

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI A.K GARODIA, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.1376 to 1379/Bang/2019
Assessment Year : 2011-12 to 2014-15

K Muniraju, No.849/2, Chinmaya Complex, 3 rd Floor, 'A' Block, 60 Feet Road 1 st Main Road, Sahakaranagar, Bengaluru-560 092. PAN – AOOKP 9420 Q.	Vs.	The Pr. Commissioner of Income Tax, Central, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Rajeev C Nulvi, Advocate
Revenue by	:	Shri Dilip Reddy, Standing Counsel to Dept. (DR)

Date of Hearing	:	22-09-2020
Date of Pronouncement	:	20-10-2020

ORDER

PER BENCH :

Present appeals has been filed by assessee against separate order dated 26/03/2019 passed by Ld.Pr.CIT (Central) for assessment years under consideration on following grounds of appeal. At the outset, it is submitted that, grounds raised by assessee in all years under consideration are identical and similar. Therefore, for sake of convenience, we are reproducing

grounds raised by assessee for assessment year 2011-12 which are as under:

ITA No.1376/Bang/2019

1. *The order of the learned Principal Commissioner of Income Tax (Central) passed u/s 263 of the Income Tax Act, 1961 in so far as against the Appellant, is opposed to the law, equity, weight of evidences, probabilities and against the fact and circumstances of the Appellants case.*

2. *The learned Principal Commissioner of Income Tax (Central) was not justified in law and fact to set aside the assessment order dated 29/12/2016 and direct the Assessing Officer to make redo the assessment de-nova after due consideration of the fact and law with regard to issues mentioned in the show cause notice.*

3. *The learned Principal Commissioner of Income Tax (Central) has grossly erred in revising the order passed by the Assessing Officer without appreciating that the order was not erroneous, much less prejudice to the interest of the revenue to warrant revision.*

4. *The learned Principal Commissioner of Income Tax (Central) was not justified in passing the order u/s 263 of the Income Tax Act, 1961 as the order passed u/s 143(3) r.w.s 153A of the Income Tax Act, 1961 was passed after proper enquiry on the facts and circumstances of the case and following the Jurisdictional High Court judgement in case of Lancy Constructions.*

5. *The learned Principal Commissioner of Income Tax (Central) erred in passing the order u/s 263 of the Income Tax Act, 1961 with the direction to make thorough verification of issues/evidences/documents which are not unearthed or found during the course of search.*

6. *The learned Principal Commissioner of Income Tax (Central) failed to appreciate the action of the Assessing Officer wherein general disallowances such as 40A(3), 40(a)(ia) in the assessment passed u/s 143(3) r.w.s 153A of the Income Tax Act, 1961, shall not be on the basis of the information obtained subsequent to the search.*

7. *The learned Principal Commissioner of Income Tax (Central) erred in revising the order passed by the Assessing Officer without following the later judgement of Jurisdictional High Court in case of Lancy Constructions and Bangalore ITAT judgement in case of Corner stone Properties Pvt Ltd. Vs ACIT.*

8. *The learned Principal Commissioner of Income Tax (Central) erred in revising the order of the Assessing Officer u/s 263 of the Income Tax Act, 1961 as the order of the Assessing Officer has stands merged with order of the Commissioner of Income Tax (Appeals) in all respect and for all the*

issues as the power of the Commissioner of Income Tax (Appeals) are co-extensive and co-terminus with the powers of the Assessing Authority.

9. The learned Principal Commissioner of Income Tax (Central) erred in revising the order of the Assessing Officer u/s 263 of the Income Tax Act, 1961 without appreciating the fact that transactions are genuine, parties are identifiable and the payments were made in cash for business expediency on banking holidays and after banking hours.

10. For these and other reasons which may be adduced at the time of the hearing the Appellant prays before this Honourable Bench to anul the order by Principal Commissioner of Income Tax (Central) u/s 263 of the Income Tax Act, 1961 for substantial cause of justice.

11.The appellant craves leaves, to add, to alter, to amend and to delete any other grounds at the time of hearing.”

2. At the outset, Ld.AR submitted that, present appeals are filed with a delay of 13 days. It has been submitted in affidavit dated 06/06/2019 by assessee that, delay was caused, since assessee was busy with getting admission to MBBS course, for which he required approval from Medical Council of India. He was therefore not available to preset the appeals in time before this *Tribunal*. He submitted that, it was unintentional, and prayed for condonation of delay by 13 days in filing present appeals before this *Tribunal*.

Before us, Ld.AR submitted that, delay occasioned to file appeal before this *Tribunal* was not intentional and deliberate and grave injustice would be caused to assessee, if appeals are not admitted.

Ld.CIT.DR on the contrary, vehemently argued for the appeals to be dismissed *in limne*.

3. We have perused submission by assessee in the affidavit.

Hon'ble Supreme Court in [*Collector, Land Acquisition vs. Mst. Katji & Ors*](#) reported in (1987) 167 ITR 471 held that, when substantial

justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred. *Hon'ble Court* has held that, there is no presumption that delay is occasioned deliberately or on account of culpable negligence or on a malafide, and that litigation does not stand to benefit by resorting to delay, in fact he is on serious risk.

4. In various cases *Hon'ble Supreme Court* and *Hon'ble High Court's* time and again laid down principles that, there should be a liberal, pragmatic, justice oriented and non-pedantic approach while considering the application of condonation of delay. The term "sufficient cause" should be construed liberally and that substantial Justice being paramount and pivotal, technical consideration should not be given undue emphasis.

Respectfully following above principles, we condoned the delay of 13 days caused by assessee in filing present appeals.

5. Ld.AR submitted that, for all years under consideration, identical Additional Ground Nos:12-13 are raised by assessee, being legal issue, challenging validity of order passed under section 263. For sake of convenience we are reproducing additional ground No. 12-13 from assessment year 2011-12 which is as under:

Additional Grounds of Appeal

"The Appellant begs to submit under mentioned Grounds of Appeal, which challenges very basic legal question against the passing of the order in the hands of the Appellant u/s 263 of the Income Tax Act, 1961 and it doesn't involve any investigation of facts otherwise on record. And it is prayed that the additional grounds may kindly be admitted and disposed off on merit for the substantial cause of justice. Reliance is placed on the ratio decision of Honourable Supreme Court in case of 229 ITR 383 National Thermal Power Co Ltd Vs CIT.

In view of Ground of Appeal No. 11, the Appellant craves leave for admission of below mentioned grounds:

12. The learned Principal Commissioner of Income Tax (Central) has grossly erred in revising the order passed by the Assessing Officer for not making the proper enquiries and verification which should have been made for the information available on record during the course of assessment which is against clause (a) of explanation 2 to Section 263(1) of the Income Tax Act, 1961. The said clause (a) of explanation 2 to Section 263(1) of the Income Tax Act, 1961 is made applicable from 01.06.2015 i.e. w.e.f A.Y 2016-17.

13. On the facts and circumstances of the case, The learned Principal Commissioner of Income Tax (Central) has erred in revising the order only on the ground that the Assessing Officer failed to make proper enquiry in respect of information available on record subsequent to date of search. The said failure for revision was effective from 01.06.2015 by introducing clause (a) of explanation 2 to Section 263(1) of the Income Tax Act, 1961.

6. Ld.AR submitted that legal plea raised is challenging application of *Explanation 2 (a) to section 263 (1)* of the Act to present case by Ld.Pr.CIT. He submitted that the said *Explanation 2* was inserted w.e.f. 01/06/2015, and therefore, not applicable to the years under consideration, being prior to insertion. He placed reliance on decision of *Hon'ble Supreme Court* in case of *NTPC Ltd. vs.CIT*, reported in 229 ITR 383.

7. We are convinced that this additional ground of appeal is purely legal ground emanating from facts available on record only. The admission of this ground does not require any further investigation into the facts. This has been fairly conceded by Ld.CIT.DR also. So this ground, being purely legal ground, is entertainable and admissible for hearing as per the provisions of Rule 11 of the ITAT Rules.

Accordingly, following decisions of *Hon'ble Supreme Court* in case of *NTPC Ltd. vs.CIT*, reported in 229 ITR 383 and decision of

Hon'ble Delhi High Court in case of Jute Corporation of India vs. CIT reported in 1991 AIR 241, we are inclined to admit the Additional Ground nos:12-13.

Brief facts of the case are as under:

8. Separate assessment orders for all years under consideration have been passed by Ld.AO on 29/12/2016, under section 143(3) read with section 153A of the Act. On perusal of assessment order, it is noted that, search action under section 132 was conducted on Sh. K Muniraju and others (group) on 09/10/2014.

9. Consequentially, notice under section 153A of the Act was issued to assessee requiring him to file return of income within 30 days of receipt, in response to notice under section 153A. It has been submitted that, assessment order for all years under consideration was passed making addition under the head capital gains being sale proceeds from land sold during the years. We therefore, for the sake of convenience, refer to details enumerated in assessment order passed for assessment year 2011-12. Assessee filed return of income on 25/08/2016 declaring Rs.3,04,59,132/- as gross total income and Rs.3,03,59,130/- as taxable income.

Ld.AO while passing assessment order, made addition in the hands of assessee being capital gain that arose during the year due to transfer of land by assessee amounting to Rs.60,99,982/- . Ld.AO further made addition of Rs.18,88,06,908/- being credits

on account of various persons with whom assessee was alleged to be transacting for purchase of land.

10. For assessment years 2012-13, 2013-14 and 2014-15, Ld.AO made addition on account of receipts from sale of land sold during the year as business income.

11. Against additions so made, assessee preferred appeal before Ld.CIT(A). Ld.CIT(A), vide order dated 12/07/2018 deleted addition on the ground that, there was no incriminating material. Ld.CIT(A) observed as under:

5. The additional ground Nos. 5 & 6 are on the question of law wherein it is argued that the additions made were not based on the incriminating documents or material found during the course of search. The A.R of the Appellant relied on the Jurisdictional Karnataka High Court judgement in the case CIT Vs Lancy Construction 383 ITR 168 and ITAT Bangalore judgement in the case of GMR Sports Pvt. Ltd. Vs DCIT In ITA 1754/6ANG/2016 wherein it has been held that "if it is found that no incriminating material was found during the course of search then the proceeding initiated by the A.O u/s 153A of the Income Tax Act, 1961 are not valid". The A.R of the Appellant has also relied on the following case laws.

a. Commissioner of Income Tax Vs Continental Warehousing Corporation 374 ITR 645 (Bombay).

b. Commissioner of Income Tax Vs Anil Kumar Bhatia 352 ITP 403 (Delhi).

c. Commissioner of Income Tax Vs Kabul Chawla 380 ITR 573 (Delhi).

d. Principle Commissioner of Income Tax Vs Kurele Paper Mills Pvt. Ltd. 380 ITR 761 (Delhi).

In this regard, it is seen from the assessment order that no incriminating material has been brought on record in support of the additions which have been made. The Jurisdictional High Court judgment in the case of CIT. vs. Lancy Construction 383 ITR 168 is the later judgment which is being followed by the Bangalore Tribunal. Therefore, following judicial discipline, I hereby allow the above grounds of appeal.

In the result, the appeal of the appellant is allowed."

12. Be that as it may, Ld.Pr.CIT sought to revise assessment orders for all assessment years under consideration, and issued

separate notice u/s.263 on 04/03/2019 to assessee. Ld.AR submitted that, in notice issued, Ld.Pr.CIT, recorded that, Ld.AO did not examine payments made by assessee in cash for purposes of buying lands which was claimed as expenditure for arriving at direct income from sale of land, and whether such expenditure paid in cash attracts provision of section 40A(3) of the Act. He also noted that, Ld.AO neither examined nor made any enquiries regarding the same during assessment proceedings.

13. Ld.AR submitted that for years under consideration, Ld.Pr.CIT sought to revise assessment order for verifying following expenditure made by assessee in cash in violation of sec.40A(3).

S.No.	Asst.Yr.	Expenditure paid in cash
1.	2011-12	20,97,48,164/-
2.	2012-13	9,89,68,350/-
3.	2013-14	98,98,400
4.	2014-15	8,00,00,000/-

14. In response to notice issued, assessee filed its reply dated 23/03/2019, wherein it was submitted that, information about cheque and cash payment in purchase of properties were available before Ld.AO vide assessee's letter dated 15/11/2006, and that such information document were not found seized from premises of assessee during search. Assessee responded before Ld.Pr.CIT as under:

"It is evident from your above statement that the information about the cheque and cash payment in purchase of the properties was

available before Your Honour only through our letter dated 15/11/2016 but not during the course of search. Such information or document were not found and seized in the premises of the Appellant. When there is no such document or evidence was not found during the course of search then the assessment which has been completed and which has not been abetted. The Assessing Officer has no jurisdiction to interfere

the completed assessment u/s 153A of the Income Tax Act, 1961.

The Karnataka High Court. in case of CIT Vs Lancy Constructions 380 ITR 168 held that any incriminating evidence found during the course of search is a pre condition to enable the Assessing Officer to interfere in the completed assessment u/s 153A of the Income Tax Act, 1961. In view of the above stated judgment, Delhi and Bombay High Court judgment which are supporting the view of the Karnataka High Court judgment, the addition on account of section 40A(3), the information regarding this made available during the course of assessment cannot be made basis for the addition in the order u/s 143(3) r.w.s 153C r.w.s 153A of the Income Tax Act, 1961.

Further the' Bombay High Court in case of CIT Vs Continental Ware Housing Corporation 374 ITR 645 held that no addition can be made where there was pending assessment, if no incriminating materials found during the search. The similar view of taken by the Bombay High Court is case of CIT Vs Gurinder Singh 386 ITR 483. The ITAT Pune in Leelavati Vijaykumar Kotecha Vs ACIT ITA No. 1294 to 1297/PUN/2016, wherein addition u/s 68 was agated, the Pune ITAT in view of the Bombay High Court judgment set aside the order of the Assessing Officer passed u/s 153A of the Income Tax Act, 1961.

2. The Delhi Tribunal in case of Lord Krishna Dwellers (P) Ltd. Vs DCITITA No. 5294/DEL/2013 and 2403/DEL/2014 stated that "the transactions found in the sale deeds are duly recorded in the regular books of account of the assessee. The Assessing Officer has not pointed out any defect in the said transactions and also Assessing Officer has neither doubted the genuineness of the transaction nor he has doubted the identity of the payees. Hence-mechanical invocation of provisions of section 40A(3) could not be mechanically. The intention behind the provision of section 40A(3) of the Income Tax Act, 1961 has to be looked into.

Section 40A(3) was inserted by the Finance Act, 1968 with the object of curbing the expenditure in cash and to counter tax evasion. The CBDT Circular No 6P dated 6.7.1968 reiterates this view that this provision is designed to counter evasion of a tax through claims for expenditure shown to have been incurred in cash with a view to frustrating proper investigation by the

department as to the identity of the payee and reasonableness of the payment.,.

Explanation 2 to Section 263 of the Income Tax Act, 1961 states that 'For the purposes of this section, it/s 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."

In view of the said explanation as for clause a and also as stated by Your Honour in the show cause notice, the order passed without making inquiries or verification which should have been made. In the Appellant's case, in view of the Karnataka High Court judgment in case of CIT Vs Lancy Constructions 380 ITR 168, the scope of the addition is restricted only to make additions on the basis of the incriminating materials/documents found during the course of search. Hence, the Assessing Officer adopted and followed the Jurisdictional High Court judgment and passed the order without making general disallowances such as u/s 40A(3), 40(a)(ia) of the Income Tax act, 1961 which could have been made in order passed u/s 143(3) and 147 of the Income. Tax Act, 1961. Such order is not an erroneous order as he has followed the Jurisdictional High Court judgment.

4. In CIT Vs Parmanand M Patel (2005) 278 ITR 3 (Guj) held that it is well settled that once an appeal has been preferred against an order of assessment, the entire assessment is open before the appellate authority. The appellate authority is entitled to do all that the Assessing Officer could have done. The powers of the appellate authority are co-extensive and co-terminus with the powers of the assessing authority. It is equally well settled that the CIT could have not exercise revisional jurisdiction qua proceedings before an appellate authority. The order of assessment does not have any independent existence and stands merged with the order of the appellate authority." Since the order of the Assessing Officer is merged with the order of the CIT(A), in all respect and for all issues, then CIT has no jurisdiction to revise the order u/s 263 of the Income Tax Act, 1961. II

5. Section 153D states that 'No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of [sub-section (1) of] section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 1538, except with the prior approval of the Joint Commissioner.

[Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the [Principal Commissioner or] Commissioner under sub-section (12) of section 144BA.]"

In view of the above scenario and also evaluating the proposition led down in Madras and Karnataka High Court in case of Laxmi Jewellery Vs DCIT 252 ITR 712 Madras and Rishabchand Bhansali Vs DCIT 267 ITR 577 Karnataka cited in the context of Section 158BG of the Income Tax Act, 1961. The order passed by the Assessing Officer after the approval of Joint Commissioner is not an, erroneous order. Hence, the said order of the Assessing Officer passed u/S 153A of the Income Tax Act, 1961 cannot be subject to revision U/s 263 of the Income Tax Act, 1961.

In view of the above submission, the order of the Assessing Officer is not erroneous and not exigible for revision u/s 263 of the Income Tax Act, 1961.

II. Without prejudice to our submission substantiating that the order passed by the A.O for assessment 'year 2011-12 to 2014-15 are not erroneous, as the said orders are not exigible for revision u/s 263.

(i) As stated by Your Honour in the show cause notices major payments were made through cheque and others through cash. The payment in cash more than Rs.20,000/- might have been paid on banking holiday or after banking hours. Such cash payments are falls under the ambit of Rule GDD(j) of Income Tax Rules, 1962. The said payments cannot be exigible u/s 40A(3) and also such payments might have been paid by, 'the assessee by cash during the business expediency. Due to paucity of time the assessee could not able to provide the date and time of payment before Your Honour, as Your Honour directed us to file reply within four days of the receipt of show cause notice.

ii. The Hon'ble I.T.A,T, Delhi Bench in case of Prime Infra Developers Pvt Ltd Vs I.T.O in ITA No.7144/Del/2017 dated 27-06-2018 held that 'It was noted that assessee-company had made advance payment for purchase of various land to farmers as a token money for execution Of deal on Sunday, i.e., day which was public holiday for banks. see-company had no option but to make immediate payment due to business expediency and thus

covered by proviso to section 40A(3). Payment was made on 0510812012, i.e., 'Sunday' which was not disputed by AO as well as CIT (A) and rule 6DD(j) specifically provides exception for disallowance under section 40A(3) on day one, which banks were closed, Payments were made to farmers for purchase of their agricultural land and payments were duly supported by various documents in form of conveyance deed, etc. Once the transactions were considered genuine and bona fide, then same were taken out of purview of sect/on 40A(3)./ [The copy of judgment is enclosed herewith].

The Hon'ble Delhi Tribunal by holding as above, relied on the following judgments:

- 1. Sri Laxmi Satranarayana Oil Mills vs. CIT 367 ITR 200 (T & AP)*
- 2. Marigold Merchandise (P) Ltd. in ITA No.5170/Del/2014 dated 1110912017*
- 3. Harshila Chordia vs. ITO 298 ITR 349 (Raj)*

And also, the assessee relied on the judgment of High Court of Delhi in case of R.C. Goyal Vs. CIT in ITA N6.636 of 2012.

The above said judgments are squarely applicable to the facts of the Assessee's case.

In view of the above submission Your Honour is requested to drop the proceedings initiated u/s 263.”

15. Thereafter, on 26/03/2019, Ld.Pr. CIT passed impugned order by observing as under:

“7. I have considered the submissions of the assessee and duly gone through the records available and facts of the case, as also the legal position in this regard.

8. At the outset, the fact that the cash payments were made in acquiring the lands and such payments in arriving at the business income is established on record and there is no dispute whatsoever by the assessee in this regard. It is also a fact that the impugned cash payments prima facie attract the provisions of section 40A(3) of the Act, wherever the same exceeds Rs.20000/-, subject to other conditions laid down therein. It is also a fact that the AO has failed to examine the applicability of the said provisions despite the fact that the basic information as to the details of cash payments is available on record. In the normal circumstances any such omission or failure on the part of the AC, makes the assessment order erroneous, which is likely to result in loss of revenue and therefore, such order is prejudicial to the interests of revenue also. The assessee has contended that in view of the Hon'ble Karnataka High Courts order in the case of M/s Lancy Constructions, the AG is barred from examining such issues and making disallowances in the assessment u/s 153A of the Act and therefore, there is no error committed by the AG in this regard requiring revision u/s 263 of the Act. The proposition laid out by the assessee is examined by the Hon'ble

Karnataka High Court once again the recent order dated 8th January 2019 in the case of PCIT (Central) vs GMR energy Ltd in ITA nos.358/359/360 of 2018 wherein it is held as under :

'5. Learned counsel for the Revenue contends that the Tribunal has committed an error in relying on the judgment in Lan.cys case, He contends that the Hon'ble Court in the case of CAIVARA HOUSING DEVELOPMENT COMPANY

V/s. DCIT reported in 274 CTR 122 (KARNA7AXA) has laid down the law with regard to the same. We have considered the said judgment. At para-10 of the said Order, it is narrated as follows:

"Para 10 - :.....The condition precedent for application of Section 153A is there should be a search under Section 132. Initiation of proceedings under Section 15311 is not dependent on any undisclosed income being unearthed during such search.

6. Therefore., the position of law is quite clear. The Tribunal was of the view that the latest judgment in the case of COMMISSIONER OF INCOME TAX V/S. LANCY CONSTRUCTIONS reported in 2016tczxrann.com 264 (K4RNATAKA) was valid since it is the latest judgment. We have considered the said judgment. Therein the Hon'ble High Court held in para 6, as follows:

"Para 6 -Merely because a search is conducted in the premises of the assessee, would not entitle the Revenue to initiate the process of reassessment, for which there is a separate procedure prescribed in the statute. It is only when. the conditions prescribed for reassessment are fulfilled that a concluded assessment can be reopened.

7. On considering the same, we are of the considered view that the reasons assigned by the Tribunal are erroneous. Firstly, the judgment reported in CANARA HOUSING DEVELOPMENT COMPANY was not even considered in Lancy Construction's case. Secondly, Lancy's case was dismissed at the stage of admission without even a notice to the Assessee. The High Court in the case of LANCY CONSTRUCTIONS, was of the view that no substantial question of law would arise for consideration in the appeal. Therefore, in the absence of any substantial question of law, the question of admitting the appeal would be inappropriate. A judgement of the court becomes binding only when a question arises for consideration, is contested by both sides and thereafter findings are recorded by the Court. None of these conditions have been fulfilled. There is no notice issued to the other side. No question of law has been determined. The appeal was dismissed, as being bereft of any substantial question of law. Therefore, the judgment reported in Lancy's case cannot be said to be applicable in law or that it is binding for any reason whatsoever. The reliance placed by the Tribunal on the judgment in Lancy's case is misplaced. The judgment in Lancy's case does not render the true position in law. It cannot be considered as a precedent.

9. In view of the above, Lancy constructions order is no more a good law and the Karnataka High Courts order in the case of Canara Housing holds fort as on date, which allows the AO to consider all such incomes in the assessment u/s 153A, which otherwise arise from the original return/original assessment u/s 143(3). Therefore, the AO is duty bound to

examine the issue relating to applicability of provisions of section 40A(3) of the Act in the given circumstances. Accordingly, failure on the part of the AO to do so, makes the order erroneous. Secondly, the argument that the assessment order got merged with the CIT(A) order on account of assessee's appeal and therefore the PCIT has no jurisdiction to take up revision proceedings is not a correct proposition that the issue under consideration wa not part of the proceedings before CIT(A). The law is clear on this issue that proceedings u/s 263 can always be taken up on matters which are not subject matter of appeal. The merger of the assessment order with that of the CIT(A) order is only to the extent of issues raised in the assessment order and not beyond.

10. *As regards the various case laws cited by the assessee, the decisions in those cases were rendered having regard to the facts of the said cases and not otherwise: All the said decisions are duly considered and noted that the issue in the said cases is whether the provisions of section 40A(3) are correctly applied in the given set of facts, whereas in the present case, the AO has neither collected any facts nor conducted any enquiry and therefore never examined the issue in the light of the applicability of the provisions of section 40A(3). Such lack of enquiry makes the assessment order erroneous and prejudicial to the interest of revenue. It is for the .AO to collect the facts, give an opportunity to the assessee, examine whether any circumstances exist calling for exception to the 0A(3) provisions u/r 6DDJ and to apply the correct position of law thereafter. There is absolute failure on the part of the AO in this regard and it is such failure which calls for revision of the assessment order u/s 263 of the Act.*

11. *In view of the above facts and circumstances of the case, I am satisfied that the Explanation (2) of Section 263 is clearly attracted in this case as the order is passed without making inquiries or verification which should have been made and hence it has made the assessment order passed not only erroneous but also prejudicial to the interests of revenue. Accordingly, the impugned assessment order is set aside with a direction to the Assessing Officer to make requisite inquiries and proper verification with regard to the issues mentioned above and redo the assessment de-novo after due consideration of the facts and law in this regard. The assessee is at liberty to adduce the facts as deemed relevant before the assessing officer at the time of assessment proceedings in consequence to this order and the Assessing officer shall allow the assessee adequate opportunity of being heard and to make relevant submissions.”*

16. Aggrieved by direction issued by Ld.Pr.CIT, assessee filed appeal before this *Tribunal*.

17. At the outset, Ld.AR submitted that, Additional Ground may be considered, as it goes to the root cause of impugned order. He submitted that, reason stated by Ld.Pr.CIT, forms part of clause (a) of Explanation 2 to section 263 (1) of the Act, which was inserted by finance act 2015 w.e.f. 01/06/2015. Ld. A.R. took us through Explanation 2 that reads as under:

Explanation 1.....

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.*

18. Ld.AR vide written submission submitted that, as per clause (a) of *Explanation 2* to Section 263(1) of Income Tax Act, 1961, order passed by Ld.AO shall be deemed to be erroneous in so far as prejudice to the interest of the revenue, if in opinion of LD.Pr.CIT, "*the order is passed without making an enquiry or verification which should have been made*".

19. He submitted that, *Explanation 2* is applicable from 01/06/2015 and in assessee's case, assessment years involved are 2011-12, 2012-13, 2013-14 & 2014-15. He thus submitted

that Explanation 2 is not applicable. It was submitted that for lack of proper enquiry or verification by Ld.AO while farming assessment, based on information available on record, cannot be considered as erroneous in so far as it is prejudicial to the interest of revenue. He thus submitted that, even on this score Ld.Pr.CIT has no jurisdiction to revise the orders in present case for A.Y 2011-12 to 2014-15 Ld.AR thus prayed for annulling orders of Ld.Pr.CIT, passed u/s 263 of Income Tax Act, 1961 dated 26/03/2019 for all years under consideration.

20. He placed reliance on following decisions in support of his claim:

- *CIT Vs Lancy Constructions 383 ITR 168 Karnataka High Court*
- *CIT Vs Continental Ware Housing Corporation 374 ITR 645 Bombay High Court*
- *CIT Vs Gurinder Singh 386 ITR 483 Bombay High Court*
- *CIT Vs Kabul Chawla 380 ITR 573 Delhi High Court*
- *Raju 3 Soomaney Vs ACIT in ITA No.347114um/2014 Mumbai ITAT*
- *Kolkata ITAT 'C' Bench in case of Krishna Kumar Singhania Vs Dy. CIT LT(SS) Appeal No. 104 to 112 (Kol) of 2017 author of judgment Sri. N.V. Vasudevan 3M & M.*
- *Indore ITAT in case of Omprakash Gupta Vs ACIT IT(SS)A.No.277 to 281Ind/2017, 283 to 287Ind/2017*
- *Delhi Bench ITAT in case of ACIT Vs SMC Power Generation Ltd in ITA No.33951Del/2015 CO No.4361Del/2015*
- *Mumbai ITAT 'E' Bench in case of Dy.CIT Vs Sopariwala Exports in ITA No.3037, 3038, 3040 and 3077/Mum/2014*
- *ITAT Amritsar Bench, Jalandhar Camp in case of Sanjana Mittal Vs Dy CIT in ITA No.487/Asr/2018*

21. On the contrary, Ld.Standing Counsel appearing for Department submitted that, in case of *Malabar Industrial Co. Ltd. vs. CIT* reported in (2000) 243 ITR 83, Hon'ble Supreme Court held that, there must be two conditions, namely order of assessment is erroneous, and that, the order of assessment is prejudicial to the interests of Revenue, which must be satisfied before Ld.Pr.CIT invoked his powers under Section 263 of the Act. Ld.Standing Counsel appearing for Department submitted that, assessing officer while passing assessment orders for all years under consideration did not verify huge expenditure made in cash by assessee towards purchase of land. While supporting the order of review by Ld.Pr.CIT, Ld.Standing Counsel submitted that, even though assessee filed some details in the form of chart revealing manner in which sale consideration was paid, which includes payment made by cheque as well as in cash, Ld.AO failed to enquire applicability of section 40A(3) of the Act in respect of payments made in cash for years under consideration. Ld.Standing Counsel thus submitted that, the Assessing Officer did not apply his mind to the specific issue picked up by Ld.Pr.CIT in 263 proceedings.

22. Ld.Standing Counsel submitted that, additional ground raised by assessee does not have any relevance in present facts of the case. He submitted that, if powers of Ld.Pr.CIT to review an assessment order in which no enquiry was carried out by assessing officer, is construed to be available from 01/06/2015, then all proceedings initiated by Ld.Pr.CIT prior to the

amendment on similar situation will have to be considered as null and void. Referring to principals laid down by *Hon'ble Supreme Court* in case of *Malabar Industries (supra)*, and various other decisions, under sec.264(1) Ld.Standing Counsel submitted that, assessment passed prior to 1/6/2015 could be considered as erroneous and prejudicial to the interest of revenue, where no enquiry is made by Ld.AO. He submitted that insertion of Explanation 2 is merely clarification to sec.264(1).

23. He thus vehemently supported impugned order by submitting that, Ld.AO in years under consideration did not verify/enquire payments made in cash, claimed as expenditure by assessee.

We have perused submissions advanced by both sides in light of records placed before us.

24. Decisions relied by Ld.AR is not in the context of applicability of Explanation 2.

Explanation 2 was inserted by the Finance Act, 2015, w.e.f 01/06/2015. *Explanation 2* sets out, what orders passed by Assessing Officer constitute orders, which are erroneous, in so far as they are prejudicial to the interest of Revenue. We have perused Explanatory notes to Memorandum of Objects to the Finance Bill, 2015, reported in (2015) 371 ITR 233 (St). It has been mentioned that, issue of what constitutes assessment orders, "erroneous and prejudicial to the revenue", is a contentious one and *Explanation 2* was introduced to clarify,

what constitutes an erroneous order that is prejudicial to the revenue.

At this juncture, we agree with argument advanced by Ld.Standing Counsel that if interpretation advanced by Ld.AR is accepted, all decisions passed by Hon'ble *High Courts* across the country and Hon'ble *Supreme Courts*, upholding orders passed under section 263 for no enquiry, will have to be considered redundant. This cannot be the intention of legislature. In our opinion, *Eplanation 2* is clarificatory in nature, as it expressly specifies circumstances under which Ld.Pr.CIT could invoke section 263. Provisions of Section 263 was considered by *Hon'ble Supreme Court* in case of *Malabar Industrial Co. Ltd. v. CIT* (supra). It was held by *Hon'ble Supreme Court* that the phrase 'prejudicial to the interests of the revenue', has to be read in conjunction with an erroneous order passed by Assessing Officer and every loss of revenue as a consequence of such order of the Assessing Officer has be treated as prejudicial to the interest of revenue. At this juncture we also refer to decisions of *Hon'ble Supreme Court* in case of *Ram Pyari Devi Sagar Vs. CIT* reported in (1968) 67 ITR 84 and *Taradevi Agarwal Vs. CIT* reported in (1973) 88 ITR 323, wherein, it is held that, mere failure to make enquiries would make the assessment order erroneous and prejudicial to interest of revenue. These principles laid down in aforesaid decision were reiterated by *Hon'ble Supreme Court* in '*CIT v. Max India Ltd.* reported in 295 ITR 282 and recently in '*Ultratech Cement Ltd. & Ors. Vs. State of*

Rajasthan & Ors. in Civil Appeal No.2773/2020 decided on 17/07/2020.

Accordingly, we do not find any merit in additional ground raised by assessee and the same is dismissed.

25. On merits of the case, Ld.AR placed reliance on following decisions vide paper book filed on 24/09/2020 before this Tribunal:

- a. *CIT Vs Lancy Constructions* 383 ITR 168 Karnataka High Court
- b. *CIT Vs Continental Ware Housing Corporation* 374 ITR 645 Bombay High Court
- c. *CIT Vs Gurinder Singh* 386 ITR 483 Bombay High Court
- d. *CIT Vs Kabul Chawla* 380 ITR 573 Delhi High Court
- e. *Raju J Soomaney Vs ACIT* in ITA No.347114um/2014 Mumbai ITAT
- f. *Kolkata ITAT 'C' Bench* in case of *Krishna Kumar Singhania Vs Dy. CIT LT(SS) Appeal No. 104 to 112 (Kol) of 2017* author of judgment Sri. N.V. Vasudevan 3M & M.
- g. *Indore ITAT* in case of *Omprakash Gupta Vs ACIT IT(SS)A.No.277 to 2811Ind/2017, 283 to 2871Ind/2017*
- h. *Delhi Bench ITAT* in case of *ACIT Vs SMC Power Generation Ltd* in ITA No.33951Del/2015 CO No.4361Del/2015
- i. *Mumbai ITAT 'E' Bench* in case of *Dy.CIT Vs Sopariwala Exports* in ITA No.3037, 3038, 3040 and 3077/Mum/2014
 - j. *ITAT Amritsar Bench, Jalandhar Camp* in case of *Sanjana Mittal Vs Dy CIT* in ITA No.487/Asr/2018 J
 - k. *Prime Infra Developers Pvt Ltd Vs ITO* in ITA No.7144/Del/2017 dated 27-06-2018
 - l. *Sri Laxmi Satranarayana Oil Mills vs. CIT* 367 ITR 200 (T & AP)
 - m. *Marigold Merchandise (P) Ltd. in ITA No.5170/Del/2014* dated 11/09/2017
 - n. *Harshila Chordia vs. ITO* 298 ITR 349 (Raj)

26. Ld.AR has also relied on decisions reproduced in para 20 hereinabove in while discussing the legal issue.

27. On the contrary, Ld.Standing Counsel for revenue submitted that all these decisions relied upon by Ld.AR are in context of 153A/153C proceedings, wherein additions were made by assessing officer in a concluded assessment without there

being seized materials to support. He submitted that, ratio laid down by *Hon'ble High Court* and various coordinate benches of this *Tribunal* in above referred decisions does not have any bearing on the facts of present case. Ld.Standing Counsel submitted that reliance is placed by Ld.AR on *CIT vs Lancy construction (supra)* passed by *Hon'ble Karnataka High Court*. He further submitted that, *Hon'ble Karnataka High Court* in (*GMR Energy Ltd.*) in *ITA No. 358-360 of 2018 by order dated 08/01/2019* held that, view taken by coordinate bench of *Karnataka High Court* in *Lancy construction (supra)* is without considering decision in case of *Canara Housing Development Company reported in 62 taxmann.com 650*. *Hon'ble Karnataka High Court*, held the law expressed in *Lancy construction (supra)* case is no more a good law. He thus submitted that the ratio cannot be followed pursuant to view taken by *Hon'ble Karnataka High Court* in case of *GMR energy (supra)*.

28. On perusal of decisions relied, we note that, facts are not similar to that of assessee. Most of these decisions(at sl.no. (a) to (i) refers to proceedings under section 153A of the Act, where there was no seized material based on which, certain additions were made in an unabated assessment. These decisions do not consider situation of no enquiry by Ld.AO on any issue.

29. In case of *M/s Rajeesh exports Ltd vs principals CIT (supra)*, relied by Ld.AR, in identical situation this *Tribunal* placed reliance on decision of *Hon'ble Karnataka High Court* in case of *CIT vs Lancy constructions reported in 237 taxman 728*.

Ld.Standing Counsel for revenue brought to our notice that decision of *Hon'ble Karnataka High Court* in case of *CIT vs Lancy Constructions (supra)* is no longer held to be a good law by subsequent bench of *Hon'ble Karnataka High Court* in case of *CIT vs GMR Energy Ltd.* (Supra). Be that as it may, we note that, even in case of *Rajeesh exports Ltd vs Ld.Pr.CIT(supra)* there is a categorical observation by this *Tribunal* that, Ld. AO in original assessment prior to search had adjudicated this issue. In the present facts of the case Ld.AR has not brought anything on record to establish any verification/enquiries by Ld.AO on the issue of huge cash payments for years under consideration, either in sec. 143(3) r.w.s 153A proceedings or original assessment order passed by Ld.AO u/s143(3) of the Act.

30. In the present facts of the case, provisions of 263 are invoked by Ld.Pr.CIT alleging that, no enquiry/verification was conducted by Ld.AO, in respect of expenditure incurred in cash and applicability of provisions of section 40A(3), is discernible from assessment records.

31. Further in case of *H. Nagaraja vs CIT (supra)* relied by Ld.AR, this *Tribunal* quashed proceedings under section 263, as it was a case of inadequate enquiry by Ld.AO on alleged issues therein. In facts before us, Ld.Pr.CIT initiated proceedings under section 263, wherein no enquiry was conducted by Ld.AO, as was discerned by him from assessment records.

32. In decision relied on by Ld.AR of *Hon'ble Bombay High Court* in case of *CIT vs Slum Rehabilitation Authority (supra)*, *Hon'ble*

Court considered the issue in case of trust, wherein, facts were that, assessee therein challenged revision order before *Mumbai Tribunal* and *Mumbai Tribunal* allowed appeal on the ground of merger, as well as on the ground that the order of assessment could not be stated to be prejudicial to the interest of the revenue since assessing officer rejected assessee's claim of exemption under section 11 of the Act, may not be with reference to section 2 (15) of the Act.

33. In the present facts of the case, applicability of principle of merger do not arise since Ld.AO had not considered the issue of expenditure made in cash by assessee and applicability of section 40A (3) of the Act u/s 143(3) r.w.s 153A. On an appeal by assessee before Ld.CIT (A), we note that assessee challenged only disallowances made by Ld.AO, under the head capital gains.

34. *Hon'ble Supreme Court* in *Malabar Industrial Co. Ltd. v. CIT* (supra) held that:

"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind."

35. Further *Hon'ble Delhi High Court* in the case of *CIT v. Sunbeam Auto Ltd.*, reported in [\(2010\) 189 Taxman 436](#) has held that;

"The Assessing Officer in the assessment order is not required to give a detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see whether there was application of mind before allowing the expenditure in question. If there was any inquiry, even inadequate, that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Income-tax Act 1961, merely because he has a different opinion in the matter. It is only in cases of lack of inquiry that such a course of action would be open."

36. In the instant case, Ld.Pr.CIT on perusal of assessment records held that Ld.AO, did not make any inquiries or called for any information/evidences in respect of such huge expenditure in cash, and that assessment order; do not reveal that, Ld.AO considered all aspects of the case, including huge expenditure incurred by assessee in cash. Even before us, Ld.AR could not establish the fact that, any query was raised and/or enquiries conducted by way of documentary evidences on this aspect. Therefore in our view, Ld.AO failed to apply his mind to this issue and therefore order passed by him was erroneous insofar as it was prejudicial to the interests of the revenue. We therefore do not find any infirmity in the order passed by Pr.CIT and the same is upheld.

Accordingly grounds raised by assessee stands dismissed for asst. year 2011-12.

37. The decision based on discussion above shall apply *mutatis mutandis* to Asst. Years 2012-13, 2013-14 and 2014-15, as facts are identical and grounds alleged by assessee on merits are similar.

In the result appeals filed by assessee for asst. year 2011-12 to 2014-15 stands dismissed.

Order pronounced in the open court on 20th Oct, 2020.

Sd/-
(A.K GARODIA)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 20th Oct, 2020.

/Vms/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar, ITAT, Bangalore.

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-10-2020		Sr.PS
3.	Draft proposed & placed before the second member	-10-2020		JM/AM
4.	Draft discussed/approved by Second Member.	-10-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-10-2020		Sr.PS/PS
6.	Kept for pronouncement on	-10-2020		Sr.PS
7.	Date of uploading the order on Website	-10-2020		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-10-2020		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS