

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**  
**AND**  
**SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

**ITA No. 345/Ind/2024**  
**(Assessment Year: 2016-17)**

Narendra Kumar Agrawal 203, CK Campus Bahadarpur Road Burhanpur (Appellant / Assessee)	vs.	PCIT (1) Aaykar Bhawan Indore (Respondent/ Revenue)
<b>PAN: ADAPA0131B</b>		
Assessee by	Shri S.N. Agrawal & Pankaj Mogra, ARs	
Revenue by	Shri Ram Kumar Yadav, CIT-DR	
Date of Hearing	20.08.2024	
Date of Pronouncement	29.08.2024	

**ORDER**

**Per Vijay Pal Rao, JM:**

This appeal by the Assessee is directed against the revision order dated 11.03.2024 of Pr. Commissioner of Income Tax passed u/s 263 of the Act for Assessment Year 2016-17. The assessee has raised following grounds of appeal:

*"1 That on the facts and in the circumstances of the case and in law, the Ld. Pr. CIT erred in setting aside the Assessment order as passed by the Ld. A.O. U/s 147 of the Act on 28.03.2022 and invoking proceedings u/s 263 of the Act even when the said assessment order as passed by the*

*A.O. was neither erroneous nor prejudicial to the interest of revenue. The present order as passed by the Ld. Pr. CIT u/s 263 without properly appreciating the facts of the case is wrong and bad-in-law. The same requires to be quashed.*

*2 That on the facts and in the circumstances of the case and in law the Ld. Pr. CIT erred in setting aside the Assessment order as passed by Ld. A.O. u/s 147 of the Act just to verify the claim of Short term Capital Loss from M/s Xpro Securities even when the reason for reopening the case of the appellant was to examine the loss of Rs. 32745549/- from M/s Xpro Securities only and moreso when the entire documents related to the said loss were duly filed by the appellant during the course of Assessment Proceedings and have duly been verified by Ld. AO after full application of mind. The present order so passed by the Pr. CIT by invoking the provision of section 263 of the Act is therefore illegal and bad-in-law. It is prayed that the same requires to be quashed.”*

2. The assessee is an individual and filed his return of income on 25<sup>th</sup> September 2016 declaring total income of Rs.5,35,510/-. The case was selected for limited scrutiny through CASS and assessment was completed u/s 143(3) on 09.12.2018 accepting return income. Subsequently, the assessment was reopened by issuing notice u/s 148 of the Act on 26.03.2021 to assess the income assessable to tax has escaped assessment on account of fictitious loss booked by the assessee on F & O transactions through M/s Xpro Securities. The AO passed the reassessment order u/s 147 r.w.section 144B of the Act on 28.03.2022 accepting return income of the assessee. Thereafter on examination of the case record the Pr. CIT observed that the AO passed the order without making required inquiry/investigation which has resulted assessment order being erroneous in so far as prejudicial to the interest of the revenue. The Pr. CIT initiated the proceedings u/s 263 while issuing show cause notice dated 22.02.2024. The Pr. CIT

then passed the impugned order whereby the order passed by the AO u/s 147 r.w.section 144B dated 28.03.2022 was set aside with the direction to make de-novo assessment and passed an order as per law after making necessary verification, inquiry and investigation. Aggrieved by the impugned order the assessee has filed the present appeal.

3. Before the Tribunal Ld. AR of the assessee has submitted that during the scrutiny assessment the assessee filed a rectified return of income before the AO wherein it was clarified that the short terms capital loss was wrongly declared instead of business loss from F&O/derivative transactions. Accordingly the assessee declared business loss of Rs.3,56,04,837/- arising from derivative transactions. He has referred to the notice issued by the AO u/s 142(1) dated 19.06.2018 and questionnaire annexed to the said notice and submitted that the AO has specifically raised query about short term capital loss claimed by the assessee in the return of income which was replied by the assessee vide reply dated 17.07.2018. The assessee also filed rectified return and computation of income during the course of original assessment proceedings. The Ld. AR has submitted that in reply to show cause notice u/s 142(1) the assessee has duly filed all relevant supporting evidences comprising of bank account details with bank statement, F & O ledger along with brokers notices. After considering reply and rectified return filed by the assessee the AO passed the scrutiny

assessment order u/s 143(3) on 09.12.2018 accepting return income. Thus, Ld. AR has submitted that during the original scrutiny assessment the AO examined this issue and thereafter the assessment was reopened vide notice u/s 148 dated 26.03.2021. The assessee filed return of income in response to notice u/s 148 of the Act declaring the same income as declared in the original return of income after setting of business loss of Rs.3,56,04,837/-. Ld. AR has referred to the reasons recorded by the AO for reopening of the assessment and submitted that the only point of reopening of the assessment is the claim of loss of Rs.3,56,04,837/- from the F&O transactions carried out through M/s Xpro Securities was to be assessed tax by treating the same as fictitious entries of loss obtained by the assessee. During the reassessment proceedings the AO issued show cause notice u/s 142(1) dated 09.03.2022 which was replied by the assessee vide reply dated 15.03.2022. The assessee also produced the relevant supporting documents including copy of account of derivative transactions, ledger account of M/s Xpro Securities (broker) in the books of assessee, copy of contract note issued by M/s Xpro Securities during the reassessment proceedings. The AO after considering reply as well as documentary evidences was satisfied and again accepted the return income while passing order u/s 147 r.w. section 144B of the Act on 28.03.2022. Thus, Ld. AR has submitted that this issue was examined by the AO during the original security assessment as well as in the reassessment proceedings. The Pr. CIT initiated proceedings u/s

263 by issuing show cause notice dated 22.02.2024 on the ground that the AO has not conducted a proper inquiry on this issue. Ld. AR has submitted that when the AO has raised specific quarries during the original assessment as well as solitary issue taken up during the reassessment and was satisfied with the reply and supporting documents filed by the assessee then the order passed by the AO cannot be held as erroneous for want of inquiry. The AO has passed the order u/s 147 r.w. section 144B of the Act with due application of mind on the issue reply filed by the assessee and supporting evidences therefore, the Pr. CIT was not justified in passing the impugned order holding order of the AO as erroneous as well as prejudicial to the interest of revenue for want of proper inquiry. Ld. AR has contended that there must be material available on record or called for by the Pr. CIT to satisfy himself that the order passed by the AO is erroneous being not in accordance with law or the same has been passed without making any inquiry. Ld. AR has submitted that every loss of revenue as consequence of the order of the AO cannot be treated as prejudicial to the interest of the revenue if the AO adopts one of the courses permissible in law and it has resulted in loss of revenue. Further where two views are possible and the AO has taken one view which the Commissioner does not agree it cannot be treated as erroneous or prejudicial to the interest of the revenue unless view taken by the AO is unsustainable in law.

3.1 Ld. AR has further contended that the revisionary authority cannot step into the shoes of the AO and re-do assessment. In the case of the assessee the AO has taken view based on the facts and record produced by the assessee in respect of the loss incurred from the derivative transactions. The view taken by the AO based on the facts and record is a plausible view and such view cannot be held as erroneous and prejudicial to the interest of revenue so as to invoke revisionary jurisdiction u/s 263 of the Act. In support of his contention he has relied upon decision of Mumbai Benches of the Tribunal in case of Sir Dorabji Tata Trust vs. DCIT, (E) Circle 2(1) Mumbai 188 ITD 38. Ld. AR has also relied upon following decisions:

- (i) *Malabar Industrial Co. Ltd. v. CIT* reported in [2000] 243 ITR 83 (SC)
- (ii) *CIT (Central), Ludhiana v. Max India Ltd.* reported in [2008] 166 Taxman 188 (SC)
- (iii) *CIT v. Sunbeam Auto Ltd.* reported in [2011] 332 ITR 167 (Delhi)
- (iv) *DIT v. Jyoti Foundation* reported in [2013] 357 ITR 388 (Delhi)

3.2 Ld. AR has submitted that when the AO during the course of original assessment as well as reassessment proceedings made extensive inquiries and was satisfied with the correctness of the claim of the assessee then the order passed by the AO cannot be held as erroneous so far as prejudicial to the interest of the revenue for want of inquiry. Once the AO has already conducted inquiry twice during the original assessment as well as reassessment proceedings then the explanation (2) to section 263 cannot be

interpreted in a manner to make inquiries unending. Ld. AR has thus contended that when the AO has examined the issue, applied his mind and reached to a conclusion which is legally possible view then the commissioner cannot be invoke the provisions of section 263 merely, because he does not agree with the view of the AO. Hence, the AR has submitted that the impugned order passed by the Pr. CIT is not sustainable in law and liable to be quashed.

4. On the other hand, Ld. DR has submitted that the order of the AO is silent about the nature of inquiry and examination of the record on the issue of fictitious loss claimed by the assessee from the transactions through M/s Xpro Securities. The Pr. CIT has highlighted the crucial facts in show cause notice that during the investigation carried out by Mumbai Investigation wing the entity of M/s Xpro security was found to be providing bogus entries of loss/profit. The assessee has not complied with the show cause notice issued by the Pr. CIT. The Pr. CIT has specifically pointed out that prior to the sale of lands resulting long term capital gain of Rs.3,57,33,333/- there was no transaction by the assessee resulting loss which shows that the alleged transactions of derivative or fictitious entries of loss are to avoid the tax on the long term capital earned by the assessee from the transactions of sale of long term capital/lands. He has relied upon the impugned order of the Pr. CIT.

5. We have considered the rival submissions as well as relevant material on record. The assessee filed his return of income on 25<sup>th</sup> September 2016 declaring total income of Rs.5,35,510/-. The case was selected for limited scrutiny through CASS and the AO issued show cause notice u/s 142(1) dated 19<sup>th</sup> June 2018 placed at page no.5 & 6 of the paper book as under:

*“Notice under Sub Section (1) of Section 142 of the Income Tax Act, 1961  
Sir/Madam/ M/s,*

*In connection with the assessment for the assessment year 2016-17 you are required to:*

*a) Furnish or cause to be furnished on or before 22/06/2018 at 11:30 AM the accounts and documents specified overleaf.*

*b) Furnish and verified in the prescribed manner under Rule 14 of I.T. Rules 1962 the information called for as per annexure and on the points or matters specified therein on or before 22/06/2018 at 11:30 AM*

*c) The above mentioned evidence/information is to be furnished online electronically in 'E-Proceeding' facility through your account in 'e-filing' website of Income Tax Department.*

*d) Para(s) (a) to (c) are applicable if you have an account in e-filing website of Income Tax Department. Till such an account is created by you, assessment proceedings shall be carried out either through your e-mail account or manually (if e-mail is not available).*

*e) In cases where order has to be passed under section 153A/153C of the Income Tax Act, 1961 read with section 143(3), assessment proceedings would be conducted manually.*

*Sd/-*

*Yours faithfully,*

**SHRIPRAKASH SHARMA**  
**ITO, BURHANPUR**

**ANNEXURE**

*1. Please furnish details of all bank accounts mentioning account numbers, branch address along with bank statements.*

*2. You have claimed short term capital loss of Rs. 3,56,04,837/- on transfer of units equity oriented (through stock exchange). Please furnish details of cost of acquisitions of units with broker's notes in respect of purchase of these securities. Please also furnish evidence with regard to the transfer of these units.*

*3. Please furnish copy of sale deeds (both side) in respect of immovable properties sold during the year. You are also requested to submit evidence regarding cost of acquisition and improvement of properties as claimed in your computation of income. Please state whether there is any difference in guideline value of the properties and sale value of the same. If yes, please explain as to why provisions of section 50C should not be invoked in your case.*

5.1 Thus, the AO has raised specific quarries about the claim of short term capital loss of Rs.3,56,04,837/- arising from the transactions carried on stock exchange through the broker. The AO specifically asked the assessee to furnish details of cost of acquisitions with broker's notes in respect of purchase of these securities. In reply dated 17<sup>th</sup> July 2018 placed at page no.7 & 8 of the paper book the assessee has stated as under:

*“You have claimed short term capital loss of Rs. 3,56,04,837/- on transfer of units of equity oriented (through stock exchange). Please furnish the details of cost of acquisition of units with broker's notes in respect of purchase of these securities. Please also furnish evidence with regards to the transfer of these units. The assessee carrying the business of F&O trading in which he suffered a business loss amounting to Rs. 3,56,04,837/- which was wrongly mentioned under short term capital loss by article clerk in return of income. The mistake is deeply regretted. The assessee corrected this mistake by filing rectified return which is attached alongwith revised computation of income. Kindly consider the Rectified Return of Income and complete the assessment proceeding considering the revised return.”*

Attached in E-Proceeding:-

*Bank Accounts Details along with Bank Statements*

*F&O Ledgers along with Broker's Notes and Rectified Return of Income and computation thereof*

*Copy of Purchase and Sale Deed of Immovable Property.”*

5.3 The assessee explained that he is carrying business of F&O trading in which he suffered a business loss of Rs.3,56,04,837/- which was wrongly mentioned under short term capital loss in the return of income. The mistake was then rectified by filing rectified return along with revised computation of income. After considering the said reply as well as supporting evidence comprising of details of derivative transactions, ledger, broker notes, and bank account statement the AO framed the assessment u/s 143(3) on 09.12.2018 accepting the return income. Thereafter the assessment was reopened by the AO vide notice u/s 148 dated 26.03.2021 and reasons recorded by the AO for reopening of the assessment are placed at page no.14E of the paper book as under:

**“REASONS TO BELIEVE THAT INCOME HAS ESCAPED ASSESSMENT**

*Assessee: NARENDRA KUMAR AGRAWAL*

*The assessee had filed his return of income for the AY 2016-17 declaring total income of Rs. 5,35,510/-. The case was selected for limited scrutiny and assessment was completed u/s 143(3) on 09.12.2018 accepting the returned income.*

*In this connection, information available in Insight portal shows that in pursuance to survey action u/s 133A by Investigation Unit Mumbai under Project Falcon, it was found that various brokers are engaged in facilitating fictitious losses through coordinated and premeditated trading in illiquid stock options. One of such stock brokers admitted in his statement that he was engaged in providing fictitious losses/profit through BSE equity/derivative trading through his concern M/s Xpro Securities. As per information, the above assessee had booked fictitious losses through the concerned entity M/s Xpro Securities. On perusal of records with this office, it is observed that the assessee had booked fictitious losses from M/s Xpro Securities during the subject year aggregating to Rs. 3,27,45,549/-. Thus, I am satisfied that the income of the assessee has been under-assessed to this extent.*

*In view of the above, I have reason to believe that the income chargeable to tax to the tune of Rs. 3,27,45,549/- has escaped assessment within the meaning of section 147 of the Income-tax Act. Accordingly, notice u/s 148 of the I.T. Act is proposed to be issued to tax the above escaped income and also any other income chargeable to tax which has escaped assessment and which comes to my notice subsequently in the course of the proceedings under the said section.”*

5.4 Thus, it is clear from the reasons recorded that the assessment was reopened by the AO to assess the income

chargeable to tax on account of business loss claimed by the assessee arising from derivative transactions carried out at the stock exchange through M/s Xpro Securities as the said broker was found engaged in facilitating fictitious losses through coordinated and premeditated trading in illiquid stock options. In response to notice u/s 148 the assessee filed its return of income declaring the same income as declared in the revised return filed during the course of original scrutiny assessment. Thereafter the AO issued show cause notice u/s 142(1) dated 09.03.2022 placed at page no.14F & 14G as under:

*“Notice under sub-section (1) of Section 142 of the Income Tax Act, 1961*

*Dear Taxpayer,*

*Kindly refer to ongoing assessment proceedings in your case for A.Y. 2016-17 under Faceless Assessment Scheme, 2019.*

*2. We appreciate the anxiety and uncertainty that is facing all of us in the times of Covid-19. This communication is to assist you in ending one uncertainty, which is pending o-Assessment in your case for the Assessment Year 2016-17.*

*3. You are requested and required to kindly furnish or cause to be furnished on or before 16/03/2022 by 12:04 PM, the accounts and documents specified in the Annexure to this notice.*

*4. The accounts or documents, as mentioned above, are required to be submitted online electronically in E- proceedings' facility through your account in e-Filing website ([www.incometaxindiaefiling.gov.in](http://www.incometaxindiaefiling.gov.in))*

*XXXXXXXXXXXXXXXXXXXX*

*ANNEXURE*

*With respect to assessment proceedings, kindly furnish the following details:*

1. A copy statement of computation of income (balance sheet if applicable) for the relevant assessment year and Annual Financial Statement for the relevant AY.

2 Details of all trading in stocks carried out by you during the financial year. Also furnish account statement of the demat account held by you for the relevant AY.

3. With respect to the reasons for re-opening communicated to you viz. notice u/s 143(2) of the Act, it is established that you have booked loss amounting to Rs.3,27,45,549/- pertaining to an entity named 'XPRO SECURITIES PVT LTD. You are requested to show cause as to why the amount of Rs.3,27,45,549/- should not be added to your returned income.

4. In ITR, you have shown capital loss of Rs.3,56,04,837/-. Please furnish the computation of the capital loss along with documentary evidences.

5.5 The Only issue raised by the AO in the reassessment proceedings is regarding the loss booked by the assessee on derivative transactions through broker M/s Xpro Securities. The assessee filed its reply dated 15.03.2022 placed at page no.15 to 17 as under:

*“Sub Reply to Notice u/s 142(1) of the Income Tax Act, 1961.  
ITBA/AST/F/142(1)/2021-22/1040493159(1) dated 09th  
March 2022*

*Ref: Assessee: Shri Narendra Kumar Agrawal 203,C.K. Campus  
Bahadarpur Road, Burhanpur(MP)*

*A.Y: 2016-17*

*PANo.: ADAPA01318*

*Status: Individual*

*With reference to above and as required by you the assessee submit herewith the following:*

*1. A copy statement of computation of income (balance sheet if applicable) for the relevant assessment year and Annual Financial Statement for the relevant AY.*

*The Computation of Income for the Assessment Year under consideration is attached herewith for your kind perusal*

*2. Details of all trading in stocks carried out by you during the financial year. Also furnish account statement of the demat account held by you for the relevant AY.*

*There is no Details of trading in stocks carried out during the financial year. There is Futures and Options Trading which can be verified from Contract Notes which are attached herewith for your kind perusal. During the year under consideration. the assessee does not hold any demat account.*

*3. In ITR, you have shown capital loss of Rs.3,56,04,837/-. Please furnish the computation of the capital loss along with documentary evidences.*

*The assessee carrying the business of F&O trading in which he suffered a business loss amounting to Rs. 3,56,04,837/- which was wrongly mentioned under the head short term capital loss by article clerk in return of income. The mistake was inadvertently repeated while filing the Return in response to the Notice. We enclose herewith the Revised return and Computation for your kind perusal and we request you to kindly proceed on the Revised Return u/s 148.*

*4. With respect to the reasons for re-opening communicated to you viz. notice ws 143(2) of the Act, it is established that you have booked loss amounting to Rs.3.27,45,549/- pertaining to an entity named 'XPRO SECURITIES PVT LTD. You are*

*requested to show cause as to why the amount of Rs.3,27,45,549/- should not be added to your returned income.*

*The Assessee has entered into Derivatives Transactions through Broker M/s Xpro Securities and incurred losses. The Assessee has incurred losses of Rs.3,27,45,549/- for which the Assessee submits herewith the documentary proofs and supporting by way of Contract Notes and Ledger Copies and Bank Statements showing payments made by Official Channels. The preliminary objections to the reason to believe is already disposed off and its stated that Assessment is re-opened and it's a fact finding process wherein all the facts will be gathered. Here, We have submitted all the facts and the documentary evidences for the Losses claimed.*

*Further, the Losses were also verified by the Assessing Officer and all records were submitted at the time of earlier Original Assessment. Though it was limited scrutiny but the Capital Gains were set off with the Losses of the Future and Options.*

*Now as the Losses are proposed to be disallowed it is the duty of the Department to prove how and on what basis/facts the losses are not allowable and addition is proposed. Just by stating that in Project falcon it is found that the entity with which the Assessee has dealt with is providing fictitious losses with M/s Xpro Securities. Further, stating that various brokers are engaged in facilitating fictitious losses through coordinated and premeditated trading in illiquid stock options. The information or belief is one sided and now you can verify our records which clearly shows that all payments are made from normal banking channels and losses are paid for to the broker. There are no facts that the losses are provided to the Assessee. The Assessee has entered into genuine trades with the Broker. Without providing any information against the Assessee the Additions cannot be made and the Assessee must be given an opportunity to explain its stand as to the information available with the Department with regard to Assessee booking fictitious losses.*

*The assessee had acted as a Bonafide trader and complied with all procedures and requirements of the stock exchange. At the time of relevant transactions/trades Assessee would not have any idea of any profit or loss in the said transactions of the futures and options. It may also be noted here that the stock market is a highly volatile market. The assessee filed complete documentary evidence before you and explained the facts of Futures and Options Trading. The assessee has also proved that all the transactions are carried out through the banking channel and as per guidelines issued by the SEBI by making payment of margin money and transactions are proved by contract notes. There is also no allegation made by BSE against any of the transactions carried out by the assessee company. The Futures and Options Trading System provides a fully automated trading environment for screen-based, floor-less trading on a nationwide basis and an online monitoring and surveillance mechanism. The system supports an order driven market and provides complete transparency of trading operations. Every day in the stock exchange crores of transactions is being done and each second hundreds of orders are placed for each stock. It may please be noted that any investor who enters into any transaction in the stock exchange does not know the details of a counter party to the transaction. In the screen-based transaction, the assessee enters his order which gets accepted by the stock exchange. The trading system of NSE and BSE ensures that neither the identity of counterparty nor the volume of transaction is known to anyone. We hope this will do the needful  
The assessee is willing and ready to furnish further information/explanation as may be required.”*

5.6 Thus, the assessee produced all the details of the transactions resulting loss along with contract notes, ledger account, bank account showing payments through banking channels. The AO then

passed reassessment order u/s 147 r.w. section 144B on 28.03.2022 as under:

*“The assessee, NARENDRA KUMAR AGRAWAL, had filed his return of income for the AY 2016- 17 declaring total income of Rs. 5,35,510/-. The case was selected for limited scrutiny and assessment was completed u/s 143(3) on 09.12.2018 accepting the returned income.*

*02. The case was re-opened for assessment u/s 147 of the Act by ITO, BURHANPUR by issue of notice u/s 148 of the Act dated 26.03.2021. Thereafter, the case was transferred to ReFAC (Regional Faceless Assessment Centre) on 11.11.2021. Accordingly, notice u/s 148 of the Act was issued and duly served upon the assessee. In compliance, the assessee filed his ITR for the A.Y. 2016-17 on 08.04.2021 and declared total income of Rs.5,35,510/-. Notice u/s 143(2) of the Act was served to the assessee on 29.06.2021. In response, the assessee raised objections to the re-opening of assessment u/s 147 of the Act, which were disposed on 15.12.2021. Notice u/s 142(1) of the Act was issued and served upon the assessee on 09.03.2021 wherein assessee was asked to furnish details of the capital loss of Rs.3,56,04,837/- as per ITR filed by assessee. In compliance, the assessee has submitted reply on 15.03.2022.*

*03. In view of the above facts and circumstances of the case, the returned income of the assessee is accepted.*

*04. The order is being passed u/s 147 r.w.s 144B of the Income tax Act, 1961. Give Credit for prepaid taxes. Issue demand notice/penalty notice/ challan accordingly. Charge interest u/s. 234A/2348/234C/234D as and where applicable. Tax Computation sheet is enclosed herewith.”*

5.7 The AO has specifically mentioned that in-compliance to notice u/s 148 the assessee has filed his return of income on 8<sup>th</sup> April 2021 declaring the same income, a notice u./s 142(1) was

issued which was duly replied vide reply dated 15.03.2022. After considering reply and details filed by the assessee the AO accepted the return income. It is a case of scrutinizing the return of income of the assessee twice by the AO during the original scrutiny assessment as well as during the reassessment proceedings with specific queries on the same issue. Thereafter the Pr. CIT has issued show cause notice u/s 263 on 22.02.2024 placed at page no.45 to 47 of the paper book as under:

*“M/s/Mr/Ms*

*Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the THE INCOME TAX ACT, 1961-Assessment Year 2016-17.*

*In this regard, a hearing in the matter is fixed on 29/02/2024 at 01:13 PM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link [incometaxindiaefiling.gov.in](http://incometaxindiaefiling.gov.in)*

*Please refer to the above.*

*2. On perusal of the records, it has been observed that the assessee had filed his Income Tax Return (hereinafter referred as "ITR") for AY 2016-17 at income of Rs. 5,35,510/-. The assessment order u/s 143(3) was passed on 09/12/2018 accepting the returned income. Further, the case was reopened u/s 147 on the basis of information that the assessee had*

*booked fictitious losses through the concern M/s Xpro Securities during the FY 2015-16 relevant to AY 2016-17. Subsequently, assessment order u/s 147 r.w.s. 144B of the Income Tax Act 1961 (hereinafter referred as "Act") was passed on 28/03/2022 accepting the returned income.*

*3. As per facts of the case, the notice u/s 148 of the Act was issued on 26/03/2021. In response to the notice, the assessee filed his ITR on 08/04/2021 declaring the total income at Rs. 5,35,510/-. Further, notices u/s 142(1) of the Act were issued on 09/03/2022. In response to aforesaid notices, the assessee submitted his response alongwith the information/documents/evidences requisite for.*

*Accordingly, considering the facts of the case as well as replies submitted by the assessee, on the basis of documents available on records, the assessment order u/s 147 r.w.s. 144B of Act was passed on 28/03/2022 accepting the returned income.*

*4. On perusal of the case records, it is observed that the assessee had sold three properties on 24/11/2015, 09/02/2016 and 31/03/2016 at the cost of Rs. 1,57,00,000/-, 1,81,50,000/- and 1,24,70,353/- respectively. He earned Long Term Capital Gain (LTCG) of Rs. 1,19,57,593/-, 1,21,96,669/- and Rs. 1,15,79,071/- respectively thereon, totaling to Rs. 3,57,33,333/-. It is observed from the contract notes of Xpro Securities and other share broking firm that the assessee immediately after/before earning capital gain, get short term capital loss within few days which clearly shows that the capital loss was manipulated to reduce tax liability of LTCG; therefore, the same was not allowable and liable to disallowed and to be added to the total income of the assessee.*

*5. During the course of assessment proceedings, you have neither furnished any details nor explained the issues involved with relevant documentary evidence with regard to issues narrated above. It appears that submission and details available on records was not enough to verify the reasons for*

*reopening of case u/s 147. The Assessing Officer has not at all verified these issues and relevant facts involved therein while completing the assessment without any application of mind, without conducting proper inquiries and due verification. As such, the assessment is erroneous in the sense that it is prejudicial to the interest of revenue. You are therefore, required to show cause why provisions of section 263 be not invoked in your case for the reasons mentioned above as the order of NFAC dated 28/03/2022 for A.Y 2016-17, is erroneous in so far as it is prejudicial to the interest of revenue.*

*6. You are hereby given an opportunity of being heard to explain as to why the proposed revision should not be carried out. For this purpose, your reply should be received on or before 29/02/2024. On the scheduled date, you may either appear in person or get yourself represented by a representative duly authorized by you as per section 288 of the Act. You may also make your written submissions in lieu of personal appearance. If such written submissions are received on or before the scheduled date, the same shall be duly considered for the purpose of the proceedings u/s 263 of the Act.*

*7. Please note that you may also file your reply through mail [indore.cit1@incometax.gov.in](mailto:indore.cit1@incometax.gov.in) along with all relevant records and documents. It is not necessary to attend the office for this purpose. In case of non compliance, the matter will be decided on merits of the case and information available on record.”*

5.8 The Commissioner has initiated the proceedings u/s 263 on the very issue of claim of loss from the derivative transactions carried out through M/s Xpro Securities. In para 5 of the show cause notice the Commissioner has stated that the AO has not at all verified these issues and relevant facts involved and completed assessment without any application of mind, without conducting proper inquiries and due verification. Therefore, the assessment

was found to be erroneous and prejudicial to the interest of the revenue. The Pr. Commissioner has referred the claim of short term capital loss as manipulated to reduced tax liability of long term capital gain. It is pertinent to note that in the return of income filed in response to notice u/s 148 the assessee has declared this loss as business loss arising from derivative transactions on stock exchange. Even in the reasons recorded by the AO for reopening of the assessment it is alleged that the broker M/s Xpro Securities is found engaged in in facilitating fictitious losses through coordinated and premeditated trading in illiquid stock options. However, from the details of the transaction resulting loss in question as placed at page no.22 to 42 of the paper book it is found that most of the transactions are in the well-known scripts like Exide Industries, HCL technology, RECL, Voltas, BEML, Just Dial, Infosys, ACC Cement Ltd, Balaji Tally Films, Bata India Ltd. HPCL, IBHF, GMR Infra, L& T, AIHPC, etc.. Thus, it is clear that the scripts in which the assessee has carried out these derivative transactions are not illiquid scripts as alleged in the reasons recorded for reopening of the assessment but these are all well known, well traded scripts with high volumes on the stock exchange. Though the AO has not given any elaborate finding in the order however, it is manifest from the record available before the AO that after conducting inquiry he was satisfied with the reply and supporting evidences and consequently no disallowance was made. Once the AO was satisfied with the reply of the assessee, he was not required to give an

elaborate finding on issue. The Pr. CIT has doubted the claim of the assessee but has not conducted any independent inquiry or referred any material or details to show that the claim of business loss though wrongly referred by the Pr. CIT as short term capital loss is actually fictitious/bogus claim of the assessee. Merely because transactions of derivative segment carried out by the assessee during and after the transactions of sale of three properties would not ipso-facto lead to the conclusion that the loss incurred by the assessee is fictitious loss. Rather it can be a case that once the assessee received the funds on account of transfer of properties he has carried out these derivative transactions. Therefore, in absence of any fact or material brought on record to show that the view taken by the AO is either contrary to the facts or to the law the initiation of proceedings u/s 263 is not warranted. It is pertinent to note that when the issue was already taken up for scrutiny twice by the AO during the scrutiny assessment u/s 143(3) and then in the reassessment proceedings u/s 147 r.w. section 144B of the Act then the Pr. CIT cannot again ask the AO to re-examine the issue which would be nothing but unnecessary harassment to the assessee to face an unending proceedings on the same issue. It is not a case of complete lack of inquiry on the part of the AO as manifest from the record that show cause notices were issued by the AO raising specific queries on the this point which were replied by the assessee along with supporting evidences. Therefore, once the AO has conducted the inquiry on this issue and was satisfied with

the reply and explanation filed by the assessee along with supporting evidences then the order of the AO cannot be held as erroneous so far as prejudicial to the interest of the revenue on the ground of lack of inquiry or lack of proper inquiry. It is settled proposition of law that when the AO has adopted one of the courses permissible and available to him and this has resulted in loss to revenue or two views were possible and the AO has taken one view which the commissioner may not agree then the said order cannot be treated as erroneous or prejudicial to the interest of the revenue unless the view taken by the AO is unsustainable in law. In the case in hand the Pr. CIT observed in para 6 of the impugned order as under:

*“6. It is worth to mention here that on perusal of the order sheet nothings, it can be observed that the AO has not neither conducted any enquiry to verify the aforesaid issue nor made any addition on the aforesaid issue to the total income of the assessee. Hence, the above referred issue related to claim of bogus short term capital loss through M/s Xpro Securities remained to be examined. Accordingly, the assessment order passed is erroneous in so far as it is prejudicial to the interest of the revenue.”*

5.9 The above observation of Pr. CIT is contrary to the facts and record as available with the AO and referred in the forgoing part of this order which includes the show cause notice issued by the AO reply along with supporting evidences filed by the assessee. The Pr. CIT then set aside the order of the AO in para 11 of the impugned order as under:

*“11. Therefore, in view of the above discussion, I am of the considered opinion that the assessment order dated*

*28/03/2022 for A.Y. 2016-17 is erroneous in, so far as it is also prejudicial to the interest of revenue on account of passing of the assessment order without making required inquiries and verification, which should have been made. Accordingly, I am satisfied that provisions of section 263 of Income Tax Act 1961 are required to be invoked. Therefore, the assessment for A.Y. 2016-17 framed on 28/03/2022 is hereby set-aside to the file of AO to re-examine the issue and to make de-novo assessment, indicated in the preceding discussion, u/s 263 and passing an order as per the law after making necessary verification, inquiries and investigations. It would be not out of place to mention that the AO shall re-examine only the issue which has been indicated for further investigation in the preceding discussion, after according due opportunities of being heard to the assessee.”*

5.10 This find of the Pr. CIT clearly shows that he has set aside the matters of the record of the AO for re-examination of the issue and to make denovo assessment which means that the commissioner was also not certain about correctness of the claim of the assessee. This course of action on the part of the commissioner is not permissible when the AO has conducted inquiry twice and has taken view based on the material on record and therefore, the only course available with the Pr. CIT u/s 263 was to give a conclusive finding that the view taken by the AO is not sustainable under the law. The Hon'ble Delhi High Court in case of *CIT vs. Sunbeam Auto Ltd. (supra)* while dealing an issue of lack of inquiry and inadequate inquiry has held in para 12 as under:

*“12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of*

*Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open."*

5.11 Similarly in case *DIT vs. Jyoti Foundation (supra)* the Hon'ble Delhi High Court has reiterated its view in para 4 as under:

*"4. Revisionary power under Section 263 of the Act is conferred by the Act on the Commissioner/Director of Income-tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because there visionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken."*

5.12 Therefore, as it is evident from record that the AO has conducted an inquiry and was satisfied with the supporting evidences produced by the assessee in response to notice u/s 142(1) then it is not necessary for the AO to give an elaborate finding on the issue. The Pr. CIT while passing revision order cannot remand the matter back to the AO for fresh adjudication simply because he himself was not sure about correctness of the claim of the assessee. Accordingly in the facts and circumstances of the case when the order passed by the AO is not erroneous for want of inquiry then it is incumbent upon the Pr. CIT to give conclusive finding that the impugned order passed by the AO is not sustainable in law. Hence, following the various judgments on this point as relied upon by the AR and cited (supra) the impugned order of the Pr. CIT passed u/s 263 is not sustainable and the same is liable to be set aside. We order accordingly.

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

Order pronounced in the open court on 29 .08.2024.

**Sd/-**  
**(B.M. BIYANI)**  
Accountant Member

**Sd/-**  
**(VIJAY PAL RAO)**  
Judicial Member

**Indore, 29 .08.2024**

**Patel/Sr. PS**

ITANo.345/Ind/2024  
Narendra Kumar Agrawal

*Copies to:* (1) *The appellant*  
(2) *The respondent*  
(3) *CIT*  
(4) *CIT(A)*  
(5) *Departmental Representative*  
(6) *Guard File*

*By order*

*Sr. Private Secretary*  
*Income Tax Appellate Tribunal*  
*Indore Bench, Indore*