IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No. 394/Bang/2020
Assessment year : 2015-16

M/s. Origami Cellulo Pvt. Ltd., # 126A, Sriranga Complex, Aswathnagar, Above Canara Bank, Bengaluru – 560 094. **PAN: AABCO 6103C**	Vs.	The Principal Commissioner of Income-tax – 5, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Shri Pradeep Kumar, CIT(DR-III)(ITAT), Bengaluru.

Date of hearing	:	02.09.2021
Date of Pronouncement	:	15.09.2021

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of the Principal Commissioner of Income Tax-5, Bengaluru [PCIT] passed u/s. 263 of the Income-tax Act, 1961 [the Act] dated 2.3.2020 for the assessment year 2015-16.

2. The assessee company is engaged in the business of manufacture and sale of paper products. Return of income was filed declaring an income of Rs.69,18,858 along with Form 3CA & 3CD with regard to Specified Domestic Transactions undertaken by the assessee during the

year. The case was selected for limited scrutiny vide notice u/s. 143(2) dated 13.4.2016 on the following:-

(a) Mismatch in amount paid to related persons u/s. 40A(2)(b) reported in Audit Report and ITR;

(b) Low income shown by large contractors.

(c) Mismatch in sales turnover reported in Audit report and ITR.

3. Notice u/s. 142(1) was also issued on 9.6.2017 calling for details of Large Specified Domestic Transactions (Form 3CEB) for limited scrutiny proceedings and the details and explanations were provided by the assessee vide letters dated 9.10.2017 & 12.10.2017. Assessment was completed u/s. 143(3) on 30.10.2017.

4. The PCIT noticed that one of the parameters was Transfer Pricing Risk Parameter which was not referred by the AO to TPO in accordance with CBDT Instruction No.8 of 2015. He was accordingly of the view that the assessment order was prima facie erroneous insofar as it is prejudicial to the interests of revenue. Notice u/s. 263 was issued to the assessee and after considering the submissions of the assessee, the PCIT observed that risk parameter was not disputed by the assessee at the time of assessment proceedings. The payments to related persons specified in section 40A(2)(b) being in the nature of commission, related fees, managerial remuneration, interest on loan, management fees, purchase of assets and reimbursement of expenses are TP issues listed in Form 3CEB and Form 3CD filed by the assessee. The assessee company entered into international transactions with AE referred to in section 92A(2) of the Act which includes interest payments, payment of management fees and expenses for reimbursement. Not referring the issue to the TPO rendered the order of assessment to be erroneous and prejudicial to the interests of the revenue, according to the PCIT, he therefore set aside the order with a

direction to the AO to make a reference to the TPO in respect of international transaction. Against this, the revenue is in appeal before the Tribunal.

5. The ld. AR submitted that the AO had conducted enquiries and called for various information by issue of notice u/s. 143(2) and 142(1) along with complete details of the Large Specified Domestic Transactions (Form 3CEB) and all the details were provided during the course of assessment proceedings. After considering these details, the AO concluded the assessment proceedings by order dated 30.10.2017. There were no further proceedings taken by the assessee and the order of AO had become final.

6. It was further submitted that transfer pricing risk parameter was not one of the reasons for selecting the case for limited scrutiny. This parameter of Large Specified Domestic Transactions was added in the notice u/s. 142(1) dated 9.6.2017 which was not part of the original scrutiny notice dated 13.4.2016. It was contended that according to Para 3.2 of CBDT Instruction No.3/2016 it mandatorily to refer the case to TPO only if it was a case selected for scrutiny with the transfer pricing risk as one of the parameters. It was argued that the assessee's case did not fall within the requirement of para 3.2 of the above Instruction and there was no requirement for the AO to mandatorily refer the assessee's case to the TPO. It was further submitted that the said Instruction is contrary to the provisions of section 92CA(1) of the Act wherein a clear discretion has been given to the AO to refer the computation of ALP to the TPO, if he considers it necessary or expedient to do so. The said Instruction cannot over ride the provisions of the Act. Reference was made to the Apex Court judgment in the case of *Kerala Finance Corporation v. CIT (1994) 210 ITR 129 (SC)* and *J.K. Synthetics v. CBDT, 83 ITR 33) (SC)*. It was contended that the AO had consciously after application of mind used the discretion

vested on him as per the provisions of section 92CA of the Act and therefore his order was neither erroneous nor prejudicial to the interests of revenue.

7. The ld. AR for the assessee submitted that in Form 3CEB under Part B (International Transactions) the form has been left blank pertaining to international transactions entered by the assessee. However in Form 3CEB the details relating to Large Specified Domestic Transactions entered into during the year was duly filled in. Thus, the PCIT erred in concluding that assessee had entered into international transactions. There was no justification to hold that assessee's case was selected for limited scrutiny on the basis of transfer pricing risk based parameters. It is submitted that all the specified domestic transactions have been reported by the assessee are transactions entered by the assessee with related persons u/s. 40A(2) within the ambit of section 92BA(i) which were amended by the Finance Act, 2017 w.e.f. 1.4.2017 wherein clause (i) of section 92BA relating to expenditure in respect of which payment made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A has been omitted. In other words, transactions covered u/s. 40A(2) of the Act are no longer regarded as " specified domestic transactions" and hence outside the ambit and scope of section 92BA of the Act. No transfer pricing adjustment is permissible on this count as held by the Bangalore ITAT in *Texport Pvt. Ltd. v. DCIT.* Reliance was also placed on the following decisions:-

Eveready Industries India Ltd. v. PCIT (ITA No.805/Kol/2019)

Malabar Industries Ltd. v. CUT [20000] 243 ITR 83 (SC)

CIT v. J.L. Morrison (I) Ltd. 366 ITR 593

CIT v. Sunbeam Auto Ltd. 332 ITR 167

8. The ld. AR accordingly prayed that the impugned order of the PCIT should be quashed.

9. On the other hand, the ld. DR submitted that apart from the reasons mentioned in para 2 hereinabove for scrutiny, there were payments to related persons specified in section 40A(2)(b) duly reported in audit report and ITR filed by the assessee filed by the assessee with the department. Certain TP issues were included in this report which are required to be decided after determining the ALP which were accepted by the AO without any examination. Further he submitted that CBDT Instruction No.3/16 dated 10.3.2016 have been expressly issued u/s. 119 of the Act which relate to determination of ALP for international transaction or specified domestic transactions. It is mandatory for the AO to refer the TP transactions to the TPO for examination and adopt the income of assessee in terms of ALP determined by the TPO. In the present case, the AO failed to do so. As such, PCIT invoked jurisdiction u/s. 263 of the Act as there was failure of the AO to refer the matter to the TPO, though risk parameter was subject matter of selection of assessee's case for scrutiny. He relied on the order of the PCIT.

10. We have heard both the parties and perused the material on record. As per section 263 of the Act, the CIT could exercise jurisdiction under this provision if the order is erroneous insofar as it is prejudicial to the interests of the revenue. Further an incorrect assumption of facts or incorrect application of law will satisfy the requirement of order being erroneous. In the same category, falls orders passed without applying principles of natural justice or without application of mind. If there is escapement of income by the action of the AO, that order is said to be prejudicial to the interests of revenue. In the present case, the case was selected for scrutiny for the following reasons:-

(a) Mismatch in amount paid to related persons u/s. 40A(2)(b) reported in Audit Report and ITR;

(b) Low income shown by large contractors.

(c) Mismatch in sales turnover reported in Audit report and ITR.

11. Now the finding of the PCIT is that in view of the case selected for scrutiny to consider the mismatch in the amount paid to related persons u/s. 40A(2)(b) reported in audit report and the international transactions entered by the assessee with AE referred to in section 92A(2) reported in Form 3CEB, the AO should have referred the matter to the TPO so as to ascertain the ALP of specific domestic transactions with related parties. According to him, the AO failed to follow the CBDT Instruction No.3/16 dated 10.3.2016, which expressly provides for determination of ALP of international transactions as well as specific domestic transactions. However, we observe that the case was not selected for limited scrutiny of specified domestic transactions or international transactions so as to draw inference that the case was selected on Transfer Pricing risk parameter. On the other hand, the case was selected for limited scrutiny one of the reasons being mismatch in amount paid to related persons u/s. 40A(2)(b) reported in audit report and ITR. From a reading of these reasons, we are of the view that no prudent business person properly instructed in law would have inferred the TP risk parameter as a reason for scrutiny so as to mandatorily make reference u/s. 92C of the Act in terms of CBDT Instruction No.3/16 and failure to make such reference made the assessment order erroneous. In our opinion, the TP risk parameter was not one of the reasons for limited scrutiny of the case and as such the PCIT was not justified in invoking jurisdiction u/s. 263 of the Act so as to direct the AO to refer the matter to the TPO in respect of international transactions and specified domestic transactions listed in Form 3CEB and Form 3CD.

12. Similar view was taken by the Kolkata Bench of the Tribunal in the case of *Eveready Industries Ltd. v. PCIT in ITA No.805/Kol/2019 by order dated 13.12.2019* and the relevant observations are as follows:-

> "8. Having heard both the parties, and on a careful consideration of the facts and circumstances , we find that in the case in hand the Ld. Pr. CIT invoked jurisdiction u/s 263 of the Act principally on the broad allegation that there was failure to conduct enquiries which the facts of the case required the AO to make. According to Ld. Pr. CIT assessment order suffered from lack of enquiry & application of mind to the facts as also by incorrect application of applicable legal provisions to the facts of the case. As a result, in the opinion of Ld. Pr. CIT, AO's order was erroneous and therefore liable for revision u/s 263 of the Act. The said findings of the Ld Pr. CIT have been seriously contested by the appellant in Gr. Nos. 1&2. In the circumstances therefore before adjudicating the issues arising from the impugned order, we have to first examine the scope of revisional jurisdiction u/s. 263 of the Act. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions should be satisfied before jurisdiction u/s 263 of the Act is exercised by the ld. CIT. The twin conditions which need to be satisfied are that (i) the order of the Assessing Officer must be erroneous and(ii) as a consequence of passing an erroneous order, prejudice is caused to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous i.e. (i) if the Assessing Officer's order was passed on assumption of incorrect facts; or assumption of incorrect law; (ii) Assessing Officer's order is in violation of the principles of natural justice; (iii) if the AO's order is passed by the without application of mind; or (iv) if the AO has not investigated the issue before him. In the circumstances enumerated above only the order passed by the Assessing Officer can be termed as erroneous for the purpose of S.263 of the Act. Coming next to the second limb, the AO's erroneous order can be revised by the Ld. CIT only when it is shown that the said order is prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of

Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue" has to be read in conjunction with an "erroneous" order passed by the Assessing Officer. The Hon'ble Supreme Court, held that for invoking powers conferred by S.263; the CIT should not only show that the AO's order is erroneous as a result of any of the situations enumerated above but CIT must also further show that as a result of an erroneous order, some loss is caused to the interest of the revenue. Their Lordship in the said judgment held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. It was further observed that when the Assessing Officer adopts one of the course permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the Ld. CIT does not agree, it cannot be treated as an order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law. In the circumstances it was necessary for the Ld. Pr. CIT to show in the impugned order that the AO's order was erroneous because the view followed by him in respect of each of the reason set out in clauses (a) to (g) of SCN was unsustainable in law and therefore the order was liable for revision u/s 263 of the Act.

9. We also note that both in the reasons set out in SCN as well as in the impugned order, the Ld. Pr. CIT observed that in respect of issues set out in clauses (a), (b), (d), (f) and (g), proper enquiry was not conducted by the AO which the circumstances of the case demanded and for absence of proper enquiry, the assessment order was considered by the Ld. Pr. CIT to be erroneous and prejudicial to the interests of the Revenue. It is true that the courts have held that an order of assessment can be considered to be erroneous if there was lack or total absence of enquiry with regard to an issue which has material bearing on the assessment of total income for the relevant year. However in such a case the CIT has to first demonstrate that no enquiry at all was conducted and consequent to which not only the order became erroneous but such an error also caused prejudice to the revenue. In our considered view one also has understand the difference between "lack of inquiry" and "inadequate inquiry" and when it can be termed as erroneous for usurpation of jurisdiction u/s 263 of the Act. For better understanding of this aspect, we can take

help of the judgment of the Hon'ble jurisdictional Calcutta High Court in the case of CIT Vs J.L. Morrison (I) Ltd (366 ITR 593), wherein their Lordships explained the difference between the two as follows:-

> "86. Whether the assessment order dated 28th March, 2008 was passed without application of mind is basically a question of fact. The learned Tribunal has held that the assessment order was not passed without application of mind. The records of the assessment including the order sheets go to show that appropriate enquiry was made and the assessee was heard from time to time. In deciding the question Court has to bear in mind the presumption in law laid down in Section 114 Clause - e of the Evidence Act:--
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> "that judicial and official acts have been regularly performed;"
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> 87. Therefore, the Court has to start with the presumption that the assessment order dated 28th March 2008 was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated.
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> 88. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons.
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> 89. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also

considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact the order was passed by the assessing officer after due application of mind.

90. The judgments cited by Mr. Nizamuddin do not really support his contention. The judgment in the case of Meerut Roller Flour Mills (P.) Ltd. (supra) does not apply because the High court in that case was satisfied that the assessment order was passed without enquiry.

91. The judgment of Cochin Bench of Income Tax Appellate Tribunal in ITA No. 116/Coch/2012 relied upon by Mr. Nizamuddin is evidently based on an erroneous impression that "the proceedings before the Assessing Officer are judicial proceedings". This impression, which is patently contrary to the views expressed by Apex Court in the case of S.S. Gadgill (supra), was responsible for the views taken by the Tribunal. When the premise is wrong, the conclusion is bound to be wrong.

92. The judgment in the case of Infosys Technologies Ltd. (supra) is distinguishable on facts. The step taken by the CIT under Section 263 in that case was justified because the Income Tax records produced before him did not show that the assessing officer had considered the double taxation avoidance agreement on the basis whereof the claims were made by the assessee. Therefore, that was a clear case to show that the assessment order was passed without considering the relevant pieces of evidence.

93. The judgment in the case of Anusayaban. A. Doshi (supra) does not apply because the High Court in that case was dealing with the need on the part of the learned Tribunal to give reasons in support of its order.

94. The judgment in the case of Hindusthan Tin Works Ltd. (supra) also does not apply because there the Delhi High Court was dealing with the duty of the learned Tribunal to disclose reasons in support of its appellate order.

95. The judgment in the case of S.N. Mukherjee (supra) is clearly distinguishable. The point for consideration in that case was whether it was incumbent for the Chief of Army Staff while confirming the findings and the sentence of the General Court Martial, and for the Central Govt. while rejecting the post confirmation petition of the appellant, to record reasons for the orders passed by them.

96. The function of an Assessing Officer is to estimate the income of the assessee and to recover tax on the basis of such estimate as laid down by the Apex Court in the case of S.S Gadgil (supra). Their Lordships opined that the income tax proceedings do not partake the character of a judicial proceeding between the State and the citizen. Therefore, the principles applicable to a proceeding before a judicial or a quasi-judicial authority where there are two contesting parties cannot be made applicable to the proceedings before an Assessing Officer.

97. Mr. Nizamuddin contended the judgments cited by Mr. Poddar indicate that the Assessing Officer is not required to write an elaborate judgment. He contended that the assessing officer may not have any such obligation but it cannot be said, according to him, that the Assessing Officer is under no obligation to record anything in his assessment order. It is not in the first place a fact that he has not recorded anything. From the assessment order, the following facts and circumstances appear:--

"Return was filed on 29/11/06 showing total income of Rs.3,80,66,940/-. In response to notices u/s. 143(2) and 142(1) of the I. T. Act, 1961, Sri P. R. Kothari, A/r appeared from time to time and explained the return. Necessary details and particulars were filed. The business of the assessee is manufacturing and trading of cosmetics and dental care products as in earlier years. In view of above total income is computed is under:"

98. Unless the aforesaid recital is factually incorrect or the computation is legally wrong, it is not possible to hold that the assessment order was passed without application of mind. On the top of that when the Assessing Officer accepted the contention of the assessee there was no occasion for him to make any discussion in his order.

> 99. If the assessing officer cannot be shown to have violated any form prescribed for writing an assessment order, it would not be correct to hold that he acted illegally or without applying his mind. The third question is, for the reasons discussed above, answered in the negative."

10. This aspect was also explained by the Hon'ble Delhi High Court in its judgment in the case of CIT Vs Sunbeam Auto Ltd (332 ITR 167). The relevant extracts of the judgment is as follows:

> 12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open. In Gabriel India Ltd.'s case (supra), law on this aspect was discussed in the following manner :
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> ". . . From a reading of sub-section (1) of section, it is clear that the power of suomotu revision can be exercised by the

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

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From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by

the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. . . . There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

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We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation on that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard . . ." (pp. 113-117)

13. When we examine the matter in the light of the aforesaid principle, we find that the Assessing Officer had called for explanation on this very items, from the assessee and the assessee had furnished his explanation vide letter dated 26-9-2002. This fact is even taken note of by the Commissioner himself in Para 3 of his order dated 3-11-2004. This order also reproduces the reply of the respondent in Para 3 of the order in the following manner:

"The tools and dies have a very short life and can produce up to maximum 1 lakh permissible shorts and have to be replaced thereafter to retain the accuracy. Most of the parts manufactured are for the automobile industries

> which have to work on complete accuracy at high speed for a longer period. Since it is an ongoing procedure, a company had produced 10,75,000 sets whose selling rates is inclusive of the reimbursement of the dies cost. The purchase orders indicating the costing includes the reimbursement of dies cost are being produced before your honour. Since the sale rate includes the reimbursement of dies cost and to have the matching effect the cost of the dies has been claimed as a revenue expenditure."
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> 14. This clearly shows that the Assessing Officer had undertaken the exercise of examining as to whether the expenditure incurred by the assessee in the replacement of dyes and tools is to be treated as revenue expenditure or not. It appears that since the Assessing Officer was satisfied with the aforesaid explanation, he accepted the same. The CIT in his impugned order even accepts this in the following words :
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> "Assessing Officer accepted the explanation without raising any further questions, and as stated earlier, completed the assessment at the returned income."
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> 15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquires rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'.

11. Before us the ld. CIT, DR supported the invocation of revisionary jurisdiction by the Ld. Pr. CIT u/s 263 of the Act, by relying on the amendment to Section 263 whereby Explanation 2 to sub-section (1) of sec. 263 of the Act was inserted with effect from 01.06.2015. The said amendment inserted the words “in the opinion of Principal Commissioner or Commissioner”. According to ld. CIT, DR, after this amendment was brought into statute, the order passed by the AO can be deemed to be erroneous insofar as prejudicial to the interest of the revenue if in the opinion of the Pr. CIT or CIT, the order has been passed without making enquiries or verification which should have been made. According to us, however, the insertion of the amendment which

introduced the words 'in the opinion of Principal commissioner or Commissioner" cannot be read in isolation. It has to be kept in mind that "Explanation" cannot over-ride the substantive provision of the law which the Explanation only tries to explain/clarify.

12. Before we advert further, let us look at Section 263 of the Act, which is reproduced as under:-

> "263. (1) The 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 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. [Explanation 1.]—For the removal of doubts, it is hereby declared that, for the purposes of this subsection,—
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> (a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—
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> (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;
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> (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 [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;
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> (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 [Principal Commissioner or] 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 [Principal Commissioner or] 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.]

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

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

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

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

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

[(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."

13. From bare reading of Section 263 of the Act and the Explanation thereto introduced through the Finance Act, 2015, w.e.f. 01.06.2015, we note that Explanation -2, is a deeming provision. The well settled position of law is that while construing a deeming provision, it has to be strictly interpreted and that the legal fiction should not be stretched beyond the purpose for which it is enacted and should not extend that legitimate field (Raymond Vs. State of Chattisgarh AIR 20-07 SC 2854). It should be kept in mind that deeming provision should be in respect of facts, from which legal consequences will follow. However, the legal consequence cannot be deemed[DCM Vs. State of Rajasthan (1996) 2 SCC 449. AIR 1996 SC 2930 (3 judges of Hon'ble Supreme Court) and same view reiterated in State of Karnataka Vs. State of Tamil Nadu (2017) 3 SCC 362. So when we look at Explanation-2, we note that deeming fiction of law that the order of the Assessing Officer is deemed to be erroneous insofar as it is prejudicial to the interest of the Revenue only if in the opinion of the ld. CIT, which necessarily has to be a finding of fact in the following four events. Then legal consequence follows, if not, it does not. So, the CIT has to make a finding of fact in the following:

(a) the assessment order passed by the Assessing Officer is without inquiry or verification,

(b) the Assessing Officer allowed a claim without enquiry,

(c) the Assessing Officer passed the order which is not in accordance with any order, directions or instructions issued by the CBDT u/s 119 of the Act,

(d) the Assessing Officer passed the order which is not in accordance to the decision of the Hon'ble Jurisdictional High Court or the Hon'ble Supreme Court, which is prejudicial to the assessee, which is rendered either in the assessee's case or any other person.

14. The amendment brought by the Finance Act, 2015, by way of insertion of Explanation-2, can come to the aid of the ld. Pr. CIT or ld. CIT only when any one or more of the four conditions, is satisfied and a clear finding of fact to that effect is recorded by the Ld. CIT. It is only after the CIT records a clear finding of fact bringing the assessee's case within the ambit of any one or more condition specified in the explanation, only then the legal consequence envisaged in the explanation can be deemed or else it cannot be deemed. Only in the case where the CIT records a clear finding of fact establishing any of the four conditions postulated above is satisfied then the order framed by the Assessing Officer can be deemed to be erroneous insofar as prejudicial to the interest of the Revenue, and not otherwise. To say it differently, the "opinion of Ld. Pr. CIT or CIT" cannot be read in isolation, and it has to be read co-jointly with the four conditions stipulated under Explanation-2 clauses (a) to (d) . it is only in the event that any one of the situation is satisfied and there is a finding of fact by the Ld. CIT to that effect in his revision order, then only the deeming provision of Explanation-2 can be pressed into service for rendering an assessment order as erroneous, insofar as prejudicial to the Revenue, which is the jurisdictional fact & law required for the ld. Pr. CIT/CIT to invoke revisional jurisdiction u/s 263 of the Act.

15. Coming to the expression in Explanation -2 "in the opinion of the Ld. CIT", it must be the considered opinion of the CIT which is based on the correct facts and in accordance with the principles of law. It cannot be an arbitrary opinion bereft of facts or law. The aforesaid clause only provides for situation where inquiries or verifications should be made by reasonable and prudent officer in the context of the case. Such clause cannot be read to authorize or give unfettered powers to the Commissioner to revise each and every assessment order. The applicability of the clause is thus essentially contextual. It has to be the opinion of a prudent person properly instructed in law. The Hon'ble Supreme Court in Maneka Gandhi Vs. Union of India reported in 1978 AIR (SC) 597 has laid down the law that a public authority should discharge his duties in a fair, just and reasonable, manner and the principle of due process of law was recognized by the Hon'ble Supreme Court. Therefore the opinion of the Ld. CIT has to be in consonance with that of the well

settled judicial principles and cannot be arbitrarily made discarding the judicial precedent on the subject. The opinion of the Ld. Pr. CIT has to be reasonable and that of a prudent person instructed in law and which founded on the correct facts borne out from records. The CIT's opinion should be based on objective consideration of material facts and not on his subjective notions of the facts wrongly presumed or inferred by him. Moreover, it has to be kept in mind that an Explanation to substantive section should be read as to harmonize with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section conferring powers or authority larger than what is envisaged in the principal provision. It is so held by the Hon'ble Supreme Court in Bihta Cooperative Development Cane Marketing Union Ltd. Vs. Bank of Bihar, AIR 1967 SC 389 and M/s. Oblum Electrical Industries Pvt. Ltd., Hyderabad vs. Collector of Customs, Bombay - AIR 1997 SC 3467 at page 3471 and also see Justice G. P. Singh, Principal of Statutory Interpretation 234 Lexus 2016. It has to be kept in mind that while the Commissioner is exercising his revisional jurisdiction over the assessment order, he has to exercise his power in an objective manner and not arbitrarily or subjectively since he is discharging quasijudicial powers vested in him while doing so. Thus according to us, Explanation (2) inserted by the Parliament u/s. 263 cannot override the main section i.e. sec. 263(1) of the Act. The Ld. CIT can exercise his revisional jurisdiction in the event the assessment order is erroneous as well as prejudicial to the interest of the Revenue as discussed above and not otherwise.

16. In the instant case we find that in the SCN, the Ld. Pr. CIT set out seven specific reasons for which he had considered the AO's order to be erroneous in so far as prejudicial to the interests of the Revenue. We also note that in response, the assessee had submitted before the Ld. Pr. CIT detailed explanations supported by tangible documentary evidence to prove that the SCN had proceeded on assumption of some incorrect facts and wrong interpretation of applicable legal provisions. The assessee also explained with cogent material that before completion of assessment, the AO had indeed made enquiries with reference to specific issues raised in the SCN and the order u/s 143(3) of the Act was passed only after considering the outcome of the enquiry. According to Ld. AR, on receipt of the objections from

the assessee, the Ld. Pr. CIT ought to have examined the assessment records and conducted his own enquiry and thereafter should have recorded his own finding proving that the explanations furnished by the assessee suffered from any factual or legal infirmity and because of which he found that the view adopted by the AO was unsustainable in law making his order as erroneous within the meaning of Section 263 of the Act. In our opinion, once the ld. CIT initiates the proceedings u/s 263 of the Act for specific reasons and these reasons are met by the assessee, then it is incumbent upon the ld. CIT to himself independently deal with the objections and record his own satisfaction to prove that the AO's order is in fact erroneous and prejudicial to the interests of the Revenue for the reasons out in the SCN. The ld. CIT in such a situation cannot merely set aside the assessment order directing AO to pass the order of assessment afresh, effectively giving the AO a second innings without establishing that the initial order was erroneous as well as prejudicial to the interests of the Revenue. In this regard, it is pertinent to refer to the observations and the decision rendered by the Hon'ble Delhi High Court in the case of ITO vs DG Housing Projects Ltd in 343 ITR 329, which is reproduced below:

> "19. In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and

> prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

17. The above view is also supported by the following decisions:

- DIT vs Jyoti Foundation reported in 357 ITR 388 (Del)
- CIT vs Ashish Rajpal reported in 320 ITR 674 (Del)
- CIT vs R.K. Construction Co. reported in 313 ITR 65 (Guj)

18. Having broadly discussed and set out above the settled judicial principles for usurpation of jurisdiction u/s 263 of the Act, we now proceed to examine whether for the reasons set out in clauses (a) to (g) of the SCN, the Ld. Pr. CIT was able to justify his finding in the impugned order that the AO's order was indeed erroneous and prejudicial to the interests of the Revenue necessitating his interference u/s 263 of the Act with reference to each of the seven issues set out in the SCN.

19. In Ground Nos. 3 & 4 the assessee objected to Ld. Pr. CIT's finding with reference to reasons set out in Clause 3(a) of the SCN which read as under:

> "One of the reasons for selection of scrutiny was mismatch in turnover. It is noticed from reply of assesse dated 16-12-2016 that receipts against deduction of TDS was disclosed at Rs.9.72 Crs. However, as per accounts there were three categories of revenue earned by the assessee during the year viz. (i) sales of products (Sch. 18a of P&L account), (ii) sales of scrap (Sch. 18b of P&L account), and (iii) other income (Sch. 19 of P&L account). Hence, incidence of TDS can apply only to other income, which as per the accounts was to the tune of Rs. 8.40 Crores (Rs. 873.53L less foreign exchange gain of Rs. 33.82L). Thus,

> even if TDS was deducted on entire other income, there was a short credit income. The same was not properly verified by the A.O."

20. In the impugned order the Ld. Pr. CIT admitted that the assessee had filed explanation but the same was not rejected summarily on the ground that the issue was not looked into nor were full facts discussed. In the course of hearing, the ld. AR drew our attention to the facts available on record which factually disproved the reasons set out in clause (a). As noted in Para 3, we find that the assessee's case was selected for scrutiny under CASS inter alia on the ground that there was a mismatch in turnover as per audit report and ITR. We note that this aspect was specifically enquired into by the AO at the time of assessment. The assessee by its letter dated 09.12.2016 [Pages 17 to 21 of paper book] had brought to the AO's attention that in fact there was no mismatch in turnover. The Ld. AR brought to our attention that in Part A of the return of income, the assessee had reported it's Turnover at Rs.1153.407 crores which matched fully with the net sales/ turnover figure which appeared on Page 37 of the annual printed accounts. From these figures, we note that the CASS reason was examined by the AO and did not find any factual infirmity in the assessee's explanation. Nor any falsity was found by the Ld PCIT in the impugned order.

21. We further find that having made a reference to CASS reason the Ld. Pr. CIT's notice proceeded to highlight an alleged mismatch between gross receipts of Rs.972 lacs reflected in TDS certificates with the amount credited in the P&L A/c under the head 'Other Income', reported at Rs.873.88 lacs. We find merit in the ld. AR's submission that the ld. Pr. CIT proceeded on an erroneous assumption that the tax was deducted at source only from the receipts, reported in the appellant's P&L A/c under the head 'Other Income' and no tax was deducted from receipts reported under other accounting heads in the P&L A/c. On the contrary, we find that in the course of assessment the assessee was specifically required by the AO to reconcile the receipts reported in Statement 26AS with the amounts certified in the TDS certificates as also with receipts reported in the audited accounts for the relevant year. In response, a statement of reconciliation was provided to the AO under the cover of assessee's letter dated 16.12.2016 which finds place at Pages 40

to 41 of the paper book. We therefore find that the relevant aspect was not only examined by the AO but being satisfied with the fact that the receipts reported in Statement 26AS fully reconciled with the receipts reported in the audited accounts, the AO had passed the assessment order u/s 143(3) of the Act. We further find that in response to the SCN, the assessee had filed a statement, reconciling receipts which suffered tax deduction at source during the relevant year with receipts accounted under respective accounting heads and which were credited in the relevant year's Profit & Loss Account. Copy of such reconciliation statement was furnished before us at Pages 119 to 121 of the paper book. On scrutiny of this statement, we find that the assessee had established before the AO as well as before the Ld. Pr. CIT that all receipts certified in the TDS certificates had been fully accounted in the assessee's books for the relevant year. Although these documents and explanations were admittedly filed before the lower authorities, no factual infirmity or falsity was shown by the Ld. Pr. CIT or by the ld. CIT, DR appearing on behalf of the Revenue. The Ld. Pr. CIT set aside the assessment order on this issue merely observing that the issue was not properly examined. Applying the principles set out in Paras 8 to 17 above, we therefore hold the order u/s 263 of the Act on this issue to be unsustainable because not only did the AO had enquired into this issue but had consciously applied his mind to the facts made available before him and adopted the permissible view in law. On the contrary the Ld. Pr. CIT did not bring on record any material to disprove the assessee's explanations which showed that receipts certified in the TDS Certificates totaling Rs 972 Lacs were fully accounted in the assessee's books of the relevant year but merely restored the issue for fresh examination by the AO. The order of the Ld. Pr. CIT with reference to issue in clause (a) is therefore set aside. Ground Nos. 3 & 4 are accordingly allowed.

22. In Ground Nos. 5 to 7, the assessee has objected to Ld. Pr. CIT's finding with reference to reasons set out in Clause 3(b) of the SCN which read as follows:

> "One of the reasons for selection of scrutiny was mismatch in amount paid to related persons u/s 40A (2) (b) reported in Audit report (Form 3CEB) and ITR. However, the case was not referred to TPO. As per para 3.2 of

> CBDT's. Instruction No. 3 of 2016, the instant case had to be mandatorily referred to the TPO (the Transfer Pricing Officer) by the A.O after obtaining the approval of Principle CIT. However, the A.O has completed assessment u/s 143(3) of the Act on 29-12-2016 without referring the matter to Transfer Pricing Officer."

23. We find that the assessee's case was selected under CASS inter alia on the parameter that "Mismatch in amount paid to related persons u/s 40A (2) (b) reported in Audit report and ITR". We note that with reference to this CASS reason the assessee was required to provide its explanation about the alleged mismatch of the figures reported in terms of Section 40A(2)(b) in ITR and Tax Audit Report. We note that explanation in that regard was furnished vide Para 9 of assessee's letter dated 09.12.2016 [Page109 of paper book]. It was explained before the lower authorities as also before us that in clause 9A of Part A- OI of the Income-tax Return in ITR-6, the assessee was required to specify the quantum of the amounts debited to the Profit & Loss Account ,to the extent disallowable u/s 40A, to the persons specified in Section 40A(2)(b) of the Act. In other words in the ITR the assessee was expected to specify the amount which was disallowable in terms of Section 40A(2)(b)of the Act. On the other hand, in Clause 23 of the TAR read with Annexure – IX thereto, the auditor had reported the payments actually made by the assessee to the persons specified in Section 40A(2)(b) of the Act. It was explained that the tax auditor, while giving his report in conformity with the form prescribed by the Board u/s 44AB of the Act, was required to report only the amounts paid to persons specified in S 40A(2) during the relevant reporting period and he was not required to express his opinion as to whether the payments to the specified persons were excessive and for that reason any part thereof was disallowable u/s 40A(2) of the Act. The ld. AR therefore submitted that the intent and purport of information disclosed in clause 9A of Part A- OI of the Income-tax Return in ITR-6 and Clause 23 of the TAR being materially different, and the figures reported in ITR and in Clause 23 of TAR did not match.

24. The ld. AR submitted that the CASS parameter referred only to mismatch of the figures reported in tax audit report in relation to payments made to persons referred 40A(2)(b) with the

figures mentioned in income-tax return. The CASS reasons did not make reference to the 'transfer pricing audit report' furnished in Form 3CEB, as wrongly alleged by the Ld. Pr. CIT in his SCN. He therefore submitted that when the reason for selection under CASS was examined and the AO was satisfied with the explanation furnished for the same, the Ld. Pr. CIT could not justify invocation of power u/s 263on the ground that before completion of assessment reference to TPO on transfer pricing risk parameter was mandatory in terms of Para 3.2 of the CBDT Instruction No. 3 of 2016.

25. Having considered rival submissions we find merit in the ld. AR's primary contention that the SCN proceeded on the wrong presumption that the assessee's case was selected on a transfer pricing risk parameter. We note that the parameter for selection was as follows:

> "Mismatch in amount paid to related persons u/s 40A (2) (b) reported in Audit report and ITR"

26. It is thus noted that nowhere the CASS reason stated the selection of the assessee's case was on the ground of there being "large value of specified domestic transactions" or "large value of international transactions" so as to warrant an inference that the case was selected on transfer pricing risk parameter. On the contrary, the CASS reason merely claimed that there was mismatch in the amount paid to related persons u/s 40A(2)(b) of the Act reported in Audit report and ITR. From plain reading of the said CASS reason, we are of the view that no prudent person properly instructed in law would have inferred that the aforesaid parameter constituted 'transfer pricing risk parameter' so as to warrant mandatory reference u/s 92CA of the Act in terms of the Para 3.2 of CBDT Instruction No. 3 of 2016 and failure to make TP reference made the assessment order erroneous. We further find that once the incorrect presumption on Ld. Pr. CIT's part was highlighted by the assessee in it's submission then in the impugned order the Ld. Pr.CIT himself completely digressed from the reason set out in the SCN but none the less justified his action on the ground that the reference to TPO was necessary because the assessee's case was selected for scrutiny under the category of 'complete scrutiny'. We are however unable to accept an altogether new case made out by the Ld. Pr. CIT while passing

the impugned order, justifying his interference that for not making reference to the TPO, order of assessment was erroneous in terms of Section 263 of the Act. In the first instance, we note that the Ld. Pr. CIT himself gave up the reason set out in SCN viz., that one of the CASS reason for selection of scrutiny assessment was a transfer pricing risk parameter. Once it is established that the transfer pricing risk parameter was not the ground for selection of scrutiny assessment u/s 143(3) of the Act, then we have to agree with the ld. AR's submission that Para 3.2 of the CBDT Instruction No. 3 of 2016 was not applicable in the given facts of the present case and therefore the AO's order could not have been held to be erroneous by the CIT for not making reference to the TPO in terms of the said CBDT Instruction 3 of 2016.

27. So far as the Ld. Pr. CIT's finding justifying his case that the AO's order became erroneous and prejudicial to the interests of the Revenue for not referring the assessee's case to the TPO u/s 92CA of the Act on the ground that the assessee's case came with the category of 'complete scrutiny', we note that this contention of the Ld. Pr. CIT is in fact contrary to the extant instructions of the CBDT contained in Paras 3.2 to 3.3 of Instruction No.3/2016 wherein the Board have set out the following specific situations/instances where the reference to TPO has been made mandatory :

> "3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard -for example. Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection

of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

3.3 Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

(a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under section 92E at all or has not disclosed the said transactions in the Accountant's report filed;

(b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO."

28. From perusal of the above, it is noted that none of the conditions prescribed in these Paras necessitating mandatory reference to TPO were satisfied in the instant case. In fact, we find that in the impugned order, Ld. Pr. CIT himself did not to make out a case that the assessee's case fell under any of the situations prescribed in Paras 3.2 & 3.3 requiring mandatory reference u/s 92CA(2) of the Act. The only ground on which the Ld. Pr. CIT ultimately justified his order requiring AO to make reference u/s 92CA mandatorily was that the assessee's case was selected under complete scrutiny criteria and therefore all possible enquiries should have been made by the AO inter alia including making reference to the TPO. We find that although in support of such conclusion the Ld. Pr. CIT has placed reliance on the CBDT Instruction No. 3 of 2016, the said Instruction nowhere even suggests let alone provides that every case of an assessee selected on non-transfer pricing risk parameter but involving

'complete scrutiny', the reference must be made to the TPO if such an assessee had entered into international transactions or specified domestic transactions during the relevant year. Instead in Para 3.3 the Board has enumerated only three specific instances/ situations when the reference to TPO has been made mandatory even though as per the CASS, the case of an assessee is not selected on "transfer pricing risk parameter". We find that in the impugned order the Ld. Pr. CIT has not brought on record any material to show that the AO had acted in violation of the CBDT Instruction No. 3 of 2016 and for that reason the AO's order was erroneous and prejudicial to the interests of the Revenue.

29. Even with regard to CIT's allegation that in complete scrutiny case, the AO did not conduct any enquiries whatsoever with regard to transactions referred to in Section 40A(2)(b) as well as Section 92CA of the Act, we find that prior to completion of assessment the AO had indeed conducted enquiries with regard to CASS reason as also the assessee's international transactions with the AEs. We note that before completion of assessment, the assessee was asked to provide explanation even with regard to its international transactions with its associated enterprises. By its letter dated 16.12.2016 [Pages 87 to 89 of paper book], the assessee had furnished its explanation in respect of its international transactions. In the said letter it was particularly brought to the AO's attention that based on the Transfer Pricing Audit report in Form 3CEB, wherein the auditors had certified ALP of international transactions, the assessee had suo moto offered adjustments in the computation of income on account of corporate guarantee fees and interest on loan to AEs which were not actually charged. We therefore find that it was not even a case where the order of the AO suffered from the charge of failure to conduct enquiry into the relevant issue as alleged by the Ld. Pr. CIT in the impugned order.

30. Lastly, as pointed out by the ld. AR, in the SCN, the Ld. Pr. CIT had justified invocation of power u/s 263 with reference to assessee's transactions with persons specified in Section 40A(2)(b) of the Act. In other words in CIT's opinion assessee's specified domestic transactions coming within the ambit of Section 92BA(i) of the Act should have been referred for transfer

pricing scrutiny. We however note that the relevant provisions of Section 92BA were amended by Finance Act, 2017w.e.f. 01.04.2017 whereby clause (i) of sec. 92BA relating to any expenditure in respect of which payment have been made or is to be made to a person referred to clause (b) of sub- section (2) of section 40A of the Act was omitted. Now the question arises whether after the omission of clause (i) from the statute, the CIT can justifiably set aside the order of assessment for not making a reference to TPO for examining transactions coming within the ambit of Section 92BA(i) of the Act. In this regard, our attention was invited to the decision of the coordinate bench of this Tribunal in the case of DVC Emta Coal Mines Ltd &Ors Vs ACIT in ITA Nos. 2430-2432/Kol/2017 dated 01.05.2019 wherein it was held that the legal effect of clause (i) of Section 92BA being omitted by subsequent amendment, would mean that clause (i) never existed in the statute and consequently no adverse inference with reference to omitted provision can be drawn against an assessee. While omitting the clause (i) of section 92BA of the Act, nothing was specified whether the proceeding initiated or action taken on this count can continue. Therefore, this Tribunal held that any proceeding initiated or action taken under that clause would not survive at all and any reference made to TPO under section 92CA in respect of transactions referred to in clause (i) of Section 92BA of the Act shall be invalid and bad in law.

31. Applying the ratio laid down in the foregoing decision to the facts of the present case, we note that when the impugned order was passed by the Ld. Pr. CIT, clause (i) of section 92BA of the Act had already been omitted by the Finance Act, 2017 and in that view of the matter the Ld. Pr. CIT could not set aside the order for alleged non-compliance with provision of law which no longer existed in the statute as on the date of order. The Ld. Pr. CIT's direction requiring the AO to consider making a reference to the TPO in the set aside proceedings is also contrary to the view expressed in the foregoing decision of the coordinate bench(supra). For all the foregoing reasons therefore, we hold that the AO's order did not suffer from any error for the reason that he did not make reference to the TPO. Accordingly the Ld. Pr. CIT's order for the reason set out in clause 3(b) of the SCN

and for the entirely new set of reasons contained in the impugned order, is set aside. Ground Nos. 5 to 7 are accordingly allowed."

13. In our opinion, the facts of the present case are similar to the case considered by the Kolkata Bench of the Tribunal cited *supra*. We are therefore inclined to quash the impugned revisionary order passed by the PCIT u/s. 263 of the Act.

14. In the result, the appeal of the assessee is allowed.

Pronounced in the open court on this 15th day of September, 2021.

Sd/-	Sd/-
(N V VASUDEVAN)	(CHANDRA POOJARI)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 15th September, 2021.

/*Desai S Murthy /*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.