IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member & Sri Aby T. Varkey, Hon'ble Judicial Member)

ITA No. 643/Kol/2020
Assessment Year: 2015-16

Hill Queen Investment (P) Ltd……Appellant
Surobala Apartments
Flat No. 202
3rd Floor
Block-B
Rekhjuani, Bhatinda
Rajarhat
Kolkata – 700 135
[PAN : AAACJ 2324 P]

Vs.

Pr. Commissioner of Income Tax -2, Kolkata……Respondent

Appearances by:
Shri S.M. Surana, Advocate, appeared on behalf of the assessee.
Shri Devi Sharan Singh, CIT, D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : April 6th, 2021
Date of pronouncing the order : April 21st, 2021

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order of the Learned Principal Commissioner of Income Tax (Appeals) - 2, (hereinafter the "ld. CIT(A)"), passed u/s. 263 of the Income Tax Act, 1961 (the 'Act'), dt. 20/03/2020, for the Assessment Year 2015-16.

2. There is a delay of 223 (two hundred twenty three) days in filing of this appeal by the assessee. After perusing the petition for condonation for delay, we are convinced that the assessee was prevented by sufficient cause in filing the appeal in time. Hence, we condone the delay and admit the appeal.

3. The assessee is a company and filed its return of income for the Assessment Year 2015-16, disclosing total income of Rs.20,40,470/- on 28/09/2015. The case was selected for limited scrutiny for the following reasons:-

"(i) Mismatch in sales turnover reported in Audit Report and ITR

(ii) Mismatch in amount paid to related persons u/s 40A(2)(b) reported in Audit Report and ITR

(iii) Suspicious sale transaction in shares (Penny Stock tab in ITS)"

3.1. The assessment was completed u/s 143(3) on 29/12/2017, determining the total income of the assessee company at Rs.20,65,790/-. The ld. Pr. CIT, Kolkata, issued a show-cause notice to the assessee on 07/01/2020, proposing to revise the assessment order passed u/s 143(3) of the Act, passed on 29/12/2017 by invoking his powers u/s 263 of the Act. The showcause notice is at page 2 & 3 of the assessment order. The assessee replied to the showcause notice. After considering the reply, the ld. Pr. CIT, at para 6 of his order, held as follows:-

> *"6. I have carefully considered the facts of the case and gone through the submission of the assessee. On perusal of the assessment record, it is seen that, the assessee company had claimed loss of Rs.73,22,956/- on account of sale transaction in penny stock shares of M/s. Cressanda Solutions ltd, Kailash Auto Finance Ltd. & Rajlaxmi Industries Ltd. In this regard, during search & Survey action, Directorate of Investigation, Kolkata, had identified the following BSE listed penny stock scrips including M/s.Cressanda Solutions ltd, Kailash Auto Finance Ltd. & Rajlaxmi Industries Ltd., which have been used by operators and beneficiaries for generation of bogus Long Term Capital Gain (LTCG) & Short Term Capital Loss (STCL). But, the A.O. made assessment without necessary verification or investigation with regard to suspicious sale transaction in Penny Stock shares, including M/s.Cressanda Solutions ltd, Kailash Auto Finance Ltd. & Rajlaxmi Industries Ltd. On the other hand, the AR of the appellant has stated that, the AO had already verified the issue on penny stock shares at the time of assessment proceedings, before finalizing the assessment order, therefore. Proceedings u/s 263 cannot be invoked."*

3.2. Thereafter, he discussed the *modus operandi* of penny stocks and certain decisions of the Courts and Tribunals and at para 18 and 19, held as follows:-

> *"18. Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Supreme Court, High Court and ITAT, and in accordance with the amendment made to Section 263 of the 'Act' with effect from 01.06.2015, I hold that the impugned assessment order dated 29/12/2017 passed by the A.O. is erroneous in so far as it is prejudicial to the interests of revenue. Therefore, after giving the assessee an opportunity of being heard, the impugned assessment order dated 29/12/2017 is restored back to the AO for making a fresh order adjudicating with the directions given in this order separately.*
>
> *19. Accordingly, in view of the facts and circumstances of the case as stated above, and also respectfully following the judgments cited above, I am of the considered view that, it is deemed fit and appropriate in the interest of justice to restore the file back to the AO with a direction to the AO to verify the issue as discussed in Para 3 & Para 6 above afresh, after giving opportunity to the assessee. Accordingly. I direct the AO to re-assess the income of the assessee for the relevant AY-2015-16 on the issues as discussed supra.*
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> *Order u/s 263 of the Act is passed accordingly."*

4. Aggrieved, the assessee is in appeal before us.

5. The ld. Counsel for the assessee relied on his submission made before the ld. PCIT during the course of reply to the show cause notice issued u/s 263 of the Act and also the arguments made before the ld. PCIT. The sum & substance of his arguments are that the AO has called for and examined all the documents and evidences pertaining to the above transaction after due enqiry and has come to a plausible conclusion. That such conclusion of the AO is supported by number of judicial decisions including that of the ITAT. He relied on the decision of co-ordination Bench of ITAT, Kolkata in the case *of M/s Gitsh Tikmani, HUF & Ors. In ITA Nos. 01 to 04/Kol/2019, ITA No. 05/Kol/2019 & ITA Nos. 13 to 15/Kol/2019 dated 20.09.2019 for AY 2014-15* and the decision of Co-ordinate Bench of ITAT , Kolkata in the case of *Kaushal Kishore Bihani in ITA No. 690/Kol/2019 dated 19.10.2020 for AY 2014-15* and submitted that the issue is squarely covered in the assessee's favour as the fact those case are identical with the facts of this case. He filed a copy of the order of the Tribunal in the case of *Manish Kumar Baid Vs. ACIT, ITA Nos. 1236& 1237/Kol/2017 dated 18.08.2017*, for the proposition that purchase and sale of shares of M/s. Kailash Auto Finance Ltd., cannot be considered as bogus, in the facts and circumstances of the case. Similarly, he relied on the order of the Kolkata 'C' Bench of the Tribunal in the case *Navneet Agarwal vs. ITO, Ward-35(3) in ITA No. 2281/Kol/2017, order dt. 20/07/2018*, for the proposition that, purchase and sale of shares in M/s. Cressenda Solutions Ltd., cannot be treated as bogus on the facts and circumstances of the case.

6. The Ld. DR on the other hand relied on the order of ld. PCIT and submitted that the entire long term capital gain declared by the assessee was a bogus transaction and hence the revision has to be upheld. He submitted that large scale rigging has taken place, where, fake transactions were declared, bogus transaction were shown and exemption claimed u/s 10(38) of the Act. He submitted that the AO has not examined the case from this angle and under such circumstances, the order of the AO is erroneous insofar as it is prejudicial to the interest of revenue. He relied on explanation (2) to Section 263 of the Act and submitted that, the order of the Assessing Officer shall be deemed to be erroneous, insofar as, it is prejudicial to the interest of the revenue as it was passed allowing relief without enquiring into the facts and without making enquiries or verification which should have been made. He relied on the case-law cited by the ld. Pr. CIT in his order u/s 263 of the Act and submitted that the order be upheld.

7. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

8. The Assessing Officer during the course of assessment proceedings issued notice u/s 142(1) of the Act on 10/01/2017, along with a questionnaire. He directed the assessee to furnish the documents and evidences of sale transactions of shares. The assessee furnished the copies of contract notes and bills issued by M/s. Fairwealth Securities Ltd. in support of the purchase and sale of these shares, copies of which are placed at pages 43 to 75 of the paper book. In fact, this case was selected for scrutiny for verification of these suspicious sale transactions of shares. The Assessing Officer, in his letter dt. 10/11/2017, called for the following details:-

> *"In continuation of the scrutiny proceedings in progress in your case for the Assessment Year 2015-16, you are requested to furnish the following information.*
>
> (i) *Please state the mode of acquisition of the scrip* ***CRESSANDA, KAILASH AUTO & RAJLAXMI.*** *Documents in support of the same may be furnished.*
>
> (ii) *Kindly state who looks after your investments in share and mutual funds. Is your consent sought before making decisions related to purchase and sale of shares?*
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> (iii) *Kindly state the financial rationale behind investment in the scrip* ***CRESSANDA, KAILASH AUTO & RAJLAXMI.*** *Did you do any financial and technical analysis while trading in this scrip? If so, what sources were referred to?*
>
> (iv) *Did you earn any dividend out of the scrip* ***CRESSANDA, KAILASH AUTO & RAJLAXMI?***
>
> (v) *Please state the broker/brokers involved in trading of the scrip* ***CRESSANDA, KAILASH AUTO & RAJLAXMI?***
>
> (vi) *A report on bogus LTCG through penny stocks at the platform of BSE has been received by the Investigation Wing, Kolkata where it is seen that the scrip* ***CRESSANDA, KAILASH AUTO & RAJLAXMI*** *is used for providing accommodation entry in the form of bogus LTCG in lieu of commission by entry operators and brokers who work in connivance with each other. In light of this fact, please clarify why the LTCG earned through the scrip should not be treated bogus and added back to the income. Also state, why commission paid for such pre-arranged accommodation entry should not be added by to your total income.*
>
> *Your written reply should reach this office by 15th November 2017 which shall be taken into account while framing your assessment order. In case no response is received, it shall be presumed that you do not have anything to say in the matter and your case shall be completed accordingly."*

8.1. The assessee gave point wise reply on 15/11/2017, copy of which is place from pages 27 to 34 of the paper book. For the sake of brevity, this is not reproduced. Suffice to say that the transactions were supported by documentary evidences such as contract notes, bills, bank transactions, payments of STT and the transactions were done on the platform of the stock exchange. Thereafter, the assessee relied on a number of case law. After considering all these transactions, the Assessing Officer in his order dt. 29/12/2017, passed u/s 143(3) of the Act, has come to conclusion that these transactions are genuine transactions as he had not found any adverse evidence to conclude otherwise.

9. On these facts, the issue is whether the ld. Pr. CIT is correct in invoking his powers u/s 263 of the Act. In our considered view, the Assessing Officer has called for and verified all the details and documents in connection to the purchase and sale of the shares in question and after examining the same, has taken a possible view that the transactions are genuine. This is not a case of non verification or no application of mind. This is not an order passed without making enquiries or verification, which should have been made. In fact, a number of decisions of the Tribunal support the view taken by the Assessing Officer on the very same issue on the very same evidences. Hence the Assessing Officer has taken a possible view.

10. This Bench of the Tribunal in the case of *Usha Devi Modi vs. ITO in ITA No. 874/Kol/2019; Assessment Year 2014-15, order dt. 12/01/2021,* under similar circumstances, has held as follows:-

> *"5. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the case law cited, we hold as follows.*
>
> *6. The AO during the course of assessment proceedings has called for the following details on the above transaction of sale and purchase of share of M/s Surbhi Chemicals and Investment Ltd.*
>
> *"Details of Investment in Equity Shares during the year under consideration*
>
> *i) Name & address of the company in which investment is made*
> *ii) Copy of allotment letter*
> *iii) Copy of "Contract Note" in respect of quoted shares*
> *iv) Date of allotment of shares*
> *v) No. Of shares*
> *vi) Value of shares*

vii) Source of payment made for obtaining shares
viii) In this regard, you are also requested to furnish the evidence of Mode of such payment alongwith the details of cheque numbers and the copy of bank statement (FY2013-14) highlighting the relevant entries therein showing the transaction.

7. Please furnish the following details in respect of Long Term Capital Gain

i) Name of Scrip
ii) Date of purchase
iii) Quantity
iv) Rate
v) Mode of payment
vi) Date of sale
vii) Quantity Sold
viii) Rate
ix) Date of Sale
x) Amount of dividend
xi) STT Paid
xii) L. T. Capital Gain
xiii) Copy of Brokers "Contract Note"

In this regard, you are also requested to furnish the evidence of Mode of such payment along with the details of cheque numbers and the copy of bank statement (FY 2013-14) highlighting the relevant entries therein showing the transaction."

The assessee has furnished all these documents called for and after considering the same the AO accepted the claim of the assessee exemption u/s 10(38) of the Act as the profits earned from purchase and sale of transfer. Nothing adverse was found by the AO during the course of assessment proceedings. Even the ld. PCIT, except the alleged report of DIT(INV), Kolkata no fresh evidence was referred to. This report of DIT(INV), Kolkata vide Note No. 75A/12015-161257 dated 27.04.2015 is not brought on record. The PCIT similarly states that there is a report of the DIT(INV) Kolkata and hence the assessment order is erronerous. The issue is whether the assessment order so passed is erroneous insofar as it is prejudicial to the interest of revenue. This is not the case of lack of enquiry as alleged ld. PCIT. In fact enquiry was conducted by the O after obtaining all required details. The ld. PCIT himself said that report of DIT(INV), Kolkata was not before the AO. Thus, the order passed by the AO by taking into account a document or information which is not before him and based on the enquiry and documents before him in a possible view and the assessment order and cannot be held to be erroneous insofar as it is prejudicial to the interest of the revenue.

7, Relying on the decision of M/s Gitsh Tikmani(HUF) & Ors. Supra under identical facts and circumstances the ITAT, has held as follows:

"8. We have given our thoughtful consideration to rival contentions. The sole issue that arises for our apt adjudication in facts of instant case is as to whether the PCIT has rightly exercised his revision jurisdiction vested u/s 263 or not. There is no dispute that the Assessing Officer accepted the assessee's LTCG as genuine as per his discussion in the assessment order that he had verified all necessary facts during the course of scrutiny. Suffice to say, the same fact very much emerges not only from assessee's detailed paper book running into 98 pages but also from the relevant assessment notings forming part of record (supra). This tribunal's co-ordinate bench's decision in case of M/s Saregama India Ltd. vs. CIT-1, Kolkata ITA No.1254/Kol/2014 decided on 20.09.2017 has reiterated the following settled principles in case of sec. 263 revision jurisdiction:-

"11. Now we shall discuss the propositions of law as laid down by various courts on the issue of revisionary jurisdiction of the Commissioner of Income Tax u/s 263 of the Act. The Hone'ble Andhra Pradesh High Court in the case of Spectra Shares and Scrips Pvt. Ltd. V CIT (AP) 354 ITR 35 had considered a number of judgments on

this issue of exercise of jurisdiciton u/s 263 of the Act by the Principal Commissioner of Income Tax and culled out the principles laid down in the judgments as below:

24. In Malabar Industrial Co.Ltd. (2 Supra), the Supreme Court held that a bare reading of Sec.263 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is 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 it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act. It also held at pg-88 as follows:

"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. Rampyaridevi Saraogi v. CIT (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal V. CIT (1973) 88 ITR 323 (SC)".

25. In Max India Ltd. (3 Supra), reiterated the view in Malabar Industrial Co.Ltd. (2 Supra) and observed that 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. On the facts of that case, Sec.80HHC(3) as it then stood was interpreted by the Assessing Officer but the Revenue contended that in view of the 2005 Amendment which is clarificatory and retrospective in nature, the view of the Assessing Officer was unsustainable in law and the Commissioner was correct in invoking Sec.263. But the Supreme Court rejected the said contention and held that when the Commissioner passed his order disagreeing with the view of the Assessing Officer, there were two views on the word "profits" in that section; that the said section was amended eleven times; that different views existed on the day when the Commissioner passed his order; that the mechanics of the section had become so complicated over the years that two views were inherently possible; and therefore, the subsequent amendment in 2005 even though retrospective will not attract the provision of Sec.263. 26. In Vikas Polymers (4 Supra), the Delhi High Court held that the power of suo motu revision exercisable by the Commissioner under the provisions of Sec.263 is supervisory in nature; that an "erroneous judgment" means one which is not in accordance with law; that if an Income Tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately; that the section does not visualize the substitution of the judgment of

the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with the law; that to invoke suo motu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suo motu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

27. In Sunbeam Auto Ltd.(5 Supra), the Delhi High Court held that the Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc.; that whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed. In that case, the Delhi High Court held that the Commissioner in the exercise of revisional power could not have objected to the finding of the Assessing Officer that expenditure on tools and dies by the assessee, a manufacturer of Car parts, is revenue expenditure where the said claim was allowed by the latter on being satisfied with the explanation of the assessee and where the same accounting practice followed by the assessee for number of years with the approval of the Income Tax Authorities. It held that the Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. Merely because the Assessing Officer in his order did not make an elaborate discussion in that regard, his order cannot be termed as erroneous. The opinion of the Assessing Officer is one of the possible views and there was no material before the Commissioner to vary that opinion and ask for fresh inquiry.

28. In Gabriel India Ltd. (6 Supra), the Bombay High Court held that a consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. It held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of

the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted; that to do so is to divide one argument into two and multiply the litigation. It held that cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes inquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the account or by making some estimate himself; that the Commissioner, on perusal of the record, may be of the opinion that the estimate made by the Officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income Tax Officer; but that would not vest the Commissioner with power to reexamine the accounts and determine the income himself at a higher figure; there must be material available on the record called for by the Commissioner to satisfy him prima facie that the order is both erroneous and prejudicial to the interests of the Revenue. Otherwise, it would amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh inquiry in matters which have already been concluded under law.

29. In M.S. Raju (15 Supra), this Court has held that the power of the Commissioner under Sec.263(1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interests of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

30. In Rampyari Devi Saraogi (21 Supra), the Commissioner in exercise of revisional powers cancelled assessee's assessment for the years 1952-1953 to 1960-61 because he found that the income tax officer was not justified in accepting the initial capital, the gift received and sale of jewellery, the income from business etc., without any enquiry or evidence whatsoever . He directed the income tax officer to do fresh assessment after making proper enquiry and investigation in regard to the jurisdiction. The assessee complained before the Supreme Court that no fair or reasonable opportunity was given to her. Supreme Court held that there was ample material to show that the income tax officer made the assessments in undue hurry; that he had passed a short stereo typed assessment order for each assessment year; that on the face of the record, the orders were pre-judicial to the interest of the Revenue; and no prejudice was caused to the assessee on account of failure of the Commissioner to indicate the results of the enquiry made by him, as she would have a full opportunity for showing to the income tax officer whether he had jurisdiction or not and whether the income tax assessed in the assessment years which were originally passed were correct or not"

31. From the above decisions, the following principles as to exercise of jurisdiction by the Commissioner u/s.263 of the Act can be culled out:

a) 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 erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act.

b) 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.

c) To invoke suo motu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suo motu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.

e) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted

f) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed.

g) The power of the Commissioner under Sec.263 (1) is not Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment. We now examine the following judgments on this issue:-

DIRECTOR OF INCOME TAX vs. JYOTI FOUNDATION 357 ITR 388 (Delhi High Court) It was held that revisionary power u/s 263 is conferred on the Commissioner/Director of Income Tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because the revisionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken.

INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD343 ITR 329 (Delhi) Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. S. 263 has been enacted to empower the

CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression "prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term "erroneous" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits. 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 s. 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 s. 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. This distinction must be kept in mind by the CIT while exercising jurisdiction under s. 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT. Nothing bars/prohibits the CIT from collecting and

relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

COMMISSIONER OF INCOME TAX vs. J. L. MORRISON (INDIA) LTD. 366 ITR As regard the submission on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable, it was held that the case of CIT vs. M. M. Khambhatwala was not applicable. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case were the issue is debatable was a mere passing remark which is again contrary to the view taken by the Apex Court in the case of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. CIT vs. M. M. Khambhatwala reported in 198 ITR 144; CIT vs. Raison Industries Ltd. reported in 288 ITR 322 (SC), not applicable; Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83, relied on. (Para 72) As regard the third question as to whether the assessment order was passed by the Assessing Officer without application of mind, it was held that the Court has to start with the presumption that the assessment order was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142(1) of the Act could not have been formulated. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the assessing officer after due application of mind. Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., ITA No. 116 /Coch/ 2012; CIT vs. Infosys Technologies Ltd., 341 ITR 293 (Karnataka); S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984; A. A. Doshi vs. JCIT, 256 ITR 685; Hindusthan Tin Works Ltd. Vs. CIT, 275 ITR 43 (Del), distinguished. (Paras 90-92, 102)

COMMISSIONER OF INCOME TAX vs. SOHANA WOOLLEN MILLS 296 ITR 238 (P&H HC) A reference to the provisions of s. 263 shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1 lakh was to be received for sale of permit. If that is so,

there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under s. 263.

COMMISSIONER OF INCOME TAX vs. LEISURE WEAR EXPORTS LTD. 341 ITR 166 (Del) The prerequisite to the exercise of suo motu jurisdiction under s. 263 by the CIT is that the order of the AO is erroneous insofar as it is prejudicial to the interest of the Revenue. Two conditions are to be satisfied, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) the error committed by the AO in the order is prejudicial to the interest of the Revenue. Both these conditions are to be satisfied simultaneously. It is also well-settled principle that provisions of s. 263 would not be invoked merely to correct a mistake or error committed by the AO unless it has caused prejudice to the interest of the Revenue. If an order is based on incorrect assumption of facts or on incorrect application of law or without applying the principles of natural justice and without application of mind, it would be treated as erroneous. Likewise, the expression "prejudicial to the interest of the Revenue" is of wide import and is not confined to loss of tax. If due to an erroneous order of the AO the Revenue is losing tax lawfully payable by a person, it would be certainly prejudicial to the interest of the Revenue. The power of revision is not meant to be exercised for the purpose of directing the AO to hold another investigation without describing as to how the order of the AO is erroneous. From this it also follows that where the assessment order has been passed by the AO after taking into account the assessee's submissions and documents furnished by him and no material whatsoever has been brought on record by the CIT which showed that there was any discrepancy or falsity in evidences furnished by the assessee, the order of the AO cannot be set aside for making deep inquiry only on the presumption and assumption that something new may come out. For making a valid order under s. 263 it is essential that the CIT has to record an express finding to the effect that order passed by the AO is erroneous which has caused loss to the Revenue. Furthermore, where acting in accordance with law the AO frames certain assessment order, same cannot be branded as erroneous simply because according to the CIT, the order should be written more elaborately.—Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1 : (2000) 243 ITR 83 (SC), Gee Vee Enterprises vs. Addl. CIT 1975 CTR (Del) 61 : (1975) 99 ITR 375 (Del), CIT vs. Seshasayee Paper & Boards Ltd. (2000) 242 ITR 490 (Mad), CWT vs. Prithvi Raj & Co. (1991) 98 CTR (Del) 216 : (1993) 199 ITR 424 (Del) and J.P. Srivastava& Sons (Kanpur) Ltd. vs. CIT (1978) 111 ITR 326 (All) relied on.

(Paras 6 & 7) In the entire order emphasis laid by the CIT is that in respect of four issues mentioned by him, no queries were raised by the AO. On this premise, though it is observed that there was no application of mind on the part of the AO and the AO has not recorded any reasons to justify the omission to consider the said facts, the CIT does not take the said order to its logical conclusion which was the prime duty of the CIT in order to justify exercise of power under s. 263. There is not even a whisper that the order is erroneous. Even if it is inferred that non-consideration of the issues pointed out by the CIT would amount to an erroneous order, it is not stated as to how this order is prejudicial to the interest of the Revenue. The penultimate paras of the order, at best, contain the observations that the AO was satisfied with making flimsy additions which were deleted by the CIT(A). There is not a whisper as to how this order was prejudicial to the interest of the Revenue. That apart, the approach of the Tribunal in discarding the observation of the CIT about not making proper inquiries in respect of the said four issues is also justified and without blemish.

(Paras 12 to 14) First comment of the CIT was in respect of finished goods in the closing stock. The CIT found that these were to the tune of Rs. 5.28 crores. According to the CIT, when the total turnover of the assessee was Rs. 6.13 crores, the AO should have satisfied himself by calling for more details as to how there was

closing stock of such a magnitude of Rs. 5.28 crores. Thus, the CIT has not doubted the statement of finished goods in the closing stock furnished by the assessee. He has only remarked that there should have been a deeper probe by calling for more details. This is neither here nor there, when one keeps in view the ingredients of s. 263.

(Para 15) Insofar as the insurance claim is concerned, the CIT observed that the assessee had shown receivable on this account to the tune of Rs. 1.21 crores but no details had been furnished. The AO had also not made any inquiries. In the detailed discussion on this aspect, the Tribunal has observed that insurance claim was lodged for the goods lost in transit. The assessee at that time had merely filed a claim with the insurance company. This claim had not been approved as the insurance company had neither accepted the same nor given any assurance for making payment. Therefore, no income had "accrued" which could be taxed. The Tribunal rightly held that ordinarily the income is said to have accrued to a person when he acquires the right to income and this should be enforceable right, though actual quantification or receipt may follow in due course. The mere claim to income without any enforceable right cannot be regarded as an accrued income for the purpose of IT Act.

(Para 16) Coming to the claim under s. 80HHC, it was totally uncalled for on the part of the CIT to say that the AO did not make requisite inquiries because of the simple reason that the AO had, in fact, declined and rejected this claim of the assessee. If the AO himself disallowed the deduction claimed by the assessee on this account under s. 80HHC, one fails to understand what further inquiries were needed by the AO.

(Para 17) Lastly, the observations of the CIT are in respect of the income of Rs. 1.61 crores shown by the assessee on account of variation in exchange rate. The CIT has only observed that in the immediate previous year no such gain was shown and therefore, it needed examination by the AO. However, the moot question would be examination for what purpose ? It is an income shown by the assessee. Whether the CIT was of the opinion that there was no such income or he was nurturing an impression that income on this account as shown was lesser ? There is no such indication in the order. The CIT also does not at all state as to what was the reason for doubting the income offered by the assessee. Even if it is found that part of such income was claimed as deduction under s. 80HHC, no benefit enured to the assessee on this account as claim under s. 80HHC was fully disallowed by the AO. It is not at all observed as to how the order of the AO on this account was erroneous and further as to how it was prejudicial to the interest of the Revenue. Thus, order of the CIT was rightly set aside by the Tribunal. In the case on hand the ld. CIT finds fault with the AO for not invoking Rule 8D while making disallowance u/s 14A. The Hon'ble Delhi High Court in the case of Maxop Investments Ltd. Vs CIT (supra) held that the AO cannot proceed to determine the amount of expenditure incurred in relation to exempt income without recording a finding that he is not satisfied with the correctness of the claim of the assessee. This is a condition precedent while rejecting the claim of the assessee, with regard to incurring of expenditure or no expenditure in relation to exempt income. The AO will have to indicate cogent reasons for the same and Rule 8D comes into play only when the AO records a finding that he is not satisfied with the assessee's method. In the case in hand the AO has not made any such recording of satisfaction and has accepted the disallowance made u/s 14A by the assessee. In such circumstances it is not open for the ld. CIT to come to a conclusion that the AO should have invoked Rule 8D, without himself recording the satisfaction that the calculation given by the assessee in its disallowance made suo moto u/s 14A is not correct. Coming to the other expenses claimed, the ld. CIT has simply collected information after raising queries and has not given any finding whatsoever that there is an error made by

the AO or that the circumstances was such that would require and warrant further inquiry or investigation. No error in the assessment order has been pointed out and it is not stated as to how prejudice was caused to the revenue. The finding that the AO had failed to properly scrutinise the above aspects does not give powers to the ld. CIT to revise the assessment u/s 263 of the Act. Making rowing enquiries is not a finding of an error. Assessments cannot be set aside for fresh enquiries unless a specific error is pointed out at not making proper enquiry cannot be equated with no enquiry. In view of the above we quash the order passed u/s 263 of the Act and allow the appeal of the assessee.

12. In the result the appeal of the assessee is allowed"

Keeping in mind the foregoing detailed discussion that an assessment has to be both erroneous as well as prejudicial in interest of the Revenue simultaneously before the same is sought to be revised and it is not permissible for the CIT or the PCIT to exercise his revision jurisdiction in case the Assessing Officer has taken one of the possible view, we proceed to deal with the relevant facts of the case. It has come on record that the Assessing Officer had issued sec. 133(6) letter / notice to the M/s SHCL during the course of scrutiny which stood adequately replied in assessee's favour. Coupled with this, all the relevant factual details in support of the assessee's share purchase document, contract notes, bank statement, (supra) already in the case records. Coupled with this, Learned CIT-DR fails to rebut the clinching fact that although the PCIT's detailed discussion extracted in the preceding paragraphs has sought to make out a case of artificial price rigging between the assessee, promoters entry operators of the entity in light of Ministry of Finance's letter dated 24.07.2015 figures, there is not even an iota of material quoted against the assessee to have been engaged in all the foregoing artificial price rigging. We are observing in view of all these facts that the Assessing Officer had rightly accepted the assessee's LTCG keeping in making the overwhelming evidence forming part of records. This tribunal's co-ordinate bench decision (supra) as well as hon'ble jurisdictional high court's decisions CIT vs. Ratan ITA No.105/2016, M/s Classic Growers Ltd vs. CIT ITA 129/2012, CIT vs. Lakshmargarh Estate & Trading Co. Ltd. (2013) 40 taxman 439 (Cal), CIT vs. Smt. Shreyashi Ganguly ITA 196/2012, CIT vs. Bhagwati Prasad Agarwal (2009/ TMI 34738/Cal in 22/2009 29.04.2009 have accepted genuineness of similar LTCG. Since the issue is covered by all the foregoing decisions of hon'ble jurisdictional high court, we observe that the Assessing Officer had rightly treated the assessee's foregoing LTCG derived from sale of shares to be genuine. That being the case, we hold that PCIT's exercise of revision jurisdiction merely on suspicious circumstances by invoking in sec. 263 Explanation (supra) with effect from 01.06.2015 is not sustaining. We therefore reverse the PCIT's order under challenge and restore the impugned assessment framed by the Assessing Officer on 29.07.2016. It is made clear that we have dealt with an instance of Assessing Officer himself having accepted assessee's LTCG after examining all the relevant facts of the case. We therefore do not deem it appropriate to restore the very issue back to him for yet another round of assessment. The assesse's sole substantive grievance as well as this "lead" appeal ITA No.01/Kol/2019 is accepted therefore.

9. Same order to follow in all remaining cases ITA No.02-05/Kol/2019 and 13-15/Kol/2019 in case of seven other assessees since it has come on record that they had also filed all the relevant evidence in support of their respective LTCG during the course of assessment / which stood accepted by the Assessing Officer.

10. All these eight assessees' as many appeals are allowed in above terms."

8. We respectfully apply the proposition of law laid down in the above case to the case on hand and hold that the order passed u/s 263 of the Act is bad in law. The co-ordinate Bench of ITAT, Kolkata in the case of Shashi Bala Bajaj (supra) applied to the judgment of jurisdictional High Court in the case of CIT vs. Bhagwati Prasad Agarwal judgment dated 29.04.2009 and held that the long term profits and gains received on, the purchase and sale of shares of M/s Surbhi Chemicals and Investment Ltd. though the Stock Exchange is exempted from tax u/s 10(38) of the Act. Thus, the view taken by the AO is plausible view which is supported by judicial decisions on this grounds also the order u/s 263 fails.

9. Thus, respectfully following the decision of the Gitsh Tikmani HUF & Ors (supra) we hold that the impugned order passed u/s 263 of the Act dated 12.02.2019 is bad in law and quash the same.

10. In the result, the appeal of the assessee is allowed."

11. Applying the proposition of law laid down in the cases as extracted above to the facts of the case on hand and considering the proposition of law laid down in the case of *Manish Kumar Baid Vs. ACIT (supra)* and *Navneet Agarwal vs. ITO (supra)*, wherein the genuineness of these transaction were upheld on the facts and circumstances of the case we hold that the revision of the assessment order u/s 263 of the Act, by the ld. Pr. CIT is bad in law. Hence we quash the order passed by the ld. Pr. CIT u/s. 263 of the Act on 20/03/2020 and allow these grounds of the assessee.

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

Kolkata, the 21st day of April, 2021.

Sd/-	***Sd/-***
[**Aby T. Varkey**]	[**J. Sudhakar Reddy**]
Judicial Member	Accountant Member

Dated: 21.04.2021
{SC SPS}

Copy of the order forwarded to:

1. ***Hill Queen Investment (P) Ltd***
Surobala Apartments
Flat No. 202
3rd Floor
Block-B
Rekhjuani, Bhatinda
Rajarhat
Kolkata – 700 135

2. ***Pr. Commissioner of Income Tax -2, Kolkata***

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches