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.1088/Kol/2016
Assessment Year : 2009-10

M/s Olympus Suppliers Pvt Ltd……..…….....…...……....Appellant
15/B, Clive Row, Kolkata-1.
[PAN: AABCO0624Q]

vs.

PCIT, Circle-2, Kolkata…….....….…..... Respondent

Appearances by:
Shri Miraj D. Shah, AR, appeared on behalf of the appellant.
Shri Abhijit Kundu, CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : April 10, 2024
Date of pronouncing the order : May 13, 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 23.03.2015 of the Principal Commissioner of Income Tax-2, Kolkata [hereinafter referred to as 'Pr. CIT'] passed u/s 263 of the Income Tax Act (hereinafter referred to as the 'Act').

2. This is a second round of litigation before us. Earlier, the assessee had filed appeal before this Tribunal against the impugned order of the Pr. CIT passed u/s 263 of the Act, however, the said appeal of the assessee was dismissed along with three other cases by a common order dated 05.08.2016. Being aggrieved by the said order, the assessee preferred further appeal before the Hon'ble Calcutta High Court bearing No. ITAT/328/2017 IA No.GA/2/2017 (Old No.GA/3184/2017). It was pleaded before the Hon'ble Calcutta High Court that the appeal of the assessee was dismissed along with other appeals, however, the specific

grounds canvassed by the assessee in its appeal were not considered by the Tribunal. The Hon'ble High Court set aside the order passed by the Tribunal and restored the matter back to the Tribunal for decision afresh observing as under:

> *"As observed by us, since we are not going into the merits of the impugned order nor the correctness of the said order of the learned Tribunal, we leave it to the Department to canvass all points at the appropriate stage. Thus, we are of the considered view that the matter has to be sent back to the learned Tribunal to take a decision on merits and in accordance with law, specifically with regard to the grounds canvassed by the appellants before it.*
>
> *For the above reasons, the appeal is allowed and the stay application stands closed and the order passed by the learned Tribunal is set aside and the appeal in ITA No.1088/KOL/2016 for the assessment year 2009-10 stands restored to the file of the learned Tribunal and the said appeal shall be heard and decided by the learned Tribunal on merits and in accordance with law.*
>
> *In view of the above liberty is granted to the appellants as well as the respondents to canvass all points, both on facts as well as on law, before the learned Tribunal, consequently the substantial questions of law are all left open."*

2.1 In view of the aforesaid directions of the Hon'ble High Court, the appeal of the assessee has been heard afresh uninfluenced by the earlier order of the Tribunal dated 05.08.2016.

3. At the outset, the ld. counsel for the assessee has invited our attention to the impugned order passed by the ld. Pr. CIT u/s 263 of the Act. The ld. Pr. CIT in this case was of the view that the Assessing Officer has not properly examined the issue relating to the share application money along with premium received by the assessee during the year.

4. The brief facts of the case are that the assessee filed return of income on 28.08.2009 declaring a loss of Rs.920/- which was processed u/s 143(1) of the Act. Thereafter, the assessee filed a letter

before the Assessing Officer stating that a sum of Rs.40,250/- inadvertently could not be offered as income for taxation. The Assessing Officer, thereafter, after getting necessary approval from the competent authority u/s 151 of the Act, reopened the assessment and passed the assessment order after making addition of the said escapement of Rs.40,250/- into the income of the assessee. In the said reassessment order, the Assessing Officer also took note of the fact that during the previous year, the assessee has raised Rs.10 crores by issuing 10 lakh equity shares of face value of Rs.1/- at a premium of Rs.99/- by private placement. A perusal of the impugned order of the ld. Pr. CIT would show that the ld. Pr. CIT at the first instance noted about general modus operandi adopted by various assessees in introducing their income from undisclosed sources as share application and premium. Thereafter, the ld. Pr. CIT noted the facts of the case and observed that the assessee during the year had received share capital along with premium of Rs.10 crores, however, the Assessing Officer had framed the assessment u/s 147 of the Act by adding Rs.40,250/- only and that he had not examined the issue relating to the receipt of share application money/share premium. In response to the show-cause notice issued by the ld. Pr. CIT u/s 263 of the Act, the assessee filed written submissions, a gist of which has been reproduced in the order of the ld. Pr. CIT itself, which read as under:

> *"i) that the assessee had voluntarily offered income for tax and that the A.O had passed the order after applying his mind.*
>
> *ii) that the A.O had conducted proper inquiry regarding the identity and creditworthiness of the shareholders. Confirmation letters along with PAN, copy of bank statement & balance sheet of the subscribing companies had been filed before the A.O.*
>
> *iii) That share capital could not be added under section 68 of the I T Act where the identity of the shareholders was established.*

iv) Reliance was placed on several authorities in support of the submissions which are dealt with later in this order.

It is accordingly, requested that in view of the aforementioned submissions, the proceeding u/s 263 should be dropped."

4.1 The ld. Pr. CIT however observed that the Assessing Officer has not made proper and adequate enquiries relating to the share application money received by the assessee during the year. He in this respect noted the following facts:

"i) the notices u/s. 133(6) have been sent only on a test check basis.

ii) it is further seen that only that extract of the bank statement has been submitted which reflects only the impugned transaction and is not for the whole year, making it impossible to make any analysis of the source of the funds and whether shareholders had the financial capability to invest such substantial amounts. The A.O. should have called for the bank statement of the full financial year for proper analysis & verification.

iii) the replies were just placed on record and no independent inquiries were carried out regarding the fact whether the subscribing companies were available at the given address, and whether they were genuine corporate entities.

iv) The A.O. had not examined u/s 131 any Directors, either of the assessee company or of the subscribing companies."

4.2 The ld. Pr. CIT accordingly set aside the order of the Assessing Officer and directed the Assessing Officer as under:

"i) Examine the genuineness and source of share capital, not on a test check basis, but in respect of each and every shareholder by conducting independent enquiry not through the assessee.

ii) The bank account for the entire period should be examined in the course of verification to find out the money trail of the share capital.

iii) Further the A.O. should examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He should examine them on oath to verify their credentials as director and reach a logical conclusion regarding the controlling interest.

The A.O. is directed to examine the source of realization from the liquidation of assets shown in the balance sheet after the change of Directors, if any. After conducting the inquiries & verification as directed above, the A.O. should pass a speaking order, providing adequate opportunity of being heard to the assessee."

The ld. Pr. CIT accordingly directed the Assessing Officer to passe the assessment order afresh.

5. At the outset, the ld. counsel for the assessee has submitted that in this case, the ld. Pr. CIT had made general observation. No specific facts of the case of the assessee have been discussed and, therefore, the observation of the ld. Pr. CIT that the assessment order passed u/s 147 of the Act was erroneous and prejudicial to the interest of revenue was not based on any specific findings of the ld. Pr. CIT. The ld. counsel, in this respect, pointing out 1st point of the ld. Pr. CIT that the notices u/s 133(6) have been sent only on test check basis has submitted that the said observation of the ld. Pr. CIT was factually wrong. He, in this respect, has submitted that in this case the share application money was received by the assessee from 9 share applicants, the details of which have been furnished at page 19 of the paper-book and that the notices u/s 133(6) were issued by the Assessing Officer to all the 9 share subscribers and all of them had filed necessary details and evidences including the confirmation of subscription of shares to the assessee company. The ld. counsel inviting our attention to the 2nd point has submitted that the ld. Pr. CIT has observed that only the extract of the bank statement has been submitted which reflects only

the impugned transaction and is not for the whole year. The ld. counsel in this respect has invited our attention to the relevant pages of the paper-book to submit that in fact the concerned shareholders have furnished the bank statements of the entire year and that the findings of the ld. Pr. CIT that the bank statement reflected only the impugned transactions were also factually wrong. The ld. counsel referring to the 3rd point noted by the ld. Pr. CIT that the replies were just placed on record and no independent inquiries were carried out regarding the fact whether the subscribing companies were available at the given address, and whether they were genuine corporate entities, the ld. counsel, in this respect, has placed reliance on the voluminous evidences on file which were filed before the Assessing Officer including ITR acknowledgements, final accounts, bank statement, allotment advice etc. of the share subscribers and also copies of replies to notices issued u/s 133(6) to respective share applicant companies. The ld. counsel has further referred to page 235 of the paper-book to submit that not only the details of share applicants were filed but also their CIN number, PAN number, details of corporate office address were filed and further the net worth of the share applicants was also shown which was sufficient to make investment in the assessee company and further that it was explained that only a small part of their net worth was invested by the shareholders in the assessee company. Pointing out to the point no.4, the ld. counsel has submitted that even the directors of the assessee were summons u/s 131 of the Act whose statements were duly recorded during the assessment proceedings. The ld. counsel, therefore, has submitted that all the discrepancies noted by the ld. Pr. CIT relating to the assessment order in question were factually wrong. He further pointed out to the directions given by the ld. Pr. CIT to the Assessing Officer and submitted that whatever the ld. Pr. CIT directed

to the Assessing Officer to comply with, that has already been done by the Assessing Officer during the assessment proceedings. The ld. counsel, therefore, has submitted that the ld. Pr. CIT had wrongly and illegally exercised his jurisdiction u/s 263 of the Act.

6. The ld. DR, on the other hand, has relied upon the order of the ld. Pr. CIT in this respect.

7. We have considered the rival submissions. In the case in hand, we note that the assessee in response to the notice issued by the ld. Pr. CIT duly furnished all the details and evidences and also specifically pleaded that the concerned Assessing Officer had conducted proper enquiry regarding the identity and creditworthiness of the shareholders. Confirmation letters along with PAN, copy of bank statements and balance sheet of subscribing companies had been filed before the Assessing Officer. That the identity, creditworthiness of the share-subscribers was duly established before the Assessing Officer. The ld. Pr. CIT without pointing out any discrepancy, error or infirmity in the details furnished by the assessee, has simply noted that the Assessing Officer has not made the requisite enquiries. 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. The Ld. Counsel has demonstrated that all the factual discripancies pointed by the Ld. PCIT regarding lack of enquiry by the Assessing Officer, were, infact, factually wrong. The Assessing Officer had not only raised the necessary queries but also asked the assessee to furnish the necessary details and evidences, which the assessee duly furnished and the same also stood examined by the Assessing Officer. The Ld. PCIT, however, without going through the such details, simply observed that the Assessing Officer, should have

made enquiries on those points. At this stage, it will be relevant to discuss the relevant provisions of Section 263 of the Act.

"**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 [2] 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. ……"*

7.1. 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.

8. 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 of the Act, it was incumbent upon the Ld. Pr. CIT to make or cause to make 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? A perusal of the impugned order of the ld. Pr. CIT reveals that the Ld. Pr. CIT had asked the assessee about the validity of the assessment order for want of necessary enquiries and verifications by the Assessing Officer relating to share application money and premium, 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 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. Admittedly, 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. The ld. Counsel for the assessee,

has demonstrated before us that all the four points, which the Ld. PCIT has held that the Assessing officer was supposed to examine, have been duly examined by the Assessing Officer during the assessment proceedings and the observations of the Ld. PCIT regarding any lack in enquiry on all the four points was factually wrong. Even, whatever, directions have been given by the ld. Pr. CIT to the Assessing Officer and that have already been done by the Assessing Officer during the assessment proceedings. The ld. Pr. CIT, as discussed above, has not pointed out any error or discrepancy in the evidence 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.

9. It is pertinent to mention here that a deeming fiction has been created in section 263 of the Act by way of Explanation 2 inserted vide 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 Assessing Officer 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 its prejudicial to the interest of Revenue. The said deeming provisions, in our view, are not applicable for the assessment year under consideration i.e. A.Y. 2009-10.

9.1 In this case 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. However, as observed above, the Ld. Counsel has demonstrated from the records that all the discrepancies pointed out by the Ld. PCIT regarding lack of enquiries , were factually incorrect. The Ld. Counsel has demonstrated that all the points regarding which the Ld. PCIT has mentioned that the Assessing Officer should have made enquiry, were duly enquired into by the Assessing Officer. The observations of the Ld. PCIT, therefore, were 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 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. PCIT 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.

9.2. 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.

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."*

9.3. 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 discussion made above, the impugned order of the Ld. PCIT passed u/s 263 of the Act is not sustainable as per law, the same is accordingly, hereby quashed. Consequential additions made, if any, stand deleted.

11. Apart from challenging the validity of the order of the Pr. CIT u/s 263 of the Act, the ld. counsel for the assessee has raised a legal objection stating that the concerned Assessing Officer did not have territorial jurisdiction to pass the assessment order u/s 147 of the Act. He, in this respect, has submitted that the impugned assessment u/s 147 of the Act was passed by the ITO, Ward-6(3), Kolkata, whereas, the jurisdiction over the assessee was of ITO, Ward-9, Kolkata. The ld. DR, on the other hand, pointing out to the provisions of section 124(3) has stated that the assessee never raised any objection relating to the territorial jurisdiction of the Assessing Officer to frame the assessment at any stage of the assessment proceedings or therefore this issue has been raised by the assessee for the first time before this Tribunal. The ld. counsel, on the other hand, has submitted that the assessee had duly filed objections agitating the territorial jurisdiction of the Assessing Officer to frame the impugned assessment order. The ld. DR, in this respect, has invited our attention to the *report* filed by the Assessing Officer, wherein, it has stated that no such objections were raised by the assessee during the assessment proceedings. However, the ld. DR admitted that a copy of objection letter was found in the record. However, there was no order or other entry evidencing of filing of such objections during the assessment proceedings. The ld. DR, in this respect, has submitted that perhaps the assessee somehow has managed to insert the aforesaid objections at a later stage in the final

assessment records. However, the plea of the ld. counsel is that the allegation of the ld. DR was not correct. That the assessee had duly filed the objections during the assessment proceedings and the same was also taken on record but the formal order perhaps has not passed by the Assessing Officer taking the said objections on record.

12. After considering the submissions, we, at this stage, are not inclined to give any finding in respect of aforesaid legal objections as the very fact relating to the date of filing of the objections by the assessee is not clear and no definite finding can be given at this stage in this respect. Moreover, the assessee has never raised this objection at any stage of proceedings in this case even before the Hon'ble High Court. This legal objection of the assessee is not entertained at this stage. However, in view of our findings given on merits, the impugned order of the ld. Pr. CIT is set aside and the appeal of the assessee is allowed.

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

Kolkata, the 13th May, 2024.

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

Dated: 13.05.2024.
RS

Copy of the order forwarded to:
1. M/s Olympus Suppliers Pvt Ltd
2. PCIT, Circle-2, Kolkata
3.CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches