IN THE INCOME TAX APPELLATE TRIBUNAL, JODHPUR BENCH, JODHPUR

BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER AND

SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

ITA No. 26/JODH/2021
Assessment Year: 2016-17

Sukhdev Chayal, Near Ratan Sagar Well, Bikaner.	Vs.	Pr.CIT-1, Jodhpur.
PAN No. AFJPC 9250 J		

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 19/03/2021 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 an individual. During the year under consideration, the assessee earned salary income from NBC, Panchati circle, Bikaner, income from business and profession. The assessee also

incurred a short term capital gain on selling of an agriculture land. The assessee also earned income from other sources. In the return of income for the year under consideration, the assessee had declared total income of Rs. 74,31,560/- . The AO completed the assessment on 26/12/2018 determining totaling total income of the assessee at Rs. 1,07,35,280/-. 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:** As per the details furnished, before conversion of the said land, the assesee has claimed to have constructed, road and colony on the said land. As per the condition No. (6) of the letter of Land Conversion Authority, the said land can't be used for any other purpose other than the purpose for which it was converted by the authority. As the said land was converted solely for the purpose of agro processing, therefore, the activity of construction of roads and colony on the said land was not legally allowable. Hence, taking into consideration the facts discussed above, the assessee was liable to be taxed treating the transaction of purchase and sale of land as business income.*
>
> *The Assessing Officer without making proper inquiries and verifications, allowed the claim of short term capital gain on the said transactions. The AO is directed to examine and verify the purchase, improvement and sale of land under the light of business transaction/activity of the assessee and tax the income accordingly.*
>
> *The matter relating to Short Term Capital Gain on sale of Land was dwelt upon by the Ld AO in great detail. The detail of property purchased and sold viz Purchase Deed, sale deed & Cost to improvement amounting to Rs. 70.04 Lacs under the ledger Land Filling, levelling, development account, conversion order were called upon and furnished the AO vetted the aforesaid documents critically and made whopping addition of Rs. 33,03,724. vide query dated 17.12.2018 the ld AO made in-depth examination of the Short Term Capital Gain Income. An elaborate reply in pursuance of the query raised was filed by the assessee on 20.12.2018 giving away the various details inter-alia the land chart. Your kind attention is drawn to the page no 2 of the assessment order*

where AO has computed the amount of STCG as well as prepared the quantitative tally and undertook ratio analysis. Ld. AO did extensive verification of the land which was a subject matter of development. He bifurcated the development expenditure into cash and cheque as well. The relevant extract of assessment order appearing at Page no 4 is being reproduced for better understanding

"Further, the assessee has claimed Rs. 70,04,902/- against cost of improvement. The whole land is improved (levelling, land filing and development) simultaneously because the part which is sold has lower level of sand that the part which is left with assessee. Therefore the cost of improvement of 70 lacs is for whole land of 10.84 hectare. The assessee is failed to explain how he bifurcate the expenses of improvement between the land sold and the land left with him. The ledgers produced by him and the amounts paid by cheques clarifies it that the whole amount of improvement is calculated to 70 lacs which is for whole land of 10.84 hectare. Therefore only 58.30% (part of land sold) of expenses of cost of improvement is allowable and the remaining 41.7% of cost of improvement i.e. Rs. 29,21,044- (41.7% of 7004902) is disallowed and added to the short term capital gain of the assessee. On perusal of documents submitted by assessee, it is found that the assessee claimed Rs. 70 lacs as cost of improvement. Out of these 70 lacs the assessee made payments of Rs. 20 lacs in cash. Further it is worthwhile to mention here that the assessee had purchased this land on 14.07.2015 and started the work of land filling, levelling and development on 15.07.2018 and further sold the land on 09.11.2015. It means the assessee work of land filling, levelling and development last for July to October month. This period of months are$_a$ period of monsoon in Bikaner and in this rainy season the assessee claimed expenses of water tanker to the tune of Rs. 6.56 lacs. Further the assessee paid the whole amount of water tankers in cash and failed to produce any documentary evidence of payment other than self made

vouchers. Therefore, as per above discussion, the 58.3% (as per para 4.1. part of land sold) payment of Rs. 6,56,400 i.e. Rs. 3,82,680/- claimed against water tanker is disallowed and added to the total income of assessee in the head of capital gain under short term capital gain for the relevant year."

It was directed by the PCIT that the sale of land be booked under the head Business and Profession rather than STCG. Such type of subjectivity which propagates one line of action and negates another is nothing but a change in opinion. 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. If there are two views plausible on the facts of the case and the AO takes one view which is in accordance of law. In that particular scenario the PCIT does not assume jurisdiction.

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

Issue/Point 2: *In the return of income, the assessee has not disclosed the sale consideration of property mentioned as Sr. No. 1 and 2 (amounting Rs 1,16,12,878 and Rs. 1,09,76,267). This fact has not been verified by the Assessing Officer while completing the assessment. The AO is directed to examine and verify the investment in purchase and tax treatment on sale of these properties.*

It was alleged by your honour the assessee has not disclosed the sale consideration of property mentioned as Sr. No. 1 and 2. The allegation is totally unfounded since no sale has taken place of the properties in that particular state. During the course of assessment proceedings the factum of agriculture land at Khara Bypass which was converted was thoroughly examined and verified. The various land accounts and land chart were furnished. From the point no 3 of the order it is obvious that 9.88 Hectare of land was converted. The same figures contained at point no 4.

The accounts of the assessee are maintained in such a way that the account get changed upon the change in nature/use of the property in question. The agriculture land at khara bypass was purchase for Rs. 10903818.00 and stamp duty of Rs. 709060.00 was paid thereon. The total cost thereof worked out to Rs. 11612878.00. When a part of aforesaid land measuring 9.88 hectare was converted for industrial use and the balance land of 0.83 hectare was retained as agriculture land then the overall cost of the land was apportioned between the two types of lands. In order to reflect the action of conversion and retention of agriculture land in its original character the agriculture land at khara bypass credited and squared up by debiting the new accounts namely agri land at khara bypass 0.83 hectare by Rs. 899971.00 and land at khara bypass 9.88 hectare by Rs. 10712907.00. The conversion is not a sale therefore the action of crediting of the agriculture land at khara bypass was not shown as such.

As mentioned earlier that land at khara bypass a/c measuring 9.88 hectare was debited by Rs. 10712907.00 and conversion charges amounting to rs. 263360.00 was also debited. The total debit to the account was Rs. 10976267.00. When part of the converted land measuring 6.32 hectare was sold and balance 3.56 hectare retained then the aforesaid account namely land at khara bypass (converted 9.88 hq) was credited by opening and debiting two new accounts namely land sale a/c (khara bypass) and land at khara bypass(3.56 hq). The cost of land sold which signifies the cost attributable to the land sold was debited by Rs. 7021255.00 and new account namely land at khara bypass 3.56 hq which underlies the cost of retained land was debited by Rs. 3955012.00. The action of crediting the land at khara bypass was necessitated by the apportionment of the cost of converted land into two parts namely one attributable to land sold and another one relating to land retained. Thus, the act of apportioning the cost of land by way of splitting the cost into two heads does not constitute sale,

hence there is no question of showing the same as sale in the return of income.

It is therefore requested that the present order of the Ld. Pr. CIT may please be quashed as void ab initio and oblige.

Issue/Point 3: *While completing the assessment, the source of acquisition of the mentioned immovable assets has not been examined by the AO. The AO is directed to examine and verify the source of investment in purchase of these properties.*

During the course of Proceedings Fixed assets Chart as well as Interest account were furnished together with the Financial Statements of Year under review and immediately preceding year. The increment in the cost of these properties baring no. 3 and 7 has taken place by virtue of capitalization of interest. The assessee had purchase the aforesaid properties in the preceding years and the amount of interest attributable to these properties was capitalized by debiting the respective immovable property. Further the act of capitalizing the interest does not result into introduction of fresh funds therefore does not have any implication on the taxable income of the assessee. The amount of capitalisation of Interest was verified from the interest account by Ld AO.

As for point no. 3 and point no. 7 of the table it is submitted that these new head of immovable properties had come into existence by virtue of transfer from the old accounts. The background of agriculture land at khara bypass0.83 hectare and land at khara 3.56 hectare has already been deliberated upon in length at point no. 2 of this letter. These two are basically offset accounts which cot debited and consiquencely came into existence by crediting the existing property account. There is no fresh funds involved in these two new accounts.

During the year the plot at panchsati circle plot no. 53 for Rs. 17446411.00 came into existence. The payment of aforesaid plot was made in the preceding years to the UIT Bikaner. The assessee has purchase the aforesaid plot from UIT, Bikaner through the process of open bidding. There was no fresh investment on the purchase of the aforesaid plot baring the payment of stamp duty registration charges UIT fees etc. The investment on account of such incidental charges was made through the regular channel of the assessee and the total value of such investment was reflected in the financial statement which is available on records. The assets of the assessee had its source in capital and liability. Each and every entry falling in that category is fully verifiable.

Tubewell at khara bypass was constructed during the year for Rs. 334425.00. The investment in tubewell stand reflected in the financial statement of the assessee available on records.

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

***Issue/Point 4:** During the year under consideration, the assessee has obtained unsecured loans amounting to Rs.1,95,34,000 from various persons, but creditworthiness of none of them was verified by the AO by invoking the provisions of Section 131 or Section 133(6) of the Income Tax Act, 1961.*

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) in ITA No. 1103/Kol/2019 Date of 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 5: *As per the detail furnished in respect of interest payment, it is found that interest of Rs.39,12,624/- is claimed to have been paid to outside parties including an amount of Rs.6,20,954 /- to DCB KCC 329 account. During the course of assessment proceedings, the Assessing officer failed to examine and verify the source of this interest payment on the alleged unsecured loans. The AO is accordingly directed to examine and verify the source of interest payment of Rs.39,12,624/- on the alleged unsecured loans. During the course of assessment proceedings the detailed interest account, bank account, duly confirmed account statements of cash creditors were furnished. The authenticity of lenders and genuineness of interest are established beyond any shadow of doubt as the same is also proved by the third party evidence. There has not been any payment of interest in cash. The rate of interest was not unreasonable or exorbitant having regard to the nature and type of loan. Further out of the total interest payment of Rs. 39,12,624.00, a sum of Rs. 32,83,916.00 was capitalized. The Fixed assets chart furnished corroborates the factum of capitalisation. Thus 80 to 85 percent of the interest payment does not*

have any implication on the taxable income. The Ld AO examined the interest account, bank statement, fixed asset chart in a cohesive manner.

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

Issue/Point 6: *As per details available in Form 26AS, the assessee has received payment u/s 194 of Rs.2,00,00,000/- as dividend from M/s. Kunjvarji Warehousing and Logistics Pvt. Ltd. The amount has not been declared by the assessee in his return of income under this head. Similarly, an amount of Rs.2,43,110/- has been received u/s 194lB from Shri Dhanpat Chayal. This amount has also not been shown/declared in the return of income.*

The assessee has not received any payment of dividend of Rs. 2,00,00,000.00 from Kunjvarji ji warehousing and Logistics Pvt. Ltd. The aforesaid payment of Rs. 2 crore was received as a sale consideration of land to the company. This sale of this land is a subject matter of STCG & the detailed discussion at Point No 1. The Form 26AS is already available on assessment record. From the perusal of it one may find that Tax has been Deducted u/s 194IA which is related to sale of Immovable Property. The brandishing of this apparent consideration from the sale of property is beyond comprehension.

The assessee has received the interest of Rs. 2,43,110.00 from Dhanpat chayal which stands reflected in the interest account under the head Yuva life style. It may be noted the Shri Dhanpat Chayal is proprietor of M/s Yuva Life Style. The TDS in case of proprietorship concern is always deducted in the name of proprietor which was Shri Dhanpat Chayal in the instant case. The Tax has been deducted wrongly under the wrong section. It should have been under section 194A rather than 1941(b) which relates to Rental Income. The rate of TDS is same i.e. 10% under both the

Sections. Thus there is no escapement of income from the clutches of revenue. 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 have also perused the documents placed in the paper book i.e. acknowledgement of documents submitted on 14/12/2018, ITR of assessee alongiwth balance sheet and schedules, confirmation of ITR of cash creditors, bank accounts, sale deed of Rs. 2.00 crore to Kunwar Ji, purchase deed of land, conversion order, sale of land account consideration of Rs. 2.00 crore, agriculture land purchase account, converted land account, land filling, leveling and development account of Rs. 7004902, questionnaire raised in notice dated 17/12/2018, acknowledgement of documents submitted on 20/12/2018, land chart, various query letters, acknowledgment of replies of query letters, acknowledgement of documents, query dated 26/12/2018 regarding disallowance of development expenses up to 41.7%, computation sheet, notice of hearing U/s 263 dated 22/02/2021,

acknowledgement of replies of query letters, reply of notice u/s 263 alongwith documents, intimation order U/s 263 and Form 26AS. We found that the ld. PCIT has held that the order of A.O. U/s 143(3) dated 26/12/2018 is erroneous in so far as it is prejudicial to the interests of the Revenue on the basis of six issued points as mentioned in its order, therefore, now we will deal with all points separately. From perusal of the record, we observed that the matter relating to Short Term Capital Gain on sale of land was dwelt upon by the AO in detail. The detail of property purchased and sold viz Purchase Deed, sale deed & Cost to improvement amounting to Rs. 70.04 Lacs under the ledger Land Filling, levelling, development account, conversion order were called upon and furnished before the AO and AO vetted the aforesaid documents critically and made addition of Rs. 33,03,724 vide query dated 17.12.2018 the AO made in-depth examination of the Short Term Capital Gain Income. The assessee had filed elaborate reply in pursuance of the query raised by the A.O. on 20.12.2018 thereby giving away the various details inter-alia the land chart. In this regard, our attention was drawn to the page no. 2 of the assessment order where the AO has computed the amount of STCG as well as prepared the quantitative tally and undertook ratio analysis. From the record, we noticed that the AO did extensive verification of the land which was a subject matter of development. He bifurcated the development expenditure into cash and cheque as well. The

relevant extract of assessment order appearing at Page no. 4 is being reproduced as under:

> *"Further, the assessee has claimed Rs. 70,04,902/- against cost of improvement. The whole land is improved (levelling, land filing and development) simultaneously because the part which is sold has lower level of sand that the part which is left with assessee. Therefore the cost of improvement of 70 lacs is for whole land of 10.84 hectare. The assessee is failed to explain how he bifurcate the expenses of improvement between the land sold and the land left with him. The ledgers produced by him and the amounts paid by cheques clarifies it that the whole amount of improvement is calculated to 70 lacs which is for whole land of 10.84 hectare. Therefore only 58.30% (part of land sold) of expenses of cost of improvement is allowable and the remaining 41.7% of cost of improvement i.e. Rs. 29,21,044- (41.7% of 7004902) is disallowed and added to the short term capital gain of the assessee. On perusal of documents submitted by assessee, it is found that the assessee claimed Rs. 70 lacs as cost of improvement. Out of these 70 lacs the assessee made payments of Rs. 20 lacs in cash. Further it is worthwhile to mention here that the assessee had purchased this land on 14.07.2015 and started the work of land filling, levelling and development on 15.07.2018 and further sold the land on 09.11.2015. It means the assessee work of land filling, levelling and development last for July to October month. This period of months are$_a$ period of monsoon in Bikaner and in this rainy season the assessee claimed expenses of water tanker to the tune of Rs. 6.56 lacs. Further the assessee paid the whole amount of water tankers in cash and failed to produce any documentary evidence of payment other than self made vouchers. Therefore, as per above discussion, the 58.3% (as per para 4.1. part of land sold) payment of Rs. 6,56,400 i.e. Rs. 3,82,680/- claimed against water tanker is disallowed and added to the total income of assessee in the head of capital gain under short term capital gain for the relevant year."*

However, after analyzing the order of assessment, the ld. PCIT directed that the sale of land be booked under the head Business and Profession rather than STCG. In our view, such type of subjectivity which propagates one line of action and negates another is nothing but a change in opinion. 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 and in case, if there are two views plausible on the facts of the case and the AO takes one view which is in accordance of law, then in that eventuality, the PCIT does not assume jurisdiction.

7. As far as point No. 2 of the order of the ld. PCIT is concerned, in that it was pointed out by the ld. PCIT that in the return of income, the assessee has not disclosed the sale consideration of property mentioned as Sr. No. 1 and 2 at page 11 of order of PCIT (amounting Rs 1,16,12,878 and Rs. 1,09,76,267) and this fact has not been verified by the Assessing Officer while completing the assessment. Therefore, AO was directed to examine and verify the investment in purchase and tax treatment on sale of these properties. However, as per the ld. AR, the allegation is totally unfounded since no sale has taken place of the properties in that particular state. During the course of assessment proceedings the factum of agriculture land at Khara Bypass which was converted was thoroughly examined and verified. The various land accounts and land chart

were furnished. From the point no 3 of the order it is obvious that 9.88 Hectare of land was converted. The same figures contained at point no 4. The accounts of the assessee are maintained in such a way that the account get changed upon the change in nature/use of the property in question. The agriculture land at khara bypass was purchase for Rs. 10903818.00 and stamp duty of Rs. 709060.00 was paid thereon. The total cost thereof worked out to Rs. 11612878.00. When a part of aforesaid land measuring 9.88 hectare was converted for industrial use and the balance land of 0.83 hectare was retained as agriculture land then the overall cost of the land was apportioned between the two types of lands. In order to reflect the action of conversion and retention of agriculture land in its original character the agriculture land at khara bypass credited and squared up by debiting the new accounts namely agri land at khara bypass 0.83 hectare by Rs. 899971.00 and land at khara bypass 9.88 hectare by Rs. 10712907.00. Since, the conversion is not a 'sale' therefore the action of crediting of the agriculture land at khara bypass was not shown as such. As per factual position, the land at khara bypass a/c measuring 9.88 hectare was debited by Rs. 10712907.00 and conversion charges amounting to Rs. 263360.00 was also debited. The total debit to the account was Rs. 10976267.00 and according to the ld. AR, when part of the converted land measuring 6.32 hectare was sold and balance 3.56 hectare was retained then the aforesaid account namely land at khara bypass (converted 9.88 hq) was

credited by opening and debiting two new accounts namely land sale a/c (khara bypass) and land retained at khara bypass(3.56 hq). The cost of land sold which signifies the cost attributable to the land sold was debited by Rs. 7021255.00 and new account namely land at khara bypass 3.56 hq which underlies the cost of retained land was debited by Rs. 3955012.00. Thus, in this way, the action of crediting the land at khara bypass was necessitated by the apportionment of the cost of converted land into two parts namely one attributable to land sold and another one relating to land retained. Thus, mere act of apportioning the cost of land by way of splitting the cost into two heads does not constitute sale, therefore, there was no question of showing the same as sale in the return of income. Since, the order of ld. PCIT is not based on correct appreciation of factual position, therefore, the same is not sustained in the eyes of law.

8. Now while dealing with point/issue No. 3, it was observed by the ld. PCIT that the assessee has made investment in following immovable properties

S.No.	Particular	Amount
1.	Agri land at Gangangar (0.556 Hq)	1,49,153
2.	Agri land at Ganganagar (1.202 Hq)	1,43,320
3.	Agri land at Khara Bypass (.83 Hq)	8,99,971
4.	Land at Ginnani (998.75 Sq. Ft)	57,592
5.	Land at JNV (4-0-35 2100 Sq. Ft)	2,10,723
6.	Land at Khara	43,430
7.	Land at Khara (3.56 Hq)	48,64,930
8.	Land at Meghasar (1/3 portion of 31.66 Hq)	25,998
9.	Land at Nokha	2,22,202
10.	Land & Building at Ratansagar Well	85,038
11.	Land in JNV Colony (6A-38, 1/2 portion)	2,30,535

12.	Plot at Ganganagar 1 (1800 Sq. Ft)	5,777
13.	Piot at Ganganagar 2 (1800 Sq. Ft)	5,777
14.	Plot at Panchsati Circle(Plot No. 53)	1,74,46,411
15.	Tubewell at Khara bypass land	3,34,425
	• Total	2,47,25,282

According to the ld. PCIT, while completing the assessment, the source of acquisition of the mentioned immovable assets has not been examined by the AO. However, the ld. AR submitted that during the course of Proceedings, Fixed assets Chart as well as Interest account were furnished together with the Financial Statements of Year under review and immediately preceding year. The increment in the cost of these properties bearing no. 3 and 7 has taken place by virtue of capitalization of interest. The assessee had purchase the aforesaid properties in the preceding years and the amount of interest attributable to these properties was capitalized by debiting the respective immovable property. Hence, the act of capitalizing the interest does not result into introduction of fresh funds therefore does not have any implication on the taxable income of the assessee. Moreover, the amount of capitalisation of interest was thoroughly verified from the interest account by AO. It was submitted that as for point no. 3 and point no. 7 of the table it is submitted that these new head of immovable properties had come into existence by virtue of transfer from the old accounts. As per the ld. AR, the background of agriculture land at khara bypass 0.83 hectare and land at khara 3.56 hectare has already been deliberated upon in length at point no. 2 of this letter. Ld. AR submitted that these two are basically offset

accounts which cot debited and consiquencely came into existence by crediting the existing property account. Thus, in this way, there is no fresh fund involved in these two new accounts. As per the ld. AR, during the year the plot at panchsati circle plot no. 53 for Rs. 17446411.00 came into existence. The payment of the aforesaid plot was made in the preceding years to the UIT Bikaner. The assessee has purchase the aforesaid plot from UIT, Bikaner through the process of open bidding. There was no fresh investment on the purchase of the aforesaid plot during the year baring the payment of stamp duty registration charges UIT fees etc. The investment on account of such incidental charges was made through the regular channel of the assessee and the total value of such investment was reflected in the financial statement which is available on records. The assets of the assessee had its source in capital and liability. Each and every entry falling in that category is fully verifiable. Tubewell at khara bypass was constructed during the year for Rs. 334425.00. The investment in tubewell stand reflected in the financial statement of the assessee available on records. Thus, in this way when all the facts supported with evidences were placed on record before the A.O. and A.O. being satisfied, passed order, therefore, the same cannot be interfered by the PCIT.

9. Now while dealing with point/issue No. 4, we observed that during the year under consideration, the assessee has obtained unsecured loans amounting

to Rs.1,95,34,000 from various persons, but creditworthiness of none of them was verified by the AO by invoking the provisions of Section 131 or Section 133(6) of the Act. However, in this regard, the ld. AR submitted that during the course of proceedings all the duly signed account statement, bank accounts, ITR and interest account were duly furnished and properly verified by 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. In this regard, we draw strength from the decision of Coordinate Bench of Kolkata Tribunal in the case of **Citystar Ganguly Projects Ltd. Vs**

PCIT (ITAT Kolkata) in ITA No. 1103/Kol/2019 order dated 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.

10. Now we take up issue/point No. 5 of the order of ld. PCIT wherein it was observed by the ld. PCIT that as per the detail furnished in respect of interest payment, it is found that interest of Rs.39,12,624/- is claimed to have been paid to outside parties including an amount of Rs.6,20,954 /- to DCB KCC 329 account. During the course of assessment proceedings, the Assessing officer

failed to examine and verify the source of this interest payment on the alleged unsecured loans. In this regard, the ld. AR vehemently argued that during the course of assessment proceedings the detailed interest account, bank account, duly confirmed account statements of cash creditors were furnished. The authenticity of lenders and genuineness of interest are established beyond any shadow of doubt as the same is also proved by the third party evidence. There has not been any payment of interest in cash. The rate of interest was not unreasonable or exorbitant having regard to the nature and type of loan. Further out of the total interest payment of Rs. 39,12,624.00, a sum of Rs. 32,83,916.00 was capitalized. The Fixed assets chart furnished corroborates the factum of capitalisation. Thus 80 to 85 percent of the interest payment does not have any implication on the taxable income. The AO examined the interest account, bank statement, fixed asset chart in a cohesive manner and thus, when once the A.O. has thoroughly examined all details including source of interest payment, therefore, PCIT has no jurisdiction to invoke the provisions of Section 263 of the Act.

11. Now we deal with point/issue No. 6 raised by the ld. PCIT, in this regard, the ld. PCIT observed that as per details available in Form 26AS, the assessee has received payment u/s 194 of Rs.2,00,00,000/- as dividend from M/s. Kunjvarji Warehousing and Logistics Pvt. Ltd. The amount has not been

declared by the assessee in his return of income under this head. In this regard, the ld. AR has drawn our attention to the records and submitted that the assessee has not received any payment of dividend of Rs. 2,00,00,000.00 from Kunjvarji ji warehousing and Logistics Pvt. Ltd. The aforesaid payment of Rs. 2 crore was received as a sale consideration of land to the company. This sale of this land is a subject matter of STCG & the detailed discussion at Point No 1. The Form 26AS is already available on assessment record. From the perusal of it one may find that Tax has been Deducted u/s 194IA which is related to sale of Immovable Property. The brandishing of this apparent consideration from the sale of property is beyond comprehension. It was also submitted that the assessee has received the interest of Rs. 2,43,110.00 from Dhanpat Chayal which stands reflected in the interest account under the head Yuva life style. It may be noted the Shri Dhanpat Chayal is proprietor of M/s Yuva Life Style. The TDS in case of proprietorship concern is always deducted in the name of proprietor which was Shri Dhanpat Chayal in the instant case. The Tax has been deducted wrongly under the wrong section. It should have been under section 194A rather than 1941(b) which relates to Rental Income. Since, the rate of TDS is same i.e. 10% under both the Sections. Therefore, there is no escapement of income from the clutches of revenue.

12. 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".*
>
> ***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.

13. 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