In the Income-Tax Appellate Tribunal,

Agra Bench, Agra

Before : Shri Laliet Kumar, Judicial Member And
Dr. Mitha Lal Meena, Accountant Member

ITA No. 358/Agr/2019

Assessment year: 2014-15

M/s. Hardik Resort Pvt. Ltd. Rajaram Colony, Pholbagh Orcha, Chattarpur (M.P.) PAN: AACCH6124P **(Appellant)**	vs.	PCIT City Centre Gwalior (M.P.) **(Respondent)**

Appellant by	Sh. Mridul Pathak, C.A.
Respondent by	Sh. Sunil Bajpai, CIT DR

Date of Hearing	28.05.2021
Date of Pronouncement	14.06.2021

ORDER

Per Laliet Kumar, J.M.:

1. **The present appeal was filled by the appellant feeling aggrieved by the order passed by Principle CIT for the assessment year 2014-15 on the following Grounds:-**

i. That the order passed under section 263 by the principle CIT is illegal and arbitrary.

ii. That the order passed u/s 263 on the issues not subjected to limited scrutiny assessment is ab initio void, and against the principle of natural justice

iii. That in absence of any finding of the Pr. CIT to the effect that order passed by AO on specific issues after due inquiries was erroneous or prejudicial to the interest of revenue; The order passed u/s 263 is illegal

iv. That the cancellation of assessment order which was passed by the AO after due inquiries on the limited issue assigned to him under limited scrutiny assessment scheme of CBDT, the order passed u/s 263 is illegal beyond jurisdiction, and against the principle of natural justice

v. That no material has been brought on record by the Pr. CIT to support
that order passed was erroneous or prejudicial on the issues covered by limited scrutiny assessment

Brief facts

The assessee filed return of income at Rs. Nil and the assessment u/s 143(3) of the I.T. Act, 1961 was completed on 27.12.2016 at the total income of Rs. 50,43,054/-. The case of the assessee was selected for limited scrutiny . The AO in para 1 and 2 of his order mentioned as under :

" 1. This case of the assessee M/s Hardik Resort Pvt. Ltd. Raja Ram Colony, Behind Phool Bagh, Orchha, Dist. - Tikamgarh was selected for scrutiny for the A.Y. 2014-15 through CASS (computer aided scrutiny selection) system during the F.Y. 2015-16 under "Limited Scrutiny". In pursuance of the selection for scrutiny, a notice u/s 143(2) was issued on 18.09.2015, which was duly served upon the assessee, through speed past. The assessee has filed his IT return for the A.Y. 2014-15 through E-filing on 26/02/2015 declaring total income at Rs. 0/-. The assessee is a hotel with the name M/s hardik Resorts and during the concerned assessment year, it was under construction.

2 The case of the assessee was selected for 'limited scrutiny' for the reason that "**(1) Large Share Application money received against unalloted shares and (2) Large increase in sundry creditors with respect to turnover as compared to preceding year"**. Accordingly, notice u/s 142(1) along with Questionnaire was issued on 18/04/2016 and subsequently on 26/05/2016, 18/10/2016 and 14/12/2016.As the case was selected under Limited scrutiny following the CASS guidelines for the reason of large share application money received by the assessee during the under consideration and increase in sundry creditors. AO raised variousqueries vide letter dated 18.10.2016 including the following queries

(1) In response to query no. 8 of query letter dated 18/04/2016, you have not furnished copy of valuation report and completion certificate of the hotel building, which is shown as fixed assets at Rs. 2,59,84,300/-. Please furnish the same along with supporting bills and vouchers.

(2) *In response to query no. 5 of query letter dated you have not furnished the complete postal address of the persons, who have given share application money to you.¯Further, you have also not furnished required (a) confirmations, (b) copy of bank statement through which share application money was given (c) copy of IT return (d) copy of personal capital account. Under such scenario, share application money of Rs. '59,55,000/- remains unverified and may be liable to be added as unexplained cash credit u/s 68 of the IT Act 1961, in you books for the A.Y. 2014-15. Hence, please furnish the full detail of share application 'along with supporting documents as desired above."*

3 The assessee filed detailed explanations duly substantiated with documentary evidences and the Ld. A.O completed the assessment after perusing and considering the replies submitted by the assessee and documentary evidence placed on record. In respect to the above two queries it was submitted by the assessee as under :

1. Regarding Completion certificate of hotel building : -

Regarding valuation and completion certificate of hotel building, it is kindly submitted that the hotel building ; under completion.

2. Regarding Share Application Money of Rs. 5955000/- :-

Regarding share application money of Rs. 5955000/- pending for allotment, it is kindly submitted that no fresh application money has been accepted during the year under consideration except from Smt. Anuradha Singh amounting to Rs.1600000/-. Further, it is_ kindly submitted /hat authorised capital has been increased from

Rs. 5000000/- to Rs. 7500000/- and the above share application money has been allotted to the respective persons during F.Y. 2014-2015. The present paid capital of the company is Rs. 6055000/-.

4 The AO had completed the assessment by making the additions of Rs50,43,054/ to the income of the assessee. It would be appropriate to reproduce the paragraphs 3-6 of assessment order to show the manner in which the assessment proceedings were completed:

"Para 3- A.O. - *In pursuance of the above notices Shri Sumitjain CA, appeared for hearing from time to time and he filed written submission to the queries along with necessary evidence, copy of bank statements, copy of audit report , copy of IT return for he A.Y. 2014 -15 , details of share application money , details of sundry creditors has been verified / examined on test check basis .*

Para 4- A.O. - *In the case of the assesse, no business was carried out during A.Y 2014-15. However, construction of hotel building of M/s Hardik Resorts Pvt Ltd. was carried out resulted into heavy investment in the fixed asset to the tune of Rs. 2,59,84,300/-. The source of investment found to be large pending unalloted share application money of Rs. 59,55,000/- and sundry creditor of Rs .1,73,93,054/-, which are the main reason for the scrutiny, which are discussed hereunder:-*

Large share application money received against unalloted share -

Para 5 –A.O. - *The counsel of the assesse in its reply dated 21/07/2016 furnished the detail of share application money along with their name and PAN numbers of the person .Tthe counsel of the assesse further submitted that authorized capital has been increased from Rs.50,00,000 /- to Rs.75,00,000/- and above share application money has been allotted to the respective persons*

during F.Y. 2014-15 .The present paid up capital of the company is Rs. 60,55,000/- All the persons , in whose name share application money is being shown , are filling IT return and assessed to their respective word / circle. There is fresh addition in the share application money of Rs. 16,00,000/- from Smt. Anuradha Singh and remaining share application money of Rs. 43,55,000/- pertains to F.Y.2012-13. In support of its claim , the counsel of the assesse also produced copy of account of Smt. Anuradha Singh , duly confirmed by her, along with her computation of income , copy of IT return . the fact has been verified with copy of bank account of the assesse maintained in Punjab national bank ,Jokhanbagh Jhansi , with a/c no. 367100IB00000363 and it is found that share application money was given thorough cheque. Another bank statement of the assesse maintained in the same bank with a/c no.36100210008200 is also verified for both F.Y. 2012-13 and 2013-14 and it is found that almost all the credit entries through cheque or cash is equivalent to the share application money. Moreover, considering the fact that the assesse has enhanced its authorized share capital in the F.Y. 2014-15 and all the pending share application money have been allocated during F.Y. 2014-15, the issue of pending share application money of Rs.59,55,000/- is found to be verified and accordingly contention of the assesse is accepted .

Large increase in sundry creditors with respect to turnover as compared to preceding year

Para 6 –A.O. - *In the case of assesse , huge sundry creditors at total Rs. 1,72,93,054/- is found, despite of the fact that M/s Hardik Resort has not carried out any business , during financial year 2013-14. The counsel of the assesse in this reply dated 21/07/2016 submitted that the assesse has established a hotel at OrachhaDist.:-Tikamgarh (M.P.) and construction of the hotel building was in full swing during the year consideration. The company had also availed term loan of Rs. 1,70,00,000/- from Punjab national bank ,Jokhanbagh , Jhansi for the construction of the hotel building and to purchase other assets . during the year ,associate group company M/s GhanaramInfraengineering P Ltd. Had repaid its term loan and an amount of Rs. 1,34,50,000/- was payable to M/s GhanaramInfraengineering P Ltd at the end of the year , which is included in the sundry creditors . The assesse has also submitted copy of account of M/s GhanaramInfraengineering*

P Ltd confirmation of accounts, copy of ITR in support of his claim, which were verified on test check basic. Moreover , the fact has also been verified from copy of bank statement of the assesse hence, creditors of Rs. 1,34,50,000/- in the of M/s GhanaramInfraengineering found to be verified . Which is in fact loan/ deposit which was entered by the assesse company in the books in column of sundry creditors .hence ,considering the above sundry creditors of Rs. 1,34,50,000 /- founds to be verified with regards to remaining creditors of Rs. 38,43,054/- (1,72,93,054 -1,34,50,000) the assesse has neither replied in this reply dated 21/07/2016 nor in the reply dated 28/11/2016 therefor a case notice issued 14/12/2016 for giving justification of remaining sundry creditors of Rs. 38,43,054/- fixing dated of hearing on 20/12/2016 the show cause notice got duly served upon assesse through DAK and through mail id, however the counsel of the assesse Shri Sumit Jain CA attended on the 20/12/2016 and requested for adjournment for furnishing reply to show case notice therefor next date of hearing is fixed 26/12/2016 but, the counsel of the assesse neither attended nor field any reply date fixed in the hearing hence considering the above concluded that the assesse has nothing to say in this regard therefore considering the above the unexplained sundry creditors of Rs . 38,43,054/- added to total income of assesse as unexplained cash credit u/s 68 IT ACT 1961 for the A.Y. 2014-15."

5 The PCIT in the impugned order mentioned that

"On going through the balance sheet, it is seen that almost whole of the amount raised through un-allotted share application money and trade payables/sundry creditors, have been invested in fixed assets of total Rs. 2,59,84,300/- including cost of land. To arrive at the actual investment in the construction out of the money raised through sundry creditors an enquiry was conducted by the official of the office of the ITO-Tikamgarh for an estimation on investment in hotel ding. In enquiry report, it has been mentioned that the estimated cost of

construction in hotel building should be a total Rs. 2,85,60,000/

………………………

Ongoing through the assessment order and reasons for which case was selected for limited scrutiny, it 'is clear that the issues for examination were sundry creditors and share application money. It was during the course of assessment proceedings and examination of sundry creditors, it was found that the amounts were linked with unsecured loans and also other investments including the investment in fixed assets.

After considering the facts on record and circumstances of the case,
it was observed that the Assessing Officer had not properly inquired into the investment made out of the amounts shown as share application money against un-allotted shares and increase in sundry creditors. In view of the above mentioned facts, notice u/s 263 of the Income Tax Act was issued to the assessee on 27.02.2019 & 13.03.2019 fixing the date of hearing on 05.03.2019 & 18.03.2019 respectively. The assessee has furnished a letter dated 19.03.2019 where it has been mentioned that the issues raised vide notice u/s 263 were not the issues covered by the limited scrutiny proceedings. However, the assessee has not discussed any details regarding the query raised by notice u/s 263 of the I.T. Act, 1961 while quoted only the assessment order passed by the Assessing Officer. The erroneous nature of the assessment order has not been objected through any replies or documents.

I have carefully considered the submission filed by the assessee inresponse to notice u/s 263 as well as the submissions filed during the course of assessment. **The reply of the assessee is not tenable as the reason for the selection of the case were (A) Share Application Money (B) Sundry Creditors and the query raised in the notice u/s 263 of the I.T. Act, 1961 are very much in nexus with these reasons.** The issue of valuation of investment was part of the use of the share application money received during the year. **The AO has not properly enquired and**

verified the linkage between the share application money, sundry creditors and investment in fixed assets.The issue of genuineness and propriety of share application money was itself a matter to be considered even under limited scrutiny proceedings. Since the same had not been properly done, the order u/s 143(3) was erroneous and prejudicial to the interest of revenue………………………."

6 AR for the assessed had submitted that, it is evident from the AO order thorough inquiry was conducted in respect of both the issues for which case was selected for scrutiny. The Ld. A.O. has also treated sundry creditors to the tune of Rs.38,43,054/- as unexplained and made additions in this regard. Thus, the assessment order has been framed judiciously and after due consideration of the material facts and evidences available on record. Although, it is pertinent to note that the Ld. Assessing Officer exceeded his jurisdiction by questioning the investments in building made by the assesse company and making a reference to the valuation officer. By doing so he has violated the instructions contained in CBDT instruction number 19 and 20/2015 2015 dated 29th December 2015 and Instruction number 5/ 2016 dated 14/07/2016 wherein it has been clearly mentioned that the purpose of Limited scrutiny proceedings is to prevent the A.O. from making roving and fishing enquiries, the A.O. should restrict himself on the points covered under Limited scrutiny. He relied upon the following case laws to buttress his arguments ITA Nos. 1013 & 1635/PUN/2014**DECCAN PAPER MILLS CO. LTD. V s. COMMISSIONER OF INCOME TAX** ITAT, PUNE TRIBUNAL (B),**Shri Atul Gupta vs ACIT, Delhi -** ITA No.3384/Del/2019**Dev**

Milk Foods (P) Ltd vs. Addl CIT, Delhi ITA No.6767/Del/2019, **Shri Sitaram Swami vs. ITO, Ward 4(5), Jaipur ITA no.73/JP/2020,Shri H.N. Ravindra vs ITO** ITA No.1065/Bang/2019 an **Suresh Jugraj Mehta vs. Addl CIT, Range -3, Dhule** ITA No.05/PUN/2016.

7 LdAR had further submitted that Questionnaire relating to issues under limited scrutiny as well as other points was issued by the Ld. A.O. and also reply was furnished by the assesse.However, no valuation report has been submitted by the Valuation Officer and no adverse inference has been drawn till date. He had drawn our attention to the following paragraph of order passed under section 263 .

"The assessee filed return of income at Rs. Nil and the assessment u/s 143(3) of the I.T. Act, 1961 was completed on 27.12.2016 at the total income of Rs. 50,43,054/-. On going through the balance sheet, it is seen that almost whole of the amount raised through un-allotted share application money and trade payables/sundry creditors, have been invested in fixed assets of total Rs. 2,59,84,300/- including cost of land. To arrive at the actual investment in the construction out of the money raised through sundry creditors an enquiry was conducted by the official of the ITO-Tikamgarh for an estimation on investment in hotel Building. In enquiry report, it has been mentioned that the estimated cost construction in hotel building should be a total Rs. 2,85,60,000/-

excluding cost of land, which is separately estimated at Rs. 1 Crore. Therefore, the case was referred to the Valuation Cell u/s 142(2A) of the I.T. Act 1961 on 14.12.2016 to determine the actual investment made in the hotel building. ***As the valuation report was not received within the time limit of passing the assessment order an order u/s 143(3) was passed with the remark that necessary remedial action would be taken once the valuation report is received.*** *Accordingly, assessment was made without covering the aspect of investment in fixed asset. The assessee did not co-operate with the valuation officer for the valuation of the property. Hence, considering the above undisclosed investment of Rs. 1,25,75,000/- remained escaped from assessment. Since proper enquiries were not conducted relating to sundry creditors, share application money and their linkage with the fixed assets, the order passed u/s 143(3) dated 27.12.2016 was prima facie erroneous and prejudicial to the interest of revenue keeping in view the provisions of section 263 of the Income Tax Act, 1961".*

8 Further the AR for the assessee had submitted that the above observations which sets the premise for initiating revision proceedings u/s 263 of the Income Tax Act, 1961. The observations made herein above contain some serious mis-statements and fallacies which render the entire proceedings u/s 263 null and void, the same are stated as under –

I. The investment in land has not been made by the assesse company rather made by the Directors of the assesse company and that too in preceding financial years -2008-09 and 2011-12. This investment made by the directors is fully explained and has never been questioned in the hands of directors. For what reason such mis-statement has been made is beyond our understanding. ***(Copy of title deeds of land enclosed).***

II. Under what authority of law the valuation has been ascertained by the official of the ITO-Tikamgarh at Rs.2,85,60,000/- is again beyond legal parlance.

III. The purported valuation, if any illegally done by the so called official of the ITO-TikamGarh has no evidentiary value as the same without any legal authority and was done at the back of the assesse and never confronted to the assesse for explanation/rebuttal.

IV. When the valuation report was not received by the Assessing Officer and the matter was getting time barred on 31/12/2016 then how can passing of the assessment order within the time prescribed render the assessment order erroneous and prejudicial to the interest of revenue.

V. What empowers the Ld. Pr. CIT to make a vague and unfounded remark that undisclosed investment of Rs.1,25,75,000/- remained escaped from assessment when the investment in land was not done by the assesse company.

VI. It is a matter of record that the assesse has made an investment of Rs. 2,42,31,696/- in building. Total investment in fixed assets including plant & machinery and furniture and fixtures as disclosed

in the balance sheet as on 31.03.2014 is Rs.2,59,84,300/- and the same is fully explained.

VII. *The Ld. PCI has said that the "The assessee did not co-operate with the valuation officer for the valuation of the property".* This statement of the Ld. PCIT is grossly incorrect, the assesse has categorically communicated to the Ld. A.O. that he is ready with all documents for valuation and this fact was also communicate to the Valuation Officer by the Ld. A.O. ***(Copies of relevant correspondence enclosed).***

VIII. The Ld. PCIT has further stated that proper inquiries were not conducted relating to sundry creditors, share application money and their linkage withthe fixed assets, the order passed *u/s 143(3) dated 27.12.2016 was prima facie erroneous and prejudicial to the interest of revenue keeping in view the provisions of section 263 of the Income Tax Act, 1961. The appellant has already demonstrated that it is evident from record as well as the assessment order that thorough inquires were conducted relating to* sundry creditors and share application money. (As discussed above).

IX. The proceedings u/s 263 were invoked by the Pr. Commissioner of Income tax arbitrarily, without any justified basis and the same are totally unwarranted and illegal. In order to invoke the provisions of section 263 two conditions are essential i.e., order should be erroneous and prejudicial to the interest of the revenue. In the instant case the order is neither erroneous nor prejudicial to the interest of revenue. In fact the assessing officer had completed the assessment keeping in view the guidelines instructions issued by the CBDT and making thorough inquiries in respect of issues

covered under Limited Scrutiny. In the instant case the Ld. Principal Commissioner of Income tax had no jurisdiction within the meaning of section 263 to invoke the said provisions. The Ld. Pr CIT has neither demonstrated incorrect assumption of facts nor alleged the incorrect application of law successfully.

X. The Revisional Commissioner is expected to 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 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 the intent of legislature. 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 totally and has passed the order in after making several additions and disallowances on the issuesinvolved impliedly after due application of mind. Hence, the very foundation for exercise of revisional jurisdiction is sorely

missing in the present case. Reliance is placed on Torrent Pharmaceuticals Ltd. Vs. CIT (ITAT Ahmedabad) (2018) 173 ITD 0130.

XI. Reliance is also placed upon the decision of the Hon'ble ITAT Mumbai in the case of Narayan Tatu Rane vs. ITO [2016] 70 taxmann.com 227 (Mum) wherein it has been held section 263 could be invoked only if the assessment order has been passed without making inquiry or verification which a reasonable and prudent Officer would have carried out in such cases. Law does not provide to stretch the inquiries and verification to an extent which may tantamount to oppression and harassment of a tax payer. Therefore the action of the AO cannot be impugned under s.263 of the Act. Further, the Hon'ble Gujarat High Court in the case of CIT vs. Arvind Jwellers 259 ITR 502 (Guj) has held that provisions of Section 263 of the Act cannot be invoked to correct each and every type of mistake or error committed by the AO. Further, reliance is placed on the decision of Hon'ble Gujarat High Court in the case of CIT vs. R. K. Construction Co. (2009) 313 ITR 65 (Guj) for the proposition that where the AO has taken a particular view on the basis of evidences produced before him, it is not open for the Commissioner, in the revisional proceedings under s.263 of the Act, to take a different view on the same material. The AO in the instant case has specifically examined all the issues raised by Pr.CIT albeit not probably in the manner in which the Pr.CIT would have liked but this cannot be the ground for assumption of jurisdiction under s.263 of the Act. Thus, the assessment order under review cannot be labelled as erroneous in

so far as prejudicial to the interest of the Revenue within the terms of Section 263 of the Act in the circumstances so narrated.

XII. The condition precedent to the exercise of jurisdiction under section 263, was that the order sought to be revised must be erroneous in so far as it was prejudicial to the interest of revenue. When two views were possible, theassessment could not be revised. ***Grasim Industries Ltd. vs. CIT (2010) 321 ITR 92 / 229 CTR 347 / 35 DTR 142 (Bom.***Since an enquiry was specifically held with reference to which a disclosure of details was called for by the Assessing Officer and made by the assessee, the observation of the CIT that the Assessing Officer had arrived at his findings without conducting an enquiry was erroneous and therefore the CIT wrongly exercised the powers by recourse to section 263. ***CIT vs. Development Credit Bank Ltd. (2010) 323 ITR 206 / 40 DTR 61 (Bom.)***

XIII. Mere lack of inquiry by Assessing Officer not sufficient for revision under section 263. ***CIT vs. Vikas Polymers (2010) 236 CTR 476 / 47 DTR 348 / 194 Taxman 57 (Delhi)***

XIV. Non–Examination of issue by Assessing Officer does not per se make assessment order prejudicial to interest of revenue for revision under section 263..***Institute of Chartered Accountants of India vs. DIT (2011) 50 DTR 409 (Delhi)(Trib.)***

XV. Order under section 263 passed by the CIT setting aside the assessment order on the ground that the Assessing Officer has not made enquiries in respect of certain issues is not valid, ***CIT vs. Leisure Wear Exports Ltd. (2010) 46 DTR 97 (Delhi)***Tribunal having found that the Assessing Officer had made reasonably detailed enquiries, collected relevant material

including the seized documents, and discussed various facts of the case with the assessee's Chartered Accountants before making the assessments, there was no valid basis for the CIT to exercise jurisdiction under section 263 and to direct the Assessing Officer to make fresh assessments by going deeper in to the matter. ***CIT vs. Hindustan Marketing & Advertising Co. Ltd. (2010) 46 DTR 109 (Delhi) .***Assessment Order was set aside by Commissioner on ground, that Assessing Officer had made Assessment without making proper enquiry. Held, that when Assessing Officer has specifically mentioned in the order that books of accounts alongwith Purchase / Sales, Invoices, ledgers, Bank Accounts were examined, verified and test checked, setting aside by Commissioner, in absence of any finding that Assessing Officer's order is factually incorrect, and not justified.***Vijay Kumar Mehta vs. CIT (2010) 195 Taxman 63 (Patna)(SMC).***Whether CIT has *suo motu* powers to pass the Order by merely stating that Assessing Officer has not properly enquired – Same materials were there before the Assessing Officer who had passed the impugned Order by applying his mind – Recourse to section 263(1) cannot be taken if the Order is erroneous but not prejudicial and vice versa – Held, provision 263 has not been rightly invoked.***CIT vs. Vikash Polymers (2010) 236 CTR 476 (Delhi)***

XVI. Merely because an assessment order does not refer to queries raised by Assessing Officer during course of scrutiny and response of assessee thereto, it cannot be said that there has been no enquiry and the assessment is erroneous and prejudicial to interest of revenue**. CIT vs. Ashish Rajpal (2009) 180 Taxman 623 (Delhi).** Order passed by Assessing Officer in accordance

with law, judicial pronouncements and after considering relevant replies duly supported by evidence cannot be branded as erroneous, merely because commissioner is of other view or in his opinion order passed is weak and not a detailed order. Section 263 empowers the commissioner to have a supervisory jurisdiction and does not visualize a case of substitution of his judgment for that of Assessing Officer. **Allied Engineers vs. CIT (2009) 180 Taxman 70 (Delhi)**

XVII. AO having taken a plausible view after investigation and proper enquiry, CIT cannot invoke reversionary power just to substitute his own view; assessment order cannot become erroneous where queries raised during the assessment proceedings are not recorded in final assessment order.**V.B. Construction (P) Ltd. V. Dy. Commissioner of Income Tax [(2009) 28 DTR 84(Kol)(Trib)].**Where the assessing officer during the scrutiny assessment proceeding raised a query which was answered by the assessee to the satisfaction of the assessing officer but the same was not reflected in the assessment order by him, a conclusion cannot be drawn by the Commissioner that no proper enquiry with respect to the issue was made by the assessing officer, and enable him to assume jurisdiction under section 263 of the Act. AO having made enquiries, elicited replies and thereafter allowed the expenditure on tools and dyes as revenue expenditure, it can notsaid that it was “lack of enquiry” and therefore, the assessment order passed by the AO can not berevised u/s. 263. **CIT v. Sunbeam Auto Ltd. (2009) 31 DTR (Del) 1 (2009) 227 CTR (Del) 133.**

XVIII. There should be an incorrect assumption of facts or an incorrect application of law by Assessing Officer to bring order of Assessing Officer within category of its being erroneous under section 263 – To qualify an assessment order as an order being prejudicial to interest of revenue, order should cause lawful loss of tax to revenue – On facts stated under heading Assessment - Additions to income, order passed by Assessing Officer could not be said to be erroneous prejudicial to interest of revenue to bring case within parameters of section 263. **Ashok Manilal Thakkar v/s. Asstt. CIT (2005) 97 ITD 361 /279 ITR 143 / (2006) 99 TTJ 1262 (Ahd)**.The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. **(Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC).**

XIX. The Hon'ble Delhi High Court in the case of **Nabha Investment Pvt. Ltd. V/s Union of India and others, 246 ITR 41** has held that :*"a bare reading of the section 263 makes it clear that the pre-requisites to the exercise of jurisdiction by the Commissioner under the said provision is :*

(i) That the order passed by Assessing Officer is erroneous, and

(ii) That it is prejudicial to the interest of the revenue.

XX. *If either of the condition is missing i.e. if the order of A.O is erroneous but is not prejudicial to the interest of the revenue or if it is not erroneous but is prejudicial to the interest of the revenue, recourse cannot be had to the provision contained in section 263(1) of the Act . It is not necessary that every order passed by the A.O, which may result in loss of revenue, is to be treated as an erroneous order in as much as it is prejudicial to the interest of the revenue. An order is erroneous if the view taken by the assessing officer is not in accordance with the law. If an order is in accordance with law, the decision of the Income tax officer cannot be regarded as erroneous merely because in the opinion of the Commissioner it should have been made or written in a different manner. The section does not visualize change ofopinion or substitution of the judgment of the Commissioner for that of the Income tax Officer. It is axiomatic that if the order is not erroneous, it will not vest the Commissioner with the power to invoke section 263(1) of the Act. Even if he is of the opinion that the order in question is prejudicial to the interest of the revenue."*

XXI. Ar for the assessee reeliedupon judgments in case of **Modi Xerox Ltd. Vs .Dy. CIT 67 ITD 252 , Patel Cotton Co. Ltd. Vs. Asstt. C.I.T 64 ITD 273 ANDSuper Cassettes Pvt. Ltd. Vs. CIT 41**

XXII. The Hon'ble Bombay High court in the case of **C.I.T. Vs. Gabriel India Ltd. 203 ITR 108 (Bom)** has held that:

(a) "The Income Tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given a detailed explanation in that

regard by a letter in writing. All these were part of the record of the case. Evidently, claim was allowed by the Income tax Officer on being satisfied with the explanation of the assessee. This decision of the Income tax officer could not be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard."

(b) "When exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have material on record to satisfy it in this regard."

(c) "if then an order is erroneous but not prejudicial to the interest of the revenue ,then the power of suo moto revision cannot be exercised. Any and every erroneous order cannot be subject matter of revision because the second requirement must be fulfilled."

XXIII. The judgment of Hon'ble Allahabad High Court in case of K.N. Agarwal Vs. C.I.T 189 ITR 769 as well as decision of Allahabad High Court in case of C.I.T. Vs Lata Sunderlal 96 ITR 310(All), the decision of the Bombay high court in case of C.I.T Vs. Paul Brothers 216 ITR 548, the judgment of the Calcutta high court in case of Russel properties Private Ltd. Vs. CIT 109 ITR 229 are also relevant.

"Where assessment order is in accordance with law, it cannot be termed to be erroneous, C.I.T Vs. Ashoka Traders SLP Civil no. 2374-2375 of 1995 dismissed by the Supreme Court 212 ITR (ST) 369."

XXIV. The judgment of Karnataka high court in case of S.S. Muddanna Vs. State of Maharashtra 89 STC 90 has held that:

(a) "Error" here should be in approach, error in computation ,error in applying the relevant law or facts, or error in selecting a principle which would notgovern the fact situation; arbitrary exercise of the appellate power certainly would fall within the scope of the section.

(b) "The fact that by resorts to a different method a larger tax can be levied and collected cannot be the sole consideration to attract revision under section."

(a) "The scope of the interference under this section is not to set a side merely unfavorable order and bring more revenue to the treasury."

XXIV The judgment of Madras High Court in case of**Venkatakrishna Rice Company Vs. CIT 163 ITR 129** has held that:

I. "The scope of interference u/s263 is not to set aside merely unfavourable order and bring to tax some more money to the treasury nor is the section meant to get at sheer escapement of revenue which is taken care of by other provision in the act.

(a) *"Section 263 is to be invoked not as a jurisdictional corrective or as a review of a subordinate's order in exercise of the supervisory power but it is to be invoked and employed for the purpose of setting right distortion and jurisdiction conferred on the Commissioner u/s 264."*

(b) *Such a power cannot in any manner be equated to or regarded as approaching in any way the appellate jurisdiction or even the ordinary revisional jurisdiction conferred on the Commissioner u/s264."*

9 During the course of hearing during the course of carrying we had directed both the parties to file the copy of the valuation report done by the valuation officer pursuant to request dated 14.12.2016. However theAr for the assessee had filled the copy of letter dated 5.10.2018 , written by the assessing officer to the district valuation officer, saying that the valuation report has not been received by the office . The copy of the letter is enclosed as Annexure P-1 this order.

10 Per contra DR for the revenue had vehemently relied upon the order passed by the revisional Commissioner. It was submitted that the order passed by the assessing officer was prejudicial to the interest of revenue and was erroneous. It was submitted despite reference the matter to the valuation, the assessing officer has decided the matter without waiting for the valuation report. Further it was submitted that the assessing officer has not examined the source of investment made in the immovable property as the same was intrinsically linked with the investment in shares and sundry creditors.

11 We have considered the rival contention of the parties and perused the material available on record, including the judgments cited at bar during the course of hearing by both the parties. Admittedly the revisional power under section 263 can be exercised by the revisional Commissioner within the parameters

laid down by section 263. For the purpose of invoking the jurisdiction it is essential to demonstrate that the order passed by the assessing officer was erroneous and was prejudicial to the interest of revenue. Undoubtedly in the present case the assessment was was selected for 'limited scrutiny' for the reason that "**(1) Large Share Application money received against unalloted shares and (2) Large increase in sundry creditors with respect to turnover as compared to preceding year"**.

12 Firstly we have to see whether the assessing officer had discharge is obligation within the four corners of the law for the purposes of examining the questions referred to it under the limited scrutiny. The perusal of the order, reproduced herein above shows that the assessing officer has not only the posed questions with respect to share application as well as sundry creditors by the detailed questionnaire to the assessee but had also made additions on of sundry creditors. (ref para 5 & 6 of AO order) .The assessing officer in paragraph 5 had mentioned that the shares were allotted in the financial year 2014 – 2015 on the basis of the share money received by the assessee. No discrepancy was found no additions were made on this head. However in respect of sundry creditor , the assessing officer had made the additions of Rs. 38,43,054/.

13 In our considered opinion once the assessing officer has examined both the issues as referred to him under the limited scrutiny, then it is not incumbent upon him to expand the scope of the assessment without seeking the approval from the principal Commissioner of income tax in accordance with the board instruction19 and

20/2015 2015 dated 29th December 2015 and Instruction number 5/ 2016 dated 14/07/2016 .

14 We are reproducing herein the Board circular dated 14/7/2016 for the ready reference, which will enable us to find whether the AO can embark upon other issues which are not provided under the limited scrutiny . it provides as under :

SECTION 143 OF THE INCOME-TAX ACT, 1961 - ASSESSMENT - GENERAL - DIRECTION REGARDING SCOPE OF ENQUIRY IN CASES UNDER LIMITED SCRUTINY SELECTED THROUGH CASS 2015 & 2016

INSTRUCTION NO.5/2016 [F.NO.225/269/2015-ITA.11], DATED 14-7-2016

Vide Instruction No. 20/2015 dated 29.12.2015 in File of even number, Board has laid down Standard Operating Procedure for handling of cases under 'Limited Scrutiny' which were selected through Computer Aided Scrutiny Selection in 'CASS Cycle 2015'. In these cases, it was stated that the general scope of enquiry in scrutiny proceedings should be restricted to the relevant parameters which formed the basis for selecting the case for scrutiny. However, in revenue potential cases, it was further provided that 'Complete Scrutiny' could be conducted, if there was potential escapement of income above a prescribed monetary limit, subject to the approval of administrative Pr. CIT/CIT/Pr. DIT/DIT.

2. *In order to ensure that maximum objectivity is maintained in converting a case falling under 'Limited Scrutiny' into a 'Complete Scrutiny' case, the matter has been further examined and in partial modification to Para 3(d) of the earlier order dated 29.12.2015, Board hereby lays down that while proposing to take up 'Complete Scrutiny' in a case which was originally earmarked for 'Limited Scrutiny', the Assessing Officer ('AO') shall be required to form a reasonable view that there is possibility of under assessment of income if the case is not examined under 'Complete Scrutiny'. In this regard, the monetary limits and requirement of administrative approval from Pr. CIT/CIT/Pr. DIT/DIT, as prescribed in Para 3(d) of earlier Instruction dated 29.12.2015, shall continue to remain applicable.*

3. *Further, while forming the reasonable view, the Assessing Officer would ensure that:*

a. *there exists credible material or information available on record for forming such view;*
b. *this reasonable view should not be based on mere suspicion, conjecture or unreliable source; and*
c. *there must be a direct nexus between the available material and formation*

of such view.

4. *It is further clarified that in cases under 'Limited Scrutiny', the scrutiny assessment proceedings would initially be confined only to issues under 'Limited Scrutiny' and questionnaires, enquiry, investigation etc. would be restricted to such issues. Only upon conversion of case to 'Complete Scrutiny' after following the procedure outlined above, the AO may examine the additional issues besides the issue(s) involved in 'Limited Scrutiny'. The AO shall also expeditiously intimate the taxpayer concerned regarding conducting 'Complete Scrutiny' in such cases.*

5. *It is also clarified that once a case has been converted to 'Complete Scrutiny', the AO can deal with any issue emerging from ongoing scrutiny proceedings notwithstanding the fact that the reason for such issue have not been included in the Note.*

6. *To ensure proper monitoring in cases which have been converted from 'Limited Scrutiny' to 'Complete Scrutiny', it is suggested, that provisions of section 144A of the Act may be invoked in suitable cases. To prevent possibility of fishing and roving enquiries in such cases, it is desirable that these cases should invariably be picked up while conducting Review or Inspection by the administrative authorities.*

7. *The above Instruction shall be applicable from the date of its issue and would cover the cases selected under CASS 2015 which are pending scrutiny cases as well as cases selected/being selected under the CASS 2016.*

8. *The contents of this Instruction may be brought to the notice of all for necessary compliance.*

15 The reading of both the circular made it abundantly clear that the assessing officer , can only deviate from the limited scrutiny and converted into the only after following the procedure provided under the circular (5/16 supra) . In the present case it is not the case of the principal Commissioner that case was required to be converted into the complete scrutiny and the proposal should have been made by the assessing officer. In our view the assessing officer had acted within the limits circumscribed by the limited scrutiny in accordance with the material available in is file after the last date of deciding the assessment .

16 In our view if the assessing officer during the course of assessment comes to the conclusion that some investment were

made in the books of account, then the addition can be made under section 69 of the act but for that procedure as provided by the circulars, were required to be followed by the assessing officer. In our considered opinion once the order was passed based on the material available on record and investment in shares and subsequent allotment have been accepted by the assessing officer and additions were made on account of sundry creditors, then no fault can be found in the order passed by the assessing officer.

17 The assessing officer had noted in paragraph 4 that the assessee had made the investment in the fixed asset of hotel building by investing an amount of ₹ 2,5 9,84,300/- and thereafter had referred the matter to the valuation officer under section 142A of the income tax act on14.12.2016. After referring the matter to the valuation cell, the assessing officer has completed the assessment on 27 December 2016(the last date for completing the assessment was 31.12.2016}.

18 The sole basis for initiating the proceedings under section 263 was the enquiry report by the ITO whereby he had estimated the investment to the tune of ₹ 2, 85, 60, 000/-and subsequent reference by the assessing officer to the valuation cell under section 142A of the income tax act.

19 The revisional Commissioner in his order though has mentioned that the valuation was referred to the valuation cell under section 142(2A) of the Income Tax Act. In our considered opinion the wrong provisions has been mentioned by the revisional Commissioner as the valuation of the assets by the valuation officer is mention under section 142A and not under section 142(2A) of the act.

20 Nonetheless the communication dated 5.10.2018, clearly shows that the no valuation of the asset was made by the valuation officer after reference on14.12.2016 till that date .

21 Now in the light of the above, we have to see whether, the revisional Commissioner was having any material on his record to show that the assessing officer has not considered the said material and had passed the order which was erroneous and prejudicial to the interests of the revenue.

22 In our considered opinion the valuation report has not seen light of the day, and was not available to the principal Commissioner for the purpose of forming an opinion that the order passed by the assessing officer was prejudicial to the interests of the revenue or was erroneous. In our considered opinion no fault was found by the in respect to the allotment of shares after receipt of the share application money and have also not filed the fact in the application made by the assessee with respect to sundry creditors. The finding of the revisional Commissioner that the assessee officer has not examine the linkage between the share application money in investment, in our view was beyond the scope of the limited scrutiny and further it was dependent upon the outcome of the valuation report. Till date no report has been brought to our notice the shows the excess investment made by the assessee beyond what has been stated in the record. We may like to point out that the limitation provided under section 142 A(6) the valuation officer is duty-bound to provide the report of estimation

made by him under the act to the assessing officer and to the assessee within a period of six months from the date of receipt of the reference. The reference was made to the valuation officer on 14.12.2016 and till 5.10.2018 ,no report was either sent to the assessing officer to the assessee.

23 In the light of the above it can be's concluded that once the valuation report has not been sent by the valuation officer to the assessing officer/assessee , within the period stipulated by the act,, that alleged report cannot found basis of " RECORD" to invoke the judicial under section 263 by the revisional Commissioner.

24 In our considered opinion the revenue has failed to demonstrate that the order passed by the assessing officer was erroneous and prejudicial to the interests of the revenue.Under the provisions of the Act, the CIT may call for and examine the record of any proceeding this Act and pass an order only if the twin conditions are satisfied, namely, the order passed by the Assessing Officer is erroneous; and also prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs CIT (2000) 243 ITR 83 (supra) has held that both of the above conditions have to be satisfied. It has been held that,

!"A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. 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. If one of them is absent-if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-

recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase “prejudicial to the interests of the Revenue" 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 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 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. The phrase "prejudicial to the interest 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.”

25 A similar view has also been taken by the Hon’ble Apex Court in the case of CIT Vs Max India Ltd. (2007) 295 ITR 282 (supra), wherein it has been held as under:

“The phrase "prejudicial to the interests of the Revenue" in section 263 of the Income-tax Act, 1962, 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."

26 In the matter ITO v. D.G. Housing Projects Ltd. 2012 (343) ITR 329 (Delhi), wherein it has been observed as under:- 16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to

conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question

27 The observation of the Hon'ble Bombay High Court in case of CIT v. Nirav Modi, 390 ITR 292 on this issue is as under :

4 (a) The powers u/s. 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions viz. the assessment order should be erroneous and prejudicial to the revenue. This power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no occasion to exercise powers of revision can arise. It was also held that revisional powers also cannot be exercised for directing a fuller inquiry to find out if the view taken is erroneous, when a view has already been taken after inquiry. This power of revision can be exercised only where no inquiry as required under the law is done. It is not open to enquire in cases of inadequate inquiry.

28 The principles that emerge out of the above cited decisions are that the twin requirement of the order being erroneous and prejudicial to the interests of revenue should be satisfied and that

the CIT should invoke the powers u/s 263 only after an enquiry by him to establish the twin conditions.

29 Further we are also the opinion that merely the assessing officer has formed an opinion which is not in line of thinking of the revisional Commissioner and there are two possible views, then also the revisional Commissioner cannot exercise the power for provision under section 263. For the above said purposes we rely upon the decision of the Bombay High Court in the matter of **C.I.T. Vs. Gabriel India Ltd. 203 ITR 108 (Bom)** has held that:

(d) "The Income Tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given a detailed explanation in that regard by a letter in writing. All these were part of the record of the case. Evidently, claim was allowed by the Income tax Officer on being satisfied with the explanation of the assessee. This decision of the Income tax officer could not be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard."

(e) "When exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have material on record to satisfy it in this regard."

(f) "if then an order is erroneous but not prejudicial to the interest of the revenue ,then the power of suo moto revision cannot be exercised. Any and every erroneous order cannot be

subject matter of revision because the second requirement must be fulfilled."

30 Respectfully following the decision of Supreme Court and High courts ,we found that the order passed by PCIT , was not in accordance with law and therefore we quash the same .

31 IN THE RESULT THE APPEAL OF THE ASSESSEE IS ALLOWED

Sd/-	**Sd/-**
(Dr. Mitha Lal Meena)	**(Laliet Kumar)**
Accountant member	**Judicial Member**

Dated: 14th June,2021

Copy of order forwarded to:

(1) The appellant (2) The respondent

(3) Commissioner (4) CIT(A)

(5) Departmental Representative (6) Guard File

By order

Sr. Private Secretary

Income Tax Appellate Tribunal

Agra Bench, Agra