आयकर अपीलीय अधीकरण, न्यायपीठ – "C" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
(समक्ष) Before **श्री जे. सुधाकर रेड्डी**, लेखा सदस्य **एवं/and श्री ऐ. टी. वर्की**, न्यायीक सदस्य)
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 260/Kol/2019
Assessment Year: 2014-15

Satish Kumar Lakhmani (PAN: ABYPL4427B)	Vs.	Principal Commissioner of Income-tax-10, Kolkata.
Appellant		Respondent

Date of Hearing (Virtual)	08.04.2021
Date of Pronouncement	21.04.2021
For the Appellant	Shri Subash Agarwal, Advocate
For the Respondent	John Vincent Donkupar Longstich, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of Ld. Pr. CIT-10, Kolkata dated 11.12.2018 for A Y 2014-15 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act").

2. The assessee has raised a legal issue wherein he has challenged the assumption of jurisdiction u/s. 263 of the Act which according to him, the Ld. Pr. CIT does not enjoy in the facts and circumstances of the case.

3. According to Ld. AR Shri Subash Agarwal, a perusal of the impugned order passed by the Ld. Pr. CIT u/s. 263 of the Act reveals that he has passed the order u/s. 263 of the Act on a proposal made by the AO and he drew our attention to para 2 and 3 of the impugned order which read as under:

> *"2.Subsequently, an error was detected in the assessment order and a proposal was received in this office for review of the impugned order u/s. 263 of the Act.*
>
> *3. On perusal of the said proposal of the AO, along with the records, prima facie it transpired that the Assessing Officer, namely ITO, Ward-28(4), Kolkata (hereinafter, the AO) had apparently failed to take a logical action on the information available with him,*

and accordingly, the impugned assessment looked erroneous in so far as it was prejudicial to the interest of revenue. Thus, a show cause notice initiating proceedings u/s. 263 of the Act was issued to the assessee vide letter No. PCIT-10/Kolkata/263/51/2018-19/5977 dated 22.11.2018, as reproduced ahead:

……"[Emphasis given by us]

4. On a perusal of the aforesaid averments made by the Ld. Pr. CIT it is evident that a proposal was received from the AO to him that he/AO has failed to take a logical action on the information available with him while framing the original assessment order passed u/s. 143(3) of the Act dated 24.08.2016 and so it require interference u/s. 263 of the Act and, therefore, he expressed his desire to invoke his revisional jurisdiction u/s. 263 of the Act. It was brought to our notice that the AO in the original assessment has scrutinised the assessment for AY 2014-15 since it was selected by the CASS especially for "*Suspicious Long Term Capital Gain on Shares* (inputs from the Investigation Wing)". According to the Ld. AR, the original assessment was passed by the AO after thorough enquiry which can be noted from the documents filed before the AO which are available in the paper book consisting of 87 pages.

5. According to Ld. AR, the following documents were filed by the assessee when he enquired about the issue of *Suspicious Long Term Capital Gain on Shares* (hereinafter referred to as "LTCG") on which STT was levied :

Sl. No.	Nature of Documents	Page Nos
1	Statement showing the details of Long Term Capital Gain	12
2	Copy of bill in connection with purchase of 250 shares of Baviscon Vintrade Pvt. Ltd. from Festino Vincom (P) Ltd	13
3	Copy of Share Transfer Advice of 250 shares in favour of the assessee	14
4	Copy of money receipt in respect of payment of Rs 2,50,000/- made toward purchase of shares	15
5	Copy of confirmation from Festino Vincom (P) Ltd	16
6	Bank Statement reflecting the payment made towards purchase of shares	17 to 18
7	Share certificate in connection with issue of 19,750 bonus shares	19
8	Order of the Hon'ble Bombay High Court in respect of amalgamation between Baviscon Vincon Pvt. Ltd. & other companies with Unno Industries	20 to 57

9	Demat Statement reflecting the inflow of 20,000 shares of BAVISCON VINCOM and credit of 2,00,000 shares of Unno Industries Ltd.(pursuant to merger and subsequent split into FV @ Re 1/-)	58
10	Contract Notes in connection with sale of shares of 2 lac shares of Unno Industries Ltd.	59 to 67
11	Bank Statement reflecting the payment received towards sale of shares of Unno Industries Ltd.	68 to 73
12	Demat statement showing the outflow of shares of Unno Industries Ltd.	74
13	Confirmation from Shree Bahubalo International Ltd.	75 to 76

6. And the AO himself has expressed his satisfaction after enquiry on this issue by holding as under:

> *"On perusal of the details submitted by the assessee that during the financial year 2013-14 relevant to assessment year 2015-15, assessee derived income from Long Term Capital Gain (with STT) and claimed exemption u/s. 10(38) of the Income Tax Act, 61. It was revealed that assessee had made some share transactions regarding sale of shares through M/s. Shree Bahubali International Limited. In this connection, letter u/s. 133(6) of the Act was issued to M/s. Shree Bahubali International Limited for verification of said transactions regarding sale of shares. Reply received from M/s. Shree Bahubali International Limited which appears to be confirmed with details filed by the assesee and all transactions made through banking channel and no discrepancy found into the transactions.[Emphasis given by us]"*

7. So according to Ld. AR, since the AO had carried out enquiry into the issue of gain from sale of shares (LTCG), the impugned action of AO to have moved a proposal to the Pr. CIT to invoke his revisional jurisdiction u/s. 263 of the Act, is akin to the AO trying to do indirectly what he (AO) cannot do directly. Further, according to the Ld. AR, as per section 263 of the Act which is the revisional jurisdiction enjoyed by the Ld. Pr. CIT, it can be exercised only by him and it is his sole discretion to use it. According to the Ld. AR, this power is given to the Ld. Pr. CIT for supervising the work of his officers discharging the duties under him and this discretion given to him by the statute cannot be delegated to any other officer

especially not to AO. According to the Ld. AR, once the AO passes the order u/s. 143(3) of the Act, he becomes *functus officio* and gets jurisdiction only u/s. 154 to correct apparent mistake on the face of the records or u/s. 147 of the Act for reopening the assessment that too after satisfying condition precedent given therein. Other than that according to the Ld. AR, the AO was not empowered by law to review his own order and leave alone recommend or put up a proposal to the Ld. Pr. CIT to revise his own order by stating that it is erroneous. If such a practice is allowed there will be no end to tax disputes/litigation and according to the Ld. AR, the power vested with the Ld. Pr. CIT has to be exercised by him alone and in the manner prescribed by section 263 of the Act and cannot be delegated to the AO which practise if allowed will create uncertainty/chaos in the assessment and will be against the basic feature of the Constitution 'Rule of Law'. Moreover, according to Ld. AR, since the AO has carried out enquiry in to the issue of LTCG, and passed the assessment order, in such a scenario, then if the Ld Pr CIT wishes to exercise his revisional power on that issue (LTCG). then only he can do so by spelling out how and where the AO erred in his enquiry and for that the Ld. Pr. CIT himself should conduct enquiry on the issue of LTCG. And the Ld. Pr. CIT during the revisional proceedings in this case has passed the impugned order behind its backs without confronting the assessee with the materials in his possession and thus erred in overturning the decision of AO, which is bad in law for violation of Natural Justice. Further, according to Ld. AR, on a perusal of the impugned action of Ld. Pr. CIT, it is discernible that Pr. CIT has based his actions on conjectures and surmises and are all general allegations/suspicion which cannot be used against the assessee to draw adverse inference. So, according to Ld. AR, the impugned order of Ld. Pr. CIT is bad for lack of jurisdiction and also on merits. Therefore, he prays that the order of the Ld. Pr. CIT be quashed.

8. Moreover, according to the Ld. AR, similar issue had come up before this Tribunal in the case of Ritin Lakhmani & Ors Vs. PCIT, ITA Nos. 41 to 47/K/2019 and in those cases also in similar manner the Ld. Pr. CIT has exercised his revisional jurisdiction and has interfered with the orders passed by the AO on the same line

and according to him, it can be seen from the Ld. Pr. CIT's order that it is verbatim the same and the impugned order is nothing but cut & paste exercise without application of mind. And drew our attention to the decision of this Tribunal in the case of Ritin Lakhmani & Ors Vs. PCIT, (supra) wherein this Tribunal by order dated 13.11.2020 appreciating the averments made therein in similar/identical factual circumstances has quashed similar action passed by Ld. Pr. CIT under section 263 of the Act. And it was brought to our attention that in that case also the issue took up by Ld. Pr. CIT was *long term capital gain from the sale of shares [LTCG]*. The Ld. AR drew our attention to the order in Ritin (supra) and especially para 5 to buttress the point that present case is identical with that of Ritin (supra) and prayed that the impugned order of the Ld. Pr. CIT be quashed for non-satisfaction of the condition precedent u/s. 263 of the Act.

9. Per contra, the Ld. DR Shri John Vincent Donkupar Longstich after having gone through the decision of the Tribunal in Ritin Lakhmani & Ors (supra) fairly submitted that the facts are similar and the ratio of this decision of the Tribunal is relevant to the issue at hand. However, he supported the impugned order of the Ld. Pr. CIT and does not want us to interfere with the order passed by the Ld. Pr. CIT.

10. Having heard both the parties and perused the records, we first of all note that the Ld. Pr. CIT has passed an identical order as in the case of Ritin Lakhmani & Ors. (supra) and only the name of the scrips and figures of LTCG are different. In the case of Ritin Lakhmani & Ors (supra) also, the Tribunal had noticed that the Ld. Pr. CIT has exercised his revisional jurisdiction on the basis of a proposal made by the AO; and that was also in respect of share trading wherein the assessee had claimed to have made LTCG. As noted except in the difference in the name of the shares/scrips and figures of LTCG, the facts and law pertaining to the issue are the same. In this case before us we note that pursuant to CASS, the AO had taken note of this issue i.e. *Suspicious Long Term Capital Gain on Shares* (inputs from the Investigation Wing) [LTCG] and has called for the documents from the assessee to substantiate the genuineness of the transaction and pursuant to which the assessee had filed the documents 76 pages (supra), which the AO in his assessment order has

acknowledged to have verified from the share trader, which facts are evident from the perusal of the original scrutiny assessment order (supra). So, the AO's action on the issue of accepting the claim of assessee in respect of LTCG which the Ld Pr CIT would like to rake up by passing the impugned order has already undergone enquiry by the AO; meaning the AO's action in the first round cannot be termed as a case of "*no enquiry*" on the issue of LTCG. Resultantly, the Ld. Pr. CIT cannot brand the action of AO to accept the claim of assessee in respect of LTCG as a case of no enquiry on the part of AO to term it as an erroneous order; and which finding could have facilitated him to usurp/interfere by exercising his revisional jurisdiction u/s. 263 of the Act. Further, we should bear in mind that in case if he wanted to interfere in the present case (since AO had enquired) then he (Ld. Pr. CIT) himself ought to have conducted enquiry to bring out the fallacy as to show how the enquiry conducted by the AO was erroneous. And for that the Ld. Pr. CIT while conducting enquiry is supposed to confront the assessee during the revisional proceedings with the materials which he is going to use against it and after eliciting the reply of the assessee then only could have passed the impugned order directing the AO to make the addition on LTCG. Failure to do so vitiates the impugned order directing addition of LTCG. And as we have noted the revenue could not point out any difference in the law and facts in respect of the facts of this present case in hand as well as in the case of Ritin Lakhmani & Ors (supra) then, we are bound by the judicial discipline to follow the decision of the coordinate bench of this Tribunal in the case of Ritin (supra). Therefore, we are inclined to give relief to the assessee by following the decision of the Tribunal in the case of Ritin Lakhmani & Ors (supra). We note that in the similar case of Ritin Lakhmani & Ors. (supra) the Tribunal has held as under:

> "3. The assessees are individuals and have e-filed their respective returns of income for the AY 2014-15. All these assessees have claimed that they have derived income from Long Term Capital Gains (hereinafter 'LTCG') (with STT) and had claimed exemption u/s 10(38) of the Act. These assessees had entered into share transactions through M/s. JRK Stock Broking Pvt. Ltd. The AO passed an order u/s 143(3) of the Act in all these cases and accepted the claim of the assessees for exemption u/s 10(38) of the Act. In this order the AO records that a letter u/s 133(6) of the Act was issued to M/s. JRK Stock Broking Pvt. Ltd., for verification of the transactions of sale of shares and that he had received a reply confirming the details filed by the assessee. The AO had concluded that he had not found anything adverse in the claim of the assessee for exemption u/s 10(38) of the Act.

3.1. The ld. Pr. CIT issued a show cause notice u/s 263 of the Act on 22.11.2018 proposing to revise the assessment order passed by the AO u/s 143(3) of the Act, on the ground that the AO should have treated the LTCG earned by the assessees as bogus credit and should have added back the entire credit u/s 68 of the Act, in view of the investigation conducted by the Directorate of Investigation, Kolkata, which had resulted in the unearthing of a huge syndicate of Entry Operators, stock brokers and money launderers involved in providing bogus accommodation entries of LTCG. The ld. Pr. CIT further mentions that it has come to light that, large scale manipulation has been done in the market price of shares of certain companies listed in the Bombay Stock Exchange by certain persons working as a syndicate, in order to provide entries of tax exempt bogus LTCG, to large number of persons, in lieu of unaccounted cash and that the basic object of this racket is to convert black money into white without payment of income tax.

3.2. The assessees replied on 29.11.2018 stating that the assessees had filed all necessary documents/evidences during the assessment proceedings to prove the genuineness of the transactions, in response to notice u/s 143(2) and 143(2)(i) of the Act before the AO. That the AO had made direct third party verification of the transactions by issuing notice u/s 133(6) of the Act and found nothing adverse. Hence the assumption that there was failure on the part of the AO to assess the income correctly is not correct. He relied on a number of case laws for the proposition that the claim for exemption u/s 10(38) of the Act has been correctly allowed. It was also claimed that there is no specific evidence or adverse material against the assessee which would implicate the assessee and that the allegations were general in nature. It was also argued that powers u/s 263 of the Act cannot be invoked under these facts and circumstances.

3.3. The ld. Pr. CIT considered these statements and for the detailed reasons given in his order rejected the contention of the assessees. He concluded as follows:

"6. Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Hon'ble Supreme Court and Hon'ble High Court and in accordance with the amendment made to Section 263 of the Act with effect from 01.06.2015, I hold that the impugned assessment order dated 02.08.2016 passed by the A.O. is erroneous in so far as it is prejudicial to the interests of revenue. Therefore, after giving the assessee an opportunity of being heard, that the impugned assessment order dated 02.08.2016 is quashed with the directions given in this order separately.

7. Accordingly, in view of the facts and circumstances of the case as stated above, and also respectfully following the judgments cited above, particularly those in the cases of Sanjay Bimalchand Jain (supra), M/s. VamaSundari Investment (Delhi)(P) Ltd (supra) and N. K. Proteins (supra), I am of the considered view that it is deemed fit and appropriate in the interest of justice to add back the entire sale consideration of the bogus penny stock shares, amounting to Rs35,78,311 /-, as unexplained cash credit u/s 68 of the Act. Further, the quantum of unexplained expenditure on account of commission payment to the tune of Rs. 1,78,916/- is also liable to be added back u/s 69C of the Act. Accordingly, I direct the AO to re-assess the income of the assessee for the relevant AY 2014-15 on the issue as discussed above."

(Emphasis ours)

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

5. The ld. Counsel for the assessee, Mr. Subash Agarwal submitted that the order passed u/s 263 of the Act is bad in law, as the proceedings were initiated at the behest of the AO and not by the Pr. CIT, as required by the Act. He pointed out to para 2

& 3 of the order passed by the Pr. CIT u/s 263 of the Act, wherein it is clearly stated that the proposal for revision was received from the AO. He relied on the decision of this Bench of the Tribunal in the case of *West Bengal National University of Juridical Science vs. CIT in ITA No. 2643/Kol/2019* order dated 30.09.2020 for the proposition that proceedings u/s 263 of the Act cannot be initiated at the instance of the AO.

5.1. The ld. Counsel for the assessee further submitted that the AO during the course of assessment proceedings had made detailed enquiries by issuing notices u/s 133(6) of the Act to the parties and only obtained confirmation and accepted the claim of the assessee. He submitted that all bills and other evidences were furnished before the AO during the course of original assessment proceedings and the AO after examining the same has taken a positive view and that on these facts the Pr. CIT was wrong in exercising his jurisdiction u/s 263 of the Act.

5.2. He referred to para 5.12.4 of the order of the Pr. CIT, at page 13 of his order and submitted that the Pr. CIT does not dispute that all details were filed before the AO and that some judgements on this issue were in favour of the assessee and that he is exercising his jurisdiction because the Revenue has not accepted such decisions and as same are yet not settled in higher courts of law.

5.3. He vehemently contended that the Pr. CIT has not spelt out in his order, what more the AO should have done during the course of scrutiny proceedings while passing the original assessment order. He submitted that observations and submissions were made by the Pr. CIT in his order without stating as to, what was the credible information received and whether such information and documents have any relation to the assessee and whether there was any proof that the assessee was involved in this scam or racket. He submitted that general observations and statements are made in all the cases, without any reference to any specific adverse material against the assessee.

5.4. Referring to the SIT Report, he submitted that certain directions were given to SEBI in this report and no action was taken against anyone by any authority. That the Pr. CIT has not brought out on record this SIT report, so as to enable the assessee to rebut the presumption being drawn by the Pr. CIT against him/her based on this SIT report. He distinguished the case laws cited by the Pr. CIT in his order. The ld. Counsel for the assessee relied on the decision of the ITAT 'C' Bench in *ITA No. 01 to 05/Kol/2019 and 13 to 15/Kol/2019* order dated 20.09.2019 in the case of *M/s. Girish Tikmani, HUF & Others* and drew the attention of the Bench to page 3-11 of the order and submitted that the order of the Pr. CIT, in the case on hand, is identical, word to word, when compared from page 3 to 13 of this order. He submitted that this is just a cut & paste job being done by ld. Pr. CIT in every case which proves total non-application of mind. He vehemently contended that the ld. Pr. CIT clearly states that the transactions are suspicious but orders that the entire sale consideration be added by the AO u/s 68 of the Act. He submitted that it is well settled that additions cannot be made, based on suspicion. He submits that all these cases are covered by the order of the ITAT in the case of *M/s. Girish Tikmani, HUF & Others* (supra), both on facts and in law.

5.5. He submitted that there is no adverse material against the assessee and that the assessee was not confronted with any material or report of the Director General of Income Tax (Investigation) and additions directed to be made by the Pr. CIT was based only on suspicion and general statements and observations. He submitted that the order u/s 263 of the Act cannot be sustained under such circumstance.

5.6. The ld. Counsel for the assessee further submitted that, the Pr. CIT has not conducted any enquiries or investigations on its own nor he has specified as to what were the enquiries that were not done by the AO warrants direction of additions u/s 68 and u/s 69C of the Act. He prayed that the order u/s 263 of the Act be quashed.

6. The ld. D/R on the other hand vehemently controverted the submissions of the assessee. At the first instance he submitted that Pr. CIT has observed that certain decisions of ITAT are in favour of the assessee and such observations cannot be read as if the Pr. CIT having conceded the issue. He pointed out that a number of decisions on the issue on hand are against the assessee and in favour of the Revenue.

6.1. On the issue of the proposal being received from the AO for involving the power of revision u/s 263 of the Act by the Pr. CIT, he argued that it is for the assessee to furnish evidence that this proposal has emanated from the AO and that the Pr. CIT has not applied his mind independently based on examination of records. He drew the attention of the Bench to the show cause notice issued u/s 263 of the Act and submitted that the ld. Pr. CIT has clearly stated that on examination of records he has come to a conclusion that there is an error which is prejudicial to the interest of the Revenue, in the order passed u/s 143(3) of the Act. The ld. CIT(DR) vehemently contended that, penny stock scam is a well known scam and the entire country is aware of it and under those circumstances, orders passed by the authorities cannot be struck down on technical grounds. He submitted that in the case of *West Bengal National University of Juridical Science* (supra) the letter of the AO to the Pr. CIT was produced by the assessee and based on that evidence the Tribunal has come to a conclusion that the revisionary proceedings were initiated at the instance of the AO. He submitted that no such evidence was produced by the assessee in this case. He further submitted that Pr. CIT takes the assistance of all the AOs, specifically when there is a large scam and the AOs in these case were collecting information and passing on the information to the Pr. CIT and that the Pr. CIT has examined this information and record and then only the revision was initiated. That this was done only on the satisfaction of the Pr. CIT.

6.2. On merits he submitted that the modus operandi of the scam and the manner in which exemptions were claimed to convert black money into white, are in the public domain and that he need not specifically argue these matters on merits. He submitted that the AO while examination of the purchase bills produced before him has failed to know that there is a time gap between the purchase and the date of payment, and submitted that this is a highly suspicious circumstance. He submitted that the entire family has indulged in these penny stock transactions. Referring to the case of Ritin Lakhmani, he submitted that the purchase bill was dated 16.09.2011 and whereas the payment was made only on 24.03.2012 i.e. after 6 months. He referred to Circular No. SMDRP/POLICY/CIR-32/99 dated 14.09.1999 and submitted that off market transactions were banned by S.E.B.I. and that the assessee should not have accepted such off-market transactions. He further referred to the CBDT Circular No. 23/2019 dated 06.09.2019 for the proposition that, appeals can be filed in all penny stock matters before ITAT, High Court and Supreme Court irrespective of the monetary limits. He referred to the theory of preponderance of probabilities and submitted that the AO in this case has failed to properly examine the claims of the assessee and has granted exemption. He justified the directions of Pr. CIT requiring the AO to add the gross receipts in the consequential order to be passed u/s 143(3) of the Act.

7. In his reply, the ld. Counsel for the assessee submitted that the Hon'ble Supreme Court in the case of *CIT vs. S. Nelliappan [1967] 66 ITR 722 (SC)* held that a legal ground can be taken by any party at any stage of the case by way of argument. He

submitted that in India, the head of the family decides transactions to be done by all the family members and hence it is not correct for the ld. D/R to find fault that all the members of the family have purchased and sold shares.

7.1. He further submitted that various judicial authorities including Tribunal have in numerous decisions held that off-market transactions are legal and have to be accepted. He further submitted that the CIT(D/R) is trying to make out a new case by pointing out to the purchase bills and the date of payment etc. when the AO and the Pr. CIT have not found fault or raised any suspicion on this issue. He submitted that the special Bench of Tribunal in the case of *Mahindra and Mahindra Ltd. v. DCIT [2009] 313 ITR 263 (AT) (Mumbai) (SB)* has held that CIT(D/R) cannot build up a new case for the Revenue, while defending an order. He prayed for relief.

8. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the case law cited, we hold as follows.

9. The first issue is whether the ld. Pr. CIT has invoked his powers u/s 263 of the Act, at the instance of the AO.

Paras 2 & 3 of the order passed u/s 263 of the Act read as follows:

"2. Subsequently, an error was detected in the assessment order and a proposal was received in this office for review of the impugned order u/s 263 of the Act.

3. On perusal of the said proposal of the AO along with the records, prima facie it transpired that the Assessing Officer, namely ITO, Ward-28(4), Kolkata (hereinafter, the AO) had apparently failed to take a logical action on the information available with him, and accordingly, the impugned assessment looked erroneous in so far as it was prejudicial to the interest of revenue. Thus, a show cause notice initiating proceedings u/s 263 of the Act was issued to the assessee vide letter No. PCIT-10/Kolkata/263/50/2018-19/5976 dated 22.11.2018 as ahead."

(Emphasis Ours)

10. A perusal of the above shows that it was the AO had detected an error in the assessment order and proposed to the Pr. CIT that the order passed u/s 143(3) of the Act passed by the AO be revised u/s 263 of the Act by the Pr. CIT. These two paragraphs do not state that the ld. Pr. CIT had on examination of the records initiated proceedings u/s 263 of the Act. The Pr. CIT has, after perusing the proposal of the AO, which was before him along with the record, came to a prima facie conclusion and initiated proceedings u/s 263 of the Act. Nowhere does the Pr. CIT state that he has examined the record.

11. Though in the show cause notice, the ld. Pr. CIT states that "on examination of records" errors were observed, the fact remains that a proposal from the AO along with the record was received and was perused (not examined) and the revisionary powers u/s 263 of the Act was initiated by the ld. Pr. CIT.

12. The proposition of law on such facts has been discussed and applied by the Kolkata 'C' Bench of the Tribunal in the case of *M/s. Rupayan Udyog vs. Pr. CIT in ITA No. 1073/Kol/2012* for the AY 2005-06 order dated 28.11.2018. This judgement was followed by the Kolkata 'A' Bench of the Tribunal in the case of *The West Bengal National University of Juridical Science vs. Commissioner of Income Tax (Exemption)* in

ITA No. 2643/Kol/2019 for the AY 2016-17 order dated 30.09.2020. At para 8 & 9 it was held as follows:

"8. We first take up the legal issue. The Assessing Officer on 25/04/2019, made the following proposals:-

"In this case the return for the A.Y-2016-17 was assessed u/s. 143(3) of the I.T. Act, 1961 on a total income of Rs. Nil on 31.10.2018.

Later it was revealed that the assessee claimed set apart of fund u/s. 11 (2) of the Act for an amount of Rs. 17,04,30,176/-. However, the requisite Form-10 was not submitted online within the due date i.e. 17.10.2016.

In this case the delay in filing Form-10 was condoned by Ld. CIT(Exemption), Kolkata vide his order dated 20.11.2017. However, as per provisions of section 13(9) of the Act both the return of income and Form-10 are required to be submitted on or before the due date of filing return as prescribed u/s 139(1) of the Act.

In the instant case, the delay in filing Form-10 though was condoned by the Ld. CIT, the delay in filing return of income stands late. Hence the assessee is not eligible for the benefit of exemption u/s. 11(2) of the Act.

In view of the above, it is evident that the order passed u/s. 143(3) of the Act as above is erroneous in so far as it is prejudicial to the interest of revenue as per Section 13 (9) of the Act.

Under the circumstances I request your honour to kindly initiate proceeding u/s. 263 of the Act, 1961 for revising the aforesaid order passed u/s. 143(3) of the Act."

8.1. The ld. CIT(E) initiated proceedings u/s 263 of the Act based on this proposal. The issue is whether such initiation of proceedings is valid in law.

8.2. The Kolkata 'C Bench of the Tribunal in the case of M/s. Rupayan Udyog (supra) has held as follows:-

"So from a bare reading of sec. 263 of the Act reveals that the Commissioner may call for and examine the record of any proceeding under the Act and if he considers that any order passed therein by the AO is erroneous in so far as prejudicial to the interest of the revenue, he may after giving opportunity of being heard to the assessee pass orders as prescribed under the Act. So, the power vested in the CIT is that of revisional jurisdiction to interfere with the order of AO, if it is erroneous in so far as prejudicial to the revenue and, therefore, the power to exercise the revisional jurisdiction is vested only with the Pr. Commissioner/Commissioner if he considers the order of the AO to be erroneous in so far as prejudicial to the interest of the revenue. Therefore, this power is vested with the Pr. CIT/CIT to exercise revisional jurisdiction is only when he considers that the order passed by the AO is erroneous in so far as prejudicial to the interest of the revenue and that power cannot be usurped by the AO to trigger the revisional jurisdiction vested with the CIT as per the scheme of the Act which gives various power to various authorities to exercise and they have to exercise powers in their respective given sphere which is clearly ear-marked and spelled out by the statute. Here, we note that the AO who is empowered by the Act to assess a subject within a prescribed time period has first assessed the assessee and later after passage of time has taken up a proposal with the CIT to exercise his revisional jurisdiction cannot be countenanced for the simple reason that when in the first place the AO noticing that he failed to properly enquire before assessing the assessee within the time limit prescribed by the statute cannot be allowed to get fresh innings to reassess because it was his duty to enquire properly within the time limit prescribed by the statute. Therefore, the very invocation of revisional jurisdiction on the proposal of the AO itself is bad in law and for coming to such a decision we rely on the decision of the Tribunal in the case of Shantai Exim Ltd. Vs. CIT (2017) 88 taxmann.com 361 (Ahd. Trib.) and the decision of ITAT, Mumbai Bench in the case of Ashok Kumar Shivpuri Vs. CIT for AY 2008-09 dated 07.11.2014. Therefore, we find merit in the contention of the

Ld. AR and we quash the very usurpation of jurisdiction u/s. 263 of the Act by the CIT. Therefore, the appeal filed by the assessee is allowed."

Similar view was taken by the Kolkata Bench of the Tribunal in the following cases:

> M/s. Luxmi Township & Holding Ltd. vs. CIT; ITA No. 468/Kol/2019; Assessment Year 2014-15, order dt. 2014-15.

> Bangiya Gramm Vikash Bank vs. Pr. CIT in ITA No. 877/Kol/2015, Assessment Year 2010-11, order dt. 12/05/2017.

> Ambo Agro Products Ltd. vs. Pr. CIT, in ITA No. 676/Kol/2016, Assessment Year 2009-10, order dt. 19/05/2017.

9. Applying the proposition of law laid down in this regard in the case law referred above, to the facts of the case on hand, we have to hold that the order passed u/s 263 of the Act is bad in law for the reason that, the jurisdiction u/s 263 of the Act, was invoked by the ld. CIT(E) based on the proposals of the Assessing Officer. This is not permissible in law."

13. Applying the propositions of law laid down in these case law to the facts of the case we have to uphold the contention of the assessee. As the initiation of the proceedings u/s 263 of the Act were based on the proposal of the AO and not on the examination of the record by the Pr. CIT, the order passed u/s 263 of the Act is vitiated. Even if the proposal had come from the AO, the ld. Pr. CIT should have independently examined the record.

14. We now take up the issue on merits. This Bench of the Tribunal in the case of *M/s. Girish Tikmani, HUF* and Others and *Manisha Tikmani vs. ITO* (supra) had adjudicated a case with identical facts. In fact, words and paragraphs written by the ld. Pr. CIT in those orders are, verbatim the same as the wording of the Pr. CIT in this order. For ready reference para 3 page 3 to 11 of that order where para 5 to 5.12.3 and para 6 of the 263 order were extracted, so that it can be compared with the paragraph numbers and words that are in this impugned order of the Pr. CIT.

"The same stand rejected in the PCIT's order under challenge as follows:-

"5. The issue under consideration in this case is that as to whether the impugned transactions of purchase and sale of shares were indeed bogus in nature and accordingly whether the entire amount of sale consideration should have been added back or not.

5.1 From the records, it is seen that credible information was available in the custody of the AO from which it was clear that the assessee had adopted the practice of accepting accommodation entries and in turn entered into bogus transactions to the tune of RsS3,63,S18/-. As per above, during the previous year 2013- I 4, corresponding to AY 2014-15, the assessee had benefitted by trading and making manipulation. in the Scrips of "Unno Industries Ltd." and claimed exemption u/s 10(38) of the Act.

5.2 On perusal of the assessment records, the following facts lead me to an inseparable conclusion that the transactions are not genuine and these connected parties have grossly misused the stock exchange system to generate bogus L TCG to aid and help beneficiaries to convert their unaccounted income into accounted one with no payment of taxes. The modus operandi, as emanating from the rep.ort of the Director General of Income Tax (Investigation),WB, Sikkim and NER, is reproduced ahead:

The Scheme

Entities involved in the transactions

There are three categories of individuals who are involved in the transactions

i) Syndicate Members.

They are the promoters of the Penny Stock companies who own the initial share holding mostly in the name of paper companies either in afresh IPO or purchased from the shareholders of a dormant company. They are usually a group of 4-5 individuals who a/so referred to as Syndicate Members and are sometimes also referred to as Operators. Their nominees are directors of the Penny Stock companies

which are indirectly controlled by them through such dummy directors. The whole operation is managed by them. They get the net commission income from the transactions. Their name, however. seldom appears in the actual transactions.

ii) The Brokers

They are registered brokers through whom shares are traded both online and off-line. They are fully aware of the nature of transactions and get paid a commission over and above their normal brokerage. Some of the big broking houses are also indulging in such transactions mostly through sub-brokers. The brokers often compromise on KYC norms of the clients to help the Syndicate Members. Even some very renowned brokers were involved in the process through their sub-brokers provided them large numbers of terminals through which these sham transactions took place.

iii) The Entry Operators.

They are individuals who control a large number of paper/shell companies which are used for routing cash for the transactions as well as buying and selling shares during the process of price rigging. They work for commission to be paid by the Syndicate Members. To cut costs sometimes in smaller operations, the same group performs more than one function.

The Transaction

The transaction involves three legs.

i) Purchase of shares by the beneficiary: In this the beneficiary sold a fixed number of shares at a nominal rate. The price and the number of shares to be purchased are decided on the basis of the booking taken and the value up to which price would be rigged This leg of the transaction mostly is off-line. This is done to save on SIT using the loophole in Section 10(38) of the IT Act which places restriction of trading by payment of SIT on sale of shares and not purchase.

ii) Price rigging: After the shares have beef) purchased by the beneficiaries, the syndicate members start rigging the price gradually through the brokers. In these transactions the volume is almost negligible. Two fixed brokers who are in league with the Syndicate buy shares at a fixed time and at a fixed price. These low volume transactions are managed through paper companies/HUF or dummy persons maintained and controlled by the entry operators.

iii) Final sale by the beneficiary: This is done after the beneficiary has already held the shares for one year. The period of holding may be a little more to match the amount of booking with the final rate. The beneficiary is contacted either by the Syndicate member or the Broker (Middle man) through whom the initial booking was done. The beneficiary provides the required amount of cash which is routed through some of the paper companies of the entry operator and is finally parked in one company which will buy the share from the beneficiary. When everything is ready a specific date and time as well as price is fixed by the operator on which the transaction is made. The paper company issues cheque to the beneficiary. The beneficiary claims the receipt as exempt income U/S 10(38) of the I. T.Act, 1961.

The above modus operandi has been confirmed by all entry operators in their statements at the time of proceedings U/S 132/133A/131 on various dates.

5.3 AII such penny stock companies were identified from the financial accounts of the companies, trading patterns of the scrips, statement of share brokers, statement of entry operators, statement of promoters of the companies and the post search/survey inquiries. The list contains the name of the scrip Unno Industries Ltd. having scrip code 519273which is the traded scrip in the instant case. Some common features of these companies, as specified in the said report, are:

(1) Initial allotment of shares to beneficiaries is generally done through preferential allotment.

(2) The market price of shares of these companies rise to very high level within a span of one year.

(3)The trading volume of shares during the period, in which manipulations are done to raise the market price, is extremely thin.

(4) Most of the purported investors are returned their initial investment amount in cash. Only small amount is retained by the operator as security.

(5) Most of these companies have no business at all. Few of the companies which have some business do not have the credentials to justify the sharp rise in Market Price of their shares.

(6)The sharp rise in market price of the shares of these entities is not supported by fundamentals of the company or any other genuine factors.

(7)An analysis in respect of persons involved in transactions apparently carried out in order to jack up the share prices has been done in respect of 84 companies. It has been noted that many common persons/entities were involved in trading in more than 1 LTCG companies during the period when the shares were made to rise which implies that they had contributed to such price rise.

(8) Names of most of the LTCG companies are changed during the period of the seam.

(9) Most of the companies split the face value of shares [this is probably done to avoid the eyes of market analysts.

(10) The volume of trade jumps manifold immediately when the market prices of shares reach at optimum level so as to result in LTCG assured to the beneficiaries. This maximum is reached around the time when the initial allottees have held the shares for one year or little more and, thus, their gain on sale of such shares would be eligible for exemption from Income Tax.

(11) An analysis of share buyers of some of LTCG companies was done to see if there were common persons/entities involved in buying the bogus inflated shares. It was noted that there were many common buyers [which were paper companies.

(12)The prices of the shares fall very sharply after the shares of LTCG beneficiaries have been off loaded through the pre-arranged transactions on the Stock Exchange floor/portal to the Short Term Loss seekers or dummy paper entities.

(13) The shares of these companies are not available for buy/sell to any person outside the syndicate. This is generally ensured by way of synchronized trading by the operators amongst themselves and/or by utilizing the mechanism of upper/lower circuit of the Exchange.

5.4 From the material available on record, it is proved beyond doubt that the alleged transactions and the scheme of colourable device mentioned in Para 5.lto 5.3 supra, is bogus and the entire sale consideration being bogus cash credit should have been added back U/S 68 of the Act and taxed at Maximum Marginal Rate. The benefit of (indexed) cost of acquisition should also not have been allowed to the assessee. In this regard, reference is made to the provisions of Sec 68 of the Act as reproduced below :

"Cash credits.

41. 68.42Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation" about the nature and source thereof or the explanation offered by him is not, in the opinion 'of the [Assessing] Officer, satisfactory, the sum so credited may be charged 10 income-tax as the income of the assessee of that previous year:

[Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory,

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 1 "

5.5 It is pertinent to mention here that two retired judges of the Supreme Court, Hon'ble Justice M. B. Shah (Retd.) and Hon'ble Justice Arijit Pasayat (Retd.) as Chairman and Vice Chairman respectively of the 11 member Special Investigation Team(SIT) of the Hon'ble Supreme Court of India on Black Money have pointed out the above mentioned modus operendi in the Third SIT report on Black Money. The recommendations of the SIT on black money as contained in the third SIT report as given below, deserve a look:

Press Information Bureau
Government of India
Ministry of Finance
24-July-2015 15:45 1ST

Recommendations o(SIT on Black Money as Contained in the Third SIT Report

Misuse of exemption on Long Term Capital gains tax/or money laundering
(Reference p. 82-84 of the Third SIT Report)

This issue was deliberated by SIT during a series of meetings held on 1" January, 14'" March, 08th April and 3rd April. In this regard, it is pertinent to mention the observations of the Committee headed by Chairman, CBDT on "Measures to tackle Black Money in India and Abroad" which submitted its report in 2012 and which read as follows:-

"3.22 Investments are made in the secondary share markets with a view to capturing gains. In this market; out of nearly 8,000 listed companies, several scrips are not traded regularly. With the collusion of promoters, some brokers arrange for price(s) with purchase of such scrips at nominal costs, and sales at exorbitant prices, with a view to receiving money on sale as 'capital gain' when the long term gain is subjected to a 'nil' or nominal rate of tax. The advantage for manipulative taxpayer is that he can launder such sale receipts through payment of no tax. "

SEBI has recently barred more than 250 entities, including individuals and companies, from the securities market for suspected tar: evasion and laundering of black money through stock market platforms. In one such instance price of a scrip rose from ₹ 10.20 to ₹ 489 in 150 trading days - a rise of 4694%. The SIT obtained the background details of these cases and studied them. A typical pattern is observed to be followed in such cases.

• A company with very poor financial fundaments in terms of past income or turnover is able to raise huge capital by allotment of Preferential allotment of shares is made to various entities.

• There is a sharp rise in price of scrip once the preferential allotment is done. This is normally achieved through circular trading of shares among a select group of companies. These groups of companies often have common promoters/directors.

• The scrips with thus artificially inflated price are offloaded through companies whose funding is provided by the same set of people who want to convert black money into white.

There is an urgent need for having an effective preventive and punitive action is such matters to prevent recurrence of such instances.

We recommend the following measures in this regard:-

• SEBI needs to have an effective monitoring mechanism to study such unusual rise of stock prices of Companies while such a rise is taking place. We understand that SEBI has a strong IT infrastructure which can generate red flags for such instances. Such red flags could be built upon trading volumes, entities which contribute to trading volume, financial background of firms through their annual returns and any other

indicators SEB! may develop. We believe that with effective and timely monitoring by SEBI a significant number of such instances can be checked in time.

• Once such instances are detected, SEBI should invariably share this information with CBDT and FIU.

• Barring such entities from securities market would no: be of strong deterrence in itself. In case it is established, that stock platforms have been misused for taking LTCG benefits, prosecution should invariably be launched under relevant sections of SEBI Act. Section 12A. read with section 24 of the Securities and Exchange Board of India Act 1992 are predicate offences.

• Enforcement Directorate should then be informed to take action under Prevention of Money Laundering Act for the predicate offences.

5.6.1 On perusal of the records available, it is found that the scrip of 'UNNO INDUSTRIES LTD is amongst the 84 penny stocks where artificial rigging of prices were made for the desired purpose.

5. 6.2 On perusal of the financial results for last few years including years from purchase to sale, it is seen that the financial health of the company had been deteriorating continuously had increased insignificantly. However, the share price and market capitalization of the scrip was shooting up almost vertically. The catapult rise of its shares defied logic as even the blue chip companies which have bulk market share in terms of market capitalization and business did not even manage to double their price in the market during the same period. Statistically, UNNO INDUSTRIES LTD having almost zero fundamental strength had shot up more than 28 times in a short span of time. Apparently it is 28 times on an average however it is taken to 28 times under the disguise of splitting of shares. This is because the parallel forces of accommodation entry providers were actively participating with their pre-settled game plan. This scrip was suspended by SEBI for Price rigging and insider trading.

5.6.3 Assessee had apparently sold the shares of UNNO INDUSTRIES LTD at pre-determined price, at pre-determined time to pre-determined parties who were seeking loss for setting off genuine capital gain with the help of different operators, members of BSE, share brokers and sub-brokers. The details of shares of UNNO Industries sold by the assessee, as available from the audit report are as under:

Sl. No.	*Name of shares*	*Date of purchase*	*Purchase price*	*Rate per share*	*Date of sale*	*Sale price*	*Rate per share*	*profit*
1	*40000*		*50,000*		*31.05.13*	*12,82,209*	*Rs.32*	*12,32,209*
2	*55000*		*68,750*		*11.06.13*	*18,53,383*	*Rs.34*	*17,84,6343*
3	*35000*	*27.12.11*	*43,750*	*Rs.1.25*	*21.06.13*	*12,02,060*	*Rs.34*	*11,58,310*
4	*30000*		*37,500*		*24.06.13*	*10,25,865*	*Rs.34*	*9,88,365*

5.6.4. It is found from the above transaction details that in the scrip of UNNO INDUSTRIES LTD the counter Party Member and Counter Party Client are those who were involved in providing accommodation entries on Long Term Capital Gains and Short Term Capital Loss to the different beneficiaries. It is also found that the assessee purchased shares of UNNO INDUSTRIES LTD at a market price of Rs. 1.25/- per share, through Private placement. The assessee after completion of 1 (one) year for qualifying the gain as exempted income, on reaching the optimum level, sold these shares to the pre-arranged buyers at pre-settled price varying between Rs 32and Rs·34. Thus, the appreciation in the rates of shares is as high as 1.25:34, i.e. almost 27 times.

5.6.5 As seen from the records, the assessee apparently sold these scrips at a pre-determined price, at a pre-determined time and to pre-determined buyers with the help of accommodation entry providers under the shell of director, share broker etc. to bring his unaccounted income into the regular books of accounts in the form of claim of exemption u/s 10(38) of the Action LTCG.

5.6.6 A microscopic view of all such data suggests that there is a common pattern in the trading of all such scrips and the pattern is that they represent a bell shape in their trading. It means first, their prices start from a low range, then it rises rapidly, stays there for a while and then it decreases more rapidly. Thus the trading pattern represents a Bell Shape[Annexure A and made part of the order]

5.6.7 Ultimately SEBI vide its order dated 29.03.2016 has restrained some persons/entities from accessing the securities market and buying, selling or dealing in securities, either directly or indirectly, in any manner whatsoever, till further direction. The list includes the name of Unno Industries Ltd besides various other companies.

5.7 Further, in light of the above chronology of events, the Income Tax Authorities are entitled/ obliged to look into the details of the documents produced and make thorough investigation into the transactions to find out the actual motive behind it. It is well settled principle of law as laid down by the Honble Apex Court in the case of Sumati Dayal vs. CIT (214 ITR 801) (SC) that the true nature of transactions have to be ascertained in the light of surrounding circumstances. It needs to be emphasized that standard of proof beyond reasonable doubt has no applicability in determination of matters under taxing statutes. It is also well settled that tax authorities are entitled to look into surrounding circumstances to find out the reality of the transaction by applying the test of human probability. This was the principle laid down by the Hon 'ble Supreme Court in the case of CIT vs. Durga Prasad More 82 ITR 540 (sq. Reference may also be drawn to the ratio of the Judgment by Hon'ble High Court of Bombay in the case of Sanjay Bimalchand Jain v. Principal Commissioner of Income-tax-l, Nagpurre ported in [2018} 89 taxmann.com 196 (Bombay). It was held therein by their Lordships that where the assessee had purchased shares of penny stocks companies at lesser amount and sold such shares at much higher amount within a short time and had not tendered cogent evidence to explain as to how shares in an unknown company had jumped to such higher amount in no time, said transactions were attempt to hedge undisclosed income as Long term Capital gain.

5.8 As discussed above, the claim of receipt of sale proceeds of the scrip of M/s Unno Industries Ltd.ofRs.53,63,5181-was found to be an accommodation entry of LTCG earned by the assessee, being the beneficiary. It is clear that the unaccounted money of the assessee was brought back in the books through bogus LTCG. As per the show cause notice issued, the assessee was asked to submit details of commission paid in this regard. However, the assessee is silent on this issue in the written submissions filed. It was confessed 'by several entry operators, share brokers, exit operators, etc. in the course of search/survey proceedings conducted by the Investigation Wing of the Department that they had received commission from the beneficiaries in lieu of such accommodation entries. Based on their statements, it would be justified to conclude the payment of commission to entry operators, brokers, etc. @ 5% of such accommodation entry. Considering the above, it is concluded that the assessee must have incurred expenditure of Rs. 2,68,176/- [5% of Rs. 53,63,518-] to obtain the above said accommodation entry. In view of the above, the unexplained expenditure of Rs. 2,68,1761- also needs to be added back U/S 69C of the Act (taxable at the rate 0[30% as provided U/S 115BBE).

5.9 Reference is also drawn to the judicial pronouncement of the Apex Court in the case of N.K.Proteins Ltd. v. Deputy, Commissioner of Income-tax SPECIAL LEAVE TO APPEAL(C) NO.769 OF 2017 JANUARY 16, 2017, as reported in [2017] 84 taxmann.com 195 (SC), wherein the High Court's decision to add back the entire bogus purchase as per the fictitious invoices debited to trading account holding that percentage disallowance of bogus purchases goes against principle of Sec 68 and 69C of the Act, was upheld by the Apex Court.

5.10 It is imperative on the part of the Assessing Officer to examine each and every transaction and finally to assess correct income of the assessee. In this case, the assessment order was passed

without arriving at the logical conclusion on the corroborative material, available at the disposal of the AO.

5.11 In this connection it is pertinent to note that the failure on the part of the Assessing Officer to make an enquiry on a relevant issue/point would render the assessment erroneous and prejudicial to the interest of the revenue as decided in the following cases by various courts:

(1968) 67 ITR 84(SC) Ram Pyari Devi Saraogi

(1973) 88 ITR 323(SC) Tara Devi Aggarwal

(1975) 99 ITR 375(Delhi) Gee Vee enterprises

(1966) 220 ITR 657 (Mad) K.A. Ramaswami Chettiar & Another

(1966) 220 ITR 456 (Delhi) Duggal and Co.

(1966) 220 ITR 167 (MP) Mahavar Traders

(1995) 213 ITR 843 (Raj) Emery Stone Mfg. Co.

(1992) 198 ITR 611 (Ker) Malabar Industrial Co.

- Malabar Industrial Co. Ltd. v. CIT: 243 ITR 83

-CIT vs. Max India Limited: 268 ITR 128 (P&H) [affirmed in 295 ITR 282 (SC)]

- CIT v Kwality Steel Suppliers Complex: 395 ITR I (SC)

- CIT vs. Amitabh Bachchan: 384 ITR 200 (SC)

-. CIT v. Hindustan Lever Ltd 343 ITR 161(Bom.)

- CIT v . Vikas Polymers: 341 ITR 537 (Del.)

- CIT v. Sunbeam Auto Ltd.: 332 ITR 167 (Del)

-CIT vs. Development Credit Bank Ltd: 323 ITR 206 (Born.)

- Vimgi Investment (P) Limited: 290 ITR 505 (Del)

- Hari Iron Trading Co. vs. CIT: 263 ITR 437 (P&H)

- CIT vs. Gabriel India Limited: 203 ITR 108 (Born).

5.12.1 In connection wit the submission of the assessee, received on 03.12.2018, it may be reiterated that in order to provide clarity on the issue of "erroneous in so far as it is prejudicial to the interest of the revenue", a new Explanation has been inserted to clarify 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.

This amendment takes effect from 1-6-2015. "

5.12.2 The spirit of this ratio is squarely applicable in a recent judgment, wherein the order u/s 263 passed by the PCIT was upheld in the case of M/s. Vama Sundari Investment (Delhi)(P) Ltd vs. Pr. CLT. - 9, New Delhi (ITA No: 22521De1l2018) by the Hon'ble ITAT, Delhi F Bench, New Delhi. In doing so, the Hon'ble ITAT had placed reliance on the following orders:

• *Hon'ble Supreme Court in the case of Deniel Merchants Pvt. Ltd. vs. ITO (Appeal No. 2396/20171 dated 29.11.2017. 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.*

• *MaJabar Industrial Co. Ltd. Vs CIT l09 Taxman 66 1SCl71 [20001 243 ITR 83 (SC)/20001 159 CTR 1 (SC) wherein the 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.*

• *Raimandir Estates (P) Ltd Vs PCIT [2017] 77 taxmann.com 285 (SC)/(2017) 245 Taxman 127 (SC) wherein the 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.*

5.12.3 Thus in the instant case, it can be summarised that the aforesaid twin conditions of rendering an assessment erroneous in so far as it is prejudicial to the interests of the revenue, are met since:

(a) during the assessment proceedings, the assessing officer did not conduct extensive/ necessary enquiries regarding the issue of transfer of shares of Unno Industries Limited;

(b) the AO whatsoever, in the original assessment order accepted the return of income filed by the assessee, more particularly on the issue of gain! loss on sale of shares in Unno Industries;

6. Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Hon'ble Supreme Court and Hon'ble High Court and in accordance with the amendment made to Section 263 of the Act with effect from 01.06./.015, I hold that the impugned assessment order dated 29.07.2016 passed by the A.O. is erroneous in so far as it is prejudicial to the interests of revenue. Therefore, after giving the assessee an opportunity of being heard, that the impugned assessment order dated 29.07.2016 is quashed with the directions given in this order separately.

7. Accordingly, in view of the facts and circumstances of the case as stated above, and also respectfully following the judgments cited above, particularly that in the cases of Sanjay Bimalchand Jain (supra), M/s. VamaSundari Investment (Delhi)(P) Ltd (supra) and that of N. K. Proteins (supra), I am of the considered view that it is deemed fit and appropriate in the interest of justice to add back the entire sale consideration of the bogus penny stock shares, amounting to Rs53,63,518/- unexplained cash credit u/s 68 of the Act. Further, the quantum of unexplained expenditure on account of commission payment to the tune of 2,68,176/- is also liable to be added back u/s 69C of the Act. Accordingly, I direct the AO to re-assess.the income of the assessee for the relevant AY 2014-15 on the issue as discussed above."

15. The ld. Pr. CIT has simply cut and pasted para 5 to para 5.12.3 and also para 6 from the orders he had passed u/s 263 of the Act from the order of the Pr. CIT passed u/s 263 of the Act in the case of *M/s. Girish Tikmani & Others*. Only in para 7, the quantum of addition, or the figures of addition have varied from case to case. This shows that the same general observations and reasons have been given by the ld. Pr. CIT in all cases where he took action u/s 263 of the Act, in cases where there was a claim of deduction u/s 10(38) of the Act on LTCG and where the claim was accepted by the AO.

16. Based on this "cut and paste" reasoning, the ld. Pr. CIT has directed the AO to make additions u/s 68 of the Act of the entire sale consideration received by each of the assessees on the sale of shares, as well as addition u/s 69C of the Act, of an assumed commission payment u/s 69C of the Act. No evidence is brought on record except for stating generalities. SIT recommendations were cited, but these do not have any reference to these assessees. This, in our view cannot be a ground for the Pr. CIT to give specific directions to the AO to make certain additions. The assessee is not confronted by any adverse material. No reference has been made to any specific adverse material. When the assessee is not confronted with any material no amount can be directed to be added by the ld. Pr. CIT, on the basis of suspicion, or material in the public domain on the general modus operandi adopted in such cases. It is necessary for the ld. Pr. CIT to have conducted his own enquiries, collected adverse material and confronted the assessee with such adverse material, consider the replied and only after following the principles of natural justice, he could have directed the additions in question against the assessee. Additions cannot be made based on general reasoning or some supposed material in the public domain which was never brought on record. Such direction is arbitrary and has to be struck down as bad in law.

17. The AO in this case has called for details and thereafter made enquiries with the parties by issuing notices u/s 133(6) of the Act. Only on receiving replies from third parties, the AO came to a conclusion that he could not find any discrepancy in the

claim of the assessee for exemption u/s 10(38) of the Act. The Pr. CIT has not pointed out as to what was the deficiency in these enquiries of the AO and as to what are the further enquiries the AO should have done.

18. The ld. D/R had stated that orders were passed by various authorities including ITAT on this issue, and that decisions were in some cases in favour of the assessee and in some cases in favour of the Revenue. The AO had taken a possible view, after making his enquiries and admittedly this view is supported by some judicial decisions. The ld. Pr. CIT has not specified as to what was the nature of enquiry that the AO has failed to do, nor he has stated the extent of enquiry that was required to be done in such cases and when he has not conducted any enquiries himself, no addition can be directed based on "cut and paste" reasoning from orders of other assessees that additions should be made u/s 68 and 69C of the Act. In our view, such conclusion by the ld. Pr. CIT is not in accordance with law. It would have been another matter, had the ld. Pr. CIT restored the issue to the file of the ld. AO for fresh adjudication in accordance with law after giving the assessee adequate opportunity of being heard. This was not done.

19. In our view all these cases are squarely covered by the judgement of this Bench of the Tribunal in the case of *M/s. Gitsh Tikmani, HUF and Others* (supra) where from para 8-10 held as follows:

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

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

24. In Malabar Industrial Co.Ltd. (2 Supra), the Supreme Court held that a bare reading of Sec.263 makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent – if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act. It also held at pg-88 as follows:

*"The phrase "****prejudicial to the interests of the Revenue****" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax*

Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyaridevi Saraogi v. CIT (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal V. CIT (1973) 88 ITR 323 (SC)".

*25. In Max India Ltd. (3 Supra), reiterated the view in Malabar Industrial Co.Ltd. (2 Supra) and observed that every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. On the facts of that case, Sec.80HHC(3) as it then stood was interpreted by the Assessing Officer but the Revenue contended that in view of the 2005 Amendment which is clarificatory and retrospective in nature, the view of the Assessing Officer was unsustainable in law and the Commissioner was correct in invoking Sec.263. But the Supreme Court rejected the said contention and held that when the Commissioner passed his order disagreeing with the view of the Assessing Officer, there were two views on the word "**profits**" in that section; that the said section was amended eleven times; that different views existed on the day when the Commissioner passed his order; that the mechanics of the section had become so complicated over the years that two views were inherently possible; and therefore, the subsequent amendment in 2005 even though retrospective will not attract the provision of Sec.263.*

*26. In Vikas Polymers (4 Supra), the Delhi High Court held that the power of suo motu revision exercisable by the Commissioner under the provisions of Sec.263 is supervisory in nature; that an "**erroneous judgment**" means one which is not in accordance with law; that if an Income Tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "**erroneous**" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately; that the section does not visualize the substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is not in accordance with the law; that to invoke suo motu revisional powers to reopen a concluded assessment under Sec.263, the Commissioner must give reasons; that a bare reiteration by him that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, will not suffice; that the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income Tax Officer was not only erroneous but was prejudicial to the interests of the Revenue. Thus, while the Income Tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his suo motu revisional powers unless supported by adequate reasons for doing so; that if a query is raised during the course of the scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the Assessing Officer called for interference and revision.*

27. In Sunbeam Auto Ltd.(5 Supra), the Delhi High Court held that the Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc.; that whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Sec.263 merely because he has a different opinion in the matter; that

it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed. In that case, the Delhi High Court held that the Commissioner in the exercise of revisional power could not have objected to the finding of the Assessing Officer that expenditure on tools and dies by the assessee, a manufacturer of Car parts, is revenue expenditure where the said claim was allowed by the latter on being satisfied with the explanation of the assessee and where the same accounting practice followed by the assessee for number of years with the approval of the Income Tax Authorities. It held that the Assessing Officer had called for explanation on the very item from the assessee and the assessee had furnished its explanation. Merely because the Assessing Officer in his order did not make an elaborate discussion in that regard, his order cannot be termed as erroneous. The opinion of the Assessing Officer is one of the possible views and there was no material before the Commissioner to vary that opinion and ask for fresh inquiry.

28. In Gabriel India Ltd. (6 Supra), the Bombay High Court held that a consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. It held that the Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted; that to do so is to divide one argument into two and multiply the litigation. It held that cases may be visualized where the Income Tax Officer while making an assessment examines the accounts, makes inquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the account or by making some estimate himself; that the Commissioner, on perusal of the record, may be of the opinion that the estimate made by the Officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income Tax Officer; but that would not vest the Commissioner with power to reexamine the accounts and determine the income himself at a higher figure; there must be material available on the record called for by the Commissioner to satisfy him prima facie that the order is both erroneous and prejudicial to the interests of the Revenue. Otherwise, it would amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh inquiry in matters which have already been concluded under law.

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

30. In Rampyari Devi Saraogi (21 Supra), the Commissioner in exercise of revisional powers cancelled assessee's assessment for the years 1952-1953 to 1960-61 because he found that the income tax officer was not justified in accepting the initial

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

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

a) The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue – recourse cannot be had to Sec.263 (1) of the Act.

b) Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue: or where two views are possible and the Income tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.

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

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

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

has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, a lesser tax than what was just, has been imposed.

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

We now examine the following judgments on this issue:-

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

*INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD343 ITR 329 (Delhi) Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. S. 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression "**prejudicial to the interest of the Revenue**" is of wide import and is not confined to merely loss of tax. The term "**erroneous**" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "**erroneous**" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.*

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

and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

*This distinction must be kept in mind by the CIT while exercising jurisdiction under s. 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "**inadequate investigation**", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.*

COMMISSIONER OF INCOME TAX vs. J. L. MORRISON (INDIA) LTD. 366 ITR As regard the submission on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable, it was held that the case of CIT vs. M. M. Khambhatwala was not applicable. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case were the issue is debatable was a mere passing remark which is again contrary to the view taken by the Apex Court in the case of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. CIT vs. M. M. Khambhatwala reported in 198 ITR 144; CIT vs. Raison Industries Ltd. reported in 288 ITR 322 (SC), not applicable; Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83, relied on. (Para 72) As regard the third question as to whether the assessment order was passed by the Assessing Officer without application of mind, it was held that the Court has to start with the presumption that the assessment order was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142(1) of the Act could not have been formulated. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption

under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the assessing officer after due application of mind. Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., ITA No. 116 /Coch/ 2012; CIT vs. Infosys Technologies Ltd., 341 ITR 293 (Karnataka); S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984; A. A. Doshi vs. JCIT, 256 ITR 685; Hindusthan Tin Works Ltd. Vs. CIT, 275 ITR 43 (Del), distinguished. (Paras 90-92, 102) COMMISSIONER OF INCOME TAX vs. SOHANA WOOLLEN MILLS 296 ITR 238 (P&H HC) A reference to the provisions of s. 263 shows that jurisdiction thereunder can be exercised if the CIT finds that the order of the AO was erroneous and prejudicial to the interest of Revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the AO was erroneous or prejudicial to the interest of the Revenue. The jurisdiction could be exercised if the CIT was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the CIT for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation. In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs. 1 lakh was to be received for sale of permit. If that is so, there was no error in the view taken by the AO and no case was made out for invoking jurisdiction under s. 263.

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

(Paras 6 & 7) In the entire order emphasis laid by the CIT is that in respect of four issues mentioned by him, no queries were raised by the AO. On this premise, though it is observed that there was no application of mind on the part of the AO and

the AO has not recorded any reasons to justify the omission to consider the said facts, the CIT does not take the said order to its logical conclusion which was the prime duty of the CIT in order to justify exercise of power under s. 263. There is not even a whisper that the order is erroneous. Even if it is inferred that non-consideration of the issues pointed out by the CIT would amount to an erroneous order, it is not stated as to how this order is prejudicial to the interest of the Revenue. The penultimate paras of the order, at best, contain the observations that the AO was satisfied with making flimsy additions which were deleted by the CIT(A). There is not a whisper as to how this order was prejudicial to the interest of the Revenue. That apart, the approach of the Tribunal in discarding the observation of the CIT about not making proper inquiries in respect of the said four issues is also justified and without blemish.

(Paras 12 to 14) First comment of the CIT was in respect of finished goods in the closing stock. The CIT found that these were to the tune of Rs. 5.28 crores. According to the CIT, when the total turnover of the assessee was Rs. 6.13 crores, the AO should have satisfied himself by calling for more details as to how there was closing stock of such a magnitude of Rs. 5.28 crores. Thus, the CIT has not doubted the statement of finished goods in the closing stock furnished by the assessee. He has only remarked that there should have been a deeper probe by calling for more details. This is neither here nor there, when one keeps in view the ingredients of s. 263.

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

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

(Para 17) Lastly, the observations of the CIT are in respect of the income of Rs. 1.61 crores shown by the assessee on account of variation in exchange rate. The CIT has only observed that in the immediate previous year no such gain was shown and therefore, it needed examination by the AO. However, the moot question would be examination for what purpose ? It is an income shown by the assessee. Whether the CIT was of the opinion that there was no such income or he was nurturing an impression that income on this account as shown was lesser ? There is no such indication in the order. The CIT also does not at all state as to what was the reason for doubting the income offered by the assessee. Even if it is found that part of such income was claimed as deduction under s. 80HHC, no benefit enured to the assessee on this account as claim under s. 80HHC was fully disallowed by the AO. It is not at all observed as to how the order of the AO on this account was erroneous and further as to how it was prejudicial to the interest of the Revenue. Thus, order of the CIT was rightly set aside by the Tribunal. In the case on hand the ld. CIT finds fault with the AO for not invoking Rule 8D while making disallowance u/s 14A. The Hon'ble Delhi High Court in the case of Maxop Investments Ltd. Vs CIT (supra) held that the AO cannot proceed to determine the amount of expenditure incurred in relation to exempt income without recording a finding that he is not satisfied with the correctness of the claim of the assessee. This is a

condition precedent while rejecting the claim of the assessee, with regard to incurring of expenditure or no expenditure in relation to exempt income. The AO will have to indicate cogent reasons for the same and Rule 8D comes into play only when the AO records a finding that he is not satisfied with the assessee's method. In the case in hand the AO has not made any such recording of satisfaction and has accepted the disallowance made u/s 14A by the assessee. In such circumstances it is not open for the ld. CIT to come to a conclusion that the AO should have invoked Rule 8D, without himself recording the satisfaction that the calculation given by the assessee in its disallowance made suo moto u/s 14A is not correct. Coming to the other expenses claimed, the ld. CIT has simply collected information after raising queries and has not given any finding whatsoever that there is an error made by the AO or that the circumstances was such that would require and warrant further inquiry or investigation. No error in the assessment order has been pointed out and it is not stated as to how prejudice was caused to the revenue. The finding that the AO had failed to properly scrutinise the above aspects does not give powers to the ld. CIT to revise the assessment u/s 263 of the Act. Making rowing enquiries is not a finding of an error. Assessments cannot be set aside for fresh enquiries unless a specific error is pointed out at not making proper enquiry cannot be equated with no enquiry. In view of the above we quash the order passed u/s 263 of the Act and allow the appeal of the assessee.

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

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

*substantive grievance as well as this "**lead**" appeal ITA No.01/Kol/2019 is accepted therefore.*

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

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

20. In view of the above discussion and respectfully following the propositions of law laid down by the Kolkata 'C' Bench of the Tribunal in the case of *M/s. Gitsh Tikmani, HUF and Others* (supra), we hold that the order passed u/s 263 of the Act is bad in law in the cases of all the assessees before us. The directions for the additions as well as the order passed u/s 263 of the Act in all these cases are quashed."

11. Respectfully following the ratio of the decision of the Tribunal in Ritin Lakhmani & Ors (supra), we hold that the order passed by the Ld. Pr. CIT u/s 263 of the Act is bad in law and, therefore, is consequently quashed.

In the result, the appeal of assessee is allowed.

Pronounced in the open court on 21st April, 2021.

Sd/- Sd/-

(J. S. Reddy) (A. T. Varkey)
Accountant Member Judicial Member

Date: 21st April, 2021

Jd (Sr. PS.)

Copy forwarded to –

1. Shri Satish Kumar Lakhmani, C/o Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2nd floor, Kolkata-700 069.
2. Pr. CIT-10, Kolkata.
3. ITO, Ward-28(4), Kolkata.
4. DR, ITAT, Kolkata.

True copy By order

Assistant Registrar
ITAT, Kolkata.