*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 06 March 2024**
Judgment pronounced on:19 March 2024

\+ ITA 247/2023

PR. COMMISSIONER OF INCOME TAX,
DELHI-7 ..... Appellant
Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Rishab Nangia & Mr. Nikhil Jain, Advs.

Versus

M/S PARAMOUNT PROPBUILD PVT. LTD. ..... Respondent
Through: Dr. Rakesh Gupta, Mr. Somil Agarwal, Mr. Dushyant Agrawal & Mr. Prateek Bhati, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. The present appeal at the instance of the Revenue is filed against the order dated 14 February 2022, passed by the Income Tax Appellate Tribunal ["**ITAT**"], setting aside the order of the Principal Commissioner of Income Tax ["**PCIT**"] passed under Section 263 of the Income Tax Act, 1961 ["**Act**"] for the Assessment Year ["**AY**"] 2016-17.

2. The brief facts which are pertinent to decide the present

controversy are that the assessee is engaged in the business of real estate development and filed an income tax return ["**ITR**"] of INR 4,52,68,500/- on 17 October 2016 for AY 2016-17. Thereafter, the case of the assessee was picked up for scrutiny and notice under Section 143(2) of the Act was issued on 10 August 2018.

3. Pursuant to the said notice, an inquiry was undertaken and an assessment order under Section 143(3) of the Act was passed on 26 December 2018, whereby, the Assessing Officer ["**AO**"] determined the income of the assessee to be INR 4,55,45,110/-, while making an addition of INR 2,76,610/- under Section 14A of the Act.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) ["**CIT(A)**"] and the CIT(A) *vide* its order dated 24 June 2019 partly allowed the appeal of the assessee and restricted the addition made by the AO to the extent of INR 1,37,022/-.

5. Thereafter, by virtue of the powers vested under Section 263 of the Act, the PCIT perused the assessment order dated 26 December 2018 and issued a notice to the assessee on 28 March 2021. Consequently, on 31 March 2021, while exercising powers under Section 263 of the Act, the PCIT set aside the assessment order dated 26 December 2018 considering it to be erroneous and prejudicial to the interests of the Revenue and directed the AO to consider the case afresh.

6. Assailing the order of the PCIT, the assessee preferred an appeal before the ITAT and *vide* its order dated 14 February 2022, ITAT accepted the contentions of the assessee and set aside the PCIT order

dated 31 March 2021 and consequently, restored the assessment order dated 26 December 2018. Aggrieved by the said order, the Revenue has preferred the instant appeal.

7. *Vide* order dated 15 February 2024, we have admitted the appeal and framed the following substantial questions of law for our consideration:-

> "(a) Whether on the facts and circumstances of case and in law, the ITAT was justified in setting aside the order passed by PCIT under Section 263 of the Act without appreciating that issuance of notice under Section 133(6) of the Act is not enough to verify identity, genuineness and creditworthiness of said transaction and the lender?
>
> (b) Whether the ITAT failed to appreciate that the present case pertained to AY 2016-17 thus attracting Explanation 2 to Section 263 of the Act would be applicable and the AO having erred in not making requisite enquiries?"

8. Mr. Puneet Rai, learned counsel appearing on behalf of the Revenue, while highlighting the infirmities in the ITAT order, submitted that the ITAT has failed to appreciate the observations of the PCIT to the effect that the AO did not examine the genuineness and creditworthiness of the unsecured loan transactions undertaken by the assessee for AY 2016-17. He further submitted that the PCIT was correct in holding that the AO had not made any inquiry as it did not take any cognizance of the information forwarded by the Deputy Director of Income Tax (Investigation), Noida ["**DDIT**"] *vide* letter dated 28 April 2017. He placed reliance on the decision of the Hon'ble Supreme Court in the matter of **Malabar Industrial Co. Limited v. CIT** [2000 SCC OnLine SC 371] to substantiate his arguments.

9. Dr. Rajesh Gupta, learned counsel appearing on behalf of the

assessee, vehemently opposed the submissions advanced on behalf of the Revenue and submitted that the impugned order does not suffer from any infirmities. He argued that the ITAT was correct in negating the PCIT order since the AO has undertaken proper inquiry and an assessment order was duly framed after considering all the relevant facts and circumstances.

10. We have heard the learned counsel appearing on behalf of the parties and perused the record.

11. Before adverting to the merits of the case, it is pertinent to refer to Section 263 of the Act, the relevant extract of which is reproduced herein for reference:-

> "**263. Revision of orders prejudicial to revenue—**
> (1) The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or 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 [or the Transfer Pricing Officer, as the case may be,] 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,—
>
> (i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or
> (ii) an order modifying the order under Section 92-CA; or
> (iii) an order cancelling the order under Section 92-CA and directing a fresh order under the said section.]
>
> ***
>
> [Explanation 2.— For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] 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 [Chief Commissioner or Chief Commissioner or 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.]"
>
> [Emphasis supplied]

12. It is abundantly clear from the reading of the abovementioned Section that the PCIT or CIT can *inter alia* exercise the revisional powers under Section 263 of the Act if the embargo of the twin conditions is satisfied i.e., the assessment order in question is erroneous and prejudicial to the interests of the Revenue. Moreover, the concerned Section also lays down parameters which would render an assessment order as erroneous and prejudicial to the interests of the Revenue.

13. A bare perusal of Explanation 2 of Section 263 of the Act clearly stipulates the quartet of exigencies when an order could be said to be erroneous and prejudicial to the interests of the Revenue i.e., when the order is passed, without making inquiries/verification which should have been made; or allowing any relief without inquiring into the claim; or not following any order/direction/instruction issued by the Central Board of Direct Taxes ["**CBDT**"] under Section 119 of the Act; or as per 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.

14. In order to elucidate the scope of the revisional powers of PCIT, it is pertinent to refer to the observations made by the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Limited v. CIT*, wherein, while referring to the revisional powers under Section 263 of the Act, the court observed as under:-

> **"6.** A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income Tax Officer is erroneous insofar 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.**
>
> ***
>
> **8. The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act.** Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in *Dawjee Dadabhoy & Co.* v. *S.P. Jain* [(1957) 31 ITR 872 (Cal)] , the High Court of Karnataka in *CIT* v. *T. Narayana Pai* [(1975) 98 ITR 422 (Kant)] , the High Court of Bombay in *CIT* v. *Gabriel India Ltd.* [(1993) 203 ITR 108 (Bom)] and the High Court of Gujarat in *CIT* v. *Minalben S. Parikh* [(1995) 215 ITR 81 (Guj)] treated loss of tax as prejudicial to the interests of the Revenue.
>
> **9.** Mr Abraham relied on the judgment of the Division Bench of the High Court of Madras in *Venkatakrishna Rice Co.* v. *CIT* [(1987) 163 ITR 129 (Mad)] interpreting "prejudicial to the interests of the Revenue". The High Court held:
>
> > "In this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration."
>
> In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with

> the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.
>
> **10. 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. (See *Rampyari Devi Saraogi* v. *CIT* [(1968) 67 ITR 84 (SC)] and in *Tara Devi Aggarwal* v. *CIT* [(1973) 3 SCC 482] .)"
>
> [Emphasis supplied]

15. Furthermore, the Hon'ble Supreme Court in the case of **CIT v. Paville Projects (P) Ltd.** [2023 SCC OnLine SC 371], followed the dictum laid down in the *Malabar Industrial Co. Limited v. CIT* and emphasized upon the germane value of the twin conditions imposed under Section 263 of the Act, before invoking the revisional powers. The relevant extract of the said decision is reproduced herein for reference:-

> "27. Learned counsel appearing on behalf of the assessee has heavily relied upon the decision of this Court in the case of Malabar Industrial Co. Ltd. (supra). It is true that in the said decision and on interpretation of Section 263 of the Income Tax Act, **it is observed and held that in order to exercise the jurisdiction under Section 263(1) of the Income Tax 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. It is further observed that if one of them is absent, recourse cannot be had to Section 263(1) of the Act**…"
>
> [Emphasis supplied]

16. After examining the scope of the revisional powers under Section 263 of the Act which suggests that both the sacrosanct conditions must stand satisfied, it is now apposite to refer to the facts of the present case. A bare perusal of the assessment order dated 26 December 2018 would reflect that it solely refers to the disallowance under Section 14A of the Act read with Rule 8D(2)(iii) of Income Tax Rules, 1962. The relevant extract of the assessment order dated 26 December 2018 is reproduced herein for reference:-

> **"6. Disallowance u/s 14A of the I..T Act. 1961 :**
> **6(i)** It has been noticed from the audited balance sheet of the assessee company that the assessee company had closing and opening balances of investments under the head Non-Current Investments in shares of companies for Rs. 6,08,22,000/- and Rs. 4,98,22,000/- respectively. It is further noted that the assessee company has received dividend income of Rs. 1,37,022/- being an exempt income during the relevant previous year. As the assessee has earned exempt income as stated above, the assessee company was asked vide this office notice u/s 142(1) dated 10.10.2018 to file computation of disallowable expenses in terms of section 14A Read with rule 8D with respect to expenses relatable to investment on which exempt income accrued / earned.
>
> **6 (ii)** Ld. A/R of the assessee has filed submissions on 15.11.2018 and 11.12.2018 stating that the assessee company has received Rs. 1,37,022/- as dividend from M/s PAV Reality limited on the preference shares. The total investments in preference shares of M/s PAV Reality limited is Rs. 250 lakhs without any change during the year. The assessee company has not incurred any direct expenses on earning of this exempted income. Thus, The assessee claimed that disallowance u/s 14A of the I.T. Act 1961 has to be made at Rs. 1,25,000/- being. 0.5 % of average value of investment of Rs. 250 lakhs. In its earlier submission, the assessee has claimed that all the borrowed funds were directed towards business in real estate for

> which funds had been taken on loan and so no interest expenses can be disallowed as interest bearing fund has not been used for investments. He further filed a detailed note in support of such claim.
>
> **6(iii)** The submissions of the assessee are considered in the light of information available on record. It is apparent from own submission of the assessee that indirect expenses relatable to exempt income had been incurred by the assessee towards earning of exempt income on investments in shares but no disallowance was made by the assessee in its computation. Thus, there is no dispute on this issue that relatable expenses which indirectly used towards earning of exempt income should have been apportioned and disallowed by the assessee, which has been calculated by the assessee company at Rs. 1,25,000/-. However, as the disallowances has to be made as per rule 8D(2)(iii) with respect to other expenses, it has to be done as per prescribed rules. It is found from the computation filed by the assessee that only the investments in M/s PAV Reality limited was considered leaving investments in other shares, which should also have been considered while computing disallowances as per rule 8D(2)(iii).”

17. Further, once the assessment order was passed on 26 December 2018, the PCIT invoked the powers vested under Section 263 of the Act and issued a notice on 28 March 2021 to the assessee inquiring about the loans advanced to the assessee by M/s. Sarvottam Securities Ltd. and M/s. Upaj Leasing & Finance Pvt. Ltd. for AY 2016-17. It was further clarified that the genuineness and the creditworthiness of the loan funds issued to the assessee was not properly examined by the AO and an opportunity of hearing was also afforded to the assessee to explain the aforementioned loan transactions.

18. Pursuant thereto, after considering the reply of the assessee, the PCIT passed an order under Section 263 of the Act and remanded the matter back to the AO for fresh assessment. The PCIT observed that it is a case of lack of inquiry, which ought to have been made on the part

of the AO as the issue of loans advanced to the assessee by M/s. Sarvottam Securities Ltd. and M/s. Upaj Leasing & Finance Pvt. Ltd. was not properly examined by the AO despite the DDIT investigation report. For the sake of convenience, the relevant extracts of the PCIT order are reproduced herein:-

> "2. After passing of the assessment order in this case, ITO, Ward 27(1), New Delhi vide letter dated 23.05.2019 informed that during the assessment proceeding for the assessment year 2016-17 of his assessee M/s Upaj Leasing and Finance Company Pvt Ltd for the AY 2016-17, it is found that M/s Upaj Leasing and Finance Company Pvt Ltd has claimed to have given loans/advances amounting to Rs 32,95,00,000/- to M/s Paramount Propbuild Pvt Ltd during the AY 2016-17. It was further informed that in the assessment proceedings of M/s. Upaj Leasing & Finance Co. Pvt. Ltd., it was held that M/s Upaj Leasing and Finance Company Pvt Ltd is a paper/bogus company of Shri Himanshu Verma, an entry operator. The assesse company, therefore, is the beneficiary of alleged unsecured loans received through entry operators. It raises serious doubt about the genuineness of the transaction.
> 3. It is also relevant to mention that post demonetization a survey was also conducted in the case of the assessee by the DDIT (Inv.)-III Noida and a survey report relating to assessment year 2017-18 was also forwarded observing as under:
>
> > *1.* ***Finding: During the course of survey action at Paramount Group, H123, Sector 63, Noida, no huge cash was found at the premise. Books of account & cash book checked during survey action and found that no huge cash entered in company cash book and no huge cash deposited in company banks account during demonetization scheme from 08.11.2016 to 23.11 2016.***
> >
> > However, along with the above finding it was also communicated that during post survey proceedings, a letter F No DDIT(Inv.)/Unit-l/Noida/S&S/Himanshu /2016-17/258 dated 28.04.2017 was received from DDIT(Inv.), Unit-1, Noida vide **which it was reported that a search operation in the case of the Entry operator Sh. Himanshu Verma was carried on 13.04.2017, where he accepted to have provided bogus entries to the tune of Rs 46.06 Crore to the concern M/s Paramount PropbuildPvt Ltd. during the FYs 2015-16 and 2016-**

17. The copy of report was enclosed along with the survey report and the copy of ledger accounts of the assessee company M/ s Paramount PropbuildPvt Ltd in the books of shell companies M/s Sarvottam Securities Pvt Ltd and M/s Upaj Leasing & Finance Co. Pvt Ltd were also provided as enclosures.

4. During the assessment proceeding in case of assessee for the A.Y. 2017-18, the interest payment made against the aforesaid entries by M/s Paramount Propbuild Private Limited to M/s Upaj Leasing & Finance Company Pvt Ltd and M/s Sarvottam Securities Pvt Ltd during the FY 2016-17 relevant to the. AY 2017-18 to the tune of Rs. 3,23,93,370/- i.e. Rs. 2,12,69,370/- and Rs. 1,11,24,000/- respectively were disallowed by the AO while passing order u/s 143(3) of the IT Act dated 16.12 2019.

5. Also, during the assessment proceedings for the AY 2017-18, the assessee in response to show cause notice submitted that it had taken interest bearing unsecured loan from the Non-Banking finance companies M/s Sarvottam Securities Pvt Ltd and Upaj Leasing & Finance Co Pvt Ltd during the previous years.

6. Further, on perusal of the ledger account of M/s Paramount Propbuild Pvt Ltd as appearing in the books of M/s Upaj Leasing & Finance Company Pvt Ltd and M/s Sarvottam Securities Pvt Ltd, it is found that various transactions were undertaken by the company M/s Paramount Propbuild Pvt Ltd with M/s Sarvottam Securities Pvt Ltd and M/s Upaj Leasing & Finance Co. Pvt Ltd during the FY 2015-16 relevant to the AY 2016-17 and total loan claimed to have been received by the assessee company from above concerns aggregated to Rs 46,85,50,000/- (Rs 13,90,50,000/- + Rs. 32,95,00,000/- respectively). **It is found from examination of assessment record for the assessment year 2016-17 that this aspect was verified only by issuing notices u/s 133(6) of the IT Act, 1961 but further verification as to the trail to unravel the true nature of the transaction and role of beneficiary was not done by the AO, as the survey report forwarded by the DDIT (Inv.), Noida relating to assessment year 2017-18, which had also information relating to transactions of assessment year 2016-17 was not considered in the assessment. Further, ITO, Ward 27(1), New Delhi has also confirmed the fact of involvement of entry operator in the transaction in which one of the loan provider company was held as a paper company controlled by the entry operator Sri Himanshu Verma.**

7. Thus, it is found that the genuineness of the loan funds received by the assessee company from M /s Upaj Leasing & Finance Company Pvt Ltd and M/s Sarvottam Securities Pvt Ltd which were found as intermediaries of an entry operator Himanshu Verma had not been properly examined by the assessing officer in the light of information available in the survey report forwarded relating to assessment year 2017-18.

8. In view of the above facts and findings, it was apparent that the order dated 26.12.2018 u/s 143(3) passed by the Assessing Officer was erroneous as proper enquiries to arrive at a logical conclusion in the light of facts available on record could not be made. This led to non-consideration of true nature of purported loan receipts of the assessee company which should have been treated as bogus loans and hence, the order is also prejudicial to the interest of revenue. Thus, the order passed by the A.O. u/s. 143(3) of the I.T. Act, 1961 vide order dated 26/12/2018 and subsequently amended u/s. 154/143(3) is erroneous and prejudicial to the interest of the revenue and requires remedial action u/s 263 of the Income tax Act, 1961.

***

11. Assessee has made a submission that the Assessing Officer has made all the necessary enquiries and taken a view for framing the Assessment Order, and that the order passed by the AO is not erroneous nor prejudicial to the interest of the revenue. However, this is not borne out from the facts available on assessment record. I have carefully perused the assessment records and the assessment order, and I am satisfied that it is a case of lack of enquiry on the claim of unsecured loans by the assessee in its return, despite existence of information about the bogus nature of the loan transactions, especially in respect of M/s Sarvottam Securities Pvt Ltd and M/s Upaj Leasing & Finance Co. Pvt Ltd., allegedly operated by the entry operator Shri Himanshu Verma. The assessing officer has omitted to act on the information contained in the survey report forwarded by. the DDIT (Inv.), Noida relating to assessment year 2017-18, which also had information relating to transactions of assessment year 2016-17. This omission becomes more glaring in the background of the fact that the ITO, Ward 27(1), Delhi has confirmed the fact of involvement of entry operator in the transaction in which one of the loan provider company was held as a paper company controlled by the entry operator Sri Himanshu Verma.

***

14. In these facts and circumstances, I hold that the Assessment Order in this case is passed by **Assessing Officer without making inquiries or verification which should have been made, despite availability of information on record about the non-genuineness of the alleged unsecured loan transactions, especially from the shell companies M/s. Sarvottam Securities Pvt Ltd and M/s Upaj Leasing & Finance Co. Pvt Ltd., operated by the known entry operator Shri Himanshu Verma.** As such, the Assessment Order is erroneous. Had the inquiries or verification been conducted, it would have made a legally sustainable tax implication in this case and therefore the order is prejudicial to the interest of revenue as well.

15. Accordingly, in exercise of powers conferred under Section 263, **I set aside the assessment order u/s 143(3) passed on 26.12.2018, and further rectified u/s 154/143(3) of the IT Act 1961, and direct the Assessing Officer to assess this case afresh and examine the identity & creditworthiness of the alleged loan creditors, including M/s. Sarvottam Securities Pvt. Ltd and M/s Upaj Leasing & Finance Co. Pvt Ltd., as well as the genuineness of the transactions with them, after giving due and adequate opportunity of hearing to the assessee.** For this purpose, the assessing officer will duly consider the information contained in the survey report of DDIT(Inv.), Noida and confront the assessee with the enquiry findings and the supporting documents, in accordance with the principles of natural justice."

[Emphasis supplied]

19. Thereafter, the matter was carried in an appeal by the assessee before the ITAT, wherein, while setting aside the PCIT order, the ITAT observed that the AO had duly inquired into the matter. It was also observed that the PCIT had erroneously invoked the jurisdiction under Section 263 of the Act as it was not a case of lack of inquiry. The relevant extracts of the ITAT order are reproduced herein below:-

"8. Vide reply dated 15.11.2018, the assessee inter alia, submitted the complete details as sought by the Assessing Officer. This detailed reply of the assessee is exhibited at pages 17 to 20 of the paper book, Confirmation of loan transaction with M/s Sarvottam

Securities Pvt Ltd and Upaj Leasing and Finance Co. Pvt Ltd were submitted which are placed at pages 47 to 49 of the paper book.

9. To further examine the loan transaction, the Assessing Officer issued notice u/s 133(6) of the Act to M/s Sarvottam Securities Pvt Ltd and M/s Upaj Leasing and Finance Co. Pvt Ltd. Such notices are placed at pages 322 to 361 of the paper book.

10. M/s Sarvottam Securities Pvt Ltd responded to the notice received by it u/s 133(6) of the Act and filed complete details sought by the Assessing Officer which included confirmation of loan, copy of ledger account, copy of their Income tax return alongwith financial statement for the year ending 31.03.2016. These details are exhibited at pages 324 to 362 of the paper book.

11. Similarly, M/s Upaj Leasing and Finance Co. Pvt Ltd responded to the notice received by it u/s 133(6) of the Act from the Assessing Officer and furnished similar details. Such details are exhibited at pages 365 to 441 of the paper book.

***

21. Facts mentioned elsewhere clearly show that this is not a case of lack of enquiry or assessment being framed in haste. **Proper enquiries were made by the Assessing Officer during the course of assessment proceedings and after considering all the facts and evidences, the Assessing Officer took a view which is a plausible view. Therefore, it is not open to the ld. PCIT to direct a re-enquiry as he is of a different view.**

22. Considering the facts of the case in hand as discussed elsewhere and in light of the judicial decisions disused hereinabove, we are of the considered opinion that the assessment order dated 26.12.2018 is neither erroneous nor prejudicial to the interest of the Revenue. Therefore, assumption of jurisdiction u/s 263 of the Act by the ld. PCIT is bad in law. We, accordingly, set aside the order of the ld. PCIT dated 31.03.2021 and restore that of the Assessing Officer dated 26.12.2018."

[Emphasis supplied]

20. It is the case of the assessee that the AO had duly inquired about the loan transactions with M/s. Sarvottam Securities Ltd. and M/s. Upaj Leasing & Finance Pvt. Ltd. and there was no room to doubt the

genuineness and creditworthiness of the aforenoted loan transactions. However, a bare perusal of the assessment order dated 26 December 2018, would reflect that it nowhere discusses, examines or evaluates the loan transactions advanced to the assessee by M/s. Sarvottam Securities Ltd. and M/s. Upaj Leasing & Finance Pvt. Ltd. The assessment order further solely alludes to the disallowance under Section 14A of the Act read with Rule 8D(2)(iii) of Income Tax Rules, 1962.

21. The PCIT invoked the revisional powers under Section 263 of the Act and particularly clause (a) of Explanation 2, which provides that an assessment order is erroneous and prejudicial to the interests of the Revenue, if the same is passed without making inquiries or verification, which should have been made. The PCIT, while exercising the revisional powers, recorded that M/s. Sarvottam Securities Ltd. and M/s. Upaj Leasing & Finance Pvt. Ltd. are the shell companies of Mr. Himanshu Verma, an entry operator and the assessee was the beneficiary of the unsecured loans received through the entry operator. Notably, the PCIT also recorded that the aspect of the aforementioned loan transactions was sought to be verified by issuing notices under Section 133(6) of the Act, however, when the record reflects that the loan transactions are obtained from the shell companies, then the AO ought to have done further inquiry to ascertain the genuineness and creditworthiness of the loan transactions.

22. The aforenoted aspect, whether the creditworthiness of the loan transactions was a relevant inquiry or not has also been considered by this Court in the case of **CIT v. N. R. Portfolio P. Ltd.** [2013 SCC OnLine Del 6466], wherein, it was observed that the mere production

of incorporation details, Permanent Account Number ["**PAN**"] or the fact that the company had filed ITR details does not verify the genuineness and creditworthiness of the transactions. The relevant extract of the said decision is reproduced herein for reference:-

> **"27.** The decision in the case of Lovely Exports (supra) was considered in CIT v. Nova Promoters and Finlease P. Ltd. (supra) and it was elucidated :
>
> "The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, Income-tax file numbers, their creditworthiness, share application forms and shareholders. register, share transfer register etc. are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under section 68 and the remedy open to the Revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed 'accommodation entry providers', whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the Revenue authorities into the activities of such 'entry providers'. The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated—plan 'a smokescreen'—conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under section 68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a

> case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary."

28. <u>In Nova Promoters and Finlease (supra), it was held that in view of the link between the entry providers and incriminating evidence, mere filing of PAN, acknowledgement of Income-tax returns of the entry provider, bank account statements, etc., was not sufficient to discharge the onus.</u>

29. In CIT v. Nipun Builders and Developers P. Ltd. [2013] 350 ITR 407 (Delhi), this principle has been reiterated holding that the assessee and the Assessing Officer have to adopt a reasonable approach and when the initial onus on the assessee would stand discharged depends upon the facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call monies, dividends, warrants, etc., have to be sent and the relationship is/was a continuing one. In such cases, therefore, the assessee cannot simply furnish details and remain quiet even when summons issued to shareholders under section 131 return unserved and uncomplied. This approach would be unreasonable as a general proposition as the assessee cannot plead that they had received money, but could do nothing more and it was for the Assessing Officer to enforce shareholders attendance. Some cases might require or justify visit by the Inspector to ascertain whether the shareholders/subscribers were functioning or available at the addresses but it would be incorrect to state that the Assessing Officer should get the addresses from the Registrar of Companies' website or search for the addresses of shareholders and communicate with them. Similarly, creditworthiness was not proved by mere issue of a cheque or by furnishing a copy of statement of bank account. Circumstances might require that there should be some evidence of positive nature to show that the said subscribers had made a genuine investment, acted as angel investors, after due diligence or for personal reasons. Thus, finding or a conclusion must be practicable, pragmatic and might in a given case take into account that the assessee might find it difficult to unimpeachably establish creditworthiness of the shareholders.

> **30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PANs or the fact that third persons or company had filed Income-tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them."**
>
> [Emphasis supplied]

23. Therefore, in light of the findings which are unravelled from the DDIT investigation report and assessment proceedings of M/s. Upaj Leasing & Finance Pvt. Ltd. that the entities M/s. Sarvottam Securities Ltd. and M/s. Upaj Leasing & Finance Pvt. Ltd. are the shell companies of an entry operator, the relevance of ascertaining the genuineness and creditworthiness of the transactions cannot be undermined. Additionally, the genuineness and creditworthiness of the transactions may not be satisfactorily determined solely on the basis of the ledger accounts or the ITR of the entities, especially when the identities of such entities are not *bonafide.* As observed in **N.R. Portfolio** [Supra], the task of unveiling the mischief of the human minds working behind the corporate veil in such cases requires a deeper scrutiny, which goes beyond the periphery of documents ordinarily submitted for the purpose of assessment. An inquiry for ascertaining the creditworthiness and genuineness of financial transactions necessarily requires unknotting of

the transactions, by going beyond what is conspicuously available.

24. Unfortunately, the assessment order nowhere reflects any element of inquiry or verification. The discussion about the loan transactions in question is altogether missing. Furthermore, the assessment record would also reflect that the AO has not taken any concrete steps to ascertain the genuineness and creditworthiness of the transactions, which merits consideration in the light of the findings that emerged from the DDIT investigation report and assessment proceedings of M/s. Upaj Leasing & Finance Pvt. Ltd. It emerges that the present is a case where the AO failed not only to spell out any finding about the DDIT investigation report and assessment proceedings of M/s. Upaj Leasing & Finance Pvt. Ltd. but also to scrutinize the highlighted aspects in the said report qua the genuineness and creditworthiness of aforenoted loan transactions. Therefore, this is the minimum inquiry which atleast was expected to have been made by the AO.

25. At this juncture, it is apposite to point out that clause (a) of Explanation 2 of Section 263 of the Act introduces a deeming fiction to the effect that the order passed by the AO shall be considered erroneous and prejudicial to the interests of the Revenue, if the order is passed without making inquiries or verification, which should have been made. Henceforth, since neither there is any facet of discussion about the aforenoted aspects in the assessment order nor the assessment record duly reflects that the AO has done inquiry in the light of the findings of the investigation report. We find that the present is a fit case to invoke the revisional powers under Section 263 of the Act.

26. Thus, so far as question (a) is concerned, we hold that the ITAT was incorrect in holding that the AO had duly made the inquiry in the instant case and considered the material produced before it. Furthermore, the ITAT also erred in holding that the PCIT has wrongly assumed the jurisdiction under Section 263 of the Act as the assessment order is not only prejudicial to the interests of the Revenue but also erroneous in nature.

27. In so far as question (b) is concerned, it is crystal clear that Explanation 2 to Section 263 of the Act will be applicable in the instant case as the said explanation was inserted *vide* Finance Act, 2015 with effect from 01 June 2015 and the case of the assessee belongs to AY 2016-17.

28. Thus, in the light of the foregoing discussion, we are of the view that the aforementioned questions of law need to be answered in favour of the Revenue and against the assessee. We accordingly do so.

29. In view of the aforesaid, we set aside the ITAT order dated 14 February 2022.

30. The appeal is accordingly allowed and disposed of, alongwith pending applications, if any.

PURUSHAINDRA KUMAR KAURAV, J.

YASHWANT VARMA, J.

MARCH 19, 2024/priya