to provisions of section 263 of the Act:*

> *"There can be no doubt that 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. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an 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 an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC)". [Emphasis Supplied]*

11.1. Hon'ble Apex Court in the case of CIT vs. Max India Limited as reported in 295 ITR 0282 has held that:

> *"2. At this stage we may clarify that under para 10 of the judgment in the case of Malabar Industrial Co. Ltd. (supra) this Court has taken the view that the phrase "prejudicial to the interest of the Revenue" under s. 263 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 interest of the Revenue. For example, when the ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the ITO is unsustainable in law."*

11.2. Hon'ble Madhya Pradesh High court in the case of CIT vs. Associated Food Products (P) Ltd as reported in 280 ITR 0377 has held that:

> *"10. In view of the aforesaid pronouncement of law and taking into consideration the language employed under s. 263 of the Act, it is clear as crystal that before exercise of powers two requisites are imperative to be present. In the absence of such foundation exercise of a suomoto power is impermissible. It should not be presumed that initiation of power under suomoto revision is merely an administrative act. It is an act of a quasi-judicial authority and based on formation of an opinion with regard to existence of adequate material to satisfy that the decision taken by the AO is erroneous as well as prejudicial to the interests of the Revenue. The concept of "prejudicial to the interests of the Revenue" has to be correctly and soundly understood. It precisely means an order which has not been passed in consonance with the principles of law which has in ultimate eventuate affected realization of lawful revenue either by the State has not been realized or it has gone beyond realization. These two basic ingredients have to be satisfied as sine qua non for exercise of such power. On a perusal of the material brought on record and the order passed by the CIT it is perceptible that the said authority has not kept in view the requirement of s. 263 of the Act inasmuch as the order does not reflect any kind of satisfaction. As is manifest the said authority has been governed by a singular factor that the order of the AO is wrong. That may be so but that is not enough. What was the sequitur or consequence of such order qua prejudicial to the interest of the Revenue should have been focused upon. That having not been done, in our considered opinion, exercise of jurisdiction under s. 263 of the Act is totally erroneous and cannot withstand scrutiny. Hence, the Tribunal has correctly unsettled and dislodged the order of the CIT. [Emphasis supplied]"*

12. In the light of the provisions of section 263 of the Act and a settled position of law, powers u/s 263 of the Act can be exercised by the Pr. Commissioner/Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and also 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 judgment of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 taxmann.com 272 (Bombay).

12.1. This view is further supported by the decision of the Hon'ble Gujarat High Court in the case of Shri Prakash Bhagchand Khatri in Tax Appeal No. 177 with Tax Appeal No.178 of 2016, wherein the Hon'ble Gujarat High Court was seized with the following substantial question of law:

> *"Whether the Tribunal is right in law and on facts in upholding the order passed by the CIT under section 263 of the Act on merits and still storing the issue of allowability of deduction under section 54 of the Act to the file of Assessing Officer even though the working of allowability of deduction under section 54F is available in the order under section 263 which is not disputed by the assessee before ITAT."*

13. We find that the Hon'ble Delhi High Court in the case of CIT vs. Anil Kumar reported in 335 ITR 83 has held that where it was discernible from record that the A.O has applied his mind to the issue in question, the ld. CIT cannot invoke section 263 of the Act merely because he has different opinion. Relevant observation of the High Court reads as under:

> *"63. We find the Hon'ble Delhi High Court in the case of Vikas Polymer reported in 341 ITR 537 has held as under:*
>
> *"We are thus of the opinion that the provisions of s. 263 of the Act, when read as a composite whole make it incumbent upon the CIT before exercising revisional powers to: (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfilment of these twin conditions that the CIT may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the CIT may call for the records and if he prima facie considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interest of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. The twin requirements of the section are manifestly for a purpose. Merely because the CIT considers on examination of the record that the order has been erroneously passed so as to prejudice the interest of the Revenue will not suffice. The assessee must be called, his explanation sought for and examined by the CIT and thereafter if the CIT still feels that the order is erroneous and prejudicial to the interest of the Revenue, the CIT may pass revisional orders. If, on the other hand, the CIT is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to*

the interest of the Revenue, he may choose not to exercise his power of revision. This is for the reason that if a query is raised during the course of scrutiny by the AO, which was answered to the satisfaction of the AO, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the AO called for interference and revision. In the instant case, for example, the CIT has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment. Assuming it to be so, in our opinion, this does not justify the conclusion arrived at by the CIT that the AO had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the CIT was duly reflected in the respective assessments of the partners who were I.T. assessees and the unsecured loan taken from M/s Stutee Chit & Finance (P) Ltd. was duly reflected in the assessment order of the said chit fund which was also an assessee."

64. Since in the instant case the A.O. after considering the various submissions made by the assessee from time to time and has taken a possible view, therefore, merely because the DIT does not agree with the opinion of the A.O., he cannot invoke the provisions of section 263 to substitute his own opinion. It has further been held in several decisions that when the A.O. has made enquiry to his satisfaction and it is not a case of no enquiry and the DIT/CIT wants that the case could have been investigated/ probed in a particular manner, he cannot assume jurisdiction u/s 263 of the Act. In view of the above discussion, we hold that the assumption of jurisdiction by the DIT u/s 263 of the Act is not in accordance with law. We, therefore, quash the same and grounds raised by the assessee are allowed."

13.1. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263:

"(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO 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 AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard."

13.2. Apart from above stated broader principles, one more principle needs to be added in view of the judgment of Hon'ble Delhi High Court in the case of ITO vs. D.G. Housing Projects Ltd. [2012] 343 ITR 329 (Delhi) that the ld. CIT has to examine and verify the issue himself and give a finding on merits and form an opinion on merits that the order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Relevant extract is reproduced below:

"In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The

> *CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."*

7. 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."

8. At this stage, the ld. counsel has placed reliance on the decision of the jurisdictional Calcutta High Court in the case of 'PCIT vs. Usha Polychem India (P) Ltd' reported in [2023] 149 taxmann.com 240 (Cal), wherein, the Hon'ble Calcutta High Court has held that where Principal Commissioner involved revision jurisdiction under section 263 in case of assessee on basis of an information received from Dy. Director (Investigation) regarding huge amount of unaccounted funds received in bank account of assessee, since a reassessment proceeding was already invoked and completed on basis of same information, impugned revision was unjustified. The relevant part of the order of the Hon'ble Calcutta High Court is reproduced as under:

"4. *The short issue which falls for consideration in the instant case is whether the assumption of jurisdiction by the Principal Commissioner of Income Tax, Kolkata - 2 (PCIT) under section 263 of the Act was justified. The Tribunal had allowed the assessee's appeal and held that the PCIT has not recorded any finding that he has reason to believe that income assessable to tax has escaped assessment and the revenue being aggrieved by the said finding on an appeal before us. What is important to note in the instant case is that the assessment for the year under consideration, AY 2012-13 was completed on 30-3-2015. Subsequently, the assessment was reopened based on the information received from the DDIT (Investigation) Unit 2(2), Kolkata dated 6-3-2019. Thereafter, notice under section 148 of the Act was issued on 29-3-2019 and in*

response to such notice the assessee filed its return of income declaring a total income of Rs. 23,440/-. Subsequently, notices were issued under sections 143(2), 142(1) of the Act and the assessee filed his response along with documents. The Assessing Officer on considering the documents and the return furnished by the assessee accepted the stand taken by the assessee and completed the assessment. It is seen that PCIT has exercised jurisdiction under section 263 of the Act on the very same information furnished by the DDIT (Investigation) Unit 2 (2) dated 6-3-2019. On perusal of the order passed by the PCIT dated 15-3-2021 in which the show cause notice issued under section 263 of the Act has been extracted, the PCIT has not recorded any finding that he has reason to believe that income that is assessable to tax has escaped assessment.

5. *In the absence of such finding, we are of the view that the Tribunal was right in coming to the conclusion that the PCIT erred in exercising its jurisdiction. Our view is supported by the decision in the case of Pr. CIT v. Anindita Steels Ltd. [2022] 137 taxmann.com 203 (Cal.).*

6. *The learned standing counsel for the appellant relied upon the decision of the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 83/[2000] 2 Supreme Court Cases 718 and, in particular two paragraphs 10 and 11 of the said decision.*

7. *In fact, the said decision would support the case of the respondent assessee and would lead us to affirm such an order.*

8. *Thus, in the light of the factual aspect brought out by the Tribunal while granting relief to the assessee, we find no substantial questions of law, much less substantial questions of law arising for consideration in this appeal."*

9. In view of the discussion made above, the impugned order of the ld. Pr. CIT is not sustainable as per law and the same is set aside.

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

Kolkata, the 9th May, 2024.

Sd/-	Sd/-
[Sanjay Awasthi]	**[Sanjay Garg]**
लेखा सदस्य/**Accountant Member**	न्यायिक सदस्य/**Judicial Member**

Dated: 09.05.2024.
RS

Copy of the order forwarded to:
1. Ramotar Choudhari HUF
2. PCIT-5, Kolkata
3.CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches