IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : 'F' : NEW DELHI

BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER
AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.2370/Del /2013
Assessment Year : 2008-2009

PVS Multiplex (India) Ltd. 328, Kishanpura, Baghpat Road, Meerut- 250002	Vs.	Commissioner of Income Tax, Meerut.
(PAN AACCP 8168 R)		
(Appellant)		(Respondent)

Date of Hearing : 01.07.2015
Date of Pronouncement : …..08.2015

Assessee by : Sri Sunil Kumar, FCA
Respondent by: Sri Vivek Wadekar, CIT. D.R.

ORDER

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

1. This appeal by the assessee has been directed against the order of the Commissioner of Income Tax, Meerut dated 25.03.2013 passed u/s 263 of the Income Tax Act, 1961 (for short the 'Act') for AY 2008-09.

2. The Ground Nos. 1 & 7 of the assessee are of general in nature, which need at no adjudication. Remaining grounds of the assessee reads as under:-

"2. That the Ld. CIT is not legally justified in issuing the notice u/s 263 of the IT Act, 1961 and is also not justified in holding the validity of notice u/s 263 when specifically challenged during proceedings u/s 263 on the basis of facts, law and circumstances of the matter, including the following:-

a. That the assessment order dated 29.12.2010 as passed by the Add. Commissioner of Income Tax, Range-2, Meerut was neither erroneous nor prejudicial to the interest of revenue.

b. That the Ld CIT had no jurisdiction to invoke the provisions of section 263 of the IT Act, 1961.

c. That the Ld. Assessing officer has passed the assessment order dated 29.12.2010 after proper application of mind and after verifying all records either filed during assessment proceedings or produced before him during assessment proceedings.

d. That various observations and directions made by the Ld. CIT in her order u/s 263 are either factually incorrect or are not tenable in law.

e. That the plethora of judgments relied upon by the Ld. CIT in her order u/s 263 are either not applicable to the appellant's case or are distinguishable on facts of appellant's case.

3. That the Ld. CIT was not correct and justified in directing the assessing officer to disallow proportionate interest on the loans and advances given by the appellant on the basis of facts and circumstances of the case.

4. That the Ld. CIT was not correct and justified in directing the assessing officer to verify the TDS deducted or not on the payments made for building repairs & Maintenance on the basis of facts and circumstances of the case.

5. That the Ld. CIT was not correct and justified in directing the assessing officer to disallow the deduction u/s SOIB (7A) of the IT Act, 1961 proportionately on profit on sale of shopping area of Multiplex and interest on FDR on the basis of facts and circumstances of the case.

6. That the impugned order 0 the Ld. CIT passed by her u/s 263 deserves to be cancelled/annulled on the basis of law, facts and circumstances."

3. Briefly stated the facts giving rise to this appeal are that in this case assessment order u/s 143(3) of the Income Tax Act, 1961 was passed on 29.12.2010 by the Addl. CIT, Range-2, Meerut at returned income of Rs.1,06,57,220/- without making any disallowance or additions. Subsequently, the case was picked up by the CIT, Meerut and notice u/s 263 of the Act was issued to the assessee on 12.02.2013 which was replied by the assessee vide letter dated 04.03.2013. Finally, the CIT passed impugned order on 25.03.2013 setting aside the impugned assessment order on three issues for proportionate disallowance on interest paid by the assessee of interest free advances for non business purposes, for verification of TDS on certain payments and to exclude income on sale of shops and FDR interest from business income for the purpose of calculation of deduction u/s 80IB(7A) of the Act. Now the aggrieved assessee is before this Tribunal in this appeal with the grounds as reproduced hereinabove.

4. We have heard the arguments on both the sides and carefully perused the relevant material placed on record. *Inter alia*, the impugned order of the CIT dated 29.12.2010 passed u/s 263 of the Act contains of the notice paper book 1 and 2 of the assessee containing 37 & 39 pages and paper book of the Revenue spread over 38 pages filed by the Ld. DR.

5. Ld. counsel of the assessee reiterating its contention before the CIT in reply to notice u/s 263 of the Act dated 04.03.2013 submitted that the Ld. CIT is not legally justified in issuing notice u/s 263 of the Act and in holding that the validity of the notice when specifically challenged by the assessee on the basis of relevant facts and circumstances and a provisions of the Act. The Ld. AR vehemently contended that the impugned order dated 29.12.2010 was passed by the AO after due enquiry on all important issues by issuing a detail questionnaire dated 11.06.2010 which was replied by the assessee vide its submission dated 13.07.2010, 16.09.2010 and 11.11.2010 during the assessment proceeding. Ld. AR further contended that the assessment order was neither erroneous nor prejudicial to the interest of Revenue and the CIT had no valid jurisdiction to invoke the provisions of Section 263 of the Act. Ld. AR strenuously contending that the plethora of judgment relied by the CIT in her impugned order are not applicable to the assessee case and are distinguishable on the facts and circumstances of the present case.

6. Ld. AR also pointed out that the CIT was not correct and justified in directing the AO to disallow the proportionate interest with higher low advance given by the assessee on the basis of facts and circumstances of the case as the assessee had sufficient interest free funds in its hands for advancement of interest free advances which were given out of business purposes. Ld. AR further drawn our attention towards issue of TDS agitated by the CIT and

submitted that the CIT was not correct and justified in directing the AO to verify the TDS deducted or not on payments made for building repairs and maintenance on the basis of facts and circumstances because the assessee filed entire details of TDS before the AO, which was duly verified and examined during the assessment proceeding and even there could be no addition during the reassessment proceeding held in pursuant to impugned order u/s 263 of the Act on this issue to support this contention. The Ld. AR also drawn our attention towards reassessment order dated 18.03.2014 passed in pursuant to the impugned order of CIT u/s 263/154, 143(3) of the Act wherein no addition on the issue of TDS has been made by the AO. The Ld. AR further submitted that the CIT was not correct and justified in directing the AO to disallow the deduction u/s 80IB(7A) of the Act proportionately on profit of sale of shop area of multiplex on interest of FDR in the peculiar facts and circumstances of the present case because these incomes was accrued to the assessee out of active and complex business activities. Ld. Counsel finally prayed that the impugned notice and order u/s 263 of the Act issued and passed by the CIT deserves to be cancelled/annulled on the basis of law, facts and circumstances of the case and therefore, the same may kindly be quashed.

7. Ld. AR placed reliance on the decision of ITAT Kolkatta Bench in the case of PFH Mall & Retail Management Ltd. Vs. ITO (2008) 110 ITD 337 and submitted that the rental income earned by the assessee in the business of

running multiplex is assessable as business income and not as income from house property. However, Ld. AR fairly submitted that this issue was mentioned by the CIT at serial no.(b) in the notice dated 12.12.2013 issued u/s 263 but in the final order u/s 263 this issue has been dropped and conclusion of the AO has been impliedly accepted by the CIT, Meerut.

8. Replying to the above, Ld. Departmental Representative (DR) at the very beginning took us through the copy of the original assessment order dated 29.12.2010 available at page 4 of the assessee's paper book no.1 and submitted that the AO passed a very brief one page order accepting the return income of the assessee in toto and without making any further verifications and examination on the all relevant issues specially on the five issues agitated by the CIT in her notice issued u/s 263 of the Act. Ld. DR submitted that the CIT was quite justified in fair in passing the order wherein she dropped issue of treatment rental income and on the issue of assessee's claim for deduction u/s 80IB(7A) of the Act and only disturbed the assessment order on the issue of interest paid on interest free investment, advances and loan, on the issue of TDS and on the issue of claiming deduction u/s 80IB(7A) of the Act incurred to income earned from sale of shop and interest on FDR. The Ld. DR placing reliance on the various orders/judgments of the Hon'ble Supreme Court and Hon'ble jurisdictional High Court of Delhi including recent decision of the Hon'ble High Court of Delhi in the case of CIT Vs. Goetze (India) Ltd. (2014) 361 ITR 505 (Del) wherein

submitted that the Revenue Department does not have any right to appeal against the order of the Assessing Officer therefore, the power of revision has been conferred of on the commissioner u/s 263 of the Act to revise erroneous assessment orders which are also prejudicial to the interest of the Revenue. Ld. DR supporting the action of the CIT, strenuously contended that when the Assessing Officer takes a view but the view is not correct and is erroneous according to the findings recorded by the commissioner with the findings that the order passed by the AO was also prejudicial to the interest of Revenue. Then the order of the commissioner cannot be set aside on the ground that the two views are possible or probable. The Ld. DR also pointed out that in the present case, the Assessing Officer accept returned income of the assessee without any examination verification on the relevant issues therefore, the order was erroneous and prejudicial to the interest of the Revenue further placing reliance on the decision of the Hon'ble jurisdictional High Court of Delhi in the case of CIT Vs. Nagesh Knitwears P. Ltd. (2012) 345 ITR 135 (Delhi) submitted that if the Assessing Officer omits to conduct required examination and investigation on important issues then he (AO) commits an error and the word erroneous includes failure to make the enquiry and in such cases, the order becomes erroneous because enquiry or verification has not been made by the AO and not because a wrong order has been passed on merits.

9. The Ld. AR placed a rejoinder to the above submissions and contention of the DR and kind drawn our attention towards copy of the questionnaire dated 13.07.2010, 16.09.2010 and 11.11.2010 available from pages 28to37 of the assessee's paper book paper book-2 and submitted that the Assessing Officer issued details questionnaire on all the relevant issues which were picked up by the CIT while issuance notice u/s 263 of the Act. That Ld. AR also pointed out that in reply to the query raised by the AO the assessee in its reply dated 16.09.2010 in para 7 submitted all the relevant facts incurred to operational income including income from sale of shops. Ld. AR further pointed out in the same reply dated 16.09.2010 in para 10 the assessee submitted details of advance of Rs.18,00,000/-given to Rajpur Residency Dehradin and all related facts. The Ld. AR further submitted that the assessee in its reply dated 11.10.2010 in para 5 submitted details of investment of Rs.19,15,000/- made in the shares of M/s Tuffest Safty Glasses (P) Ltd and all details have been submitted.

10. The Ld. AR supporting the assessment order submitted that the Assessing Officer was quite justified and correct while granting deduction to the assessee u/s 80IB(7A) of the Act and concluding that thus the assessee was correct in submitting all relevant details of the TDS. The Ld. AR also placed reliance on the judgment of the Hon'ble jurisdictional High Court of Delhi in the case of CIT Vs. Anil Kumar Sharma (2011) 335 ITR 83 (Delhi) and submitted that the

action of the CIT issuance of notice u/s 263 of the Act and passing impugned order is not valid and bad in law, which is also not sustainable in the light of the provisions of Section 263 and other relevant provisions of the Act.

11. On careful consideration of above rival submissions of both the sides and carefully perusal of relevant paper book filed by both the sides, at the very outset, we note that the CIT issued notice u/s 263 of the Act agitating five issues in the impugned order of the CIT and partly set aside the assessment order on three issues directing the AO to work out interest free advances for non business purposes and disallowances of proportionate interest free thereon, for verification of TDS on certain payments noted in point no. (2) of notice u/s 263 of the Act and to exclude income on sale of shops and FDR interest from business income for the purpose of deduction u/s 80IB(7A) of the Act, when we analyse and examined the questionnaire dated 11.06.2010 (Pages 25 to 27 of assessee paper book 2) we note that the Assessing Officer have not raised any query in regard to interest free advances for non business purposes showing intention to disallow proportionate interest thereon and also on the issue of verification of TDS on certain payments noted by the CIT. However, we note that the assessee in its reply dated 16.09.2010 at para 10 and in reply dated 11.10.2010 in para 5 has given details of advance to Rajpur Residency Dehradun and investment made in the shares of M/s Tuffest Safty Glasses (P) Ltd. to bed there is no query or verification or examination by the AO to work out interest

free advances for non business purposes and for making in proportionate disallowance of interest paid by the assessee thereon. On the issue of verification of TDS, on certain payments agitated alleged by the CIT, we note that there is no query in the Addl. CIT's note dated 11.06.2010 issued by the AO and there is no reply or details from the assessee showing the correctness of the TDS and its deposit to the exchequer properly. However, we also note that during the reassessment proceeding, in pursuant to impugned order passed u/s 263 of the Act, the Assessing Officer in the reassessment order dated 18.03.2014 at page 2 in para 4 has noted that the assessee has submitted details of TDS of bill on challan no adverse inference drawn against the assessee on the third issue of exclusion of income on sale of shop and FDR interest from business income for the purpose calculation of deduction u/s 80IB(7A) of the Act. We note that in the questionnaire issued by the AO (supra) there is no specific query about the claim of deduction u/s 80IB(7A) of the Act. However, in reply dated 16.09.2010 at page 2 para 7 he assessee has submitted facts and details pertaining to receipt/income on sale of shops and submitting the entire amount of sale of shop has been shown under the head profit of sale of property in the list of operational income of the balance sheet. At the same time, we clearly observe that the Assessing Officer has not raised any query and has not made any examination and verification on the issue of claim of deduction of the assessee u/s 80IB(7A) of the Act and on the basis of calculation and claim of deduction under the said

section and the AO has not paid any heal of deduction towards treatment of income on sale of shops and FDR interest accrued to the assessee during the relevant assessment period which was included by the assessee for the purpose of calculation of deduction u/s 80IB(7A) of the Act. In this situation, on the logical analysis for the facts and circumstances of the present case and vigilant consideration of submission of contention of both the sides we clearly observe that there was enquiry by the AO on the issue of interest free advances for non business purposes and proportionate disallowance interest thereon on the issue of verification of TDS certificates on certain payments and on exclusion of income on sale of shops and FDR interest from business income and on the issue of claim of assessee and its claim of pertaining to deduction u/s 80IB(7A) of the Act.

12. Now, we proceed to consider the ratio of the orders/judgments relied by the Ld. AR at the very outset, we note that since the CIT dropped the issue of treatment of rental income as business income by the assessee in the final impugned order passed u/s 263 of the Act, therefore, benefit of the ratio of the order of the ITAT Kokatta 'A' Bench in the case of PFH Mall & Retail Management Ltd. (Supra) is not available for the assessee in the facts and circumstances of the present case. On careful consideration of the ratio laid down by the Hon'ble jurisdictional High Court of Delhi in the case of CIT Vs. Sunbeam Auto Ltd. [2011] 332 ITR 167 (Delhi) which was also considered by

the Hon'ble High Court in its subsequent judgment with the similar issues in the case of CIT Vs. Anil Kumar Sharma (Supra) we observe that dismissing the appeal of the Revenue their lordship held that the Assessing Officer allowed the claim of the assessee on being satisfied with the explanation of the assessee and on such decision of the AO could not be held as erroneous simply because in his order he did not make elaborate discussion in this regard in the case of CIT Vs. Anil Kumar Shama (supra) their lordship also held that being the position and facts and circumstances of that case would not be held "lack of inquiry" and even if the inquiry was termed inadequate that would not by itself give occasion to the Commissioner to pass orders u/s 263 of the Act, merely because he has a different opinion in the matter.

13. On careful and respectful consideration of these judgments of the Hon'ble High Court in our humble understanding we are of the view that these judgments are related to the cases and wherein there was an allegation of inadequate inquiry and the Hon'ble High Court held that the assessment order could not be held as erroneous simply because in his order the AO did not make elaborate discussion in that regard. In the case of Anil Kumar Sharma (Supra) their lordship after considering the ratio of its earlier position in the case CIT Vs. Sunbeam Auto Ltd. (Supra) held as follows:-

> ***"In view of the above discussion, it is apparent that the Tribunal arrived at a conclusive finding that, though the assessment order does not patently indicate that the issue in question had been***

considered by the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernable from the record, the proceedings under Section 263 would fell into the area of the Commissioner having a different opinion. We are of the view that the findings of facts arrived at by the Tribunal do not warrant interference of this Court. That being the position, the present case would not be one of "lack of inquiry" and, even if the inquiry was termed as inadequate, following the decision in Sunbeam Auto Ltd [2011] 332 ITR 167 (Delhi) (page 180) :, "that would not by itself give occasion to the Commissioner to pass orders under Section 263 of the said Act, merely because he has a different opinion in the matter." No substantial question of law arises for our consideration."

14 When we analyise the facts and circumstances of the present case, in the light of ratio laid down by the Hon'ble High Court in the judgment of CIT Vs. Sunbeam Auto Ltd. (Supra) we note that the present case is not a case of 'lack of inquiry' or inadequate inquiry but present case is the case wherein the Assessing Officer has not made required inquiry on he issue of interest free advances for non business purposes and consequently proportionate disallowance of interest thereon, on the issue of verification of TDS and on the issue of claim of deduction of the assessee u/s 80IA(7A) of the Act specially on the issue of exclusion on income of sale of shop and FDR interest from finding income for the purpose of computation of claim of deduction under the said provision. For the facts and circumstances, we respectfully hold that the benefit of ratio of decision in the case of CIT Vs. Sunbeam Auto Ltd. (Supra) and CIT Vs. Anil Kumar Sharma (Supra) is not available for the assessee as the facts and circumstances of the present case are clearly distinguishable from these cases.

15. When we proceed to consider the ratio of judgment of the Hon'ble jurisdictional High Court of Delhi relied by the Ld. DR in the case of CIT Vs. Nagesh Knitwears P. Ltd. (Supra) and in the recent judgment in the case of CIT Vs. Goetze (India) Ltd. (Supra) we observe that their lordship after considering and referring the ratio of the land mark judgments of Hon'ble Supreme Court in the case of Ram Pyari Devi Sargosi 67 ITR 84 (SC) and in the case of Tara Devi Aggarwal Vs. CIT (1973), 88 ITR 323 (SC) and the judgment of Hon'ble Delhi High Court in the case of CIT Vs. Nagesh Knitwears P. Ltd. (Supra) and the judgment in the case of CIT Vs. Sunbeam Auto Ltd.(Supra) and ITO Vs. DG Housing Projects Ltd. (2012) 343 ITR 329 (Delhi) held that in the cases where the bare reading of the order passed by the Commissioner showed that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of Revenue then the Tribunal was wrong in holding that the order passed by the Commissioner u/s 263 of the Act was passed in contrary to the provisions of the Act. The relevant operative part of the order of Hon'ble Delhi High Court in the case of CIT Vs. Nagesh Knitwears P. Ltd. (Supra) reads as under:-

> ***" As far as Section 263 is concerned, we have examined the said Section in depth and detail in ITO Vs. D G Housing Projects Ltd. decided on 1st March, 2012, in ITA No. 179/2011 and observed as under:-***

"The Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. 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.

The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word „erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

The Delhi High Court in Gee Vee Enterprises v. Additional Commission of Income-Tax, Delhi-I, (1975) 99 ITR 375, has observed as under:-

"The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. 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. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word

"erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

In the said judgment, Delhi High Court had referred to earlier decisions of the Supreme Court in Rampyari Devi Sarogiv. CIT (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal v. CIT (1973) 88 ITR 323 (SC), wherein it has been held that where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. After reference to these two decisions, the Delhi High Court observed:-

"These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return."

The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry.

In the case of Commissioner of Income Tax v. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del), Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held as under:-

"We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does

not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment 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. Learned counsel for the assessee is right in his submission 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 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113):

"… From a rending of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is „erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC) at page 10)

From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer 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 estimate 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 figure higher than the one determined by the Income-tax Officer. 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 Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion … 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 …

We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be „erroneous" simply because in his order he did not make an elaborate discussion in that regard."

Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and

necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is

erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. 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.

It is in this context that the Supreme Court in Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, (2000) 243 ITR 83 (SC), had observed that the phrase „prejudicial to the interest of Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue"

16. In the case of CIT Vs. Goetze (India) Ltd. (Supra) their lordship after referring to the ratio laid down by it in the case of CIT Vs. Nagesh Knitwears P. Ltd. held as follows:-

"The first question raised is whether the order under Section 263 of the Act is justified and in accordance with law. Section 263 has been elucidated and explained in Commissioner of Income Tax versus Nagesh Knitwears Private Limited, (2012) 345 ITR 135 (Delhi). In the said decision, reference was made to Malabar Industrial Company Limited versus CIT, (2000) 243 ITR 83 (SC) and decisions of Delhi High Court in Nabha Investments Private Limited versus Union of India, (2000) 246 ITR 41 (Delhi) and ITO versus DG

Housing Projects Limited, (2012) 343 ITR 329 (Delhi). It has been observed in Nagesh Knitwears Private Limited (Supra):-

"The Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. 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.

The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word „erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

The Delhi High Court in Gee Vee Enterprises v. Additional Commission of Income-Tax, Delhi-I, (1975) 99 ITR 375, has observed as under:-

"The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. 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. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax

Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

Reference was also made to decisions of the Supreme Court in Rampyari Devi Saraogi versus CIT, (1968) 67 ITR 84 (SC) and Tara Devi Aggarwal (Smt) versus CIT, (1973) 88 ITR 323 (SC) wherein it has been observed that where the Assessing Officer had accepted a particular contention or issue without inquiry whatsoever, the order was erroneous and prejudicial to the interest of Revenue. These two decisions were explained in the case of DG Housing Project Limited (supra) in the following words:-

"These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.

The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry."

In Nagesh Knitwears Private Ltd. (supra), reference was made to CIT Vs. Sunbeam Auto Ltd. (2011) 332 ITR 167, with the following quote from the later decision:-

" In the case of CIT v. Sunbeam Auto Ltd (2011) 332 ITR 167 (Delhi), the Delhi High Court was considering the aspect, when there is no proper or full verification and it was held as under (page 179)

"We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by

the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment 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. Learned counsel for the ass ssee is right in his submission 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 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113):

"… From a rending of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is „erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must

be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC) at page 10).....

From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer 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 estimate 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 figure higher than the one determined by the Income-tax Officer. 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 Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion … 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 …'

Thereafter, it was observed and elucidated in Nagesh Knitwears Private Limited (Supra), when and how power under Section 263 can be exercised where there was no proper or full verification and when the twin pre-conditions are satisfied:-

"Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and

necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is

erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. 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.

It is in this context that the Supreme Court in Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, (2000) 243 ITR 83 (SC), had observed that the phrase „prejudicial to the interest of Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue"

17. In view of above, if we analyise facts and circumstances of the present case, wherein the Assessing Officer conduct the assessment proceeding and passed impugned assessment order accepting the return of income of the assessee we clearly observe that the Assessing Officer has not made inquiry on the issue of interest free advances and proportionate disallowance of interest thereon, on the issue of verification on TDS and on the claim and calculation of the assessee for the purpose of deduction u/s 80IB(7A) of the Act specially on

the issue of exclusion of income/receipt on sale of shop and FDR interest. In this situation, we have no hesitation to hold that the order of the AO which is apparently very precise and cryptic, was not passed after due examination and verification of certain or issue and therefore, there was an error on the part of AO which leads to a correct conclusion of the CIT with the order of the AO is not only erroneous or also prejudicial to the interest of Revenue. We may further point out that the assessment order suffers lack of necessary enquiry on certain important issues which have been raised by the CIT in the notice issued to the assessee and impugned order u/s 263 of the Act. Therefore, we reach to a conclusion that the assessment order is not sustainable and in accordance with the provisions of the Act which is not only erroneous but also prejudicial to the interest of the Revenue.

18. Hence, we are inclined to hold that the issuance of notice u/s 263 of the Act and impugned order passed by the CIT u/s 263 of the Act is validly assumed jurisdiction of revisional powers u/s 263 of the Act which cannot be alleged as invalid assumption of jurisdiction or bad in law and we confirm the same. Accordingly, grounds no. 2 to 6 of the assessee being devoid of merits deserves to be dismissed and we dismiss the same.

18. In the result, appeal of the assessee is dismissed. Notice and the impugned order of the CIT u/s 263 of the Act is upheld.

The decision is pronounced in the open court on 14th August, 2015.

Sd/-	**Sd/-**
(J.S. REDDY) **ACCOUNTANT MEMBER**	**(CHANDRAMOHAN GARG)** **JUDICIAL MEMBER**

Dated: 14th August, 2015.
Aks/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi

		Date	
1.	Draft dictated on	23.07.2015	PS
2.	Draft placed before author	….07.2015	PS
3.	Draft proposed & placed before the second member		JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS		PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk		PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		