

Ramesh Kumar Goyal Huf, Hisar vs Ito, Ward-3, , Hisar on 25 January, 2019

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "F", NEW DELHI]

BEFORE SMT. BEENA A. PILLAI, JUDICIAL MEMBER
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No. 1982/Del/2018
Assessment Year: 2014-15

Ramesh Kumar
H.No.467, Urban Estate-II,
Hisar, Hisar,
Haryana, Pin: 125005

ITO,
Ward- 3,
Vs. Hisar

PAN: ACGPK7006A
(Appellant) (Respondent)

ITA No. 1983/Del/2018
Assessment Year: 2014-15

Ramesh Kumar(HUF)
H.No.467, Urban Estate-II,
Hisar, Hisar,
Haryana, Pin: 125 005

ITO,
Ward- 3,
Vs. Hisar

(Appellant) (Respondent)

Assessee by : Shri K. Sampat, Advocate
Shri V. Raja Kumar, Advocate

Department by : Smt. Sulekha Verma, CIT(DR)

Date of hearing : 02-01-2019

Date of pronouncement : 25.01.2019

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ORDER

PER Bench:

The present appeals have been filed by the Assessee against the orders of the Ld. Pr. CIT, Hisar passed under section 263 of the Income Tax Act,1961. Since both the above appeals deal with common grounds, a consolidated order is being passed. For the sake of ready reference the Assessment Order in toto is reproduced as under:

"Return declaring Total income amounting to Rs. 16,36,340/- was e- filed by the assessee on 29.09.2014, which was processed u/s 143(1) of the Income Tax Act, 1961 on the returned income. The assessee is a partner in a Firm dealing in Petroleum Products and derives income from rent, share trading and interest during the year under consideration. Later on, the case of the assessee was selected for scrutiny assessment u/s 143(3) of the Income Tax Act, 1961 through CASS system of ITD for verification of suspicious long term capital gain on shares (inputs from investigation Wing). Statutory notice u/s 143(2) of the Income Tax Act, 1961 dated 18.09.2015 was issued and served upon the assessee. Subsequent notices u/s 143(2) and 142(1) of the Income Tax Act, 1961 alongwith questionnaire were issued and served upon the assessee. Sh. Ashok Kumar Goyal & Sh. Satish Kumar Goyal, Chartered Accountants, counsels for the assessee furnished Power of Attorney duly signed by the assessee and accepted by them and attended the assessment proceedings from time to time and furnished the requisite information/documents/evidence. The requisite details/information/ documents/ evidence filed by the counsel have been placed on record. The books of a/c alongwith original vouchers and other documents were produced by the assessee, which were examined".

2. From the examination of the above Assessment Order it can be deciphered that the Assessing Officer has passively mentioned about the inputs from investigation wing regarding the suspicious long term capital gains on shares and nothing beyond that.

3. Post the assessment proceedings, the Ld. Principal CIT issued a notice under section 263(1) to the assessee on 13/12/2017 giving the detailed reasons to invoke provisions of section 263 against the order of the Assessing Officer passed under section 143(3). During the proceedings conducted under section 263, the Ld. PCIT enquired about the capital gain earned by the assessee on sale of 30,000 shares of Kailash Auto Finance Ltd. in July 2013 for the consideration of Rs. 11,29,511/- which lead to Long Term Capital Gain of Rs. 10,99,599/- claimed by the assessee as exempt under section 10(38). It was brought to our notice that the assessee has replied to the Pr.CIT that this issue has been examined by the Assessing Officer as per point no. 4 of the reply and documentary evidence such as,

i) Copy of D-MAT A/c

iii) Share Bill evidencing purchase of shares

iii) Bank Statement through which the payment for purchase of shares was made and the sale proceeds of shares received.

iv) Copy of High Court order no. 9945 dt. 21.05.2013 for allotment of Kailash Auto Finance Ltd. Shares in exchange of shares of M/s Panchshul Marketing Ltd. i.e. in the ratio of 1:1.

v) Copy of Contract notes for sale of Kailash Auto Finance Ltd. shares depicting the payment of Securities Transaction Tax on sale of shares, have been provided.

It was argued before the Ld. PCIT that the Assessing Officer has conducted due enquiries and fully satisfied himself about the Long Term Capital Gains and passed the assessment order.

4. During the hearing before us, the Ld. AR, in addition to reiterating the arguments taken before the PCIT relied on the following case laws.

Commissioner Of Income Tax Vs. Gabriel India Ltd. (1993) 203 ITR 0108 High Court Of Bombay where in it was held that the power of suo motu revision under sub-s. (1) of s. 263 is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interest of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. An order cannot be termed as erroneous unless it is not in accordance with law. If an ITO acting in accordance with law makes certain assessment, the same cannot be branded as erroneous by the Commissioner simply because according to him the order should have been written more elaborately. This section does not visualise a case of substitution of judgment of the Commissioner for that of the ITO, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where ITO while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimates himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and, left to the Commissioner, he would have estimated the income at a higher figure than the one determined by the ITO. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the ITO has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interest of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, namely, the order is erroneous, is absent. Similarly if an order is erroneous but not prejudicial to the interest of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. There must be material available on record called for by the Commissioner to satisfy him, prima facie, that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on records to satisfy it in that regard. If the action of the authority is challenged before the Court, it would be open to the Courts to examine whether the relevant objective factors were available from the records called for and examined by such authority. Any other view in the matter will amount to giving unbridled and arbitrary power to revising authority to initiate

proceedings for revision in every case and start re- examination and fresh enquiries in matters which have already been concluded under the law. It is quasi-judicial power hedged with limitation and has to be exercised subject to the same and within its scope and ambit. So far as calling for the records and examining the same is concerned, undoubtedly it is an administrative act, but on examination, "to consider", or in other words, to form an opinion that the particular order is erroneous in so far as it is prejudicial to the interest of the Revenue, is a quasi-judicial act because on this consideration or opinion the whole machinery of reexamination and reconsideration of an order of assessment, which has already been concluded and controversy about which has been set at rest, is again set in motion. It is an important decision and the same cannot be based on the whims or caprice of the revising authority. There must be materials available from records called for by the Commissioner.

5. It is further argued by the Ld.AR that if two views are possible and Assessing Officer allows one of the possible views, the CIT cannot sit over the judgement of the AO as held by the Apex Court in the case of CIT vs Max India Ltd [2007] 295 ITR 282 (SC). It was argued that Similar view has been taken by Jurisdictional High Court in the case of CIT vs Kelvinator India Ltd. [2011] 332 ITR 231 (Del).

6. The Ld.AR has also relied on the judgement of the Hon'ble Delhi High Court in CIT vs Sunbeam Auto Ltd 332 ITR 167 (Del) where in it was held that AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. It was held that that one has to keep in mind the distinction between "lack of inquiry " and "inadequate inquiry". If there was any inquiry', even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. It was further held that if the AO had called for explanation on the very item from the assessee and the assessee had furnished his explanation ,then it clearly shows that the AO had undertaken the exercise of examining as to whether the expenditure incurred by the assessee is to be treated as taxable or not. If the AO was satisfied with the explanation, and accepted the same. Then the CIT cannot hold that the AO should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'. {CIT vs. Gabriel India Ltd. (1993) 114 CTR (Bom) 81 : (1993) 203 ITR 108 (Bom) relied on}.

7. The Ld.AR further relied on the judgement in the case of Income Tax Officer Vs. Dg Housing Projects Ltd (2012) 343 ITR 0329 (Delhi) where in it was held that Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression "prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term "erroneous" means a wrong/incorrect decision deviating from law'. This expression postulates an error which makes an order unsustainable in law.

8. It was also argued by the Ld.AR that in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiries. He also been referred to in the case of Commissioner of Income Tax Vs. Nirav Modi (2017) 390 ITR 0292 (Bom) High Court Of Bombay.

9. It was also argued by the Ld.AR that it is clear that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 and argued that the exemption claimed u/s 10(38) cannot be disallowed due to the fault of the company unless and until there is specific charge against the assessee.

10. It is again argued that the assessee had purchased 30,000 shares of Panchshul Marketing on 16.03.2012 & paid the amount by cheque. These shares were received in his D-mat account no 10001736, copy of his D-mat A/c statement was also enclosed at the time of assessment. Then as per High Court order dt. 21.05.2013 due to merger of Panchshul Marketing with Kailash Auto Finance Limited, the assessee was allotted 30000 shares of Kailash Auto Finance Ltd. And that the assessee had purchased the shares on 16.03.2012 i.e. more than 4 years back and that too of a company named Panchshul Marketing Ltd which then merged with another company and he got the shares of another company as per the directions of the High Court. The assessee as an investor, can only accept the shares allotted to as per the merger agreement of the listed companies and as approved by the High court.

11. He also relied on the case of 'Lalit Jagmohan Jain (HUF) v/s ACIT ITA no. 693/KoI/2009 dated 10.02.2016 and argued that assessee is not supposed to know the working of share broker in the stock exchange. He also relied on the case of ITO vs. Raj Kumar Aggarwal, ITA No. 1330/K/07, dated 10.08.2007 where in it was held that "A.O. has failed to bring on record any evidence to establish that evidence filed by assessee as well as share broker were fabricated or false. ...It is not the case of the revenue that there is no such broker or the distinctive nos of the shares of M/s Nageshwar Investments Ltd. do not exist or the transactions of purchase and sale of such shares recorded through bank and demat form are fictitious. The A.O. has simply acted on the information gathered from the Calcutta Stock Exchange and made an addition u/s 68. enquiry, if required and necessary, before the order under s. 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous.

12. It was argued quoting the judgements, that distinction must be kept in mind by the CIT while exercising jurisdiction under s. 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. passed by the Assessing Officer but also the record as it stands at the time of examination

by the CIT. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

13. Quoting the case of Kiran Kothari Huf, Kolkata vs Ito, Ward 35(3), Kolkata, on 15 November, 2017 I.T.A No. 443/Kol/2017 Assessment Year:

2013-14 Income Tax Appellate Tribunal - Kolkata, it was argued that the transactions of sale of shares by the assessee was duly backed up by material/evidence including contract notes, demat statement, bank account reflecting transactions, the stock brokers have confirmed the transactions the shares having been sold on the online platform of the stock exchange and each trade of sale of shares were having unique trade number and trade time. It is not the case of the AO that the shares which were sold on the date mentioned in the contract note were not the traded price on that particular date.It should be noted that the Stock Exchange and SEBI are the statutory authorities appointed by the Govt, of India to ensure that there is no stock rigging or manipulation. The AO has not brought any evidence on record to show that these agencies have alleged any stock manipulation and it cannot be said that merely because the stock price moved sharply, the assessee was to be blamed for bogus transactions

14. The Ld. AR concluded his arguments highlighting the following prepositions of law and facts :

- The order passed by the Assessing Officer is neither erroneous nor prejudicial to the interests of the revenue.
- The assessee is not covered in any of the conditions mentioned in Explanation 2 of Section 263(1).
- Merely because the CIT may not agree to the order of the Assessing Officer just due to change of opinion, the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue. · There is a distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even if it was inadequate, it does not give right to the Commissioner to pass orders under section 263 merely because of a different opinion.
- The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded.
- The assessee has already furnished all the documentary evidences which proves that transactions related to sale and purchase of shares are genuine.
- Merely because the stock price moved sharply, the assessee is not to be blamed for bogus transactions where he has purchased and sold the stocks through registered brokers and confirmed by valid contract notes as per law.

- The transactions cannot be brushed aside on suspicion and surmises where the transactions of the shares are genuine.

15. On the other hand the Ld. CIT DR filed her written submission which is as under:

Sub: Written Submission in the above case- reg.

In this regard, it is humbly submitted that Explanation 2 has been inserted in Section 263 of I.T. Act by Finance Act 2015 w.e.f. 01.06.2015 which is reproduced below:

Explanation 2. -- For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner--

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

In the above case, it is humbly submitted that the following decision may kindly be considered with regard to validity of proceedings u/s 263 of I.T.Act:

1. Hon'ble Supreme Court in the case of Deniel Merchants Pvt. Ltd. vs. ITO (Appeal No. 2396/2017) dated 29.11.2017. (copy enclosed). The relevant judgement of Hon'ble Calcutta High Court in this case is also enclosed. In this group of cases, Hon'ble Supreme Court has dismissed SLPs in cases where AO did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry thorough and detailed inquiry.

2. Malabar Industrial Co. Ltd. Vs CIT r20001 109 Taxman 66 (SC)/r20001 243 ITR 83 (SC)/r20001 159 CTR 1 (SC) (Copy Enclosed) where Hon'ble Supreme Court held that where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified

3. Rajmandir Estates (P.) Ltd. Vs PCIT T70 taxmann.com 124 (Calcutta)/f20161 240 Taxman 306 (Calcutta)/f20161 386 ITR 162 (Calcutta)/f20161 287 CTR 5121 (Copy enclosed) Where Hon'ble Calcutta High Court held that where assessee with a small amount of authorised share capital, raised a huge sum on account of premium and chose not to go in for increase of authorised share capital merely to avoid payment of statutory fees and Assessing Officer passed assessment order without carrying out requisite enquiry into increase of share capital including premium received by assessee, Commissioner was justified in treating assessment order as erroneous and prejudicial to interest of revenue

4. Rajmandir Estates (P.) Ltd. Vs PCIT f20171 77 taxmann.com 285 (SC)/r20171 245 Taxman 127 (SC) Hon'ble Supreme Court has dismissed SLP against High Court's ruling that where assessee with a small amount of authorised share capital, raised huge sum on account of premium, exercise of revisionary powers by Commissioner opining that this could be a case of money laundering was justified

5. Shree Manjunathesware Packing Products & Camphor Works Vs CIT T19981 96 Taxman 1 (SC)/r19981 231 ITR 53 (SC)/f19971 143 CTR 406 (SC) Hon'ble Supreme Court held that word 'record' used in section 263(1) would mean records as it stands at time of examination by Commissioner but not as it stands at time of order passed by Assessing Officer. Material which had already come on record though subsequently to making of assessment could be taken into consideration by Commissioner. Commissioner was justified in invoking section 263 on basis of valuation report submitted by DVO subsequent to assessment order.

6. Order of Hon'ble SUPREME COURT OF INDIA in the case of CIT v. Amitabh Bachchan 384 ITR 200 dated MAY 11. 2016 Section 263 does not require any specific show cause notice detailing specific grounds on which revision of assessment order is tentatively being proposed affecting initiation of exercise in absence thereof or to require commissioner to confine himself to terms of notice and foreclosing consideration of any other issue or question of fact; Commissioner is free to exercise his jurisdiction on consideration of all relevant facts, provided an opportunity of hearing is afforded to assessee to contest facts on basis of which he had exercised revisional jurisdiction

7. Order of Hon'ble ITAT F-Bench in the case of PTC Impex (India) Pvt. Ltd. Vs CIT, ITA No. 2860/Del/2010 dated 03.04.2018 Hon'ble ITAT Delhi F- Bench has held as under:

"21. We have carefully considered the rival contention and also gone through the order of the Ld. CIT u/s 263 and the order of the assessing officer passed u/s 143 (3) of the act which was subject to revision by the CIT. We have also perused the various case laws cited before us by the parties. According to section 263 of the Act, Commissioner of Income tax can resort to corrective measures by revising the assessment order passed by the Assessing Officer, if after examining records such assessment order passed by the Assessing Officer, he (the Commissioner of Income-tax) found that such an order passed by the Assessing Officer is erroneous

and prejudicial to the interest of revenue. In Malabar industrial Co Ltd versus CIT 243 ITR 83 (SC) Hon'ble Supreme Court held the Commissioner has satisfied of twin conditions namely (i) that the order is erroneous, (ii) that it is prejudicial to the interest of revenue. As held in several judicial precedents that Commissioner does not have power to revise the order of the Ld. assessing officer where there are two views possible and the Ld. assessing officer has taken one of the possible view. Further, where the Ld. assessing officer has made some enquiry and has reached at a conclusion. Therefore on debatable Issues and where there is absence of Lack of Inquiry" the powers of the CIT cannot be exercised under section 263 of the act. There exists a difference between „Lack of Inquiry" and "Inadequate Inquiry". In the present case on all the four issues raised by the Ld. CIT, in the paper book submitted by the assessee or in the arguments raised by the Ld. authorised representative we did not find that Ld. AO has made any enquiry on all ITA No. 2860/Del/2010 A Y 2005-06 PTC Impex (India) pvt Ltd Vs. The Commissioner Of Income tax the 4 issues. Therefore, according to us there is no Inquiry made by the Ld. assessing officer on the issues raised by CIT in proceedings under section 263 of the act. The arguments of Ld. Authorized representative on the issue with respect to cash deposited in the bank account, loan repaid, bank interest on fixed deposit receipt and absence of narration in the bank statements were more on the aspect that no such addition can be made in the hands of the assessee. However nothing is lead before us that makes us to ascertain that Ld. AO during the course of assessment proceedings have inquired about all those things at all. Merely because there are disallowances under section 10 B of the act and addition on account of undisclosed sales which is precisely made on the basis of the information available with the Ld. assessing officer in tax audit report only, it cannot be said that on these 4 issues the Ld. AO has made any enquiry. The Ld. assessing officer notes in the assessment order that despite request the assessee has not produced the complete books of accounts along with the bills and vouchers before him. The Ld. authorised representative vehemently referred to page No. 19 of the order of the Ld. CIT (appeals) dated 15/3/2010 wherein it is stated that books of accounts and vouchers were produced before the assessing officer on 26/12/2007 and 29/12/2007 (Saturday) but not taken on record by the AO. The assessment in the present case was framed under section 143 (3) of the act on 31/12/2007. This itself shows that assessing officer has not looked at the books of accounts which are allegedly produced before AO as per version of the assessee on 26/12/2007. This too is the submission of the assessee before CIT (A) which has not been adjudicated by CIT (A). Even otherwise, mere production of books of accounts does not make the issues before us fall in to the category of inadequate inquiry". If we agree to such an argument then, in all cases where the books of accounts were produced before the Id AO, then the case would fall outside the purview ITA No. 2860/Del/2010 A Y 2005- 06 PTC Impex (India) pvt Ltd Vs. The Commissioner Of Income tax of section 263 of the act. Further No records of communication by the AO to assessee and reply by assessee to Id AO was shown to us to show on these four issues that the Assessing Officer had applied his mind on any of them. According to us case before us is of Jack of inquiry" and not absence of any inquiry. All judicial

precedents relied up on before us related to „ absence of adequate inquiry but none of them dealt with the issues of complete lack of inquiry as in case before us. Hence, we do not have any hesitation in upholding action of Id CIT in invoking his jurisdiction u/s 263 of the act. Hence, order passed u/s 263 of the act by the Id CIT is upheld and appeal of the assessee is dismissed."

16. We have heard the arguments of both the parties and gone through the facts on record. All the arguments, facts, decisions, case laws cited by the Ld. AR and the Ld. DR have been perused and duly considered for adjudication . To the notice issued by the Assessing Officer pertaining to the Long Term Capital Gains the assessee has replied that he had purchased the shares on 16/03/2012 and sold in July 2013 and received sale proceedings of Rs. 11,29,599/-. It was replied that the original shares purchased were of M/s Panchshul Marketing Ltd. which stands merged with M/s Kailash Automobile and the shares of Kailash Automobiles were allotted in the ratio of 1:1. Beyond this information there were no enquiries conducted by the Assessing Officer. The reliance of the Ld. AR on the case of Gabriel India Ltd. is of no help to the assessee as it enunciated two principles namely i.) the order is erroneous ii) by the virtue of the order being erroneous prejudice is caused to the interest of the Revenue. In the instant case there has been an information with the department which has been passed on to the Assessing Officer for verification and failure of the Assessing Officer to verify the transactions in the light of the information available makes the order erroneous and also prejudicial to the interest of the Revenue. The Assessing Officer has mentioned about inputs from investigation wing in assessment order but has not examined absolutely anything regarding the genuinity of the transactions. The Ld.PCIT had enough material in his custody to prima facie to show that the tax which was lawfully exigible has not been imposed. Similarly in the case of Sunbeam Auto the courts have held that in the case of lack of enquiry course of action under section 263 is valid. In this case on the facts of the record it can be observed that the Assessing Officer has not applied his mind regarding the allowability of the exemption of the Long Term Capital Gain. This is not the case of inadequate enquiry but is a clear case of lack of enquiry which makes it different from the case of Nirav Modi (supra). Obtaining of the information about the transaction cannot be taken as akin to enquiring about the information. This is a clear case of no enquiry for which the Ld.PCIT has rightly invoked the provisions of Section 263. We also find that the Ld. PCIT has clearly brought about the error in the assessment order and has also directed the Assessing Officer to take remedial action to take action as per the law after providing due opportunity to the assessee. Thus, it can be said that the Ld. PCIT has not exceeded his jurisdiction nor directed the Assessing Officer to pass the assessment order in any particular way thus not interfering in the judicial function of the Assessing Officer.

17. On going through the facts, it can be observed that the Assessing Officer has not conducted any enquiry and this is a clear case of lack of enquiry not a case inadequate enquiry. Further non application of mind by the Assessing Officer can be easily gauzed from the fact that the information available with the Assessing Officer has not been utilised during the assessment proceedings which makes the case fit for applying the provisions of explanation 2 (a) of section 263. Thus based on the facts on record the contention of the assessee cannot be held to be valid in which are detailed as under :-

(a) The order passed by the Assessing Officer is neither erroneous nor prejudicial to the interests of the revenue : The order passed has been found to be erroneous and prejudicial to the interest of the revenue as per the case law cited and on facts of the case.

(b) The assessee is not covered in any of the conditions mentioned in Explanation 2 of Section 263(1) : The assessee has found to be squarely covered by the provisions of section 263 91) explanation 2 as no enquiries or verification has been conducted which should have been made by the Assessing Officer.

(c) Merely because the CIT may not agree to the order of the Assessing Officer just due to change of opinion, the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue : This is not a case of the Principal CIT not agreeing to the order of the Assessing Officer and nor a case of change of opinion. In fact the Assessing Officer has nor formed any opinion in allowing the long term capital gains and practically has not examined the issue at all.

(d) There is a distinction between "lack of inquiry" and "inadequate inquiry".

If there was any inquiry, even if it was inadequate, it does not give right to the Commissioner to pass orders under section 263 merely because of a different opinion :- From the assessment order questionnaire it can be unequivocally held that this is a clear case of lack of enquiry.

(e) The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded :- There are no fishing or ruin enquiries conducted by the Ld. Principal CIT nor directed the Assessing Officer to conduct such enquiries.

(f) The assessee has already furnished all the documentary evidences which proves that transactions related to sale and purchase of shares are genuine :-

There is absolute difference between enquiry calling of information, investigation and examination. From the action of the Assessing Officer it can be said that no enquiry has been conducted in this case.

(g) Merely because the stock price moved sharply, the assessee is not to be blamed for bogus transactions where he has purchased and sold the stocks through registered brokers and confirmed by valid contract notes as per law :-

The order u/s 263 has not been based on the stock price but it was based on the information and extensive investigation and the conclusion drawn thereof by the revenue extensive investigation by the department.

(h) The transactions cannot be brushed aside on suspicion and surmises where the transactions of the shares are genuine :- The Ld. Principal CIT has invoked the

provisions of section 263 based on the valid tangible information which has been extensively investigated by the department as the Assessing Officer has failed to discharge his statutory duties in accordance with the Income Tax Act which led to the order being erroneous and prejudicial to the interest of the revenue.

18. Hence keeping in view the entire facts of the case, the judgment of the Apex Court in the case of Malabar Industrial Co. Ltd. 243 ITR 83 wherein the action under section 263 is upheld when the Assessing Officer has accepted the statement of account filed by the Assessee without making any enquiry, the judgment of Hon'ble Supreme Court in the case of Daniel Merchants Pvt. Ltd. which held that in the case where Assessing Officer did not make any proper enquiry, the Ld. PCIT is correct in directing the Assessing Officer to carry thorough and detailed enquiry.

19. On going through the questionnaire, assessment order, we have no hesitation to say that the Assessing Officer has not applied his mind to the issue of share transactions for which the detailed information is available regarding the suspicious nature of the transactions. Accordingly to us, based on the facts and circumstances, the case before us is a case of absolute lack of enquiry but not a case of inadequate enquiry by him. Hence, order passed u/s 263 of the act by the Id CIT is upheld and appeal of the assessee is dismissed.

The order pronounced on the open court on 25.01.2019.

Sd/-
(BEENA A. PILLAI)
JUDICIAL MEMBER
Dated: .01.2019
Bidhan
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(B.R.R. KUMAR)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI

Draft dictated on

Draft placed before author

Draft proposed & placed before the second member

Draft discussed/approved by Second Member

Approved Draft comes to the Sr.PS/PS

Kept for pronouncement on

Date of uploading order on the website 25.01.2019

File sent to the Bench Clerk

Date on which file goes to the AR

Date on which file goes to the Head Clerk

Date of dispatch of Order