IN THE INCOME TAX APPELLATE TRIBUNAL, JODHPUR BENCH, JODHPUR

BEFORE HON'BLE SH. SANDEEP GOSAIN, JUDICIAL MEMBER AND

HON'BLE SH. VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

ITA No. 24/JODH/2021
Assessment Year: 2016-17

Mukesh Agarwal, 98, Industrial Area, Rani Bazar, Bikaner.	Vs.	Pr.CIT-1, Jodhpur.
PAN No. AALPA 2772 Q		

Assessee by	Shri Manish Surana, CA
Revenue by	Smt. Sanchita Kumar, CIT-DR
Date of Hearing	11/08/2021
Date of Pronouncement	07/10/2021

O R D E R

PER: SANDEEP GOSAIN, J.M.

The present appeal has been filed by the assessee against the order of the ld. Pr.CIT-1, Jodhpur dated 19/03/2020 for A.Y. 2016-17 passed u/s 263 of the Income Tax Act, 1961 (in short, the Act) wherein following grounds have been raised:

> *"1. The Ld. PCIT was wrong in law as well as in facts in setting aside the order of the assessing officer without considering facts and circumstances of the case.*
>
> *2. The ld. PCIT has not been able to establish the pre-requisite conditions for invoking the revisional provision."*

2. The brief facts of the case are that the assessee is AA class civil contractor. During the year under consideration, the assessee was engaged in civil construction work of roads with PWD, RSARMB, RICCO. During the

year under consideration, a survey u/s 133A of the Act was carried out at the business premises of the assessee. During the survey proceedings, the assessee had voluntarily surrendered a sum of Rs. 1.15 Crore on account of discrepancies found in the books of account and inflated expenditure. In the return, the assessee had declared total income Rs. 1,79,37,270/-the year under consideration. The case was selected for scrutiny and various notices were issued by the AO on various dates. The AO completed the assessment on 11/12/2018 determining totaling total income of the assessee at Rs. 2,24,87,770/-. Thereafter, the ld. PCIT had issued a show cause notice dated 22/02/2021 which was served upon the assessee. In response to the notice U/s 263 of the Act, the assessee submitted reply before the ld. PCIT and finally the ld. PCIT passed the order U/s 263 of the Act on the ground that the order U/s 143(3) of the Act dated 11/12/2018 passed by the A.O. is found to be erroneous in so far as it is prejudicial to the interests of the Revenue. The order passed is based on incorrect/mistaken assumption of the facts of the case by way of accepting the statement of the assessee without due verification/erroneous application of provisions of the Act.

3. Now the assessee is in appeal before the ITAT on the grounds mentioned above.

4. Both the grounds raised by the assessee in this appeal are interrelated and interconnected and mainly relates to challenging the order of the ld. PCIT passed U/s 263 of the Act. In this regard, the ld. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. PCIT and also relied on the written submissions filed before the Bench and the same is reproduced below:

> *"**Issue/Point 1:** The Surrendered amount was declared by the assessee as his business income and the capital was increased accordingly by this amount instead of reducing debtors or creditors from it. AO accepted the claim of the assessee without proper verification and examination of records.*
>
> *The allegation of PCIT is unfounded since it is factually incorrect. Your kind attention is drawn to audit financial Statements available on record. On perusal it would be found that by virtue of surrendered amount the capital has not increased directly. In place the surrendered amount formed part of the credit side of the Profit & Loss account and consequently the profit for the year was increased by corresponding amount of Rs. 1.15 Crore. On the contrary in the capital account which is also available on record, your honour find that there is no such credit entry of Rs. 1.15 Crore. Thus Capital Account was not directly impacted by amount surrendered. The proposition of Id PCIT calling for reduction in debtors or creditors from surrendered amount is beyond comprehension. The assessee is a Civil Contractor and the awarders happen to be corporates or Govt. Departments. They may figure in the list of sundry debtors, how the amount of sundry debtors can be reduced as a result of surrender.*

Further the Ld AO subjected the income surrendered of Rs. 1.15 Crore to tax at the flat rate of 30% by invoking the provision of Section 115BBE. The Page 7 of the Assessment order is a testimonial to it.

Hence the order passed by the Ld. Pr. CIT is bad in law and is requires to be quashed.

Issue/Point 2: *During the year under consideration, the assessee has obtained unsecured loans from 22 Parties, but creditworthiness of none of them was verified by the AO.*

During the course of proceedings all the duly signed account statement, bank accounts, ITR and interest account were duly furnished and properly verified by Ld AO. There has not been any single amount of cash being deposited into the accounts of cash creditors. The money has come from the banking channel and the payers were regular assessee of Income Tax. Thus the onus of identity and genuineness of cash creditors stand discharged. Since there is no factum of cash being deposited immediately prior to the issue of cheque in favour of assessee, the source of money is also established. There is no obligation on the part of AO to inquire into the source of source of cash credit. AO having examined all the details had not drawn any adverse inference against any loan creditors and did not follow a view 'unsustainable in law' and assessment order was not the result of non-application of mind or any inadequate enquiry, accordingly, invocation of jurisdiction under section 263 was untenable. The courts across the spectrum have unanimously held that the order of AO can be brandished as erroneous if it is unsustainable in the eyes of law. He relied on the decision in the case of ***Citystar Ganguly Projects Ltd. Vs PCIT (ITAT Kolkata) Appeal Number : 1TA No. 1103/Kol/2019 Date of Judgement/Order : 31/10/2018.***

In view of foregoing the order passed by the Ld. Pr. CIT is bad in law and is requires to be quashed.

Issue/Point 3: *Assessee has shown opening balance of loan as on 01.04.2015 from Virendra Agarwal HUF at Rs. 17,13,420/- and on 14.12.2015 you have again accepted loan of Rs. 10,00,000/- from Virendra Agarwal HUF. Virendra Agarwal HUF has shown income of Rs. 94,426/-only in its ITR. Further, Virendra Agarwal HUF did not charge any interest on this loan from you. The AO id directed to examine and verify the creditworthiness of the creditor namely Virendra Agarwal HUF and genuineness of Transaction.*

The ITR, Confirmation, Bank Statement of Sh. Virendra Agarwal HUF is available on record. The same was duly examined and verified by the Ld AO. From the perusal of bank statement it is obvious that the immediate source of money given to the asseesee as unsecured loan was the proceeds realized from the FDRs. The money received from FDRs constituted the source of unsecured loan given to the assesse. The Ld PCIT doubted that the creditworthiness of the cash creditor in light of paltry return of Income showing income of 94,426. It is not the present income but it is the accumulated savings of the past years invested in the form of FDR became the source to the assessee. There is also ITR of Shri Virendra Agarwal(Individual) is on record. He has shown an income of Rs. 31.50 Lacs in his return of income. Therefore, in the light of the entire nitty gritty of the case, the allegation of Mr. Virendra Agarwal not having the credit worthiness is baseless and unfounded.

Hence the order passed by the Ld. Pr. CIT is bad in law and is requires to be quashed.

Issue/Point 4: *Non-Deduction of tax on payment of interest to the mentioned persons and without obtaining Form No. 15G/H, the assessing officer have disallowed the claim of interest expenses.*

It has been alleged by Ld PCIT that TDS has not been deducted on the interest paid above Rs.10,000.00. In this regard the assesse would like to draw your kind attention to the 15G and 15H forms submitted on 28/04/2016 to the

department. A copy of the acknowledgement is being enclosed for your ready reference. Hence there is no liability to deduct TDS. The form 15G/H are available on record therefore, no disallowance was made by AO on account of Non deduction of TDS. Further the Chartered Accountant in TAR has not pointed out any disallowance u/s 40(a)(ia) of Income Tax Act on account of Non deduction of TDS.

Hence the order passed by the Ld. Pr. CIT is bad in law and is requires to be quashed.

Issue/Point 5: *It is evident that assessee has received a total loan of Rs. 15 Lacs from one Smt. Rekha instead of Rs. 10 Lacs as shown by you. Apart from this Smt Rekha verma has filed her ITR for the year under consideration showing income of Rs.2,68,662.*

During the course of Assessment proceedings the ITR, Computation, Bank Statement and confirmation of accounts of all cash creditors including Smt. Rekha Verma were furnished. In the confirmation of accounts both assessee as well as the cash creditor put their signatures in token of having accepted the veracity of transactions. Further the bank statement of Rekha Verma also highlighted the payment made by her to assessee. The Bank Statements of the assessee are also on records. If such type of money had been paid by Rekha verma it would have featured in the bank statement of the assessee.

The Ld PCIT has gone in overdrive in assuming and presuming the transaction dated 14.05.2015 for Rs. 5 Lacs as that of the assessee. It may be noted that the aforesaid amount was received by way of loan by the Wife of the assessee Sunita Agarwal. The reason behind the existence of Narration "TO YS AC RTGS" in both the transaction involving the assessee and his wife is the fact that the assessee is Prop of M/s Yash Trading Corporation and his wife is Prop of M/s Yogesh Enterprises. The cash credits were received by both of

them in the bank account of their respective proprietorship concern. Therefore, the nomenclature in the narration was same.

From the Bank Statement it is obvious that the immediate source of unsecured loan of Rs, 10 lakhs Rekha Verma was the money received by her from M/s Jaishree Products 09.05.2015 for Rs. 3 Lacs & 11.05.2015 for Rs. 7 Lacs through account payee cheque.

The current income didn't constitute the source of unsecured loan, hence the comparison of current income which the amount of unsecured loan does not have any meaning and relevance.

It is therefore sincerely requested that the order passed by the Ld. Pr. CIT is illegal and may kindly be quashed.

It is therefore sincerely requested that the impugned order passed by Pr. CIT u/s 263 of the Income Tax Act, 1961 may kindly be quashed and oblige."

5. On the other hand, the ld. CIT-DR has vehemently supported the order of the ld. PCIT.

6. We have heard the ld. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well as cited before us and we have also gone through the orders passed by the revenue authorities. We found that the ld. PCIT has held that the order of AO U/s 143(3) dated 11/12/2018 is erroneous in so far as it is prejudicial to the interest of the Revenue on the basis of five issues/points as mentioned in its order, therefore, now we will deal with all points separately. Ld. PCIT's main thrust was that the A.O. had without

proper verification and examination of records has accepted the claim of the assessee. As per issue/point No. 1 of the order of ld. PCIT, we found that according to PCIT the surrendered amount was declared by the assessee as his business income and the capital was increased accordingly and A.O. has not verified the same fact. However, as per the ld AR, the allegation of PCIT is unfounded and factually incorrect. Our attention was drawn to audit financial statements are available on record and from perusal the same, it was found that by virtue of surrendered amount the capital has not increased directly. In place the surrendered amount formed part of the credit side of the Profit & Loss account and consequently the profit for the year was increased by corresponding amount of Rs. 1.15 Crore. On the contrary in the capital account which is also available on record, we find that there is no such credit entry of Rs. 1.15 Crore. Thus Capital Account was not directly impacted by amount surrendered. The proposition of ld. PCIT calling for reduction in debtors or creditors from surrendered amount is beyond comprehension. As per facts, the assessee is a Civil Contractor and the awarders are to be corporate or Govt. Departments. They may figure in the list of sundry debtors, but then how the amount of sundry debtors can be reduced as a result of surrender. The AO after due examination and verification subjected the surrendered income of Rs. 1.15 Crore to tax at the flat rate of 30% by invoking the provision of Section 115BBE. In this respect, a detailed discussion at page

No. 7 and para 7 of the A.O. is mentioned and penalty to this effect has also been initiated, therefore, we are of the view that this issue has been examined by A.O. and thus no proceedings U/s 263 could have been invoked.

7. Issue/Point No. 2: As per Ld. PCIT, during the year under consideration, the assessee has obtained unsecured loans from 22 parties but creditworthiness or none of them was verified by the A.O.

8. In this context, we have analysed the documents placed on record and as per the ld. AR, during the course of proceedings, all the duly signed accounts statements, bank accounts, ITR and interest account of respective parties were duly furnished by the assessee and the same were also examined and verified by the AO and on examination of the records, it was found by the A.O. that there has not been any single amount of cash being deposited into the accounts of cash creditors. As per the assessee, it has also been proved that the money has come from the banking channel and the payers were regular assessee of Income Tax. In this way, the onus of identity and genuineness of cash creditors stand discharged by the assessee. It was submitted that the A.O. was satisfied after examination of the records that since there is no factum of cash being deposited immediately prior to the issue of cheque in favour of assessee, therefore, the source of money also stands established. Even otherwise, there was no obligation on the part of

AO to inquire into the source of source of cash credit. After examining the entre records and after hearing the parties, we have also found that AO after having examined all the details had not drawn any *adverse inference* against any loan creditors and did not follow a view 'unsustainable in law' and thus, in our view, the assessment order was not the result of non-application of mind or any inadequate enquiry, therefore, in these circumstances, the invocation of jurisdiction U/s 263 was untenable and unsustainable in law. The courts across the spectrum have unanimously held that the order of AO can be brandished as 'erroneous' if it is unsustainable in the eyes of law. In this regard, we draw strength from the decision of the Coordinate Bench of Kolkata Tribunal in the case of **Citystar Ganguly Projects Ltd. Vs PCIT (ITAT Kolkata) in ITA No. 1103/Kol/2019 Date of order 31/10/2018** wherein it was held as under:

> *"We are also alive to clause (a) of Explanation (2) to Section 263 of the Act inserted by Finance Act, 2015 w.e.f. 01.06.2015 which seeks to clarify that the order passed by the lower authorities to be erroneous in so far as prejudicial to the interest of the Revenue in the event of absence of inquiry which should have been made. The aforesaid clause only provides for situation where inquiries or verifications should be made by reasonable and prudent officer in the context of the case. Such clause cannot be read to authorize or give unfettered powers to the Commissioner to revise each and every assessment order. The applicability of the clause is thus essentially contextual. As observed in the preceding paras, the AO had made specific and detailed cross verifications from the loan creditors and the information gathered from them,*

satisfied the three ingredients embedded in Section 68 of the Act. Apart from making sweeping statements, which have been found to be factually erroneous, no objective material has been brought on record by the ld. Pr. CIT to implicate the assessee or the AO per se of being guilty of non-enquiry. We further find that when confronted with the reasons set out in the SCN, the assessee had led before the Ld. Pr. CIT sufficient documentary evidence which proved that the SCN had proceeded on assumption of incorrect facts which were not borne out from the assessment records. It was also established before the ld. Pr. CIT that before completion of assessment, the AO had indeed made enquiries from all the loan creditors u/s 133(6) and only after objective consideration of the evidences furnished, order u/s 143(3) of the Act was passed. On receipt of these objections, the Ld. Pr. CIT himself did not make any effort to prove any factual or legal infirmity in the documents or explanations furnished nor he was able to prove that any of the documents or evidences were false so as to establish that the AO's order was erroneous as well as prejudicial to the Revenue's interests because the view taken by him was unsustainable in law. On the contrary, the Ld. Pr. CIT merely set aside the assessment order directing AO to pass the order afresh in accordance with law which in our opinion was nothing but giving the AO second innings without establishing that the AO's order was erroneous as well as prejudicial to the interests of the Revenue. Our findings in this regard find support in the following judgments:

DIT vs Jyoti Foundation reported in 357 ITR 388 (Del)

ITO vs DG Housing Projects Ltd reported in 343 ITR 329

CIT vs Ashish Rajpal reported in 320 ITR 674 (Del)

CIT vs Sunbeam Auto Ltd reported in 332 ITR 167 (Del) CIT vs R.K. Construction Co. reported in 313 ITR 65 (Guj)

For these reasons, we are of the considered view that the assessment order is not the result of non-application of mind or any inadequate enquiry. We are also of the considered opinion that while passing the assessment order the AO did not follow a view which can be said to be 'unsustainable in law'. In the circumstances therefore, the jurisdictional facts for usurping the jurisdiction, being absent, we hold that the action of Ld. Pr. CIT was without jurisdiction and all subsequent actions are 'null' in the eyes of law."

Therefore, considering the aforementioned facts on the issue under consideration, the order passed by the ld. PCIT is bad in law.

9. As regards, issue/point No. 3: As per the PCIT, the assessee has shown opening balance of loan as on 01.04.2015 from Virendra Agarwal HUF at Rs. 17,13,420/- and on 14.12.2015 the assessee has again accepted loan of Rs. 10,00,000/- from Virendra Agarwal HUF. Whereas the said Virendra Agarwal HUF has shown income of Rs. 94,426/- only in its ITR. According to ld. PCIT, the said Virendra Agarwal HUF did not charge any interest on this loan from the assessee, therefore, the AO was directed to examine and verify the creditworthiness of the creditor namely Virendra Agarwal HUF and genuineness of transaction.

10. In this regard, after examining the documents placed on record and hearing the parties, we found that the ITR, Confirmation, Bank Statement of Sh. Virendra Agarwal HUF is available on record. As per ld. AR, the same was duly examined and verified by the AO. However, from the perusal of bank

statement, it is obvious that the immediate source of money given to the asseesee as unsecured loan was the proceeds realized by Virendra Agarwal HUF from the FDRs. Thus, in this way, the money received from FDRs constituted the 'source of unsecured loan' given to the assessee but the Ld PCIT doubted that the creditworthiness of the cash creditor in light of partly return of income showing income of Rs.94,426. IN this regard, we also noticed that it was not the present income but it was the accumulated savings of the past years of the Virendra Agarwal HUF invested in the form of FDR became the source to the assessee. The ITR of Shri Virendra Agarwal (Individual) is also on record wherein an income of Rs. 31.50 Lacs has been shown in his return of income. Therefore, in the light of the entire facts and circumstances, the allegation that Mr. Virendra Agarwal was not having the creditworthiness, is baseless and unfounded. Thus, in our view, the order passed by the ld PCIT is bad in law.

11. Now coming to issue/point No. 4, the ld. PCIT has alleged that TDS has not been deducted on the interest paid to the mentioned persons and without obtaining Form No. 15G/H, the A.O. should have disallowed the claim of interest expenses.

12. In this regard, after examining the documents placed on record as well as hearing of the parties, we found that From 15G and 15H were submitted on

28/04/2016 with the department. In this regard, the copy of the acknowledgement has also been placed on record, thus in this way, there was no liability to deduct TDS. Since, Form 15G/H are already available on record, therefore, no disallowance was made by AO on account of Non deduction of TDS. Apart from this, the Chartered Accountant in TAR has not pointed out any disallowance u/s 40(a)(ia) of Income Tax Act on account of Non deduction of TDS. Therefore, considering the totality of the facts, we are of the view that the order passed by the ld. PCIT on this issue is bad in law.

13. Issue/point No. 5: Ld. PCIT noticed that the assessee had received a total loan of Rs. 15 Lacs from one Smt. Rekha instead of Rs. 10 Lacs as shown by him and apart from this, Smt Rekha Verma has filed her ITR for the year under consideration showing income of Rs.2,68,662. In this regard, we have gone through the documents placed on record and after hearing the parties, we found that during the course of assessment proceedings, the ITR, Computation, Bank Statement and confirmation of accounts of all cash creditors including that of Smt. Rekha Verma were furnished. It is important to mention that in the confirmation of accounts, both assessee as well as the cash creditor put their respective signatures in token of having accepted the veracity of the transactions. Further the bank statement of Rekha Verma also highlighted the payment made by her to the assessee. The bank statements

of the assessee are also on record and in case, any amount had been paid by Rekha Verma then the same would be featuring in the bank statement of the assessee. Accordingly, the Ld PCIT has gone wrong in assuming that the transaction dated 14.05.2015 for Rs. 5 Lacs as that of the assessee. In this regard, it was pointed out by the ld. AR that the aforesaid amount was received by way of loan by the wife of the assessee Smt. Sunita Agarwal. The reason behind the existence of Narration "TO YS AC RTGS" in both the transaction involving the assessee and his wife is the fact that the assessee is Prop of M/s Yash Trading Corporation and his wife is Prop of M/s Yogesh Enterprises. The cash credits were received by both of them in the bank account of their respective proprietorship concern. Therefore, the nomenclature in the narration are same. Apart from this, from the Bank statement it is obvious that the immediate source of unsecured loan of Rs. 10 lakhs to Rekha Verma was the money received by her from M/s Jaishree Products on 09.05.2015 for Rs. 3 Lacs and on 11.05.2015 for Rs. 7 Lacs through account payee cheques. Thus, in this way, the entire source of unsecured loans of Rs. 10.00 lacs stands proved.

14. Since, the current income didn't constitute the source of unsecured loan, therefore, the comparison of current income with the amount of unsecured loan

does not have any meaning and relevance. Thus, after considering the facts, we are of the view that the order passed by the ld. PCIT is unsustainable.

15. After analyzing the totality of facts and circumstances and after evaluating the documents placed on record and the order passed by the A.O., we are of the view that A.O. had carried out all the necessary enquires and examined all the issues and had formed a possible view. It is also settled law that where two views are possible and the A.O. has taken one view, then in that eventuality, the assessment order cannot be treated as erroneous. In this regard, we draw strength from the decision of **CIT Vs. Kwality Steel Suppliers Complex (2017) 395 ITR 1 (SC)** wherein it has been held that:

> *"Where two views are possible and the AO has taken one view, the assessment order cannot be treated as erroneous or prejudicial to the interest of revenue. This is for the reason that while exercising the revisionary jurisdiction, the CIT is not sitting in appeal. In the instant case, the assessee firm was constituted with two partners viz., mother and son. It stood dissolved by the operation of law in view of the death of one of the partners, i.e. the mother but the business did not come to an end as the other partners, viz., son who inherited the share of the mother continued with the business. In this situation, there was no question of selling the assets of the firm including stock-in-trade and therefore, it was not necessary to value stock-in-trade at market price. Thus, the view taken by AO in accepting the book value of the stock-in-trade was a plausible and permissible view and therefore, the CIT could not exercise his powers u/s 263."*

Even otherwise a bare perusal or bare reading of Section 263 of the Act, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner

suo moto under it, is that the order of ITO/AO is erroneous in so far as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied or twin condition and in case if one of them is absent then recourse cannot be had to Section 263 of the Act and thus in this way the provisions cannot be invoked to correct each and every type of mistake or error committed by the A.O.. It is only when an order is erroneous then the Section will be attracted. Even the Coordinate bench of ITAT in the decision of **Sir Dorabji Tata Trust Vs DCIT(E) 188 ITD 38** had discussed and explained the nature and scope of provisions of explanation 2(a) of Section 263 of the Act and held as under:

> ***"19.*** *The question that we also need to address is as to what is the nature of scope of the provisions of Explanation 2(a) to Section 263 to the effect that an order is deemed to be "erroneous and prejudicial to the interests of the revenue" when Commissioner is of the view that "the order is passed without making inquiries or verification which should have been made".*
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> ***20.*** *Undoubtedly, the expression used in Explanation 2 to Section 263 is "when Commissioner is of the view," but that does not mean that the view so formed by the Commissioner is not subject to any judicial scrutiny or that such a view being formed is at the unfettered discretion of the Commissioner. The formation of his view has to be in a reasonable manner, it must stand the test of judicial scrutiny, and it must have, at its foundation, the inquiries, and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant- that an Assessing Officer is expected to be. If we are to proceed on the basis, as is being urged by the learned Departmental Representative and as is canvassed in the impugned order, that once Commissioner records his view that the order is passed without making inquiries or verifications which should have*

been made, we cannot question such a view and we must uphold the validity of revision order, for the recording of that view alone, it would result in a situation that the Commissioner can de facto exercise unfettered powers to subject any order to revision proceedings. To exercise such a revision power, if that proposition is to be upheld, will mean that virtually any order can be subjected to revision proceedings; all that will be necessary is the recording of the Commissioner's view that "the order is passed without making inquiries or verification which should have been made". Such an approach will be clearly incongruous. The legal position is fairly well settled that when a public authority has the power to do something in aid of enforcement of a right of a citizen, it is imperative upon him to exercise such powers when circumstances so justify or warrant. Even if the words used in the statute are prima facie enabling, the courts will readily infer a duty to exercise a power which is invested in aid of enforcement of a right—public or private—of a citizen. [L Hirday Narain v. ITO [1970] 78 ITR 26 (SC). As a corollary to this legal position, when a public authority has the powers to do something against any person, such an authority cannot exercise that power unless it is demonstrated that the circumstances so justify or warrant. In a democratic welfare state, all the powers vested in the public authorities are for the good of society. A fortiorari, neither can a public authority decline to exercise the powers, to help anyone, when circumstances so justify or warrant, nor can a public authority exercise the powers, to the detriment of anyone, unless circumstances so justify or warrant. What essentially follows is that unless the Assessing Officer does not conduct, at the stage of passing the order which is subjected to revision proceedings, inquiries and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant- that an Assessing Officer is expected to be, Commissioner cannot legitimately form the view that "the order is passed without making inquiries or verification which should have been made". The true test for finding out whether Explanation 2(a) has been rightly invoked or not is, therefore, not simply existence of the view, as professed by the Commissioner, about the lack of

necessary inquiries and verifications, but an objective finding that the Assessing Officer has not conducted, at the stage of passing the order which is subjected to revision proceedings, inquiries and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant that the Assessing Officer is expected to be.

21. *That brings us to our next question, and that is what a prudent, judicious, and responsible Assessing Officer is to do in the course of his assessment proceedings. Is he to doubt or test every proposition put forward by the assessee and investigate all the claims made in the income tax return as deep as he can? The answer has to be emphatically in negative because, if he is to do so, the line of demarcation between scrutiny and investigation will get blurred, and, on a more practical note, it will be practically impossible to complete all the assessments allotted to him within no matter how liberal a time limit is framed. In scrutiny assessment proceedings, all that is required to be done is to examine the income tax return and claims made therein as to whether these are prima facie in accordance with the law and where one has any reasons to doubt the correctness of a claim made in the income tax return, probe into the matter deeper in detail. He need not look at everything with suspicion and investigate each and every claim made in the income tax return; a reasonable prima facie scrutiny of all the claims will be in order, and then take a call, in the light of his expert knowledge and experience, which areas, if at all any, required to be critically examined by a thorough probe. While it is true that an Assessing Officer is not only an adjudicator but also an investigator and he cannot remain passive in the face of a return which is apparently in order but calls for further inquiry but, as observed by Hon'ble Delhi High Court in the case of Gee Vee Enterprises v. Addl. CIT [1975] 99 ITR 375 "it is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. (Emphasis, by underlining, supplied by us). It is, therefore, obvious that when the circumstances are not such as to provoke an inquiry, he need not put every proposition to the*

test and probe everything stated in the income tax return. In a way, his role in the scrutiny assessment proceedings is somewhat akin to a conventional statutory auditor in real-life situations. What Justice Lopes said, in the case of Re Kingston Cotton Mills [(1896) 2 Ch 279,], in respect of the role of an auditor, would equally apply in respect of the role of the Assessing Officer as well. His Lordship had said that an auditor (read Assessing Officer in the present context) "is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a bloodhound.". Of course, an Assessing Officer cannot remain passive on the facts which, in his fair opinion, need to be probed further, but then an Assessing Officer, unless he has specific reasons to do so after a look at the details, is not required to prove to the hilt everything coming to his notice in the course of the assessment proceedings. When the facts as emerging out of the scrutiny are apparently in order, and no further inquiry is warranted in his bona fide opinion, he need not conduct further inquiries just because it is lawful to make further inquiries in the matter. A degree of reasonable faith in the assessee and not doubting everything coming to the Assessing Officer's notice in the assessment proceedings cannot be said to be lacking bona fide, and as long as the path adopted by the Assessing Officer is taken bona fide and he has adopted a course permissible in law, he cannot be faulted- which is a sine qua non for invoking the powers under section 263. In the case of Malabar Industrial Co Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 83, Hon'ble Supreme Court has held 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 ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO 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 ITO is unsustainable in law." The test for what is the least expected of a prudent, judicious and responsible Assessing Officer in the normal course of his assessment work, or what constitutes a

permissible course of action for the Assessing Officer, is not what he should have done in the ideal circumstances, but what an Assessing Officer, in the course of his performance of his duties as an Assessing Officer should, as a prudent, judicious or reasonable public servant, reasonably do bona fide in a real-life situation. It is also important to bear in mind the fact that lack of bona fides or unreasonableness in conduct cannot be inferred on mere suspicion; there have to be some strong indicators in direction, or there has to be a specific failure in doing what a prudent, judicious and responsible officer would have done in the normal course of his work in the similar circumstances. On a similar note, a co-ordinate bench of the Tribunal, in the case of Narayan Tata Rane v. ITO [2016] 70 taxmann.com 227 (Mum.) has observed as follows:

> *"20. Clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld. Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-a-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have claimed out or not. It does not authorise or give unfettered powers to the Ld. Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made."*

22. *Having said that, we may also add that while in a situation in which the necessary inquiries are not conducted or necessary verifications are not done, Commissioner may indeed have the powers to invoke his powers under section 263 but that it does not necessarily follow that in all such cases the matters can be remitted back to the assessment stage for such inquiries and verifications. There can be three mutually exclusive situations with regard to exercise of powers under section 263,*

read with Explanation 2(a) thereto, with respect to lack of proper inquiries and verifications. The first situation could be this. Even if necessary inquiries and verifications are not made, the Commissioner can, based on the material before him, in certain cases straight away come to a conclusion that an addition to income, or disallowance from expenditure or some other adverse inference, is warranted. In such a situation, there will be no point in sending the matter back to the Assessing Officer for fresh inquiries or verification because an adverse inference against the assessee can be legitimately drawn, based on material on record, by the Commissioner. In exercise of his powers under section 263, the Commissioner may as well direct the Assessing Officer that related addition to income or disallowance from expenditure be made, or remedial measures are taken. The second category of cases could be when the Commissioner finds that necessary inquiries are not made or verifications not done, but, based on material on record and in his considered view, even if the necessary inquiries were made or necessary verifications were done, no addition to income or disallowance of expenditure or any other adverse action would have been warranted. Clearly, in such cases, no prejudice is caused to the legitimate interests of the revenue. No interference will be, as such, justified in such a situation. That leaves us with the third possibility, and that is when the Commissioner is satisfied that the necessary inquiries are not made and necessary verifications are not done, and that, in the absence of this exercise by the Assessing Officer, a conclusive finding is not possible one way or the other. That is perhaps the situation in which, in our humble understanding, the Commissioner, in the exercise of his powers under section 263, can set aside an order, for lack of proper inquiry or verification, and ask the Assessing Officer to conduct such inquiries or verifications afresh."

Thus, while applying the principles laid down in the case of **Sir Dorabji Tata Trust Vs DCIT(E)** (supra), it is evident that in the present case, the A.O. had made all necessary enquiries and verifications as can be expected of a prudent,

judicious and responsible A.O. in normal course of his assessment work. Even ld. PCIT has not specified as to what type of enquiry ought to have been made by the A.O. which would have resulted into income or disallowance or any other adverse action, therefore, in such circumstances, the order passed by the A.O. cannot be branded as erroneous and prejudicial to the interest of revenue, therefore, we set aside and quash the order passed u/s 263 of the Act.

16. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 07/10/2021.

Sd/-	Sd/-
(VIKRAM SINGH YADAV)	**(SANDEEP GOSAIN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Jodhpur
Dated 07/10/2021
*Ranjan
Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT (A)
5. The DR
6. Guard File

Assistant Registrar

Jodhpur Bench