

**THE INCOME TAX APPELLATE TRIBUNAL,
'C' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 254/KOL/2024
Assessment Year: 2015-2016
&**

**I.T.A. No. 255/KOL/2024
Assessment Year: 2016-2017**

***Rajesh Kumar Jalan,.....Appellant
138/A, G.T. Road (West),
Konnagar, Hooghly-712235, West Bengal
[PAN:AMKPJ4084B]***

-Vs.-

***Principal Commissioner of Income Tax,....Respondent
Kolkata-13,
3, Government Place (West),
Kolkata-700001***

Appearances by:

*Shri S.K. Tulsiyan, Advocate & Puja Somani, C.A appeared
on behalf of the assessee*

*Shri Rakesh Kumar Das, CIT, D.R., appeared on behalf
of the Revenue*

Date of concluding the hearing : May 30, 2024

Date of pronouncing the order : June 12, 2024

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The present two appeals are directed at the instance of assessee against the orders of Id. Principal Commissioner of Income Tax, Kolkata-13 dated 14.12.2023 and 15.12.2023 passed

under section 263 of the Income Tax Act in A.Ys. 2015-16 and, 2016-17.

2. The assessee has raised verbatim five grounds of appeal in each year except variation of the quantum stated in those grounds. In brief, the grievances of the assessee in all these five grounds in both the years revolve around a single issue, namely-

whether the impugned order passed by the Id. Commissioner under section 263 of the Income Tax Act in each year is sustainable or not?

3. The facts on all vital points are common in both the assessment years. Even the impugned orders are almost verbatim except variation in dates and quantum mentioned in each year. Therefore, we deem it appropriate to take facts for the facility of reference from A.Y. 2015-16. We deem it appropriate to dispose of both these appeals by this common order.

4. Brief facts of the case are that the assessee at the relevant time was engaged in trading of cloth including sarees. He has filed his returns of income on 28th May, 2015 and 29th July, 2016 declaring total income at Rs.3,41,700/- and Rs.4,15,530/- in A.Y. 2015-16 and 2016-17 respectively. These returns were filed by the assessee under presumptive taxation scheme contemplated in section 44AD of the Income Tax Act. In other words, section 44AD would provide that if a small assessee, whose gross turnover does not exceed 50 lakhs rupees, then such an assessee can compute

his income @ 8% of the gross receipts achieved by him. The assessee has gross turnover of Rs.39,48,887/- in A.Y. 2015-16 and Rs.49,48,857/- in A.Y. 2016-17. He claimed deduction under Chapter VI-A of Rs.1,11,708/- from the gross total income of Rs.4,53,403/- in A.Y. 2015-16. Similarly, in A.Y. 2016-17, he claimed deduction under Chapter-VI at Rs.85,743/- from the gross total income of Rs.5,01,272/-.

5. The ld. Assessing Officer had received information from Bureau of Investigation, Commercial Taxes, West Bengal during the meeting of REIC held on 23.03.2018. This information exhibits that the assessee had by fraudulent act opened seven Bank accounts under five proprietorship concerns and received a total sum of Rs.112,41,47,898/- over the years. The ld. Assessing Officer thereafter reproduced the details of such proprietorship concerns and their Bank accounts with different Banks. He recorded the reasons and reopened the assessment in both the assessment years.

6. During the course of reassessment proceedings, it was submitted by the assessee that he has not opened any of the Bank accounts. It might have been done by some unknown person by using fake identity of the assessee. The assessee participated the investigation conducted by the Sales Tax Authorities. He also lodged FIR in this regard in the Police Station, which is still pending as per the information to the assessee.

7. The ld. Assessing Officer was not satisfied with the submissions of the assessee. He was of the view that the alleged money credited to the account of the assessee in these two years is to be treated as unaccounted sales of the assessee. For example- in A.Y. 2015-16, ld. Assessing Officer has worked out this sale at Rs.30,47,35,796/-, he assumed this figure as turnover of the assessee and estimated the profit at 8%. In this way, he made an addition of Rs.2,43,78,864/-. After giving credit of the income disclosed by the assessee in his return of income, he determined the undisclosed income of the assessee. The ld. Assessing Officer further estimated unexplained investment of Rs.41,21,145/-. In other words, it was added by the ld. Assessing Officer on the ground that Office of the Registrar of Assurance, Kolkata has disclosed that the assessee had purchased one immovable property for consideration of the above amount in this way in A.Y. 2015-16. The ld. Assessing Officer has determined the total income at Rs.2,84,12,234/-.

8. In A.Y. 2016-17, the ld. Assessing Officer did not make any addition of unexplained investment but on the analogy of first-fold of addition, he determined the taxable income at Rs.3,44,05,554/-, which is 8% of the alleged gross turnover of Rs.43,08,96,425/-.

9. The Additional Commissioner of the Range forwarded a proposal to the ld. CIT for initiating proceedings under section 263 of the Income Tax Act against the assessee. The ld. CIT has reproduced the proposal made by the ld. Addl. CIT, Range-43,

Kolkata. Thereafter issued a notice under section 263 and invited explanation of the assessee as to why assessment orders are not to be set aside being erroneous and prejudicial to the interest of Revenue. The ld. CIT was of the view that the alleged credit of sales ought to be treated as unexplained cash credit against the name of assessee. The ld. Assessing Officer has erred in treating it as a gross turnover. The copy of the show-cause notice has been placed on record by the ld. Counsel for the assessee. These are available on pages no. 58 to 66 for A.Ys. 2015-16 and 2016-17.

10. In response to the show-cause notice, the assessee appeared and filed written explanation. We will refer such explanation while taking note of the submissions made by the ld. Counsel for the assessee. In brief, the stand of the assessee was that somebody has personated his identity and opened these fake accounts in his name. According to him, his identity has been misused by some unknown person. He has not undertaken any such business. Ld. CIT was not satisfied with the explanation of the assessee and set aside the assessment orders with a direction that ld. Assessing Officer to recompute income at Rs.30,07,20,390/- in A.Y. 2015-16 and Rs.43,13,11,955/- in A.Y. 2016-17.

11. The ld. Counsel for the assessee while impugning both these orders of the ld. CIT has filed a detailed written submission, wherein facts have also been arranged in a seriatim exhibiting alleged allegation of receipt of amounts in different bank accounts in different years as well as details of the Bank account. The ld.

Counsel for the assessee thereafter made reference to the stand taken by the assessee before the Revenue Authorities that in the assessment proceeding as well as before the Id. Commissioner. The Id. Counsel for the assessee in alternative contended that Id. Assessing Officer has duly examined this issue and treated the alleged amount as a gross turnover of the assessee. He estimated the income on such amounts, therefore, Id. Assessing Officer has formulated as one of the views, which ought to have not been disturbed by the Id. Commissioner. The Id. Counsel for the assessee thereafter made reference to a large number of decisions in his written submission. We deem it appropriate to take note of this written submission, which reads as under:-

“Your Honours,

The following submissions is being made against the order of the learned PCIT, Kolkata-13 passed u/s 263 of the Act dated 14-12-2023 and 15-12-2023 for AYs 2015-16 and 2016-17 respectively.

FACTS OF THE CASE OF THE ASSESSEE:

- 1. The Assessee, a resident of a small town, Konnagar situated in Hooghly district, educated merely upto class VII, is a Retail Haat Trader of Cloth items including sarees. Being a small trader, the Assessee stood exempt under sales tax provisions. The assessee also received rental income from leased hotel in AY 2016-17.*
- 2. The assessee is furnishing income under presumptive taxation scheme under section 44AD of the Act. Therefore no books of accounts were maintained by the assessee.*
- 3. The assessee for the F.Y. 2014-15 (AY 2015-16) reported Gross Turnover of Rs.39,48,887/-. Return was filed u/s 139(1) of the Act in Form ITR-4S on 28.08.2015 declaring therein a Gross Total Income of Rs. 4,53,403/- comprising therein a sum of Rs.4,29,475/- under Profits from Business on presumptive income @ 8% of the turnover and Income from Other Sources of Rs.23,928/- (i.e. Saving Bank Interest).*

4. The Assessee for FY 2015-16 (AY 2016-17) reported Gross Turnover of Rs.49,48,857/- and Return was duly filed u/s 139(1) of the Act in Form ITR-4S on 29.07.2016 declaring therein a Gross Total Income of Rs.5,01,272/- comprising of Rs. 4,81,690/- under Profits from Business on presumptive income @ 8% of the turnover and Income from Other Sources of Rs. 19,582/- (i.e. Saving Bank Interest).

5. On 01.04.2016 the Assessee randomly received certain information from Commercial Tax Authorities that he had by the fraudulent act of opening seven bank accounts under five alleged proprietary concerns received total amount of Rs. 1,12,41,47,898/- over the years tabulated below:

Financial Year	Assessment Year	Amounts received (Rs.)
2012-13	2013-14	Rs.7,77,42,891/-
2013-14	2014-15	Rs.31,96,40,421/-
2014-15	2015-16	Rs.30,03,78,690/-
2015-16	2016-17	Rs.42,63,85,896/-
	TOTAL	Rs.1,12,41,47,898/-

The impugned 7 Bank A/cs is as follows:

S. No	Name of the Bank	Branch	A/c No	Name of the organization
1.	IDBI Bank	Braboume Road	0060102000139274	M/s KL Enterprised
2.	Federal Bank	Rabindra Sarani	16230200007883	M/s. Sampuma Traders
3.	Indusind Bank	Burrabazar	200999284782	
4.	Canara Bank	Burrabazar	1392201980153	M/s. Naina International
5.	Indusind Bank	Burrabazar	200999293494	M/s. Keswani Enterprises
6.	Indusind Bank	Burrabazar	200004740517	M/s. Gobinda Trading
7.	HDFC Bank	India Exchange Place	02192000029922	M/s. Eastern Engineering Corporation

Thus for A.Y. 2015-16, a sum of Rs.30,03,78,690/- and for AY 2016-17 a sum of 42,63,85,896/- was held to be Suppressed Sales of the Assessee by the Commercial Tax Authorities

6. *The Assessee being completely unaware of any such actions which have been permeated through fraud, denied the said transactions before the sales-tax authorities. He vehemently denied opening any of the bank accounts and also obtaining the said Trade Licences in the name of the said proprietary concerns. With all due promptness and diligence, the Assessee appeared before the Economic Investigating Wing of the Sales Tax Authorities, Kolkata, from time to time as and when he was called for and persistently denied any knowledge about the issuance of five trade licenses in favour of five proprietorship concerns and the opening of seven bank accounts at different banks of Kolkata in the name of said proprietorship concerns. Denying the execution of the said bank transactions, he completely denied having any knowledge about the nature of the said transactions.*

7. *The Sales Tax Authorities however alleged that the impugned banking transactions were all executed by the said 5 proprietary concerns through all the 7 bank accounts all belonging to the Assessee since the said 7 bank accounts were all initiated on the PAN and Aadhaar Card of assessee.*

8. *On request to the Commercial/Sales Tax Authorities (VAT), a copy of the said forged documents were all provided to the Assessee and accordingly the Assessee on 22.04.2016 filed a Police Complaint to the Officer-in-charge of the Local P.S. Konnagar, Hooghly with a request to investigate the matter, copy enclosed at Page 3 of the P/b for AY 2015-16.*

9. *Pursuant to the above, the Assessee duly submitted and produced his original PAN Card and Aadhaar Card. On verification of the PAN card and Aadhar card used to initiate the Bank Accounts and the Trade Licences of the 5 Proprietary concerns it was found that forged photo and signature of the Assessee was used on both the said cards used to open the impugned bank accounts. Thus it was then revealed to the knowledge of the Assessee that a huge fraud was committed wherein the identity of the Assessee was stolen and tampered with and on the basis of the forged/fraud KYC documents, the said Trade Licences, bank accounts were opened and the said huge transactions were carried out all fraudulently in the name of the Assessee.*

10. *The Assessee was constantly interrogated in the said case by the Commercial Tax Authorities (VAT) (Investigation Unit) and the Officers of Economic Officer Wing, Enforcement Branch (Kolkata Police) Co-operating with the Police and the VAT Authorities, the Assessee provided all explanations and documents that were in his possession.*

11. Next, on 15.06.2018, due to the constant interrogation and the Notices received by the VAT Authorities, the Assessee filed a Reminder to the Police Station to speed up the investigation process and to clear the fraud. Further FIR was also filed on 08.03.2020, copy enclosed at Page 4- 5 of the P/b for AY 2015-16. Further, reminder to Officer-in-charge, P.S. Konnagar was also filed on 25.10.2021, copy enclosed at page 6-8 of the P/b for AY 2015-16.

12. Meanwhile on 23.03.2018, the same information was also received by the learned AO from Bureau of Investigation, Commercial Taxes, West Bengal that the assessee has received payments to the tune of Rs. 1,12,41,47,898/- through seven current bank accounts in F.Ys 2012-13 to 2015-16. Relevant extract of the assessment order is reproduced below:

“An information was received from Bureau of Investigation, Commercial Taxes, West Bengal during the meeting of REIC on 23.03.2018 regarding Shri. Rajesh Kumar Jalan. The detailed information is as follows,

Shri. Rajesh Kumar Jalan has received payments to the tune of Rs.1,12,41,47,898/- through seven current bank accounts in the names of the below noted six trades, from several other dealers during the period 2012-13, 2013-14, 2014-15, 2015-16.

By the above act of suppressing sales, at least, to the tune of Rs.112,41,47,898/-, the dealer Shri Rajesh Kumar Jalan has avoided his tax liability to defeat the tax imposed by not less than Rs.5,54,04,766/- as per WBVAT Act, 2003. ”

Accordingly, based on this information alleging suppressed sales, it is understood that the learned AO initiated Reassessment proceedings u/s 148 of the Act vide Notice u/s 148 of the Act on 20-03-2020 for both the assessment years. However, the assessee being a simple honest man failed to check the income tax portal and missed the receipt of the Notice u/s 148 of the Act dated 20.03.2020 and failed to respond to the same. Thus, no return could be filed u/s 148 of the Act.

13. Further, notices u/s 142(1) of the Act dated 06.01.2021 was issued on the Assessee. The Assessee, on becoming aware of the said Notice, through the help of a professional, submitted his response on the LT Portal on 10.02.2021 along with a 57 pages Annexure wherein it was submitted that none of the 7 impugned bank accounts as mentioned in the notice pertained to or belonged to the Assessee. The same was opened by some unknown fraudulent person in the forged Pan and Aadhar card of the assessee. It was submitted that the

assessee has filed various police complaints explaining his case. Copy of the forged PAN and the Aadhar along with all the Police Complaint and the FIR filed by the assessee were all submitted before the learned AO. The original Pan Card, Aadhar Card and Voter Id of the Assessee was also submitted. The assessee also submitted the details of the Bank A/cs actually held by him and year wise receipts in these bank accounts as follows:

S.No.	Bank Name	Account Number	Total Credit during FY 2014-15	Total Credit during FY 2015-16
1.	HDFC Bank Ltd	12421930004224	Rs.14,18,355/-	Rs.11,77,356/-
2.	Indusind Bank Ltd	100004703638	Rs.13,02,550/-	Rs.30,83,475/-
3.	State Bank of India	322523821922	Rs. 15,12,218/-	Rs. 1,22,057/-
4.	United Bank of India	1840010011556	Rs. 1,23,983/-	Rs. 1,27,641/-
	Total Credits		Rs.43,57,106/-	Rs.45,10,529/-

Copy of the ITR and bank accounts were also submitted. Copy of the reply is enclosed at page 1-57 of Paper Book 2.

14. However, the learned AO was not satisfied with the submissions of the assessee. He passed the Assessment Order u/s 147 r.w.s 144 of the Act wherein he opined the impugned receipts as per Commercial Tax Authorities of Rs.30,03,78,690/- for AY 2015-16 and Rs.42,63,80,896/- for AY 2016-17 to be the trading receipts of the Assessee and computed net profits (a). 8% of the total receipts and added the same to the income of the assessee u/s 44AD of the Act in the respective years. The relevant extract of the order is reproduced below:

AY 2015-16

“8. As discussed, the total payment of Rs.30,47,35,796/- (Rs.30,03,78,690 + Rs.43,57,106) received during the financial year 2014-15 is taken as total turnover of the assessee. The assessee has filed return u/s.44AD shown net profit @ 8% in the return. Therefore, net profit is computed @ 8% on total turnover which comes to Rs.2,43,78,864/-. Since the assessee already showed net profit of Rs.4,29,475/- in his return of income, remaining income of Rs.2,39,49,389/- (Rs.2,43,78,864 (-) Rs.4,29,475) is brought to tax as shortfall profit. ”

AY 2016-17

“As discussed, the total payment of Rs.43,08,96,425/- (Rs.42,63,85,896 + Rs.45,10,529) received during the financial year 2015-16 is taken as total turnover of the assessee. The

assessee has filed return u/s. 44AD shown net profit @ 8% in the return. Therefore, net profit is computed @ 8% on total turnover which comes to Rs.3,44,71,714/-. Since the assessee already showed net profit of Rs. 4,81,690/- in his return of income, remaining income of Rs. 3,39,90,024/- (Rs. 3,44,71,714 (-) Rs. 4,81,690) is brought to tax as shortfall profit. ”

In doing so, he completely ignored the fact that the impugned 7 bank accounts were not opened by the assessee but was opened by some fraudulent person using the forged PAN Card and Aadhar card of the assessee and police complaints were filed by the assessee in this respect.

15. Aggrieved with the assessment orders, the assessee preferred an appeal before the learned CIT(A) for both the assessment years, copy of Form 35 is enclosed. The assessee has also filed detailed written submissions for the said case before the learned CIT(A). However, the appeal is pending for disposal. Copy of Form 36 and online response summary is enclosed at page 9-19b of paper book filed for AY 2015-16.

16. The Assessee once again submitted a complain to the Local PS, Uttarpara, West Bengal on 25/10/2021. Copy of the said Complaint is enclosed at page 6-8 of the P/b filed for AY 2015- 16.

In the given set of facts, the Assessee also filed an Affidavit dated 25/11/2021 before the Notary Public, Kolkata, wherein all the facts of the case of the Assessee were stated and put under oath. Copy of the said Affidavit is enclosed at page 36-42 of the P/b for AY 2015-16.

17. Subsequently, revision notice u/s 263 of the Act dated 14/07/2023 was issued by the learned PCIT for both the assessment years on the sole ground that the learned AO erred in adding only 8% of the total receipts as per the information of the Sales Tax Authorities instead of adding the entire receipts credited in the impugned bank accounts which has made the assessment order erroneous and prejudicial to the interest of the revenue. Copy of the notice is enclosed at page 58-66 of paper book 2.

18. In reply, the assessee filed a detailed reply, enclosed at page 20-35 of paper book filed for AY 2015-16, wherein it was submitted that none of the 7 impugned bank accounts as mentioned in the assessment order and its transactions pertained to or belonged to the Assessee. The same was opened by some unknown person misusing the Pan Card and Aadhar card of the assessee. It was submitted that the assessee has filed various police complaints explaining his case. It was also submitted that the assessee has filed an affidavit under oath

stating that the said bank accounts does not belong to the assessee. It was also submitted that the assessee never received the details of such transactions, impugned bank statements from the assessing officer. Hence it's difficult and impossible for the assessee to imagine the nature of purchase and sales, bank transaction, cash transaction during the year.

It was further submitted that that the learned AO took a plausible view that the total receipts of Rs.30,47,35,796/- (Rs.30,03,78,690 + Rs.43,57,106) during the financial year 2014-15 and Rs.43,08,96,425/- (Rs.42,63,85,896 + Rs.45,10,529) during the financial year 2015-16 comprising of undisclosed receipts as per information from the Sales Tax Department and disclosed receipts as shown by the assessee in the return filed for the year respectively represents total turnover of the assessee and since, the assessee had filed return u/s.44AD of the Act under presumptive taxation and had shown net profits @ 8% on the turnover, net profits were computed @ 8% on total turnover of Rs.30,47,35,796/- and Rs.43,08,96,425/- for AY 2015-16 and AY 2016- 17 respectively by the learned AO. Since the learned AO has taken a plausible/possible view which is not unsustainable in law, the assessment order cannot be termed as erroneous, thus rigors of section 263 of the Act cannot be invoked.

It was further submitted that the assessment order is prejudicial to the interest of the assessee and not prejudicial to the interest of the revenue since the impugned receipts as per the information of the Sales Tax Authorities does not belong to the assessee and addition of 8% of these receipts to the total income of the assessee has made the assessment order prejudicial to the interest of the assessee.

19. However, the learned PCIT was not satisfied with the submissions of the assessee and set aside the case to the file of the learned AO directing him to recompute the income taking into consideration the entire receipts of the 7 Bank A/cs in the relevant years.

20. Aggrieved, the assessee is in appeal before Your Honours.

SUBMISSIONS:

Grounds 1-4: Order passed u/s 263 of the Act dated 14-12-2023 is not as per law since the assessment order dated 28-09-2021 is neither erroneous nor prejudicial to the interest of the revenue as a plausible view was taken by the AO during assessment.

1. At the outset, it is relevant to quote and analyse the said Section 263 of the Act which reads as follows:

“263. Revision of orders prejudicial to revenue.—(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.”

Vide Finance Act, 2015 w.e.f. 01-06-2015 a new explanation ‘Explanation 2’ was added to section 263 of the Act which reads as follows:

Explanation 2.- For the purposes of this section, it is hereby declared that an order passed by the AO 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.”.*

Thus in simple words, now w.e.f 01/06/2015, the following Orders shall be considered as erroneous and prejudicial to the interest of revenue, where the A.O. passed the said order:

- (1) without making any inquiries/verification which he/she is required to be made.*
- (2) without making inquiry into a claim which is claimed by assessee and allowed such claim.*

(3) which is not in accordance with any order/direction/instruction (i.e. circulars) issued by CBDT

(4) which is not in accordance with any decision of jurisdictional High Court or Supreme Court which is prejudicial to the assessee or any other person. In other words, where jurisdictional High Court or Supreme Court's decision is against the assessee or any other person and AO passed the order without considering such judgment then such order shall be considered as erroneous and prejudicial to the interest of revenue.

Analysing the said section along with the explanation so inserted, it is the position of the law that in order to invoke the revisionary provisions u/s 263 of the Act, 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.

The Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs. Commissioner of Income-tax (243ITR 83) held that:

“A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suomotu under it, is that 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 is prejudicial to the Revenue—recourse cannot be had to section 263(1) of the Act.

“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.”

In CIT v. Max India Ltd [2007] 295 ITR 0282-SC it was held that:

“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.”

2. *Now, in the light of the above, analysing the facts of the case of the Assessee it is seen that the case of the assessee was reopened u/s 148 of the Act on the basis of information received by the learned AO from the Bureau of Investigation Commercial Taxes, West Bengal, (VAT Department) on 23.03.2018 allegedly against the Assessee, whereby it was alleged that the assessee has suppressed sales, relevant extract quoted below:*

“An information was received from Bureau of Investigation, Commercial Taxes, West Bengal during the meeting of REIC on 23.03.2018 regarding Shri. Rajesh Kumar Jalan. The detailed information is as follows,

Shri. Rajesh Kumar Jalan has received payments to the tune of Rs. 1,12,41,47,898/- through seven current bank accounts in the names of the below noted six trades, from several other dealers during the period 2012-13, 2013-14, 2014-15, 2015-16.

By the above act of suppressing sales, at least, to the tune of Rs.112,41,47,898/-, the dealer Shri Rajesh Kumar Jalan has avoided his tax liability to defeat the tax imposed by not less than Rs.5,54,04,766/- as per WBVAT Act, 2003. ”

The case of the assessee was thus reopened on the issue that the assessee has suppressed sales as per WBVAT Act, 2003.

3. *The Assessee during the course of reassessment explained in detail the factual matrix of the case. It was submitted that none of the 7 impugned bank accounts as mentioned in the assessment order*

and its transactions pertained to or belonged to the Assessee. The same was opened by some unknown person in the forged Pan card and Aadhar card of the assessee. It was submitted that the assessee has filed various police complaints explaining his case and also submitted all his personal and business details including its bank details and accounts.

On the basis of the submissions filed by the assessee, the learned AO took a plausible view that the total receipts of Rs.30,47,35,796/- (Rs.30,03,78,690 + Rs.43,57,106) during the financial year 2014-15 and Rs.43,08,96,425/- (Rs.42,63,85,896 + Rs.45,10,529) during the financial year 2015- 16 comprising of undisclosed receipts as per information from the Sales Tax Department and disclosed receipts as shown by the assessee in the return filed for the year respectively represents the total turnover of the assessee and since the assessee had filed return u/s.44AD of the Act under presumptive taxation and had shown net profits @ 8% on the turnover, net profits were computed by him @ 8% on total turnover of Rs.30,47,35,796/- and Rs.43,08,96,425/- for AY 2015-16 and AY 2016-17 respectively.

- 4. Subsequently, revision notice u/s 263 of the Act dated 14/07/2023 was issued by the learned PCIT for both the assessment years on the sole ground that the learned AO erred in adding only 8% of the total receipts as per the information of the Sales Tax Authorities instead of adding the entire receipts credited in the impugned bank accounts which has made the assessment order erroneous and prejudicial to the interest of the revenue.*

The relevant extract of the notice is reproduced below:

“On verification of the records it is found that the amount of Rs.30,03,78,690/- (Rs. 30,47,35,796/- minus Rs.43,57,106)/- was to be added as it is unexplained and taxed instead of 8% as per provisions of section 68 of the Act. Hence an under-assessment occurred which is adverse to the Revenue and an addition to the tune of Rs. 27,63,48,395/- (Rs. 30,03,78,690 minus 8% of Rs. 30,03,78,690/-) is to be made.

From the observation of the A.O., it is clear that no explanation about the nature and source of the sum of Rs.27,63,48,395/- was provided by the assessee. Hence, the entire sum is liable to be treated as cash credit in the part of the assessee. ”

Copy of the notice is enclosed at page 58-66 of paper book 2.

- 5. On perusal of the information received by the learned AO from the Commercial Tax Department, it may kindly be seen that the case*

of the assessee was reopened on the ground of suppressed sales. However, the learned PCIT has issued the notice u/s 263 of the Act stating that the amounts received by the assessee should be treated as cash credit u/s 68 of the Act. In this regard, it is humbly submitted that the case of the assessee was reopened on the ground of unexplained trade credits/sales reflected in the impugned 7 bank accounts and not on account of cash credits u/s 68 of the Act. As such, the notice issued u/s 263 of the Act alleging cash credit u/s 68 is completely without jurisdiction. Trade credits cannot never be added u/s 68 of the Act. To buttress the contention of the assessee reliance is placed on the judgment of the Hon'ble ITAT, Kolkata in the case of ACIT vs Debashis Roy in I.T.A. No. 226/Kol/2019 pronounced on 09-11-2022 wherein it was held that,

"So we are to decide whether trade liability could be added u/s 68 of the Act. We have perused the provisions of Section 68 of the Act and find that the provisions of section 68 of the Act are applicable to the money credited during the year in the books of the accounts qua which the assessee has failed to furnish any details thereby not proving the identity, creditworthiness of the creditors and genuineness of the transactions. But this is not the case before us. We observe that these liabilities represented trading liabilities and are beyond the ambit of Section 68 of the Act."

As such, the very foundation of initiation of proceedings u/s 263 of the Act is without jurisdiction and hence bad in law.

6. Even otherwise, the assessment order is neither erroneous nor prejudicial to the interest of the revenue. As per the information received by the learned AO from the Sales Tax Department, the assessee has undisclosed receipts on account of undisclosed sales. It is a trite law that entire undisclosed sales cannot be added. Additions can be made only to the extent of the estimated profits embedded in these sales. Since the assessee had offered net profits @ 8% of the total turnover in his return of income, the learned AO rightly considered only the profit element in the alleged suppressed sales as per the Sales Tax Department. Here, your kind attention is invited to the judgment of the Hon'ble High Court of Gujarat, in the case of President Industries vs CIT (2002) 124 taxmann 654 wherein it was held that,

"2. The facts giving rise to the present case are that during the course of survey conducted on the premises of the assessee on 1-12-1994, from the excise records found,

inference was drawn by the Assessing Officer from the movement of finished goods from the premises of the assessee to godowns that sales amounting to Rs. 29,01,300 have not been disclosed in the books of account. The Assessing Officer made the addition of the entire sum of the said undisclosed sales as income of the assessee for the assessment year 1994-95. The additions on account of undisclosed sales was affirmed by the Commissioner (Appeals) to the reduced sum of Rs. 28,35,883. On further appeal, the Tribunal found that the entire sales could not have been added as income of the assessee for the assessment year in question but only to the extent the estimated profits embedded in the sales for which the net profit rate was adopted entailing addition of income on the suppressed amount of sales. The Tribunal also found that there is no material on the record to suggest that the assessee made any investment outside books of account to make alleged unaccounted sales in respect of the aforesaid appellate order. The applicant made an application under section 256(1) for referring the aforesaid question said to be arising out of the Tribunal's order.

3. Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner (Appeals) and the Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be a matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question, whether entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred to about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales. ”

7. Here, it may kindly be noted that since the assessee outrightly denied having opened the impugned 7 Bank accounts and having made any such transactions, appeal was filed before the learned CIT(A) by the assessee against the impugned assessment orders.

8. *In the present case, it is evident from the facts that during assessment a specific query was raised by the learned AO with respect to the transactions in the 7 impugned bank accounts. The assessee had filed written submissions along with documentary evidences before the learned AO explaining that the said bank accounts does not belong to him. On perusal of the submissions made by the assessee, the learned AO took a possible view which is not unsustainable in law, that 8% of the total receipts in the impugned bank accounts should be taken as the total turnover of the assessee as per section 44AD of the Act. As such, it cannot be said that the AO had failed to examine this issue during the assessment stage to render the assessment order erroneous.*

Here, please note that if a query has been raised at the time of assessment and the same was duly responded to by the assessee, it would not lead to the conclusion that the AO has passed the assessment order without making adequate enquiries/verification which he was required to make so as to render the assessment order erroneous and prejudicial to the interests of the revenue. Further, it is a trite proposition that in a case where the AO has taken a plausible view, then the CIT is not permitted to substitute his own view because he disagrees with the view of the AO to warrant initiation of proceedings u/s 263 of the Act.

9. *Evidently, none of the conditions/clauses mentioned in Explanation 2 to section 263 of the Act is met in the present case. The same is discussed hereunder:*

Condition 1- Order passed without making any inquiries/verification which he/she is required to be made.

As evident from the assessment order, the case of the assessee was reopened by the learned AO on the sole ground that information was received from the Sales Tax Department regarding undisclosed receipts in 7 bank A/cs. Thus, the order was passed after making necessary enquiries in this regard.

Condition 2:-Order passed without making inquiry into a claim which is claimed by assessee and allowed such claim.

This clause is not applicable in the present case since no claim was claimed by the assessee.

Condition 3:-Order which is not in accordance with any order/direction/instruction (i.e. circulars) issued by CBDT

There is no reference to any order/direction/instruction in the assessment order. As such, this clause is not applicable.

Condition 4:- Order is not in accordance with any decision of jurisdictional High Court or Supreme Court which is prejudicial to the assessee or any other person.

There is no reference to any order of the High Court in the assessment order. As such, this clause is not applicable.

Thus, none of the above clauses mentioned in Explanation 2 to section 263 of the Act is met in the present case and therefore the assessment order cannot be said to be erroneous.

Reliance in this regard is placed on the judgment of the jurisdictional ITAT, Kolkata in the case of J L Morison (India) Ltd Vs ACIT (ITA No. 786 (Koi) of 2010) wherein it was held that “It is now settled law that if, while making the assessment, the AO examines the accounts and other details, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the Id. C.I.T., while exercising his power under sec. 263 of the Act, is not permitted to substitute his own view about the computation of income in place of the income assessed by the A.O., unless the order of the A.O. is patently unsustainable in law.”

Aggrieved, the Revenue went in appeal before the Hon'ble Calcutta High Court. Dismissing the appeal of the revenue, the Hon'ble HC vide its judgment dated 15-05-2014 [2014] 46 taxmann.com 215 (Calcutta) held that,

“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 Commissioner with jurisdiction to exercise power under section 263

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 by the Tribunal 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 the order was passed by the Assessing Officer after due application of mind. [Para 89]

The Tribunal had before them the records of both the Assessing Officer and the Commissioner After examining the records both of the Commissioner and the Assessing Officer, the Tribunal reached the conclusion that the order of the Assessing Officer was not passed without application of mind. [Para 112]

In view of aforesaid, the Tribunal was justified in setting aside revisional order passed by the Commissioner. In the result, the revenue's appeal is dismissed. [Para 115]"

Reliance is also placed on the recent judgment of the Hon'ble High Court Of Calcutta in the case of PCIT vs Britannia Industries Ltd. dated 25-08-2022 [2023] 146 taxmann.com 246

"5. From the above, we see that it is not a case where the Assessing Officer failed to conduct an enquiry rather it is the case where the Assessing Officer has conducted an elaborate enquiry and adopted one of the three views which was the plausible view. The question would be as to whether in such circumstances the power under section 263 could be invoked. This issue is no longer res integra and well settled in several decisions and one of the earliest decision on the said point is in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 109 Taxman 66/243ITR 83/159 CTR1 (SC). In the said decision the Hon'ble Supreme Court held 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 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."

6. Further, the Hon'ble Supreme Court in the case of Pr. CIT v. Canara Bank Securities Ltd. [2020] 114 taxmann.com 545 dismissed the department's appeal affirming the view taken by the Bombay High Court in Pr. CIT v. Canara Bank Securities Ltd. [2020] 114 taxmann.com 544, wherein the High Court held that the question whether the income should be taxed as business income or has arisen from other source was a debatable issue and the Assessing Officer

had taken the plausible view that it was a business income after due enquiries and therefore not open for the Commissioner to take such an order in revision.

7. *In the light of the above, we are of the considered view that the learned Tribunal had rightly granted reliefs in favour of the assessee.*
”

Reliance is also placed on the judgment of the Bombay High Court in the case of Commissioner of Income-tax v. Sunbeam Auto Ltd [2011] 332ITR 0167-DEL wherein it was 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. Whether there was application of mind before allowing the expenditure in question has to be seen. If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Income- tax Act, 1961, merely because he has a different opinion in the matter. It is only in cases of lack of inquiry that such a course of action would be open.

Commissioner of Income-tax v. R. K. Construction Co [2009] 313 ITR 0065-Guj,

On appeal by the Department dismissing the appeal, it was held that “since all the necessary details were furnished to the Assessing Officer, there was no reason for the Commissioner to invoke the revisional jurisdiction under section 263 of the Act. The Assessing Officer had taken a particular view on the basis of the evidence produced before him. On the basis of the evidence before the Assessing Officer and materials which were collected by the Commissioner in revisional proceedings, the Commissioner had taken a different view. However, in the revisional proceedings under section 263, it was not open for the Commissioner to take such a different view. There was nothing on record to suggest that the view taken by the Assessing Officer was unsustainable in law.

Reliance is also placed on the judgment of the Hon’ble High Court of Gujarat in the case of PCIT vs S N Tradelink (P.) Ltd. [2022] 145 taxmann.com 73, wherein it was held that,

“Where Pr. Commissioner invoked revision jurisdiction on ground that there was difference in amount of

opening/closing balance of liabilities shown as compared to total liabilities which ought to have been disallowed under section 41(1) and, thus, order passed by Assessing Officer was erroneous and prejudicial to interest of revenue, since Assessing Officer after applying his mind and making due enquiries had taken a plausible view and passed assessment order, Pr. Commissioner could not invoke revision jurisdiction under section 263 merely because view taken by Assessing Officer was not found acceptable to him. ”

Reliance is placed on the judgment of the Hon’ble jurisdictional IT A T, Kolkata pronounced on 19-03-2021 in the case of The Peerless General Finance & Investment Company Limited vs DCIT (I.T.A. No. 892/KOL/2019) wherein it was held that,

16. As is evident from the submission made by the assessee before the Assessing Officer during the course of assessment proceedings, the actual sale consideration adopted by the assessee for computation of capital gain arising from the sale of concerned flats which was lower than the stamp duty valuation was duly explained by the assessee and the same was also supported by a valuation report of the registered valuer, which had valued the market value of the flats at Rs.5.84 crores just before its sale by the assessee. It is also relevant to note here that a specific request was also made by the assessee to the Assessing Officer to refer the matter relating to the valuation of the property to DVO in terms of section 50C(2) of the Act if the lower sale consideration actually received by the assessee than the stamp duty value as justified by it was not acceptable. No such reference, however, was made by the Assessing Officer and keeping in view the same as well as all the facts of record, we find merit in the contention of the Id. Counsel for the assessee that the explanation/justification offered by the assessee in the matter was found acceptable by the Assessing Officer and on appreciation thereof a well considered view was taken by the Assessing Officer. This issue thus was examined by the Assessing Officer during the course of assessment proceedings and after having satisfied himself with the explanation/justification offered by the assessee, which was duly supported by the valuation report of the Registered Valuer, a possible view was taken by the Assessing Officer accepting the stand of the assessee.

In the case of R.K. Construction Co. (supra) cited by the Id. Counsel for the assessee, it was held by the Hon ’ble Gujarat High Court that when the necessary details and documents were furnished by the

assessee to the Assessing Officer and a particular view was taken by the Assessing Officer on the basis of the same, it was not open for the Commissioner to take a different view in the revision proceedings under section 263 of the Act. If the facts of the present case as discussed above are considered in the light of the decision of the Hon'ble Gujarat High Court in the case of R.K. Construction Co. (supra), we find that there was no error in the order of the Assessing Officer on this issue as alleged by the Id. Pr. CIT and the impugned order passed by the Id. Pr. CIT revising the order of the Assessing Officer on this issue is not sustainable. We accordingly set aside the impugned order passed by the Ld. Pr. CIT under section 263 on this issue and restore that of the Assessing Officer. Ground No. 4 of the assessee's appeal is accordingly allowed.

The Hon'ble Karnataka High Court in the case of K.R. Satyanarayana vs CIT pronounced on 21-12-2020 reported in [2021] 126 taxmann.com 22 (Karnataka) held that,

8. The aforesaid provision was considered by the Supreme Court in Malabar Industrial Co. Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 83 and it was held that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer and every loss of revenue as a consequence of the order of the Assessing Officer cannot be treated as prejudicial to the interest of revenue. It was further held that where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, the order passed by the Assessing Officer cannot be treated as erroneous order prejudicial to the interest of the revenue. The principles laid down in the aforesaid decision were reiterated by the Supreme Court in CIT v. Max India Ltd. [2008] 166 Taxman 188/[2007] 295 ITR 282 and recently in Ultratech Cement Ltd. v. State of Rajasthan [2020] 117 taxmann.com 807 (SC).

9. In the backdrop of aforesaid well settled legal position, we may advert to the facts of the case. From perusal of the order passed by the Commissioner of income Tax, it is evident that he has invoked powers under section 263 of the Act, on the ground that the Assessing Officer has not satisfied itself that the assessee was engaged in the business of purchase and sale of plots and Assessing Officer has not brought any material on record to show that investment in the property was made for the purposes of trading. However, it is pertinent to mention here that the Commissioner of Income-tax as well as the tribunal has failed to appreciate that the Assessing Officer had put 36 questions to the assessee to ascertain the nature of business of the assessee and from perusal of questions Nos. 16 and 18, it is evident that the

aforesaid questions specifically pertain to issue of classification of income. It is pertinent to note that several notices were issued to the assessee and detailed hearings were conducted and the Assessing Officer in its order has mentioned the details of all the properties with dates of purchase and sale and from perusal of the same, it is evident that the properties were brought and sold within a maximum period of 20 months, from which it is evident that the assessee was engaged in real estate business. The Assessing Officer has conducted sufficient enquiry as required under Explanation 2(a) to Section 263 of the Act and there was material available on record to arrive at a conclusion, which was recorded by the Assessing Officer. It is trite law that merely because a different view can be taken, the powers under section 263 of the Act cannot be invoked.

In view of preceding analysis, the substantial question of law framed by this court is answered in favour of the assessee and against the revenue. In the result, the orders passed by the Commissioner of Income-tax and the tribunal dated 2-1-2014 and 28-11-2014 are hereby quashed.

In the result, the appeal is allowed.

Reliance is also placed on the recent judgment of the Hon'ble ITAT Kolkata in the case of Konsortia Construction Company (P.) Ltd. vs DCIT dated 30-11-2023 [2023] 157 taxmann.com 811, wherein it was held that,

“5. After hearing the rival contentions and perusing the material on record, we find that the issue raised by the PCIT for which the assessment was set aside to reframe de novo, was examined during the assessment proceedings by the AO and after calling for details and evidences from the assessee has taken a plausible view by accepting the explanation of the assessee which in our opinion is neither against the facts on record nor against the provision of the Act. Therefore on this count alone, the jurisdiction u/s 263 exercised by the PCIT cannot be justified. In the present case, we observe from the order passed by the PCIT that he has stated that the order passed by AO appears to be prima facie to be erroneous which is again is not correct and not as per the provision of Act. In our opinion, the PCIT has to record a clear cut finding after carrying out enquiry into the issue and record a finding as to how the order is erroneous and prejudicial to the interest of the revenue as has been decided in the case of D. G Housing (India) Pvt. Ltd. (supra). We also note

that the AO has examined these issues and has taken a plausible view on the issue. In case where the view taken by the AO is according to the PCIT is not correct view and AO should have taken an another view. In our opinion when the AO has taken a plausible view then the PCIT cannot be invoked u/s 263 of the Act to justify the assessment framed on the ground that he does not agree with the view of the AO and that the AO should have taken a different view. The case of the assessee finds support from the decision of Hon 'ble Bombay High Court in the case of Gabriel India Ltd. (supra). Accordingly we are not in a position to sustain the order of PCIT and same the thereby quashed.

6. In the result, appeal of the assessee is allowed. ”

Reliance is also placed on recent the judgment of the Hon'ble ITAT Ahmedabad in the case of Conitrade Commodities Services Ltd. vs PCIT dated 27-09-2023 [2023] 156 taxmann.com 369, wherein it was held that,

“11. On the second issue of the claim of loss in the return of income to the tune of Rs. 7,52,06,488/- as opposed to a meager Rs. 7 lakhs reflected in the computation sheet attached to the assessment order, we have noted from the Id. Pr. CIT order that the assessee had explained that there was a mistake in the computation sheet, and the assessee had filed an application seeking rectification of the same. The Id. Pr. CIT taking note of the above facts, has directed verification of the said claim of the assessee. It is settled law that the power under section 263 of the Act cannot be exercised for verification of the issue. There has to be a finding of error causing prejudice to the Revenue, by the Id. Pr. CIT, for valid exercise of revisionary power under section 263 of the Act. Verification precedes finding of the error. Therefore, any direction for verification of the claim u/s. 263 of the Act is not in consonance with the requirement of law. Accordingly, the Id. Pr. CIT's order, directing verification of claim of carry forward of current year's business loss is also set aside..

12. In sum and substance, therefore, the order of the Id. Pr. CIT passed under section 263 of the Act, is entirety, is set aside.

13. In the result, the appeal of the assessee is allowed. As such, the assessment orders cannot be said to be erroneous since the Id. AO took a possible view which is not unsustainable in law.

10. Here, it is also submitted that the assessment order is prejudicial to the interest of the revenue since the impugned

receipts as per the information of the Sales Tax Authorities does not belong to the assessee and therefore addition of 8% of these receipts to the total income of the assessee has made the assessment orders prejudicial to the interest of the assessee.

Thus, both the twin conditions stipulated in section 263 of the Act is not met in the present case to warrant the initiation of proceedings u/s 263 of the Act.

Hence, it is humbly requested to quash the revision orders passed for both the assessment years.

Ground No.5 is general in nature.

Hope the above submission is in order and to your satisfaction”.

12. The ld. CIT(DR), on the other hand, relied upon the order of the ld. Commissioner. He submitted that the assessee failed to discharge his onus that these Bank accounts do not belong to him. He also failed to explain the source of credits in these accounts. Therefore, instead of treating them as a gross turnover, the ld. Assessing Officer should have made additions on account of unexplained credits.

13. We have heard the ld. Representatives and with their assistance gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the

interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

14. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the

records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show-cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order.

15. A perusal of sub-clause (c) of the above would contemplate that if any order, which is subject matter for revision under section 263 is challenged in appeal, then, on the items which are subject matter of appeal, no power under section 263 could be exercised by the ld. Commissioner. We may elaborate further, for example- an assessment order was passed, it contains five issues, which were challenged before the ld. CIT(A), but ld. Assessing Officer failed to look into few issues, which may arise from the record, then inspite of the assessment order being challenged before the ld. CIT(A), the ld. Commissioner would have jurisdiction on such items, which are not subject matter of appeal in that assessment order.

16. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in

his order he does not make an elaborate discussion in that regard.

17. A perusal of the show-cause notice issued by the Id. Commissioner in both the assessment years would reveal that Id. Commissioner has narrated the brief background of the assessment proceedings, namely assessee has filed the return under section 44AD, Id. Assessing Officer got information from Sales Tax Authorities, Bureau of Investigation, Commercial Taxes. He has recorded the reasons and reopened the assessment. The Id. CIT further observed that in the information, it has been exhibited that specific amounts were received by the Bank account maintained in the name of assessee's proprietorship. These facts were supplied to him by the Id. Additional CIT, Range-43, Kolkata. Thereafter the contribution of the Id. Commissioner for forming the opinion that action under section 263 is required to be very limited, which can be noticed in the following paragraph:-

“On verification of the records, it is found that the amount of Rs.42,14,37,039/- (Rs.42,63,85,896/- - Rs.49,48,857/-) was to be added and taxed instead of 8%. Hence an under-assessment occurred which is adverse to the Revenue and an addition to the tune of Rs.38,74,47,015/- (Rs.42,14,37,039/- minus Rs.3,39,90,024/-) is to be made.

In view of the above, the impugned assessment order under section 147 read with section 144 of the Income Tax Act, 1961 dated 06.09.2021 is proposed to be revised under section 263 of the Income Tax Act, 1961”.

18. In response to this show-cause notice, the assessee has filed detailed written submission, which has also been reproduced in the impugned order. A perusal of the impugned orders would reveal that in first three pages, ld. Commissioner has narrated the facts enumerated in the show-cause notice. Thereafter from page 6, paragraph 4.1, he has reproduced the written submission, which goes to page 23 of the impugned order. The ld. Commissioner thereafter issued one more show-cause notice, whose reply as well as finding of the ld. CIT deserves to be noted:-

“4.2. On perusal of the submission, another notice was issued to the assessee vide DIN: ITBA/COM/F/17/2023-24/1057776407(1) on 07/11/2023 fixing date of hearing on 17/11/2023 seeking clarification on a few points. A copy of the letter is reproduced below:

“Please refer to the above

Notices u/s. 263 of Income Tax Act, 1961 were issued for hearing on 28.07.2023 and 05.09.2023 and subsequently your reply was received by this office on 06.10.2023.

As per your explanation it is seen that a huge fraud was committed wherein the identity of you was stolen and tampered with and on the basis of the forged/fraud KYC documents, and trade licences, bank accounts were opened and a huge transactions were carried out of fraudulently in your name. Please substantiate the same with proper documentary evidences.

You are requested to produce the following documentary evidences on the day of hearing i.e. on 17.11.2023 at 2PM before the undersigned:

(i)Books of accounts. And Balance Sheet for the F. Y. 2014-15 (Audited books of accounts, if any) including Ledger for the F.Y 2014-15 as well as proof of Vouchers invoices (in original).

(ii) Purchase and sales register for the F.Y. 2014-15.

(iii) Cash transaction and Bank transaction details of all banks for F.Y. 2014- 15.

(iv) Please furnish details regarding the result of the enquiry / investigation made by Police, of Konnagar PS against your FIR dated 24.04.2016 and 25.10.2021.

Your case is fixed for hearing on 17.11.2023 at 2 PM in Room No. 2/30 of Income Tax Building, 3, Government Place, Kolkata - 700001.

You are requested to appear in person or through Authorised Representative or furnish your submissions, if any, in writing by post or through Email ID [kolkata, pcit13@incometax.gov.in]

*yours faithfully,
Sd/-*

(Tajinder Pal Singh)

Pr. Commissioner of Income Tax-13, Kolkata

This notice remain non-complied from the end of the assessee. Hence, another opportunity was provided to the assessee on 17/11/2023 vide DIN: ITBA/COM/F/17/2023-24/1058032103(1).

4.3. Through letter dated 07/11/2023 and 17/11/2023, the assessee was asked to submit his audited Balance Sheet and Books of Accounts for the F.Y. 2014-15 along- with proof of vouchers/ Invoices in original, purchase and sales register, details of transactions through cash and banking channel for the relevant Financial Year.

Furthermore, the assessee was asked to apprise about the progress of complaint lodged by him in Konnagar Police Station. In response to the notices dated 17.11.2023, the authorized representative of the assessee has appeared with partial reply and requested for additional time to bring on record the evidences regarding the progress about the complaint lodged by the assessee before the law enforcing authority. Subsequently, he was granted time up-to 04.12.2023.

It is observed that till date i.e. 14.12.2023, the assessee has failed to furnish any progress/status report about the complaint lodged by the assessee before the law enforcing authority for which the adjournment was requested for by the assessee.

5.To ascertain the scope of revision of the impugned order dated 28.09.2021 u/s section 147 r.w.s. 144 and 144B of the Act, reliance is made upon the following observations made by various judicial authorities”.

19. The above show-cause notice and the finding of ld. CIT are recorded on pages no. 23 to 25, though it is just one and half page. He then devoted pages no. 25 to 41 towards reproduction of the jurisprudence. His conclusions are in paragraph no. 7.5 to end, which we deem fit to take note:-

“7.5. It is seen from the perusal of the documents on record available with the Department that there is a total credit of Rs.30,03,78,690/- in the bank accounts of the assessee maintained with various banks as mentioned in the Para 2.1 during the financial year 2014-15. The Assessing Officer estimated 8% of the cumulative amount of the disclosed and undisclosed deposit as turnover income of the assessee for the Assessment Year 2015-16 and added the shortfall profit amount of Rs.2,43,78,864/- coupled with returned income as assessed income vide order u/s 147 read with section 144 and 144B of the Income Tax Act, 1961. The Assessing Officer has made an estimated addition of Rs.2,80,70,534/- which is not based on proper appreciation of facts and law. The Assessing Officer has not given any reason whatsoever and arbitrarily computed the income of Rs.2,43,78,864/- @8% on entire amount deposited instead of making an addition of the total credit of Rs.30,03,78,690/- in the Bank accounts of the assessee.

7.6. It is also relevant to note that as per Section 115BBE, income tax shall be calculated at prescribed rate for the relevant A.Y. where the total income of assessee includes following income:

- 1. Income referred to in Section 68, Section 69, Section 69A, Section 69B, Section 69C or Section 69D and reflected in the return of income furnished under Section 139;*

2. or b) Which is determined by the Assessing Officer and includes any income referred to in Section 68, Section 69, Section 69A, Section 69B, Section 69C or Section 69D. if such income is not covered under clause (a).

Such tax rate applicable will be further increased by surcharge and penalty (including cess). Provided that such penalty shall not be levied when the income under Section 68, 69, etc., has been included in return of income and tax has been paid on or before the end of relevant previous year. No deduction in respect of any expenditure or allowance [or set off of any loss] shall be allowed to the assessee in computing his income referred to in clause (a) of sub-section (1) of Section 115BBE.

In view of the encompassing facts and circumstances of the case and respectfully following the ratio of judgment of Hon'ble Supreme Court, various High Courts as well as the other authorities including the Hon'ble ITAT Bench, Mumbai, as discussed in detail in the preceding paragraphs, the Assessing Officer is directed to re-compute income at Rs.30,07,20,390/- and give necessary effect as per law and pass necessary order accordingly”.

20. It is pertinent to observe that at the first instance, the assessee submitted that he has not opened any bank accounts, rather somebody has personated him. His case is based on the issue that his IDs have been misused and some unknown person has carried out these transactions in his name. He could only know about this when he received information from Sale Tax Authorities, Bureau of Investigation, Commercial Taxes. He pleaded this stand before those agencies also, but none of the agencies has culminated the inquiry into a positive finding. Nobody has recorded a specific finding that this plea of the assessee is false. We have taken note of the show-cause notice issued by the ld. Commissioner in paragraph no. 4.2

reproduced (supra) and after the show-cause notice, the finding of the Id. Commissioner is that the assessee was asked to submit his audited balance-sheet, books of account for A.Ys. 2014-15 and 2015-16 along with proof of vouchers/invoices in original, purchases and sales. He further observed that the assessee was asked to appraise about the status of the complaint lodged by him in Konnagar Police Station. Thereafter he recorded the finding that the assessee failed to give anything. To our mind, this cannot be expected from a Senior Officer of the Income Tax Department to put somebody under the Tax liability without concluding the finding. He ought to have issued notice to the Police Authorities as well as to the Commercial Tax Investigating Authorities for submission of their report. He ought to have first determined whether these accounts belong to the assessee, only thereafter taxability of the amounts available in those accounts would have fallen upon the assessee.

21.A perusal of the impugned orders would reveal that neither the Id. CIT has applied his mind analytically while assuming jurisdiction for taking cognizance under section 263. We have specifically noticed that details in paragraph no. 17 of this order and we find that after narrating the facts, Id. CIT just observed on verification of the record, it is found that the amount of Rs.42,14,37,039/- was to be added and taxed instead of 8%, hence under-

assessment occurred, which is adverse to the revenue. We failed to appreciate, which aspect was verified by him because he has just reproduced the proposal sent by the Additional CIT, Circle-43. There is no independent application of mind at his end for taking cognizance under section 263.

21.1. Apart from the above, while dealing with explanation of assessee in paragraph no. 4.3 of the impugned order, we find that ld. CIT has not recorded any finding. He just put the blame on the assessee to prove a negative aspect. It is for the revenue to first determine that these accounts belong to the assessee. Once the assessee has been emphasizing that these accounts do not belong to him and he has lodged a FIR in such situation, there should be adjudication of this aspect but ld. CIT simply ignored this aspect under the garb that the assessee failed to substantiate this issue. It cannot be substantiated by the assessee. It is to be investigated by the ld. Assessing Officer or by the ld. CIT. The role of the ld. Assessing Officer is not only a prosecutor but he has to play a role of an adjudicator. That very role has to be played by the ld. Commissioner while exercising the powers under section 263.

22. We could have set aside to the issue to ld. CIT for recording a categorical finding on this fold of issue but for the reasons to be recorded by us in the subsequent

paragraph, we do not deem it necessary to set aside this issue.

23. As observed earlier, we have construed the meaning of clause (c) of section 263(1). The ld. CIT in the present proceeding has treated the assessment orders as erroneous and prejudicial to the interest of the revenue, but failed to note that these assessment orders are challenged before the ld. CIT(Appeals). The assessee has been disputing before the ld. 1st Appellate Authority that these accounts do not belong to him. It is yet to be decided whether these accounts belong to the assessee and additions made by the ld. Assessing Officer at 8% of the alleged gross turnover is sustainable or not. In other words, it is a subsequent stage whether the total amounts credited to the accounts deserve to be treated as cash credit of the assessee or not. This issue is pending before the ld. CIT(Appeals). It is directly linked to the issue taken up in 263 proceedings. The ld. 1st Appellate Authority has co-terminus powers of the ld. Assessing Officer if it is felt that the total amount deserves to be considered as an unexplained credit of the assessee, then, that aspect could be looked into by the ld. 1st Appellate Authority and no revisionary power ought to have been exercised on that aspect.

24. It is also pertinent to note that a poor fellow, who has been returning income of Rs.4,33,403/- and Rs.5,01,272/-, all of a sudden assume as owner of more than Rs.112 crores, before drawing such type of inference, at least a local Commissioner or Inspector or could have been deputed to verify the level of living of the assessee. It ought to have been determined whether he owns such type of properties or his trading business of that magnitude. We hope all analysis would be looked into by the ld. 1st Appellate Authority while adjudicating the appeals of the assessee against the assessment orders. But we are of the view that these impugned orders are not sustainable because the same very issue is subject matter of appeal before the ld. CIT(Appeals). Before we part with this order, it is observed that ld. Commissioner has confirmed the additions on merit in the present orders. Since we have observed that this issue is pending in appeals before the ld. CIT(Appeals) and ld. CIT(Appeals) could consider all possible aspects, therefore, this order would not impair or injure the explanation of the assessee and would not cause any prejudice to the interest of the ld. Assessing Officer. This finding is confined to the legality of orders passed under section 263 and we have not expressed our mind on the merits of the issue whether the alleged unexplained sales turnovers are to be treated as a cash credit or not. With the above observations, we

allow both the appeals and quash both the orders passed under section 263 of the Income Tax Act in both the years.

24. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 12/06/2024.

Sd/-

(Manish Borad)
Accountant Member

Sd/-

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 12th day of June, 2024

*Copies to : (1) Rajesh Kumar Jalan,
138/A, G.T. Road (West),
Konnagar, Hooghly-712235, West Bengal*

*(2) Principal Commissioner of Income Tax,
Kolkata-13,
3, Government Place (West), Kolkata-700001*

(3) CIT- , Kolkata

(4) The Departmental Representative;

*(5) Guard File
TRUE COPY*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.