IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
(DELHI BENCH 'B' NEW DELHI)
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER
ITA No. 4214/Del/2019 (A.Y. 2014-15)

SKN PropmartPvt. Ltd. 4, 1st Floor, Paras Down Centre Gurugram Tower, DLF-V Gurugram, Haryana **PAN: AAJCS6930K**	Vs.	Principal Commissioner of Income Tax Gurugram, Haryana
Appellant		**Respondent**

Assessee by	Shri Ashwani Kumar, CA and Sh. Ankur Aggarwal, CA
Revenue by	Sh. Surender Pal, CIT, DR

Date of Hearing	08/01/2025
Date of Pronouncement	19/02/2025

ORDER

PER YOGESH KUMAR, U.S. JM:

This appeal is filed by the Assessee against the order of the Principal Commissioner of Income Tax, ('PCIT' for short)-Gurgaon, dated 07/03/2019 for the Assessment Year 2014-15.

2. The Grounds of Appeal are as under:-

"That on the facts and circumstances of the case and in law, the order passed by the Ld. PCIT under section 263 of the Act is bad in law and liable to be set aside.

2. That on the facts and circumstances of the case and in law, the Ld. PCIT has erred in assuming the revisionary jurisdiction

under section 263 of the Act, without appreciating that the twin conditions, ie, assessment order should be erroneous in so far at it is prejudicial to the interest of the Revenue, are not satisfied in Appellant's case.

3. That on the facts and circumstances of the case and in law, the order passed by the Ld. PCIT under section 263 of the Act, is bad in law and void ab initio as the Ld. PCIT merely set aside the assessment order passed with directions that the fresh assessment order be passed after makingthe detailed enquiry, which clearly shows that there was non-application of mind by the Ld. PCIT. That on the facts and circumstances of the case and in law, the order passed by the Ld. PCIT.

4. Under section 263 of the Act is bad in law as its based upon merely change of opinion, especially, when the assessing officer in the assessment order passed under section 143(3) of the Act had duly verified the genuineness of the transaction relating to sale of shares.

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant."

3. The brief facts of the case are that, Assessee filed its return of income declaring income of Rs.2,06,64,574/-. The case was selected for limited scrutiny through CASS. Assessment was completed u/s 143(3) of the Income Tax Act, 1961 ('Act' for short) vide order dated 07/12/2016 by making disallowance of Rs. 5,37,860/- being 1/8th expenses incurred for personal use, further disallowed Rs. 2,86,365/- towards outstanding service tax payable u/s 43B of the Act. The revisionary jurisdiction u/s 263 of the Act

was invoked by the PCIT,Gurgaon and an order dated 07/03/2019 u/s 263 of the Act came to be passed by setting aside the assessment order dated 07/12/2016 directing the AO to pass fresh Assessment order. Aggrieved by the order dated 07/03/2019 passed u/s 263 of the Act by the PCIT, Gurgaon the Assessee preferred the present appeal on the ground mentioned above.

4. The Ld. Counsel for the Assessee submitted that during the course of the assessment proceedings, the A.O. issued a specific query at Point No. 12 of the notice dated 13/06/2016 calling for the details and evidences on*'Short Term or Long Term Gain earned during the year'*for which the Assessee has provided all the relevant documents. The Ld. A.O. after examining the documents and considering the explanation, made no addition. Therefore, invocation of the provision of Section 263 of the Act by the PCIT is erroneous. The Ld. Assessee's Representative further submitted that the Ld. PCIT invoked the provision of Section 263 of the Act without fulfilling the twin conditions i.e. the assessment order should be erroneous and should be prejudicial to the interest of the Revenue. The Ld. Assessee's Representative also submitted that

there is no mentioning of invoking of Explanation 2 to Section 263 of the Act in the notice issued by the Ld. PCIT. The original assessment order has been passed after due examination of issue which necessary entails making enquiries and requisite verification where by pivot for invocation of Section 263 of the Act becomes non existence leading to the assumption of jurisdiction u/s 263 of the Act rendering the subsequent process null and void. The Ld. Assessee's Representative relied on the plethora of Judgments and sought for allowing the Appeal.

5. Per contra, the Ld. Departmental Representative submitted that the assessment order has been passed without making proper enquiries and verification, therefore the Ld. PCIT rightly invoked the Explanation 2 of Section 263 of the Act.The Ld. Departmental Representative relying on the Judgment of Jurisdictional High Court in the case of PCIT Vs. Paramount Propbuild (P.) Ltd. reported in [2024] 161 traxmann.com 85 (Delhi) and also relying on the order of the PCIT, sought for dismissal of the Appeal.

6. We have heard both the parties and perused the material available on record. During the original assessment proceedings, a notice dated 13/06/2016 issued u/s 142(1) of the Act by the A.O. The A.O. vide Point No. 12, asked the details and evidence of 'Short and Long Term Capital Gains earned during the year' which reads as under:-

> *"Please state, if the Company has showed any Short Term or Long Term Capital Gain during the year under consideration, with proper details and evidences."*

7. The said query has been replied by the Assessee vide letter dated 23/06/2016, wherein the Assessee has produced the details which reads as under:-

> *"Dear Sir,*
>
> *This is in reference to the above mentioned notice, you may please find enclosed herewith following documents for your references:*
>
> *1. The Detail of Share Trading Statement of the Broker.*
> *2. The Copy of Demat Statement with reconciliation.*
> *3. The Copy of Sale/Purchase Bills of Share Trading.*
> *4. The Copy of Financial Ledger of the Brokers."*

The Assessee produced the details of share trading statement of broker, Demat statement with re-conciliation, sale/purchase bills of

share trading and financial ledger of the broker and after going through those documents the A.O. made no addition. Apart from the same, as could be seen from the assessment order, the A.O. has also called for the books of account and examined on test check basis which makes it clear that the A.O. has fully examined the genuineness of the parties and saleof the shares in question, accordingly passed the order u/s 143(3) of the Act. The A.O. has also examined the transaction with a view to sale and purchase and consequent allowability of loss, thus the said transaction has been undergone scrutiny and examination by the A.O. before finalizing the Assessment. Therefore, in our opinion, the assessment order cannot be termed as erroneous or prejudicial to the interest of the Revenue.

8. The Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Kwality Steel Suppliers (2017) 395 ITR 001, wherein the Hon'ble Court held as under:

> *"At the same time, this Court has also laid down that this provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. While interpreting the expression 'prejudicial to the interests of the Revenue', it is also held that order of the Assessing Officer cannot be termed as prejudicial simply because Assessing Officer adopted*

one of the 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 did not agree,It is clear from the above that where two view are possible and the Assessing Officer has taken one view and the CIT again revised the said order on the ground that he does not agree with the view taken by the Assessing Officer, in such circumstances the assessment order cannot be treated as an order erroneous or prejudicial to the Interest of the Revenue. Reason is simple. While exercising the revisionary jurisdiction, the CIT is not sitting in appeal. This has been so eloquently explained in the case of 'Malabar Industrial Co. Ltd. v. Commissioner of Income Tax' [(2000) 243 ITR 83]."

9. The Hon'ble Jurisdictional High Court in ITA No. 1428/2018 in the case of Pr. Commissioner of Income Tax Vs. M/s Clicks India Finance Pvt. Ltd vide Judgment dated 01/03/2024, while considering the revisional jurisdictional of the PCIT u/s 263 of the Act held as under:-

19. A bare reading of sub-Section (1) of Section 263 of the Act makes it abundantly clear that the said provision lays down a twopronged test to exercise the revisional authority i.e., firstly, assessment order must be erroneous and secondly, it must be prejudicial to the interests of the Revenue. Further, Explanation 2 to Section 263 of the Act delineates certain conditions and circumstances when the order passed by the AO can be said to be erroneous and prejudicial to the Revenue.

20. Clause (a) of Explanation 2 to Section 263 of the Act further stipulates that if an order is passed without making an enquiry or verification which should have been made, the same would bestow a revisional power upon the Commissioner. However, the said Clause or any other condition laid down in Explanation 2 does not warrant recording of the said enquiry or verification in its entirety in the assessment order.

21. Admittedly, in the instant case, the questionnaire dated 02.11.2004, which has been annexed and brought on record in the present appeal, would manifest that the AO had asked for the

allowability of the claims with respect to the issues in question. Consequently, the respondent-assessee duly furnished explanations thereof vide replies dated 09.12.2004, 20.12.2004 and 06.01.2005. Thus, it is not a case where no enquiry whatsoever has been conducted by the AO with respect to the claims under consideration. However, this leads us to an ancillary question– whether the mandate of law for invoking the powers under Section 263 of the Act includes the cases where either an adequate enquiry has not been made and the same has not been recorded in the order of assessment or the said authority is circumscribed to only consider the cases where no enquiry has been conducted at all.

22. Reliance can be placed on the decision of this Court in the case of CIT v. Sunbeam Auto Ltd. [2009 SCC OnLine Del 4237], wherein, it was held that if the AO has not provided detailed reasons with respect to each and every item of deduction etc. in the assessment order, that by itself would not reflect a non-application of mind by the AO. It was further held that merely inadequacy of enquiry would not confer the power of revision under Section 263 of the Act on the Commissioner. The relevant paragraph of the said decision reads as under:-

> *"17. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he*

*has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. (1993) 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113) ***"*

23. A similar view was taken by this Court in the case of CIT v. Anil Kumar Sharma [2010 SCC OnLine Del 838], wherein, it was held that once it is inferred from the record of assessment that AO has applied its mind, the proceedings under Section 263 of the Act would fall in the category of Commissioner having a different opinion. Paragraph 8 of the said decision reads as under:-

"8. In view of the above discussion, it is apparent that the Tribunal arrived at a conclusive finding that, though the assessment order does not patently indicate that the issue in question had been considered by the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernible from the record, the proceedings under section 263 would fall into the area of the Commissioner having a different opinion. We are of the view that the findings of facts arrived at by the Tribunal do not warrant interference of this court. That being the position, the present case would not be one of "lack of inquiry" and, even if the inquiry was termed inadequate, following the decision in Sunbeam Auto Ltd. (2011) 332 ITR 167 (Delhi) (page 180) : "that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter." No substantial question of law arises for our consideration."

24. In Ashish Rajpal as well, this Court was of the view that the fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee. 25. Further, the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd., enunciates the meaning and intent of the phrase "prejudicial to the interests of the Revenue", in the following words:-

"8. The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in DawjeeDadabhoy& Co. v. S.P. Jain [(1957) 31 ITR 872 (Cal)], the High Court of Karnataka in CIT v. T. NarayanaPai [(1975)

98 ITR 422 (Kant)], the High Court of Bombay in CIT v. Gabriel India Ltd. [(1993) 203 ITR 108(Bom)] and the High Court of Gujarat in CIT v. Minalben S. Parikh [(1995) 215 ITR 81 (Guj)] treated loss of tax as prejudicial to the interests of the Revenue.

9. Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Co. v. CIT [(1987) 163 ITR 129 (Mad)] interpreting "prejudicial to the interests of the Revenue". The High Court held:

"In this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration."

In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. 10.

The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. (See Rampyari Devi Saraogi v. CIT [(1968) 67 ITR 84 (SC)] and in Tara Devi Aggarwal v. CIT [(1973) 3 SCC 482 : 1973 SCC (Tax) 318 : (1973) 88 ITR 323].)"

[Emphasis supplied]

26. Recently, the Hon'ble Supreme Court in the case of CIT v. Paville Projects (P) Ltd. [2023 SCC OnLine SC 371], while relying upon Malabar Industrial Co. Ltd., has discussed the sanctity of twofold conditions for the purpose of invoking jurisdiction under Section 263 of the Act. The relevant paragraph of the said decision reads as under:-

> *"27. Learned counsel appearing on behalf of the assessee has heavily relied upon the decision of this Court in the case of Malabar Industrial Co. Ltd. (supra). It is true that in the said decision and on interpretation of Section 263 of the Income Tax Act, it is observed and held that in order to exercise the jurisdiction under Section 263(1) of the Income tax Act, the Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. It is further observed that if one of them is absent, recourse cannot be had to Section 263(1) of the Act. ***"*

27. Considering the aforesaid judicial pronouncements, it can be safely concluded that inadequacy of enquiry by the AO with respect to certain claims would not in itself be a reason to invoke the powers enshrined in Section 263 of the Act. The Revenue in the instant case has not been able to make out a sufficient case that the CIT has exercised the power in accordance with law. Rather, in our considered opinion, the facts of the case do not indicate that the twin conditions contained in Section 263 of the Act are fulfilled in its letter and spirit. 28. Notably, the ITAT, while making a categorical finding that the CIT had failed to point out any definite or specific error in the assessment order, has satisfactorily explained both the claims in question in Paragraph 8.2 of its order, which reads as under:-

> *"8.2 In the Impugned Order, the Ld. Commissioner of Income Tax-IV, Delhi held that the AO had not examined the aforesaid two issues properly and, therefore, set aside the issues for further inquiries to be conducted by the AO. As regards the first issue is concerned, we note that out of total provision of Rs. 1114.68 lacs, a sum of Rs. 7,60,76,105/- was suomoto added back in the computation of income and a further sum of Rs. 73,46,160- was disallowed by the AO in the original assessment order dated 30.3.2005. Therefore, out of Rs. 1114.68 lacs, Rs. 834.22 lacs already stood disallowed in the original assessment order. The balance amount represented*

actual write off which was palpably clear from page 2 of the impugned order itself. No deduction on account of any such provision was, therefore, allowed to the assessee. Hence, there is no error or prejudice to the interest of revenue. As regards second issue it was noted that interest rate swap was an actual loss and only the net loss of Rs. 114.05 lacs after setting of gain of interest rate swap was claimed as deduction. However, we find that both these issues were duly examined by the AO vide Questionnaire dated 2.11.2004 (Page 1-2 of the Paper Book) to which replies dated 9.12.2004, 20.12.2004 and 6.1.2005 (Page No. 3-39 of Paper Book-1) were furnished and, therefore, the finding of the Ld. CIT that the issues were not examined properly was not correct. Even the Ld. CIT has not pointed out the definite and specific error in the original assessment order and observed that the inquiry made by the AO was inadequate or improper without first pointing out the error in the original assessment order passed by the AO, particularly because both the aforesaid issues were duly examined at the stage of the original assessment proceedings, hence, the impugned order is beyond jurisdiction, bad in law and voidab-initio."

29. It is discernible from the aforenoted findings of the ITAT that both the claims were duly examined during the original assessment proceedings itself and neither there was any error nor the same was prejudicial to the interests of the Revenue. Thus, the findings of fact arrived at by the ITAT do not warrant any interference of this Court.

30. So far as the reliance placed by the CIT on Umashankar Rice Mill is concerned, the same is misplaced, particularly in light of the insertion of Explanation 2 to Section 263 of the Act, brought in place by the Finance Act, 2015. The said amendment markedly specifies various conditions to exercise the authority vested in the Commissioner under Section 263 of the Act, leaving no ambiguity in the interpretation of the said provision.

31. In view of the aforesaid, the Appeal preferred by the Revenue is dismissed along with the pending application(s), if any."

10. It is the contention of the Ld. Department's Representative that the Ld. PCIT has invoked Explanation 2 to Section 263 of the Act, therefore, the Judgment of Jurisdictional High court in the

case of Paramount Propbuild Pvt. Ltd. (supra) is applicable. We find no force in the said argument as Ld. PCIT has not invoked the Explanation 2 of Section 263 either while issuing notice or while passing the order impugned. The Ld. Department's Representative cannot improve the case of the PCIT before us. Therefore, the Judgment relied by the Ld. Department's Representative in the case Paramount Propbuild is not applicable to the case in hand.

11. In the present case, the A.O. raised specific query on the issue of 'Short Term and Long Term Capital Gains earned during the year' and the Assessee has produced the cogent documents and after verifying the documents, the A.O. came to a conclusion that no addition requires to be made and while doing so, the A.O. has also called for books of accounts and examined on test check basis to examine the genuineness of the transaction. By following the ratio laid down by the Jurisdictional High Court and the Hon'ble Supreme Court (supra), we are of the opinion that the Ld. PCIT committed error in invoking the provision of Section 263 of the Act, accordingly, findings merits in the Grounds of appeal of

theAssessee, we hereby quash the order impugned dated07/03/2019 passed by the Ld. PCIT.

12. In the result, Appeal filed by the Assessee is allowed.

Order pronounced in the open court on 19th February, 2025

Sd/-	**Sd/-**
(M. BALAGANESH)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 19.02.2025
R.N, Sr.P.S*

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI