आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"B" JAIPUR

डा॰ एस. सीतालक्ष्मी,न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 605/JP/2024
निर्धारणवर्ष/AssessmentYear : 2019-20

Shri Alok Vijawat Station Road, Masjid Ke Samne Bhawani Mandi, Jhalawar 326 502	बनाम Vs.	The PCIT Udaipur
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AERPV0538 B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assesseeby : Shri Devang Gargieya, Advocate
राजस्व की ओरसे/Revenue by: Ms. Alka Gautam, CIT-DR

सुनवाई की तारीख/Date of Hearing : 13/11/2024
उदघोषणा की तारीख/Date of Pronouncement: 13/12/2024

आदेश/ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

The assessee in the present appeal challenges the order of the Principle Commissioner of Income Tax, Udaipur [for short PCIT], which was passed on 26-03-2024. That order relates to the assessment year 2019-20. Ld. PCIT passed that order while exercising the power vested upon her while examining the assessment records of the assessee which was passed by the National Faceless Assessment Centre on 29.09.2021.

2. The present appeal is filed on the following grounds:

> ''1. The Id. PCIT, Udaipur seriously erred in law as well as on the facts of the case in invoking the provisions of S.263 of the Act and therefore, the impugned order dated 26.03.2024 u/s 263 kindly be quashed.
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> 2. The Id. PCIT, Udaipur seriously erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 by wrongly and incorrectly holding that the subjected assessment order passed u/s 143(3) dated 29.09.2021 is prejudicial to the interests of the revenue. The assumption of jurisdiction u/s 263 being contrary to the provisions of law and facts on record, hence, the proceedings initiated u/s 263 hence, the impugned order dated 26.03.2024 deserves to be quashed.
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> 3. The Id. PCIT Udaipur, erred in law as well as on the facts of the case in wrongly setting aside the assessment order dated 29.09.2021 in as much, the Id. PCIT, Udaipur completely ignored/did not judiciously appreciate the detailed written submission filed before him, though was taken note of. He even ignored that the Id. AO raised a specific query on invoking (or otherwise) of S. 115BBE which was duly replied by the appellant in a great detail and therefore the allegations of the PCIT in the impugned are factually incorrect, unjustified and hence, the impugned order passed u/s 263 of the Act dated 26.03.2024 deserves to be quashed.''

3. Brief facts of the case as emerges from the assessment order dated 29-09-2021 are that the case of the assessee was selected for Complete Scrutiny assessment under the E-assessment Scheme on the following issue:-

(i) Case is pertaining to survey u/s 133A of the Income Tax Act, 1961

It is noted from the assessment order that as per information available on record in this case, survey proceedings u/s 133A of the Act was conducted on 16-01-2019. It is further noted that during the survey proceedings u/s 133A of the Act, the following undisclosed income for the Assessment Year 2019-20 was identified by the Revenue.

1.	Undisclosed debtors	45,50,000/-
2.	Excess cash found	9,50,000/-
3.	Unaccounted construction	21,00,000/-

It is further noted that the assessee had filed its return of income for A.Y.2019-20 on 31-10-2019 declaring total income of Rs.83,70,380/- after offering the above additional income as business income for taxation. Thus the case of the assessee was selected for ‘’Complete Scrutiny ‘’ on the issue that *case is pertaining to survey us/ 133A of the Act.’* In this case, notice u/s 143(2) of the Act was issued on 15-10-2020 and subsequently notice u/s 142(1) was issued on 21-01-2012 and 08-09-2021 through E-mail / E-filing portal which were duly served upon the assessee.In response to the notices, the assessee submitted the requisite details before the AO

who after considering the submissions and documents filed by the assessee assessed the returned income at Rs.83,70,380/-. It appears from the assessment order that the AO had not found anything against the assessee from the requisite details submitted by him in response to statutory notices and thus the assessment was completed by passing an order on 29.09.2021 on returned income at Rs.83,70,380/.

4. On culmination of the assessment proceeding ld. PCIT called for the assessment records in accordance with the provision of section 263 of the Act. While examining the assessment record ld. PCIT observed that the AO failed to apply his mind on the material available on record and failed to invoke the applicable provisions of law. Thus the ld. PCIT observed that the order passed by the AO is erroneous in so far as it is prejudicial to the interest of Revenue and thus he invoked provision of Section 263 of the Income Tax Act. The ld. PCIT noted that the said assessment order passed by the AO is without verification of the issue. The relevant paras of the ld. PCIT as to passing of order u/s 263 of the Act is as under:-

> ‘’6. I have carefully considered the facts and circumstances of the enumerated from the material available on record and my observations are as under: -

(i) The assessee had accepted undisclosed& Additional Income of Rs.76,00,000/- in his statement duly recorded during survey proceedings.

(ii) Out of this admitted additional income of Rs.76,00,000/-. Rs.9,50,000/- was on account of difference in cash balance, Rs.45,50,000/- on account of undisclosed sundry debtors and balance of Rs.21,00,000/- on account of unaccounted expenses for construction.

(iii) In the ITR, the assessee declared the aforesaid sum of Rs.76,00,000/- under the head 'Business Income'. The A.O/NaFAC, while completing the assessment u/s 143(3)/144B of the Act, accepted the same without verifying the sources of that income, particularly the business nexus of such Unexplained (Admitted to be as additional Income) sums, respectively.

(iv) The applicable tax should have been charged u/s 69 as Unexplained Investment for Rs.66,50,000 (45,50,000 +21,00,000), AND, Rs.9,50,000/- (Unexplained Money) should have been charged u/s 69A of the Act and hence, the tax should have been charged u/s 115BBE of the I.T. Act, 1961, which was not done by the AO/NaFAC, while completing the assessment on 29.09.2021.

(v) The reply of the assessee is not accepted because the facts of the judgments on the cases relied upon by the assessee are found to be different from the facts of the case of assessee. The issue for adjudication in the case of CIT vs Bajargan Traders [ITA No. 258/2017 Dated 12/09/2017] as well as in the case of Shri Lovish Singhal vs ITO [ITA No 142 to 146/Jodh/ 2018 for 2014-15 dated 25 May 2018) were related to taxing the additional sum on account of "Excess Stock" found/determined and accepted by the assessee WHEREAS, in the case of assessee, the additional income were determined/surrendered on account of "Undisclosed Debtors", Excess Cash Found" and "Unaccounted Construction", which have had direct nexus of chargeability of tax u/s 69 and 69A of the I.T. Act, 1961 and therefore, the applicable tax was chargeable u/s 115BBE of the Act, accordingly. The reply of the assessee is found not acceptable as it is not in conformity with the facts of the case vis- à-vis the provisions of law in this regard.

(vi) In view of the above, the reply of the assessee is not accepted for the reasons mentioned herein above The above mentioned incorrect assumptions of facts and incorrect application of law resulted in undercharging of tax of Rs.33,45,949 plus applicable interest u/s 234 in the case of assessee which was erroneous and prejudicial to the interest of revenue.

(vii) In view of the above, since the Income was not charged/considered under the Correct Head/Section and the correct tax was not levied by the AO/NeAC, therefore due to incorrect assumption of facts and incorrect application of law the tax been under computed/under assessed by Rs.33,45,949/- in the case while passing the Assessment Order on 29.09.2021, the same was found erroneous in

so far as it was prejudicial to the Interest of Revenue within the meaning of Section 263 of the Act.

7. As per the amended provision i.e. clause (a) of Explanation 2 of Section 263, an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of revenue, if in the opinion of Principal Commissioner or Commissioner, the order is passed without making inquiries or verification which should have been made; Further, as per clause (b) to Explanation 2 of Section 263 says about "if the order is passed allowing any relief without inquiring into the claim It reads as under:-

(Amendment of section 263 w.e.f 01.06.2015).

67. In section 263 of the Income-tax Act, in sub-section (1), the Explanation shall be numbered as Explanation 1 thereof and after Explanation 1 as so numbered, the following Explanation shall be inserted with effect from the 1st day of June, 2015, namely: -

"Explanation 2. -For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, -

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d)the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.".

7.2 In reaching such conclusion, I rely on the following judicial rulings:

(i) The Hon'ble Supreme Court in the case of Malabar Industrial Limited V/S CIT2431TR has held that "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.

(ii) In case of TTK LIG Ltd., v/s. ACIT(Mad) 51 DTR 228 it has been held that Order would be erroneous if it is based on an incorrect assumption of facts or an

incorrect application of law or non-application of mind or based on no or insufficient materials.

(iii) In the case of Arvee international vis. Addl. CIT (ITAT, Mum) 101 ITD 495, it has been held that Unlike the Civil Court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but also an investigator He cannot remain passive on the face of a return which is apparently in order but calls for further enquiry- It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke inquiry - If there is failure to make such enquiry, order is erroneous and prejudicial to revenue - CIT need not prove that it is erroneous and he can revise it u/s 263.

(iv) CIT v/s. Raisons Industries Ltd., 288 ITR 322 (SC): *The Hon'ble Supreme Court held as under: "The power of revision under section 263 is exercised by a higher authority. It is a special provision. The revisional jurisdiction is vested in the Commissioner. An order there under can be passed if it is found that the order of assessment is prejudicial to the Revenue. In such a proceeding, he may not only pass an appropriate order in exercise of the said jurisdiction but in order to enable him to do it, he may make such inquiry as he deems necessary in this behalf."*

(v) Madras High Court in the case of Seshasayee Paper & Boards Ltd. [2000] 242 ITR 490 (Mad.) has held that the powers of the Commissioner are very wide in exercising the powers of revision u's 263. It is no doubt true that for making a valid order u/s 263, it is essential for the Commissioner to record an express finding that the order sought to be revised was erroneous as well as prejudicial to the interest of the revenue. However, there is nothing in section 263 to show that the Commissioner should in all cases record his final conclusion on the points in controversy before him. The legislative intent to bring the amendment was to make clear the provisions of Explanation to section 263 and to reduce the litigations in this regard which is well supported in view of the clear words used in clause (a) of the Explanation 2 to section 263 (1) wherein it is mentioned that the order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of revenue, if in the opinion of the PCIT the order is passed without making inquiries or verification which should have been made. If the order is passed without application of mind. such order will fall under the category of erroneous order''

8. Considering the above facts, it is held that the order passed by the Assessing Officer (NFAC) u/s 143(3) r.w.s 144B of the IT Act dated 29.09.2021 is suffering from specific defects, hence, order so passed by the AO is erroneous and also prejudicial to the interest of the revenue. The order of the assessing officer istherefore, liable to revision under clause (a) &(b) of the Explanation (2) of section 263 of the Income Tax Act, 1961.

> 9. In the light of above discussion, assessment order passed by the AO in the case of the assessee is Set-aside to the AO on the above mentioned issue i.e. the issue of "Treatment of Additional Income disclosed/accepted during the course of Survey u/s 133A of the Act to be considered the Income u/s 69 and 69A of the Act respectively and further chargeability of income-tax thereupon u/s 115BBE of the I.T. Act, 1961". Therefore, the AO is directed to verify this issue while finalizing the assessment considering the observations mentioned herein above. Thereafter, based on outcome of such enquiries and verification, necessary additions, wherever required, may be made to the total Income of the assessee as per law by modifying the assessment order u/s 143(3) /144B of the Act dated 29.09.2021. However, the AO is directed to ensure that ample opportunities of being heard are provided to the assessee before passing such order.''

5. Feeling dissatisfied with the above finding of the ld. PCIT, the assessee preferred the present appeal on the grounds as reiterated herein above. Ld. AR of the assessee vehemently argued that the issue which the ld. PCIT raised in her order has already been verified by the National Faceless Assessment Unit while passing the order and for that specific notice was issued by the ld. AO. Thus, he relied upon the assessment order and submitted that there is no flaw in the assessment order and the impugned order u/s 263 of the Act passed by the ld. PCIT needs to be quashed for which he submitted the following written submission to counter the order of the ld. PCIT:

> ''**1.1** The **pre-requisites** to the exercise of jurisdiction by the CIT u/s 263, is that the order of the Assessing Officer is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The CIT has to be satisfy the **twin conditions**, namelythe order of the Assessing Officer sought to be revised is erroneous; and it is prejudicial to the interests of the Revenue. If any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, Sec.263 cannot be invoked.

This 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 as also prejudicial to revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase '*prejudicial to the interest of the revenue' has* to be read in conjunction with an erroneous order passed by the AO. **Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial** to the interest of the Revenue. For example, if the **AO has adopted one of the two or more courses permissible in law** and it has resulted in loss of revenue, or where **two views are possible** and AO 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 AO is totally unsustainable in law. Kindly refer Malabar **Industrial Co. Ltd. v/s CIT** (2000) 243 ITR 83 (SC).

1.2 Also kindly refer **CIT v/s Max India Ltd. (2007) 295 ITR 282 (SC)** wherein it is held that

*"The phrase **"prejudicial to the interests of the Revenue"** in S. 263 of the Income Tax Act, 1961, has to be read in conjunction with the expression **"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 the Assessing **Officer adopts one of two courses permissible** in law and it has resulted in loss of revenue, or where **two views are possible** and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."*
Ratio of these cases fully apply on the facts of the present case in principle and therefore, invoking of sec.263 was not legally justified also for the detailed reasons being submitted herein below issues wise:

2. Due Enquiry Made with full application of mind

In the facts and circumstances of the case, it cannot be alleged that the AO did not verify the facts and particularly w.r.t the source of the additionally declared income, vis-a-vis non- applicability of S.115BBE of the Act thereon in as much as, the ld.AO was fully conscious of the issue and therefore even a show cause notice was raised, specifically on the aspect of applicability of or otherwise of section 115BBE vide its show cause notice come draft assessment order dated 24.09.2021 bearing DIN: ITBA/AST/F/143(3) (SCN)/2021-22/1035876830(1), in the following words:

"2. In your ITR for the year 2019-20, you have offered such income as business income for taxation at normal rates, whereas the above-mentioned income needs to have following treatment as per Table A Below:

S.NO	***Particulars***	***Amount***	***To be treated***	***Taxability as***
1.	*Undisclosed debtors*	*45,50,000/-*	*Debtors being undisclosed income u/s 69*	*To be tax @ 60% u/s 115BBE*
2.	*Excess Cash Found*	*9,50,000/-*	*Unexplained Money u/s 69A*	*To be tax @ 60% u/s 115BBE*
3.	*Unaccounted Construction*	*21,00,000/-*	*Unexplained Expenditure u/s 69C*	*To be tax @ 60% u/s 115BBE*

In response thereto, appellant filed a **very detailed submission** on dated 27.09.21, running into 9 pages **(PB 7-16)** explaining the entire legal & factual position, touching each and every relevant aspect therein. It cannot be said nor it is so alleged that the AO did not raise this SCN and the AO did not apply its mind on the issue in hand. The reply dated 27.09.2021 is reproduced hereunder in verbatim:

"A. Proposed taxing at higher rate u/s 115BBE:
Through the above captioned show cause notice and draft assessment order, the assessee has been asked as to why the tax be not computed as per the provisions of S. 115BBE of the Act, on the amount of additional income surrendered being Rs. 76,00,000/- in the course of survey conducted on, dated 16.01.2019. In this connection our submissions are as under:

1. Provisions of section 115BBE: *The provisions of section 115BBE(1) reads as under:*

"(1) Where the total income of an assessee, — 1. includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or 2. determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a), the income-tax payable shall be the aggregate of— 1. the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and 2. the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).] (2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance [or set off of any loss] shall be allowed to the

assessee under any provision of this Act in computing his income referred to in clause (a) [and clause (b)] of subsection (1).]"

***2.1** At the outset it is submitted that S.115BBE specifically refers to the income which are of the nature as referred in S. 68 ,69 ,69A of the Act being the income from other sources. Therefore, subjected income has essentially to be classified u/s 14 of the Act as income from other sources and that is possible only when the income is not capable of being classified under any other head being income from salary, house property, capital gain, business or profession.*

***2.2** A combined reading of S. 14 with S. 56 of the Act makes is evidently clear that for the assessment of an income it must have to be classified under four heads of income as enumerated u/s 14 and if it doesn't fall under any specific head of income as per item A to E of S. 14, such income has to be assessed under the residuary head of income i.e. item F of S. 14. Therefore, income added u/s 68 or 69 etc. has to be given a specific head in terms of S. 14.*

***2.3** The Hon'ble Supreme Court in case of Karanpura Development Co Ltd vs. CIT [1962] 44 ITR 362 (SC) held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under another head. Further, the Hon'ble Supreme Court in case of Nalinikant Ambalal Mody v CIT [1966] 61 ITR 428, has held that whether an income falls under one head or another is to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter. Of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.*

***3.** The scheme of sections 68, 69, 69A, 69B and 69C provides that in cases where the nature and source of investments or acquisition of money, bullion or expenditure incurred are not explained at all, or not satisfactorily explained, then, the value of such investments and money, or value of articles not recorded in the books of accounts or the unexplained expenditure may be deemed to be the income. In view of the above, it can be said that for triggering section 115BBE what is relevant is whether income remains disclosed or undisclosed or explained or unexplained. If the income is disclosed or explained as mandated by the law, then same would be taxable in the ordinary manner. On the other hand, if the income is undisclosed or unexplained then the provisions of section 115BBE may be triggered depending upon the facts involved in each of the cases. The moment a satisfactory explanation is provided about nature and source then the source would stand explained and therefore, the income would be computed under the appropriate head of income as per the provisions of the Act.*

***4.** On perusal of the Finance Minister's speech and Explanatory Memorandum (2), it is clear that the legislative intent behind introduction of section 115BBE*

was to curb the generation and use of unaccounted money and tax the same at the highest rate.

***5**. However, in this case the only regular source of income of the assessee in A.Y. 2019- 20 was the real estate business (and the connected ancillary activities/services thereto). The assesse was in receipt of the profit on the purchase and sale of properties and also commission/brokerage income and consultancy income relating to the real estate business. There is no other known or unknown source of income, neither stated by the assessee nor by the department.*

***6.1** In the present case, the facts & circumstances rather very clearly indicates and established that what was stated during survey on dated 16.01.2019, was nothing but the additional income of Rs. 76,00,000/- arising/ resulting from the regular business income only i.e. from real estate business and has to be classified u/s 14 r.w.s 28 as business income only and not income from other sources, for the following reasons:*

***6.1.1** It is submitted that whatever, was disclosed was nothing but additional income only and it cannot be termed as excess/undisclosed/unaccounted income for the simple reason that survey was carried out on 19.01.2019 i.e. before close of the relevant previous year ending on 31.03.2019 or in other words, during the currency of the previous year only. The assessee did not yet close the previous year's books of accounts therefore, unless a comparison is made between the completely prepared books of accounts with the stock, cash or debtors etc. as physically found during the course of survey, it can't be termed as excess-shortage /undisclosed/unaccounted money, quantity etc. Even the return of income was not filed. At the best it was only additional income stated during survey. Moreover, the assessee admittedly accounted for such income also in regularly maintained books of accounts and also in its ROI. Therefore, once a comparison is made between the income shown in the accounts and the additional income, there will be no difference. Consequently, it cannot be said that there was some excess - shortage/undisclosed/unaccounted income, etc.*

***6.2** Although **the certified copies of the statement recorded during the survey is not supplied to us despite repeated request** yet however, the assessee based on his recollection is able to submit that all the related question answers were towards the additional income if any arising from the real estate business or its ancillary activities etc. and the assessee also admitted additional income of the current year as a matter of abundant precaution as arising from the real estate business.*

6.3 *Even the heads under which the additional income was admitted also, supported the contention that the entire additional income pertained to /arose from business activities only.*

6.4 *It is submitted that the profit arising from the real estate transaction of the purchase and sale, were advanced /given to various debtors. There apart, additional cash found also arose from same business activity. There apart, additional income of Rs. 21,00,000/- on account of construction activity, was in fact related to the construction of the apartment, villas, houses etc for the buyers during the relevant previous years. The said table shows the utilization/availability of the funds under different heads of the asset/expenditure etc and their nature also suggest that the additional income was related to/arose during the course of the real estate business only. The investment/ outgoing is clearly identifiable with the regular stock, cash, construction of real estate business activities only. There is no mention or whisper in these statements that such surrendered income was something beyond or in addition to the real estate business or that there was some other source of income giving rise to such additional income/ alleged undisclosed Income. In these circumstances, the only inescapable conclusion is that the surrendered income was nothing but a business income from the real estate business of the assessee. Therefore, to consider subjected income as income from other sources "merely to levy more tax, is an illegal and unjustified attempt to invoke 115BBE" which is not clearly applicable on the facts of the present case and contrary to Article 265 of the Constitution of India.*

6.5 *Further importantly, the assesse has admittedly shown such additional income in its regularly maintained books of accounts as evident from the fact that in its Income and Expenditure account as sum of Rs. 76 Lakh stands credited. Subsequently in the computation also the admitted additional income has been shown under the head income from business and profession.*

7. *Judicial Guideline: The Hon'ble Rajasthan High Court, ITAT Jaipur and various other courts have held that where the additional income/ undisclosed income declared during the course of survey is relatable to some business activity then it cannot be considered to be income from other sources and consequently S. 115BBE cannot be invoked.*

7.1 *The Hon'ble Ahmedabad Tribunal in case of Chokshi Hiralal Maganlal vs DCIT (ITA No. 3281/Ahd/2009 AY 2004-05 dated 5 August 2011) held that for invoking deeming provisions under sections 69, 69A, 69B & 69C there should be clearly identifiable investment or asset or expenditure (i.e. in our understanding not connected with business so as to make convenient to invoke aforesaid sections). In case source of investment or asset or expenditure is clearly identifiable and has no independent existence of its own where a case arises to claim that it cannot be separated from business then*

first 'what is to be taxed is the undisclosed business receipt. Only on failure of such exercise, it would be regarded as taxable under section 69 on the premises that such excess investment or asset or expenditure is unexplained and unidentified, satisfying the mandate of the law.

***7.2** The Hon'ble Rajasthan High Court in case of CIT vs Bajargan Traders [ITA No. 258/2017 dated 12/09/2017] has held that when the assessee is dealing in sale of food grains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under the head income from other sources.*

***7.3** In case of Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014- 15 dated 25 May 2018), the Jodhpur Tribunal applying the proposition of law laid down by the Hon'ble Rajasthan High Court in the Bajargan Traders (supra), held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act and accordingly held that there is no justification for taxing such income U/s 115BBE of the Act. In view of the facts & circumstances, judicial guidelines and the statutory provisions, the additional income declared during survey of Rs. 76,00,000/- cannot be subjected to S. 115BBE of the Act".*

In the ROI itself, as stated in the SCN u/s 263, **the subjected additional income of Rs 76 Lakh was declared as income from business and profession**. With regard to the source of such additional income, the aforesaid detailed submission on its own clarified the source/ nexus with the real estate business which the assessee was carrying on at that point of time. Thus, AO made full enquiries and applied his mind which, he was supposed to do as contemplated by law. Based thereon, he took his own decision which cannot be interfered with.

3. In fact, the AO (so also the CIT) was not even entitled to change the head of income on his own. kindly refer the Hon'ble Supreme Court in case of **Karanpura Development Co Ltd vs. CIT [1962] 44 ITR 362 (SC)** held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under another head. Further, the Hon'ble Supreme Court in case of **Nalinikant Ambalal Mody v CIT [1966] 61 ITR 428**, has held that whether an income falls under one head or another is to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter. Of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.

4.1. No error when AO acted in accordance with binding decisions:

In addition, the legal position and the judicial guideline through the various decisions of Hon'ble Rajasthan High Court and ITAT Jaipur, is well settled. The AOacted in accordance with the judicial guideline and the ratio laid in the cases of:

1. CIT vs Bajargan Traders [ITA No. 258/2017 dated 12/09/2017] – **(DC 42-56)**
2. Chokshi Hiralal Maganlal vs DCIT (ITA No. 3281/Ahd/2009 AY 2004-05 dated 5 August 2011)
3. Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014- 15 dated 25 May 2018**)**

and applying the same on the facts of the case in hand, decided that the provisions of S.115BBE were not applicable and hence did not therefore apply high rate of tax.

4.2. The law is well settled that once the AO has acted as per the decision available at that point of time, his order cannot be found fault with u/s 263 (even where such decision might have been reversed by the apex court later on) this also held in the case of **CIT vs G.M. Mittal Stainless (2003) 130 taxman.com 679 (SC).**

Pertinently, the ld. PCIT herself termed the income of Rs. 76,00,000/- of additional income at Para 9 - Pg 18 and if so, there is no justification yet to consider the same as open to the applicability to S. 69 & 69A of the Act. It is, evident that the AO has taken a **plausible view** on the issue in hand and thus, has committed no error at all.

5. No substitution of opinion permissible:

The law is well settled that the ld. CIT acting u/s 263 cannot substitute his/ her own opinion for that of the AO. In this case the AO made pointed inquiries got the submission and applied his mind and in the light of the judicial guideline made available before him, he formed an opinion. Such an opinion cannot be substituted by the ld. CIT u/s 263 merely because it is getting more revenue to the department. kindly refer **CIT vs. Gabriel India Ltd. [1993] 71 Taxman 585 (Bombay)**

6. The issue in hand in the context of Section 263 is directly covered by the decisions in the following cases:

6.1. In **Surendra Kumar vs. PCIT (2023)** 222 TTJ_UO (Chd) it was held that:
"Principal CIT has confused himself between 'undisclosed income' and the words 'unexplained income'. Provisions of ss. 68 to 69D are attracted in respect of the undisclosed income but the condition for assessing such income under the said provisions is that the assessee has either failed to disclose the nature and source of such income or the AO is not satisfied with the explanation offered by him. The

perusal of the relevant part of the audit report proposal of the AO and show-cause notice issued by the Principal CIT under s. 263 would show that all the aforesaid authorities have been swayed by the notion that the income surrendered by the assessee was undisclosed income of the assessee and therefore, the same has to be assessed under ss. 68 to 69D, as the case may be, and thereby would be charged to higher rate of tax under s. 115BBE. In the case in hand, the AO duly made enquiries from the assessee as to the nature and the source of the aforesaid surrendered income and also show caused the assessee as to why the same should not be charged at a higher rate of tax as per the provisions of s. 115BBE. After considering the submissions and explanations of the assessee the AO accepted the contention of the assessee that the surrendered income was out of the business income of the assessee. Principal CIT has not pointed out as to why the explanation offered by the assessee to the AO was not satisfactory and what more enquiries were required to be conducted in this case which the AO failed to conduct. The Principal CIT has simply based his opinion and order on the audit objections/report as pointed out even in the audit report that since the 1 / 7 same was undisclosed income of the assessee which was surrendered by the assessee during the survey action the same was to be assessed under the provisions of ss. 68 to 69D. The above reasoning of the survey party is not in accordance with the relevant provisions of the Act. Therefore, there is no justification on the part of the Principal CIT in invoking the revisionary jurisdiction. In view of the discussion made above, the revision order has been passed by the Principal CIT by wrongfully exercising the jurisdiction under s. 263 and the same is, therefore, held as bad in law and is accordingly, quashed. —Gandhi Ram vs. Principal CIT (ITA No. 121/Chd/2021, dt. 4th Aug., 2022) followed."

6.2. In **Smt. Rekha Shekhawat vs. PCIT (2022)219 TTJ (Jp) 761(DC 3-41)** it was held that:

"Revision—Erroneous and prejudicial order—Lack of proper enquiry vis-a-vis assessment of additional income as business income—During the course of survey under s. 133A assessee's husband admitted unrecorded income in the case of his wife i.e., assessee which was stated to be advances made for property in the course of her real estate business—Unrecorded trade advances and cash in hand were brought in the books of accounts and formed part of business assets and thereafter used in day-to-day business activities—Questions which were raised and the answers given during the survey show that the additional income declared on account of advances and the cash found emanated from and related to the real estate business only—Even the Principal CIT has admitted in the impugned order that this income pertains to recovery of cash amounts of advances made by the assessee to the other persons for purchase of land/plots—Undisputedly the assessee is engaged in the real estate business and there is no undisclosed or unknown source of income and the source of additional income so admitted is clearly identifiable and is the regular business of real estate—Since the additional income is related to the real estate business it is certainly assessable as

business income and cannot be considered as income falling under s. 68/69A—AO having applied his mind in accepting the said additional income as business income, there was no error in the assessment order—Thus, the Principal CIT was not justified in expecting the AO to apply s. 115BBE as also s. 271AAC by merely imposing and substituting his own opinion, which is not the legislative intent even behind Expln. 2(a) to s. 263—Further, merely because the assessee has taken a mistaken view of the correct legal position by wrongly showing such additional income under head income from other sources in her return, the same cannot be taken as an admission as there is no estoppel against statute—Therefore, Principal CIT was not justified in invoking the provisions of s. 263 by wrongly holding that the assessment order under s. 143(3) was passed without considering that the additional income fell under the purview of ss. 68 and 69 and that tax was chargeable under s. 115BBE as against normal rates—Hence, the proceedings initiated under s. 263 and the impugned order are quashed."

7. Dealing with the objection of the ld. PCIT: The ld. PCIT, in the impugned order [Para 6 page 14], has observed that the AO was wrong while assessing the additional income declared by the appellant during survey under the head "Business income", without verifying the sources of income and in particular, the business nexus of such unexplained admitted income. She further distinguished the judicial precedents cited before her being CIT vs Bajargan Traders [supra] and Lovish Singhal vs ITO (Supra) on the alleged ground that in those cases, the admitted income was in relation to excess stock whereas in the present case, the additional income was admitted on account of undisclosed debtors, excess cash found and unaccounted construction expenses which, in her opinion, had a direct nexus of chargeability u/s 69 & 69A of the Act and therefore section 115BBE was applicable. However, such an observation/finding by the Ld. PCIT got no legal basis, rather simply twisting of facts or over stretching or else, a case of misinterpretation. This issue was fully explained before the AO, during the course of the assessment proceeding itself in reply dated 27.09.2021 **(PB 5-72)** wherein, in Para 5 onward it has been elaborately submitted as to how these three items of additional incomes were part of business incomes and the AO has rightly considered them as part of business. The Ld. PCIT unfortunately completely ignored, what to talk of dealing with/ meeting with such contentions. Interestingly, she considers additional income from excess stock as business income whereas these 3 items being the debtors, cash and expenses which are, in the very name and nature, part of the business activities, and has been hold as not a case of business income. Even she did not record any categorical findings that these items of income could be assessed under the head of Income from other sources. Further, a decision of this Hon'ble ITAT in the case of **Rekha Shekhawat vs. PCIT (supra)** which was also a case of real-estate developer/ builder, cited in Para 6.2 and reproduced at Pg. 13 of her order, was not at all adverted.

8. Clause (a) of Explanation 2 of Section 263 - Wrongly invoked: The ld. PCIT has dealt with this issue at Pg 15 of the impugned order :

8.1 At the outset, this was never made a ground in the Show Cause Notice issued u/s 263 (PB 73-75) and therefore, the ld. PCIT could not have adopted such reasoning in the impugned order for the first time, which was not confronted to the assessee earlier. Reliance is placed on **PCIT vs. Shreeji Prints (P.) Ltd. 2021 [130 taxmann.com 294 (SC)] (DC 47-52) wherein it is held** "*SLP dismissed against impugned order passed by High Court holding that where assessee-company had received unsecured loans from two different companies and Assessing Officer had made inquires in detail and accepted genuineness of same, such view of Assessing Officer being a plausible view could not be considered erroneous or prejudicial to interest of revenue*"

The Hon'ble Gujarat High Court in **Shreeji Prints (P.) Ltd. Vs PCIT** affirmed the ld. ITAT order, the relevant extract of which is as under:

"15 The Pr.CIT had observed that Explanation 2 of section 263 of the Act is clearly applicable and it is clear that the Assessing Officer has passed the assessment order after making enquiries for verification which ought to have been made in this case. However, we find that the Pr. CIT has not mentioned in the show-cause notice issued under section 263 that he is going to invoke the Explanation 2 to 263 hence, invocation of Explanation in the order without confronting the assessee is not appropriate and sustainable in law in support of this contention, the ld. Counsel has placed reliance on the following decision:

CIT v. Amir Corporation 81 CCH 0069 (Guj.), CIT Mehrotra Brothem -270 ITR 0157 (MP,CIT v. Ganpet Ram Bishnoi - 296 ITR 0292 (Raj.), Cadila healthcare Ltd. v. CI 7, Ahmedabadh-1 [ITA no. 1096/Ahd/2013 & 910/Ahd/2014], Sri Saí Contractors v. ITO [ITO no. 109Nizag/2002] and Pyare lal Jaiswal v. CIT, Vamnesi [(2014) 41 taxmann.com 27 & (All Trib.)].

It was contended by the Learned Counsel that clause -(a) & (b) of Explanation 2 of Section 263 are not applicable as the Assessing Officer has made enquiry and verification which should have been made. Further, in the show cause notice, the Explanation-2 of section 263 was not invoked by the PCIT and it was referred in the order u/s.263 of the Act. Therefore, in the light of decision of the Co-ordinate Bench of Mumbai ga in the case of Narayan Tatu Rane - 70 taxmann.com 227 (Mum. Trt.) [PB 153-1561 wherein held that explanation cannot laid to have over ridden the law as interpreted/the various High Courts where the High Courts have held that before reaching the conclusion that the order of the Assessing Officer is erroneous prejudicial to the interest of Revenue. The CIT himself has to undertake some enquiry to establish that the assessment order is erroneous and prejudicial to the interest of Revenue. The ld. Counsel relied on the decision of ***M/s. Amira Pure Foods Pvt. Ltd., v. PCIT in ITA No.3205/Del/2017*** *and* ***Ahmedabad***

Tribunal in the case of Torrent Pharmaceuticals Ltd. v. DCIT [2018] 97 taxmann.com 671 (Ahd. - Trib.). *it is clear from the enquiries made by the Assessing Officer and submissions made by the assessee that the Assessing Officer has taken the plausible view which is valid in the eyes of law. The Assessing Officer was satisfied consequent to making enquiry and after examining the evidences produced by the assessee, he accepted the assessee's claim of loan similar vi ew were also expressed by the Hon'ble Delhi High Court in the case of* ***CIT v. Vodafone Essar South Ltd. [2013] 212 taxman 0184****. We observe the Pr.CIT has drawn support from newly inserted Explanation 2 below section 263(1) of the Act introduced by Finance Act, 2015 w.e.f. 1-6-2015 for his action. The Explanation 2 inter alia provides that the order passed without making inquiries or verification 'which should have been made' will be deemed to be erroneous insofar as it is prejudicial to the interest of the Revenue. It is on this basis, the assessment order passed by the AO under section 143(3) of the Act has been set aside with a direction to the AO to pass a fresh assessment order. It will be therefore imperative to dwell upon the impact of Explanation 2 for the purposes of section 263 of the Act.*

X X X X.

"17 We thus find merit in the plea of the assessee that the Revisional Commissioner is expected show that the view taken by the AO is wholly unsustainable in law before embarking upon exercise of revisionary powers. ***The revisional powers cannot be exercised for directing a fuller inquiry to merely find out if the earlier view taken is erroneous particularly when a view was already taken after inquiry.*** *If such course of action as interpreted by the Revisional Commissioner in the light of the Explanation 2 is permitted,* ***Revisional Commissioner can possibly find fault with each and every assessment order*** *without himself making any inquiry or verification and without establishing that assessment order is not sustainable in law. This would inevitably mean that every order of the lower authority would thus become susceptible to section 263 of the Act and, in turn, will cause serious unintended hardship to the tax payer concerned for no fault on his part. Apparently, this is not intended by the Explanation. Howsoever wide the scope of Explanation 2(a) may be, its limits are implicit in it. It is only in a very gross case of inadequacy in inquiry or where inquiry is per se mandated on the basis of record available before the AO and such inquiry was not conducted, the revisional power so conferred can be exercised to invalidate the action of AO. The AO in the present case has not accepted the submissions of the assessee on various issues summarily but has shown appetite for inquiry and verifications.* ***The AO has passed after making due enquiries issues involved impliedly after due application of mind. Therefore, the Explanation 2 to section 263 of the Act do not, in our view, thwart the assessment process in the facts and the context of the case.*** *Consequently, we find that the foundation for exercise of revisional jurisdiction is sorely missing in the present case.*

18. In the light of above facts and legal position, we are of the considered view that the AO had made detailed enquiries and after applying his mind and accepted the

genuineness of loans received from GTPL and PAFPL, which is also plausible view. Therefore, we find that twin conditions were not satisfied for invoking the jurisdiction under section 263 of the Act. The case laws relied by the ld. CIT(D.R.) are distinguishable on facts and in law hence, by the ld. Counsel as well and we concur the same hence not applicable to present facts of the case. Therefore, in absence of the same, the ld. CIT ought to have not exercised his jurisdiction under section 263 of the Act. Therefore, we cancel the impugned order under section 263 of the Act, allowing all grounds of appeal of the Assessee."

8.2 In Mahaveer Prasad Jain vs. PCIT [2023] 153 taxmann.com 207 (Jaipur - Trib.) (DC 53-66) this Hon'ble bench has held as under:

"9. We have heard the rival contentions and perused the material placed on record and also gone through the judicial decision relied upon. Both the parties have not disputed the fact mentioned in the assessment proceeding about the act of the assessee in depositing a sum of Rs. 51.60 lac in the bank account during the period of demonetization. Out of the cash so deposited a sum of Rs. 16.80 lac was consisting of high value notes of Rs. 500 and Rs. 1000. The ld. PCIT in his order contended that the ld. AO has not properly addressed the issue while completing the assessment. Even the ld. DR did not place anything further to support the any specific error on the part of the assessee. We have perused the assessment order and the relevant submission on the issue that the assessee has given details in the assessment proceeding at four instance so as to support PITHISARIA the fact that inquiry in relation to the generation of the cash by the assessee is verified by the ld. AO. It is also not disputed by the PCIT or ld. Sr. DR for the balance amount deposited in the demonetized period which is that out of 51.60 lacs but disputed only for an amount Rs. 16.80 lac being the demonetized currency. There is no evidence or material that has been observed by the PCIT from the details so placed on record by the assessee in the assessment proceeding to disbelieve the averments about the source of the said demonetized currency. Merely the PCIT said that in his opinion the ld. AO has not properly addressed the issue. The observation so made is very general and routine without pinpointing any specific defect the action of the PCIT u/s. 263 is nothing but a review of the order of the ld. AO. It has been held in so many cases by the various High Courts and Tribunal that the amendment made in section 263 does not confer blind and uncontrolled power to the PCIT, despite there being an amendment, enlarging the scope of the revisionary power of the ld. PCIT. The newly inserted explanation 2(a) to section 263 does not authorize or give unfettered powers to Commissioner to revise each and every order, if in his opinion same has been passed without making enquiry or verification. Here in this case the ld. AO has made enquiry at four instance and recorded his satisfaction after examined the books of account, bank statement and purchase and sales records of the assessee. Here in this case even there is no specific observation of the PCIT pinpointing any specific defect in the records that has been placed on record instead he has simply stated that AO has not addressed the issue this observation is very much in general and without

specifying any faults in the assessment records, details submitted and verified by the ld. AO. In fact on perusal of the assessment order we have noted the following observation of the ld. AO."

8.3 Even the amendment [i.eExpl. 2(a)] does not confer blind powers: It is held that despite there being an amendment, enlarging the scope of the revisionary power of the ld. PCIT u/s 263 to some extent, it cannot justify the invoking of the Expl. 2(a) in the facts of the present case. Before referring to that Explanation, one has to understand what was the true meaning of the Explanation in the context of application of mind by a quasi-judicial authority.

In the above case and in **Narayan Tatu Rane Vs. ITO** (2013) 7 NYPTTJ 1493 (Mum.),it was held that newly inserted **Explanation 2(a) to Sec. 263 does not authorize or give unfettered powers to Commissioner** to revise each and every order, if in his (subjective) opinion, same has been passed without making enquiries or verification which should have been made.

7. Thus, in the totality of facts and circumstances, it is not at all a case where the subjected assessment order dt. 29.09.2021 should be alleged to be erroneous in so far as prejudicial to the interests of the revenue. There is neither an no error of law nor of facts. There is no erroneous assumption by the AO of either the facts or of law, as alleged by the ld. PCIT.

In view of these legal and factual submissions, and the binding judicial precedents, the impugned order passed u/s 263 deserves to be quashed.

6. On the other hand, the ld. DR supported the order of the ld. PCIT and repeated the same arguments which are recorded in the impugned order.

7. We have heard both the parties and perused the materials available on record. In the present appeal the assessee has raised as much as three grounds of appeal all relates to the one issue wherein the assessee challenges the finding of the ld. PCIT while invoking the provision of section 263 of the Act. Since the issue revolves around the invocation of provision

of section 263 of the Act we deal with all the grounds of appeal of the assessee together with. The brief facts related to the disputes are that in this case survey was conducted as per provisions of section 133A of the I.T. Act, 1961 on 16.01.2019 and Rs.76,00,000/- were identified as undisclosed Income by the search team of the revenue, which comprise of undisclosed debtors Rs. 45,50,000/-, Excess cash found Rs. 9,50,000/- and unaccounted construction Rs. 21,00,000/-. For the year under consideration assessee filed return of Income on 31.10.2019 declaring total Income of Rs.83,70,380/. -Thereafter, case was selected for scrutiny under "Compulsory Scrutiny" criterion. Thus the AO/NFAC completed scrutiny assessment u/s 143(3) r.w.s. 144B of the Act, on 29.09.2021 at the total assessed income at Rs. 83,70,380/-. While examining the assessment record ld. PCIT noted that assessee-appellant had accepted undisclosed income of Rs. 76,00,000/- in the statement recorded during survey proceedings. In the ITR, filed the assessee-appellant declared the aforesaid sum of Rs. 76,00,000/- under the head 'Business Income'. The A.O/NFAC while completing the assessment u/s 143(3)/144B of the Act, accepted the same without verifying the sources of that income, particularly the business nexus of such Unexplained (Admitted to be as additional

Income) sums, respectively and thus she noted that the tax should have been charged u/s 69 as Unexplained Investment for Rs.66,50,000 (45,50,000+21,00,000) and Rs.9,50,000/- (Unexplained Money) should have been charged u/s 69A of the Act and hence, the tax should have been charged u/s 115BBE of the I.T. Act, 1961, which was not done by the AO/NFAC, while completing the assessment on 29.09.2021 and thus the order was erroneous and prejudicial to the interest of revenue. In the light of this observation the assessee was issued a show cause notice for the above observation made by the ld. PCIT vide notice dated 15.03.2024. Against that notice the assessee filed a detailed reply which was not accepted because the facts of the judgments on the cases relied upon by the assessee found to be different from the facts of the case of the assessee. In the light of that aspect of the matter ld. PCIT considered that the order of the assessment is liable to revision under clause (a) & (b) of the Explanation (2) of section 263 of the Act. The bench noted in response to the show cause notice issued by the ld. PCIT assessee-appellant filed point to point response to the queries raised by the Ld. PCIT. Upon considering the rival contentions and orders of the lower authority that in this case the limited issue for the consideration is that the assessee was

surveyed by the revenue. In that proceeding the assessee surrendered a sum of Rs.76,00,000/- comprising of undisclosed debtors for an amount of Rs. 45,50,000/-, excess cash found Rs. 9,50,000/- and unaccounted construction Rs. 21,00,000/-. While filling the return of income thereafter the assessee has admitted the additional income disclosed in the survey proceedings. While conducting the assessment proceeding the ld. AO initiated a specific enquiry to the assessee and a show cause notice was issued proposing the variation in the assessment asking the assessee-appellant as to why the provision of section 115BBE should not be applied vide notice dated 24.09.2021. The said show cause notice was placed on record at page 1-3 of the paper book filed by the assessee. This here it is not the case of the revenue that the assessing officer has not raised the issue and has not conducted any enquiry, but while doing so he has applied his mind and taken a plausible view on the matter. That view so taken being not erroneous and prejudicial ld. PCIT merely cannot impose her view that the ld. AO should have considered that income so offered u/s 69 as Unexplained Investment for Rs.66,50,000 (45,50,000+21,00,000) and Rs.9,50,000/- (Unexplained Money) u/s 69A of the Act. From the orders of the lower authorities and the submissions of the assessee, it is

found that the pre-requisites to the exercise of jurisdiction by the CIT u/s 263, is that the order of the AO is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The ld. PCIT has tobe satisfied the twin conditions, namelythe order of the AO sought to be revised is erroneous; and it is prejudicial to the interests of the Revenue. If any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, Sec.263 cannot be invoked. It is noted that this provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous as also prejudicial to revenue's interest, that the provision will be attracted. The Bench noticed that an incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase '*prejudicial to the interest of the revenue' has* to be read in conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the ld. PCIT does not agree, it cannot be treated

as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. We draw strength from the order of the Honble Apex Court in the case of Malabar Industrial Co. Ltd. v/s CIT (2000) 243 ITR 83 (SC). We also refer to the case of CIT v/s Max India Ltd. (2007) 295 ITR 282 (SC) wherein it is held that ;

> *"The phrase "prejudicial to the interests of the Revenue" in S. 263 of the Income Tax Act, 1961, has to be read in conjunction with the expression "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 the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."*

It is noted that ratio of these cases fully apply on the facts of the present case in principle and therefore, invoking of sec.263 was not legally justified also for the detailed reasons mentioned issue wise as under:-

> As regards due Enquiry Made with full application of mind, it is noted that in the facts and circumstances of the case, it cannot be alleged that the AO did not verify the facts and particularly w.r.t the source of the additionally declared income, vis-a-vis non- applicability of S.115BBE of the Act thereon in as much as, the AO was fully conscious of the issue and therefore even a show cause notice was raised, specifically on the aspect of applicability of or otherwise of section 115BBE vide its show cause notice come draft assessment order dated 24.09.2021 bearing DIN: ITBA/AST/F/143(3) (SCN)/2021-22/1035876830(1), in the following words:

"2. In your ITR for the year 2019-20, you have offered such income as business income for taxation at normal rates, whereas the above-mentioned income needs to have following treatment as per Table A Below:

S.NO	***Particulars***	***Amt***	***To be treated***	***Taxability as***
1.	*Undisclosed debtors*	*45,50,000/-*	*Debtors being undisclosed income u/s 69*	*To be tax @ 60% u/s 115BBE*
2.	*Excess Cash Found*	*9,50,000/-*	*Unexplained Money u/s 69A*	*To be tax @ 60% u/s 115BBE*
3.	*Unaccounted Construction*	*21,00,000/-*	*Unexplained Expenditure u/s 69C*	*To be tax @ 60% u/s 115BBE*

In response thereto, assessee filed detailed submission on dated 27.09.21, running into 9 pages (PB 7-16) explaining the entire legal & factual position, touching each and every relevant aspect therein. It cannot be said nor it is so alleged that the AO did not raise this Show cause notice and the AO did not apply its mind on the issue in hand. The reply dated 27.09.2021 is reproduced hereunder in verbatim:

"A. Proposed taxing at higher rate u/s 115BBE:
Through the above captioned show cause notice and draft assessment order, the assessee has been asked as to why the tax be not computed as per the provisions of S. 115BBE of the Act, on the amount of additional income surrendered being Rs. 76,00,000/- in the course of survey conducted on, dated 16.01.2019. In this connection submissions of assessee are as under:

''1. Provisions of section 115BBE: *The provisions of section 115BBE(1) reads as under:*

"(1) Where the total income of an assessee, — 1. includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or 2. determined by the Assessing Officer includes any income referred to in section

68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a), the income-tax payable shall be the aggregate of— 1. the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and 2. the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).] (2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance [or set off of any loss] shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) [and clause (b)] of subsection (1).]"

***2.1** At the outset it is submitted that S.115BBE specifically refers to the income which are of the nature as referred in S. 68 ,69 ,69A of the Act being the income from other sources. Therefore, subjected income has essentially to be classified u/s 14 of the Act as income from other sources and that is possible only when the income is not capable of being classified under any other head being income from salary, house property, capital gain, business or profession.*

***2.2** A combined reading of S. 14 with S. 56 of the Act makes is evidently clear that for the assessment of an income it must have to be classified under four heads of income as enumerated u/s 14 and if it doesn't fall under any specific head of income as per item A to E of S. 14, such income has to be assessed under the residuary head of income i.e. item F of S. 14. Therefore, income added u/s 68 or 69 etc. has to be given a specific head in terms of S. 14.*

***2.3** The Hon'ble Supreme Court in case of Karanpura Development Co Ltd vs. CIT [1962] 44 ITR 362 (SC) held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under another head. Further, the Hon'ble Supreme Court in case of Nalinikant Ambalal Mody v CIT [1966] 61 ITR 428, has held that whether an income falls under one head or another is to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter. Of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.*

***3.** The scheme of sections 68, 69, 69A, 69B and 69C provides that in cases where the nature and source of investments or acquisition of money, bullion or expenditure incurred are not explained at all, or not satisfactorily explained, then, the value of such investments and money, or value of articles not recorded in the books of accounts or the unexplained expenditure may be deemed to be the income. In view of the above, it can be said that for triggering section 115BBE what is relevant is whether income remains disclosed or undisclosed or explained or unexplained. If the income is disclosed or explained as mandated by the law, then same would be taxable in the ordinary manner. On the other hand, if the income is undisclosed or*

unexplained then the provisions of section 115BBE may be triggered depending upon the facts involved in each of the cases. The moment a satisfactory explanation is provided about nature and source then the source would stand explained and therefore, the income would be computed under the appropriate head of income as per the provisions of the Act.

4. *On perusal of the Finance Minister's speech and Explanatory Memorandum (2), it is clear that the legislative intent behind introduction of section 115BBE was to curb the generation and use of unaccounted money and tax the same at the highest rate.*

5*. However, in this case the only regular source of income of the assessee in A.Y. 2019- 20 was the real estate business (and the connected ancillary activities/services thereto). The assesse was in receipt of the profit on the purchase and sale of properties and also commission/brokerage income and consultancy income relating to the real estate business. There is no other known or unknown source of income, neither stated by the assessee nor by the department.*

6.1 *In the present case, the facts & circumstances rather very clearly indicates and established that what was stated during survey on dated 16.01.2019, was nothing but the additional income of Rs. 76,00,000/- arising/ resulting from the regular business income only i.e. from real estate business and has to be classified u/s 14 r.w.s 28 as business income only and not income from other sources, for the following reasons:*

6.1.1 *It is submitted that whatever, was disclosed was nothing but additional income only and it cannot be termed as excess/undisclosed/unaccounted income for the simple reason that survey was carried out on 19.01.2019 i.e. before close of the relevant previous year ending on 31.03.2019 or in other words, during the currency of the previous year only. The assessee did not yet close the previous year's books of accounts therefore, unless a comparison is made between the completely prepared books of accounts with the stock, cash or debtors etc. as physically found during the course of survey, it can't be termed as excess-shortage /undisclosed/unaccounted money, quantity etc. Even the return of income was not filed. At the best it was only additional income stated during survey. Moreover, the assessee admittedly accounted for such income also in regularly maintained books of accounts and also in its ROI. Therefore, once a comparison is made between the income shown in the accounts and the additional income, there will be no difference. Consequently, it cannot be said that there was some excess - shortage/undisclosed/unaccounted income, etc.*

6.2 *Although* ***the certified copies of the statement recorded during the survey is not supplied to us despite repeated request*** *yet however, the*

assessee based on his recollection is able to submit that all the related question answers were towards the additional income if any arising from the real estate business or its ancillary activities etc. and the assessee also admitted additional income of the current year as a matter of abundant precaution as arising from the real estate business.

***6.3** Even the heads under which the additional income was admitted also, supported the contention that the entire additional income pertained to /arose from business activities only.*

***6.4** It is submitted that the profit arising from the real estate transaction of the purchase and sale, were advanced /given to various debtors. There apart, additional cash found also arose from same business activity. There apart, additional income of Rs. 21,00,000/- on account of construction activity, was in fact related to the construction of the apartment, villas, houses etc for the buyers during the relevant previous years. The said table shows the utilization/availability of the funds under different heads of the asset/expenditure etc and their nature also suggest that the additional income was related to/arose during the course of the real estate business only. The investment/ outgoing is clearly identifiable with the regular stock, cash, construction of real estate business activities only. There is no mention or whisper in these statements that such surrendered income was something beyond or in addition to the real estate business or that there was some other source of income giving rise to such additional income/ alleged undisclosed Income. In these circumstances, the only inescapable conclusion is that the surrendered income was nothing but a business income from the real estate business of the assessee. Therefore, to consider subjected income as income from other sources "merely to levy more tax, is an illegal and unjustified attempt to invoke 115BBE" which is not clearly applicable on the facts of the present case and contrary to Article 265 of the Constitution of India.*

***6.5** Further importantly, the assesse has admittedly shown such additional income in its regularly maintained books of accounts as evident from the fact that in its Income and Expenditure account as sum of Rs. 76 Lakh stands credited. Subsequently in the computation also the admitted additional income has been shown under the head income from business and profession.*

***7.** Judicial Guideline: The Hon'ble Rajasthan High Court, ITAT Jaipur and various other courts have held that where the additional income/ undisclosed income declared during the course of survey is relatable to some business activity then it cannot be considered to be income from other sources and consequently S. 115BBE cannot be invoked.*

***7.1** The Hon'ble Ahmedabad Tribunal in case of Chokshi Hiralal Maganlal vs DCIT (ITA No. 3281/Ahd/2009 AY 2004-05 dated 5 August 2011) held that for*

invoking deeming provisions under sections 69, 69A, 69B & 69C there should be clearly identifiable investment or asset or expenditure (i.e. in our understanding not connected with business so as to make convenient to invoke aforesaid sections). In case source of investment or asset or expenditure is clearly identifiable and has no independent existence of its own where a case arises to claim that it cannot be separated from business then first 'what is to be taxed is the undisclosed business receipt. Only on failure of such exercise, it would be regarded as taxable under section 69 on the premises that such excess investment or asset or expenditure is unexplained and unidentified, satisfying the mandate of the law.

***7.2** The Hon'ble Rajasthan High Court in case of CIT vs Bajargan Traders [ITA No. 258/2017 dated 12/09/2017] has held that when the assessee is dealing in sale of food grains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under the head income from other sources.*

***7.3** In case of Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014- 15 dated 25 May 2018), the Jodhpur Tribunal applying the proposition of law laid down by the Hon'ble Rajasthan High Court in the Bajargan Traders (supra), held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act and accordingly held that there is no justification for taxing such income U/s 115BBE of the Act. In view of the facts & circumstances, judicial guidelines and the statutory provisions, the additional income declared during survey of Rs. 76,00,000/- cannot be subjected to S. 115BBE of the Act".*

In the ROI itself, as stated in the SCN u/s 263, **the subjected additional income of Rs 76 Lakh was declared as income from business and profession**. With regard to the source of such additional income, the aforesaid detailed submission on its own clarified the source/ nexus with the real estate business which the assessee was carrying on at that point of time. Thus, AO made full enquiries and applied his mind which, he was supposed to do as contemplated by law. Based thereon, he took his own decision which cannot be interfered with.

3. In fact, the AO (so also the CIT) was not even entitled to change the head of income on his own. kindly refer the Hon'ble Supreme Court in case of **Karanpura Development Co Ltd vs. CIT [1962] 44 ITR 362 (SC)** held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under another head. Further, the Hon'ble Supreme Court in case of **Nalinikant Ambalal Mody v CIT [1966] 61 ITR 428**, has held that whether an income falls under one head or another is to be decided according to the common

notions of practical man because the Act does not provide any guidance in the matter. Of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.

4.1. No error when AO acted in accordance with binding decisions:
In addition, the legal position and the judicial guideline through the various decisions of Hon'ble Rajasthan High Court and ITAT Jaipur, is well settled. The AOacted in accordance with the judicial guideline and the ratio laid in the cases of:

1. CIT vs Bajargan Traders [ITA No. 258/2017 dated 12/09/2017] – **(DC 42-56)**
2. Chokshi Hiralal Maganlal vs DCIT (ITA No. 3281/Ahd/2009 AY 2004-05 dated 5 August 2011)
3. Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014- 15 dated 25 May 2018**)**

and applying the same on the facts of the case in hand, decided that the provisions of S.115BBE were not applicable and hence did not therefore apply high rate of tax.

4.2. The law is well settled that once the AO has acted as per the decision available at that point of time, his order cannot be found fault with u/s 263 (even where such decision might have been reversed by the apex court later on) this also held in the case of **CIT vs G.M. Mittal Stainless (2003) 130 taxman.com 679 (SC).**

Pertinently, the ld. PCIT herself termed the income of Rs. 76,00,000/- of additional income at Para 9 - Pg 18 and if so, there is no justification yet to consider the same as open to the applicability to S. 69 & 69A of the Act. It is, evident that the AO has taken a **plausible view** on the issue in hand and thus, has committed no error at all.

5. No substitution of opinion permissible:

The law is well settled that the ld. CIT acting u/s 263 cannot substitute his/ her own opinion for that of the AO. In this case the AO made pointed inquiries got the submission and applied his mind and in the light of the judicial guideline made available before him, he formed an opinion. Such an opinion cannot be substituted by the ld. CIT u/s 263 merely because it is getting more revenue to the department. kindly refer **CIT vs. Gabriel India Ltd. [1993] 71 Taxman 585 (Bombay)**

6. The issue in hand in the context of Section 263 is directly covered by the decisions in the following cases:

6.1. In **Surendra Kumar vs. PCIT (2023)** 222 TTJ_UO (Chd) it was held that:

"Principal CIT has confused himself between 'undisclosed income' and the words 'unexplained income'. Provisions of ss. 68 to 69D are attracted in respect of the undisclosed income but the condition for assessing such income under the said provisions is that the assessee has either failed to disclose the nature and source of such income or the AO is not satisfied with the explanation offered by him. The perusal of the relevant part of the audit report proposal of the AO and show-cause notice issued by the Principal CIT under s. 263 would show that all the aforesaid authorities have been swayed by the notion that the income surrendered by the assessee was undisclosed income of the assessee and therefore, the same has to be assessed under ss. 68 to 69D, as the case may be, and thereby would be charged to higher rate of tax under s. 115BBE. In the case in hand, the AO duly made enquiries from the assessee as to the nature and the source of the aforesaid surrendered income and also show caused the assessee as to why the same should not be charged at a higher rate of tax as per the provisions of s. 115BBE. After considering the submissions and explanations of the assessee the AO accepted the contention of the assessee that the surrendered income was out of the business income of the assessee. Principal CIT has not pointed out as to why the explanation offered by the assessee to the AO was not satisfactory and what more enquiries were required to be conducted in this case which the AO failed to conduct. The Principal CIT has simply based his opinion and order on the audit objections/report as pointed out even in the audit report that since the 1 / 7 same was undisclosed income of the assessee which was surrendered by the assessee during the survey action the same was to be assessed under the provisions of ss. 68 to 69D. The above reasoning of the survey party is not in accordance with the relevant provisions of the Act. Therefore, there is no justification on the part of the Principal CIT in invoking the revisionary jurisdiction. In view of the discussion made above, the revision order has been passed by the Principal CIT by wrongfully exercising the jurisdiction under s. 263 and the same is, therefore, held as bad in law and is accordingly, quashed. —Gandhi Ram vs. Principal CIT (ITA No. 121/Chd/2021, dt. 4th Aug., 2022) followed."

6.2. In **Smt. Rekha Shekhawat vs. PCIT (2022)219 TTJ (Jp) 761(DC 3-41)** it was held that:

"Revision—Erroneous and prejudicial order—Lack of proper enquiry vis-a-vis assessment of additional income as business income—During the course of survey under s. 133A assessee's husband admitted unrecorded income in the case of his wife i.e., assessee which was stated to be advances made for property in the course of her real estate business—Unrecorded trade advances and cash in hand were brought in the books of accounts and formed part of business assets and thereafter used in day-to-day business activities—Questions which were raised and the answers given during the survey show that the additional income declared on account of advances and the cash found emanated from and related to the real estate business only—Even the Principal CIT has admitted in the impugned order that this income pertains to recovery of cash amounts of advances

made by the assessee to the other persons for purchase of land/plots—Undisputedly the assessee is engaged in the real estate business and there is no undisclosed or unknown source of income and the source of additional income so admitted is clearly identifiable and is the regular business of real estate—Since the additional income is related to the real estate business it is certainly assessable as business income and cannot be considered as income falling under s. 68/69A—AO having applied his mind in accepting the said additional income as business income, there was no error in the assessment order—Thus, the Principal CIT was not justified in expecting the AO to apply s. 115BBE as also s. 271AAC by merely imposing and substituting his own opinion, which is not the legislative intent even behind Expln. 2(a) to s. 263—Further, merely because the assessee has taken a mistaken view of the correct legal position by wrongly showing such additional income under head income from other sources in her return, the same cannot be taken as an admission as there is no estoppel against statute—Therefore, Principal CIT was not justified in invoking the provisions of s. 263 by wrongly holding that the assessment order under s. 143(3) was passed without considering that the additional income fell under the purview of ss. 68 and 69 and that tax was chargeable under s. 115BBE as against normal rates—Hence, the proceedings initiated under s. 263 and the impugned order are quashed."

7. Dealing with the objection of the ld. PCIT: The ld. PCIT, in the impugned order [Para 6 page 14], has observed that the AO was wrong while assessing the additional income declared by the appellant during survey under the head "Business income", without verifying the sources of income and in particular, the business nexus of such unexplained admitted income. She further distinguished the judicial precedents cited before her being CIT vs Bajargan Traders [supra] and Lovish Singhal vs ITO (Supra) on the alleged ground that in those cases, the admitted income was in relation to excess stock whereas in the present case, the additional income was admitted on account of undisclosed debtors, excess cash found and unaccounted construction expenses which, in her opinion, had a direct nexus of chargeability u/s 69 & 69A of the Act and therefore section 115BBE was applicable. However, such an observation/finding by the Ld. PCIT got no legal basis, rather simply twisting of facts or over stretching or else, a case of misinterpretation. This issue was fully explained before the AO, during the course of the assessment proceeding itself in reply dated 27.09.2021 **(PB 5-72)** wherein, in Para 5 onward it has been elaborately submitted as to how these three items of additional incomes were part of business incomes and the AO has rightly considered them as part of business. The Ld. PCIT unfortunately completely ignored, what to talk of dealing with/ meeting with such contentions. Interestingly, she considers additional income from excess stock as business income whereas these 3 items being the debtors, cash and expenses which are, in the very name and nature, part of the business activities, and has been hold as not a case of business income. Even she did not record any categorical findings that these items of income could be assessed under the head of Income from other sources. Further, a decision of this Hon'ble ITAT in the case of **Rekha Shekhawat vs. PCIT**

(supra) which was also a case of real-estate developer/ builder, cited in Para 6.2 and reproduced at Pg. 13 of her order, was not at all adverted.

8. Clause (a) of Explanation 2 of Section 263 - Wrongly invoked: The ld. PCIT has dealt with this issue at Pg 15 of the impugned order :

8.1 At the outset, this was never made a ground in the Show Cause Notice issued u/s 263 (PB 73-75) and therefore, the ld. PCIT could not have adopted such reasoning in the impugned order for the first time, which was not confronted to the assessee earlier. Reliance is placed on **PCIT vs. Shreeji Prints (P.) Ltd. 2021 [130 taxmann.com 294 (SC)] (DC 47-52) wherein it is held** "*SLP dismissed against impugned order passed by High Court holding that where assessee-company had received unsecured loans from two different companies and Assessing Officer had made inquires in detail and accepted genuineness of same, such view of Assessing Officer being a plausible view could not be considered erroneous or prejudicial to interest of revenue*"

The Hon'ble Gujarat High Court in **Shreeji Prints (P.) Ltd. Vs PCIT** affirmed the ld. ITAT order, the relevant extract of which is as under:

"15 The Pr.CIT had observed that Explanation 2 of section 263 of the Act is clearly applicable and it is clear that the Assessing Officer has passed the assessment order after making enquiries for verification which ought to have been made in this case. However, we find that the Pr. CIT has not mentioned in the show-cause notice issued under section 263 that he is going to invoke the Explanation 2 to 263 hence, invocation of Explanation in the order without confronting the assessee is not appropriate and sustainable in law in support of this contention, the ld. Counsel has placed reliance on the following decision:

CIT v. Amir Corporation 81 CCH 0069 (Guj.), CIT Mehrotra Brothem -270 ITR 0157 (MP,CIT v. Ganpet Ram Bishnoi - 296 ITR 0292 (Raj.), Cadila healthcare Ltd. v. CI 7, Ahmedabadh-1 [ITA no. 1096/Ahd/2013 & 910/Ahd/2014], Sri Saí Contractors v. ITO [ITO no. 109Nizag/2002] and Pyare lal Jaiswal v. CIT, Vamnesi [(2014) 41 taxmann.com 27 & (All Trib.)].

It was contended by the Learned Counsel that clause -(a) & (b) of Explanation 2 of Section 263 are not applicable as the Assessing Officer has made enquiry and verification which should have been made. Further, in the show cause notice, the Explanation-2 of section 263 was not invoked by the PCIT and it was referred in the order u/s.263 of the Act. Therefore, in the light of decision of the Co-ordinate Bench of Mumbai ga in the case of Narayan Tatu Rane - 70 taxmann.com 227 (Mum. Trt.) [PB 153-1561 wherein held that explanation cannot laid to have over ridden the law as interpreted/the various High Courts where the High Courts have held that before reaching the conclusion that the order of the Assessing Officer is

erroneous prejudicial to the interest of Revenue. The CIT himself has to undertake some enquiry to establish that the assessment order is erroneous and prejudicial to the interest of Revenue. The ld. Counsel relied on the decision of ***M/s. Amira Pure Foods Pvt. Ltd., v. PCIT in ITA No.3205/Del/2017*** *and* ***Ahmedabad Tribunal in the case of Torrent Pharmaceuticals Ltd. v. DCIT*** *[2018] 97 taxmann.com 671 (Ahd. - Trib.)**. it is clear from the enquiries made by the Assessing Officer and submissions made by the assessee that the Assessing Officer has taken the plausible view which is valid in the eyes of law. The Assessing Officer was satisfied consequent to making enquiry and after examining the evidences produced by the assessee, he accepted the assessee's claim of loan similar vi ew were also expressed by the Hon'ble Delhi High Court in the case of* ***CIT v. Vodafone Essar South Ltd. [2013] 212 taxman 0184****. We observe the Pr.CIT has drawn support from newly inserted Explanation 2 below section 263(1) of the Act introduced by Finance Act, 2015 w.e.f. 1-6-2015 for his action. The Explanation 2 inter alia provides that the order passed without making inquiries or verification 'which should have been made' will be deemed to be erroneous insofar as it is prejudicial to the interest of the Revenue. It is on this basis, the assessment order passed by the AO under section 143(3) of the Act has been set aside with a direction to the AO to pass a fresh assessment order. It will be therefore imperative to dwell upon the impact of Explanation 2 for the purposes of section 263 of the Act.*

X X X X.

"17 We thus find merit in the plea of the assessee that the Revisional Commissioner is expected show that the view taken by the AO is wholly unsustainable in law before embarking upon exercise of revisionary powers. ***The revisional powers cannot be exercised for directing a fuller inquiry to merely find out if the earlier view taken is erroneous particularly when a view was already taken after inquiry.*** *If such course of action as interpreted by the Revisional Commissioner in the light of the Explanation 2 is permitted,* ***Revisional Commissioner can possibly find fault with each and every assessment order*** *without himself making any inquiry or verification and without establishing that assessment order is not sustainable in law. This would inevitably mean that every order of the lower authority would thus become susceptible to section 263 of the Act and, in turn, will cause serious unintended hardship to the tax payer concerned for no fault on his part. Apparently, this is not intended by the Explanation. Howsoever wide the scope of Explanation 2(a) may be, its limits are implicit in it. It is only in a very gross case of inadequacy in inquiry or where inquiry is per se mandated on the basis of record available before the AO and such inquiry was not conducted, the revisional power so conferred can be exercised to invalidate the action of AO. The AO in the present case has not accepted the submissions of the assessee on various issues summarily but has shown appetite for inquiry and verifications.* ***The AO has passed after making due enquiries issues involved impliedly after due application of mind. Therefore, the Explanation 2 to section 263 of the Act do not, in our view, thwart the assessment process in***

the facts and the context of the case. *Consequently, we find that the foundation for exercise of revisional jurisdiction is sorely missing in the present case.*

18. In the light of above facts and legal position, we are of the considered view that the AO had made detailed enquiries and after applying his mind and accepted the genuineness of loans received from GTPL and PAFPL, which is also plausible view. Therefore, we find that twin conditions were not satisfied for invoking the jurisdiction under section 263 of the Act. The case laws relied by the ld. CIT(D.R.) are distinguishable on facts and in law hence, by the ld. Counsel as well and we concur the same hence not applicable to present facts of the case. Therefore, in absence of the same, the ld. CIT ought to have not exercised his jurisdiction under section 263 of the Act. Therefore, we cancel the impugned order under section 263 of the Act, allowing all grounds of appeal of the Assessee."

8.2 In Mahaveer Prasad Jain vs. PCIT [2023] 153 taxmann.com 207 (Jaipur - Trib.) (DC 53-66) this Hon'ble bench has held as under:

"9. We have heard the rival contentions and perused the material placed on record and also gone through the judicial decision relied upon. Both the parties have not disputed the fact mentioned in the assessment proceeding about the act of the assessee in depositing a sum of Rs. 51.60 lac in the bank account during the period of demonetization. Out of the cash so deposited a sum of Rs. 16.80 lac was consisting of high value notes of Rs. 500 and Rs. 1000. The ld. PCIT in his order contended that the ld. AO has not properly addressed the issue while completing the assessment. Even the ld. DR did not place anything further to support the any specific error on the part of the assessee. We have perused the assessment order and the relevant submission on the issue that the assessee has given details in the assessment proceeding at four instance so as to support PITHISARIA the fact that inquiry in relation to the generation of the cash by the assessee is verified by the ld. AO. It is also not disputed by the PCIT or ld. Sr. DR for the balance amount deposited in the demonetized period which is that out of 51.60 lacs but disputed only for an amount Rs. 16.80 lac being the demonetized currency. There is no evidence or material that has been observed by the PCIT from the details so placed on record by the assessee in the assessment proceeding to disbelieve the averments about the source of the said demonetized currency. Merely the PCIT said that in his opinion the ld. AO has not properly addressed the issue. The observation so made is very general and routine without pinpointing any specific defect the action of the PCIT u/s. 263 is nothing but a review of the order of the ld. AO. It has been held in so many cases by the various High Courts and Tribunal that the amendment made in section 263 does not confer blind and uncontrolled power to the PCIT, despite there being an amendment, enlarging the scope of the revisionary power of the ld. PCIT. The newly inserted explanation 2(a) to section 263 does not authorize or give unfettered powers to Commissioner to revise each and every order, if in his opinion same has been passed without making enquiry or verification. Here in this case the ld. AO has made enquiry at four instance and recorded his satisfaction after examined the books of account, bank statement and purchase and sales records of the assessee. Here in this case even there is no specific observation of the PCIT pinpointing any specific defect in the records that has been placed on record instead he has simply stated that AO has not addressed the

issue this observation is very much in general and without specifying any faults in the assessment records, details submitted and verified by the ld. AO. In fact on perusal of the assessment order we have noted the following observation of the ld. AO."

It is noted that even the amendment [i.e.Expl. 2(a)] does not confer blind powers and it is held that despite there being an amendment, enlarging the scope of the revisionary power of the ld. PCIT u/s 263 to some extent, it cannot justify the invoking of the Expl. 2(a) in the facts of the present case. Before referring to that Explanation, one has to understand what the true meaning of the Explanation in the context of application of mind by a quasi-judicial authority was. It is further noted that in the above case and in **Narayan Tatu Rane Vs. ITO** (2013) 7 NYPTTJ 1493 (Mum.),it was held that newly inserted **Explanation 2(a) to Sec. 263 does not authorize or give unfettered powers to Commissioner** to revise each and every order, if in his (subjective) opinion, same has been passed without making enquiries or verification which should have been made. Thus, in the totality of facts and circumstances, it is not at all a case where the subjected assessment order dt. 29.09.2021 should be alleged to be erroneous in so far as prejudicial to the interests of the revenue. There is neither error of law nor of facts. There is no erroneous assumption by the AO of either the facts or of law, as alleged by the ld. PCIT.

8. Hence in view of these legal and factual submissions, and the binding judicial precedents, the impugned order passed u/s 263 deserves to be quashed.

Order pronounced in the open court on 13 /12/2024.

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोडकमलेशजयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 13 /12/2024
*Mishra

आदेश की प्रतिलिपिअग्रेशित / Copy of the order forwarded to:

1. The Appellant- Shri AlokVijawat , Jaipur
2. प्रत्यर्थी / The Respondent- The PCIT,Udaipur .
3. आयकरआयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No. 605/JP/2024)

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar