IN THE INCOME TAX APPELLATE TRIBUNAL
"B" Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Amit Shukla (JM)

I.T.A. No. 2690/Mum/2016
(Assessment Year 2007-08)
I.T.A. No. 2691/Mum/2016
(Assessment Year 2008-09)

Shri Narayan Tatu Rane 9/301, "E"Wing Atuar Park 5th Road Ganga Estate Chembur East Mumbai-400 071.	Vs.	ITO Ward 27(1)(1) Mumbai
(Appellant)		(Respondent)

PAN No.AACPR3658M

Assessee by	Dr. P. Daniel
Department by	Shri N.P. Singh
Date of Hearing	3.5.2016
Date of Pronouncement	6.5.2016

O R D E R

Per Bench :-

Both the appeals filed by the assessee are directed against the common order dated 29-03-2016 passed by Ld Pr. CIT-27, Mumbai u/s 263 of the Act and they relate to the assessment years 2007-08 and 2008-09. The assessee is challenging the validity of the revision orders passed by Ld CIT.

2. The facts relating to the issue are stated in brief. The assessee originally filed returns of income for both the years under consideration u/s 139(1) of the Act. Subsequently information was received from Bangalore office of Income tax that they had carried out search and seizure operations in the case of M/s R.N.S Infrastructure Ltd on 16.02.2012 and during the course of the search, certain documents indicating payments made to persons holding public office

were seized. One of the said documents contained certain payment details under the heading "Rane C M". Based on this information, the assessing officer reopened the assessment of both the years under consideration by issuing notices u/s 148 of the Act. The AO completed the assessments u/s 143(3) r.w.s. 147 of the Act, accepting the explanations of the assessee that the said incriminating document do not relate to him. Thus the assessing officer completed the assessment without making any addition, i.e., accepting the income returned by the assessee.

3. On examination of the assessment records, the Ld Pr. CIT took the view that the assessing officer did not examine and verify the issues by correlating the evidences found during the course of search conducted in the hands of R.N.S. Infrastructure. Accordingly he held that the assessment orders passed for both the years under consideration is erroneous and prejudicial to the interests of revenue. The relevant observations made by Ld Pr. CIT in this regard are extracted below, for the sake of convenience.

> "2……On perusal of records, the fo11owing issues were noticed in the aforesaid order u/s 143(3) r.w.s 147 of the income-tax Act, 1961 dated 31.03.2015 for the A.Y. 2007-08:-
>
> (1) The case was reopened for scrutiny to verify information received from the Investigation Wing during the course of search operations in the case of' M/s. R.N. S. Infrastructure Ltd. on 16/02/2012. During the course of the search operations, certain documents were found and *seized,* which indicated the payments made to several persons holding public office. As per the information received, Shri Naravan Tatu Rane is one of the recipients, which is reflected as per the notings given below:

Rane - CM		
16. 11 .2006	10,00.000/-	NAVEEN
09.03.2007	25,00,000/	KUDAL

The notings have been made in a diary seized from the chamber of Shri Suni D. Sahasrabuddhe. Vice-President, Finance. R.N.S. Infrastructure Ltd. and inventorised as A/RNS IL/ 17 dated 16/02/2012 (page 9).

(2) On further scrutiny of the above mentioned sheet, the following points are notable which prove the fact that payments made to "Rane-CM" is to the same person Shri Narayan T. Rane, who is the Ex-Chief Minister of Maharashtra, and who has received the above payments

i. An amount of 50 lakhs is shown to have been paid on 10/4/1999 against which birthday is mentioned. The date of birth of Shri Narayan Rane, Ex Chief-Minister of Maharashtra is 10thApril, 1952 which is the same as mentioned above.

ii. An amount of 50 lacs is shown to have been paid in March, 1999 (end of Mar). It is hereby pointed out that Shri Narayan T. Rane became the Chief Minister of Maharashtra in February, 1999.

iii. Further, there are following entries on the same page in date-wise sequence:

3rd week September, 1999	50,00,000	Kudal
4th week September, 1999	50,00,000	Kudal
7/4/2003	5,00,000	Panch Elect. Vijaya
29/12/07	10,00,000	Election, Kudal

Similarly for the A.Y. 2008-09, similar payments were noticed as mentioned hereunder:

Rane - CM		
14.3.2008	50,00,000/-	NAVEEN
14.3.2008	17,00,000/-	SITE

The Assessing Officer did not examine and verify the above issues while completing the assessment u/s 143(3) r.w.s 147 of the Act for both the A.Ys. and accepted the assessee's explanation that he did not have any transactions with M/s. R. N. S. Infrastructure Ltd.

or Shri Sunil D. Sahastrabudhe, Vice President, Finance and had not received any cash from him and assessed the total income at Rs. 21,18,945 and Rs.13,68,103/- respectively without examining and correlating the evidences found in the course of the search, which resulted in incorrect computation of income for both the years as the amounts shown to be received were not been added to the total income by the Assessing Officer. For the said reasons, the assessment order made by the Assessing Officer was found to be erroneous in so far as it was prejudicial to the interest of the revenue. Hence, a notice u/s 263 of the Act dated 1.3.2016 was issued to the assessee as the order was found to be erroneous & prejudicial to the interest of the revenue within the meaning of section 263 of the Income-tax Act. 1961 and the assessee was allowed an opportunity of being heard and to show cause as to why an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment within the meaning of Section 263 of the Income Tax Act, 1961 may not be passed in his case. Similar notice was issued for A.Y. 2008-09 as well with minor modifications."

4. The assessee contended before the Ld Pr. CIT that the assessing officer has reopened the assessment of both the years for the specific purpose of assessing the income, if any, noticed in the incriminating documents. The assessee had objected to the reopening, but the AO has overruled the same by giving detailed reasoning. The assessing officer issued notice u/s 142(1) of the Act calling for various details. The assessee replied to all the queries raised by the assessing officer by giving a detailed reply, wherein the assessee had denied the entire transactions noted down in the incriminating documents. It was further submitted that the assessing officer was satisfied with the explanations and replies given by the assessee and accordingly he did not make any addition. The assessee further contended that the assessing officer has applied his mind on the incriminating documents, correctly appreciated the facts and has come to reasoned conclusion that no addition is required to be made to the income of the assessee. It was also submitted that the revision proceedings have been initiated for examining the very same issue on which the assessments were reopened. Accordingly it was contended that the revision proceedings initiated

u/s 263 of the Act is not valid in law. The assessee relied upon following case law in support of his contentions:-

(i) CIT Vs. Gabriel India Ltd 9203 ITR 108)(Bom)
(ii) CIT Vs. Sunbeam Auto Ltd (332 ITR 167)(Delhi)
(iii) CIT Vs. Vikas Polymers (341 ITR 537)(Delhi)
(iv) CIT Vs. Arvind Jeweller (259 ITR 502)(Guj)

5. The Ld Pr. CIT was not convinced with the contentions of the assessee and accordingly held that the assessment order is erroneous and prejudicial to the interests of revenue. Accordingly he set aside the assessment orders of both the years under consideration and directed the AO to redo the assessment de novo. The Ld Pr. CIT also observed that the AO may pass the assessment order within six months under the guidance and after obtaining prior approval of the Jt. Commissioner of Income tax. For the sake of convenience, we extract below the operative portion of the revision order passed by Ld Pr. CIT.

> "7. I have considered the facts of the case, the assessment records, show cause notice issued ande appellant's submission and the case laws relied upon by the assessee. In CIT Vs. Gabriel India Ltd 203 ITR 108, 114-115, 117 (Bom), the assessee had claimed a deduction of Rs.99,326 under the head plant 're-lay-out expenses' which was allowed by the Assessing Officer while the CIT was of the view that it was a capital expenditure. Hon'ble Bombay High Court held that the Commissioner could not be vested with the power to re-examine the accounts and determine the income himself at a higher figure. The claim was allowed by the Assessing Officer on being satisfied with the explanation of the assessee and such decision cannot be held to be 'erroneous' simply because in his order he did not make an elaborate discussion in that regard. The decision is distinguishable on facts as in the instant case the issue is not the nature of expenditure being capital or revenue but failure to conduct inquiries and examine the evidence found in the course of the search in which transactions relating to the assessee were mentioned. Hon'ble Delhi High Court in the case of CIT vs. Sunbeam Auto Ltd 332 ITR 167, 182 also held that the opinion of the Assessing Officer in treating the revenue expenditure was plausible and thus, there was no material before the Commissioner to vary that opinion and ask for fresh inquiry. In the case of the assessee, on the other hand, on examination of records as they exist now, it is evident that the Assessing Officer did not appreciate the full facts of the case and vital evidences

being the date of birth, the date of assumption of the public office and the constitutency etc. which all linked the transactions in the seized document with the assessee and thereby passed an order which is now held to be erroneous and prejudicial to the interests of the revenue. Hence, the decision is not applicable to the facts of the case of the assessee. In CIT Vs. Vikas Polymers 341 ITR 537, 548, Hon'ble Delhi High Court held that the order of the Assessing Officer might be erroneous but how it was prejudicial to the interest of revenue had not been stated by the Commissioner as he did not deal with the explanation given by the assessee in the course of the proceedings under section 263. This decision also being distinguishable, is not applicable to the facts of the case of the assessee. Thus, all the decisions relied upon by the Ld A.R being distinguishable on facts are not applicable to the facts of the case of the assessee.

8. The objection of the assessee that the order is no erroneous for the purpose of section 263 of the Act is also not borne out from the facts of the case. The relevant facts of these cases relied upon are not similar to the facts of the case of the assessee as the Assessing Officer has not examined and verified the information with reference to the assessee. Secondly, the assessee has maintained silence on the issue in para no.3(2) of the show cause notice wherein it was mentioned that the payments were made to "Rane CM" who is the same person as Shri Narayan T Rane, the Ex-Chief Minister of Maharashtra. Kudal is the assembly constituency of Shri Narayan Rane which is also mentioned in the first two entries. The last entry indicates that the amount was paid to Shri Narayan Rane for the election expenses. Further, it is also observed that no notices u/s 133(6) were issued to M/s R.N.S Infrastructure Pvt Ltd and neither was any opportunity given to the assessee to cross examine the said person Shri Sunil Sahasrabudhe (VP – Finance) on the basis of whose statement the case was reopened. Merely on the basis of the assessee's submissions and arguments, the proceedings u/s 148 were completed. It is, therefore, evident that the information was not verified properly. Thus it is held that the requisite inquiry and verification was not carried out before passing the orders u/s 143(3) r.w.s. 147 of the Act as the Assessing Officer did not make necessary enquiry on this issue and accordingly, in view of clause (a) of Explanation 2 below sub section (1) of section 263 of the Income tax Act, 1961, the order passed by the Assessing Officer is deemed to be erroneous and prejudicial to the interests of revenue."

6. Aggrieved by the common order passed by Ld CIT, the assessee has filed these appeals before us.

7. The Ld A.R submitted that the assessing officer had reopened the assessment of both the years under consideration on the basis of the incriminating documents found during the course of search conducted in the hands of M/s R.N.S infrastructure in order to assess the income escaped in the hands of the assessee. He submitted that the objection raised by the assessee for reopening of the assessment was overruled by the AO. Thereafter the assessee has cooperated fully with the assessing officer by furnishing necessary details and has strongly denied the transactions noted down in the document. The Ld A.R submitted that the assessing officer was satisfied with the explanations given by the assessee and hence did not make any addition. He submitted that the assessing officer has taken a possible view after due application of mind and hence the Ld Pr. CIT was not justified in holding that the assessment orders were erroneous, since the assessing officer did not make enquiries in the way the Ld CIT thought that it should have been done. He submitted that the Ld CIT has initiated the revision proceedings in respect of the very same issue, since he was of the view that the assessing officer should have conducted the enquiries in a particular manner and the enquiries made by the AO were not sufficient. Thus, the Ld CIT has initiated revision proceedings in order to carry out fishing and roving enquiries in the matters which have already been concluded, which is not permissible u/s 263 of the Act as held in the case of CIT Vs. Gabriel India Ltd (203 ITR 108)(Bom). He further submitted the Ld CIT is not entitled to initiate revision proceedings on the ground that the enquiry was not conducted in the manner thought by him. In this regard, he placed reliance on the decision rendered by the Hon'ble jurisdictional Bombay High Court in the case of CIT Vs. Development Credit Bank Ltd (2010)(323 ITR 206)(Bom). He further submitted that the provisions of sec. 263 do not visualise a case of substitution of the judgement of the Commissioner for that of the Income tax Officer who passed the order unless the decision is held to be

erroneous, as held by Hob'le Delhi High Court in the case of CIT Vs. Sunbeam Auto Ltd (2011)(332 ITR 167).

8. He further contended that the assessment order cannot be considered to be prejudicial to the interests of the revenue, if the assessing officer has taken one of the possible views. He further submitted that the Ld Pr.CIT has not shown as to how the entries made in the incriminating document could translate into income in the hands of the assessee. He further submitted that the impugned incriminating document was a dumb document and even the official of M/s R.N.S. Infrastructure also did not implicate the assessee, when specific questions were put to him about the impugned incrimating document. Accordingly he submitted that the assessment order cannot be considered to be prejudicial to the interest of the revenue. He further submitted that the Ld Pr. CIT has also not shown as to how the assessment order is erroneous one. He further submitted that the Ld CIT can initiate revision proceedings only if both the conditions specified in sec. 263 of the Act is satisfied, viz., the assessment order was erroneous and it was prejudicial to the interest of the revenue. For this proposition he placed strong reliance on the decisions rendered by Hon'ble Supreme Court in the case of Malabar Industrial Co. (243 ITR 83)(SC) and CIT Vs. Max India Ltd (295 ITR 282)(SC).

9. On merits, the ld A.R submitted that the impugned incriminating document was a dumb document and hence the tax authorities could not place any reliance on it. In this regard, he placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Central Bureau of Investigation vs. V.C.Shukla (1998)(3 Supreme Court Cases 410) and more particularly to the following observations made by Hon'ble Apex Court:-

"37. In Beni Vs. Bisan Dayal (AIR 1925 Nag 445: 89 IC 371), it was observed that entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another....."

10. On the contrary, the Ld D.R submitted the assessing officer has simply extracted the explanations furnished by the assessee in the assessment order and he did not give his conclusion on the submissions made by the assessee. Accordingly he contended that the assessing officer has not taken any view at all and hence there is no justification in contending that the assessing officer has taken a possible view. He submitted that the incriminating document contained sufficient entries to indicate that the payment was made to the assessee only. He submitted that a part of sum was given to the assessee on his birth day and further, a reference is there as "Rane C M", which is nothing but "Rane Chief Minister". He submitted that the assessee has not rebutted this inference before the assessing officer. He further submitted that there is a reference to a place called "Kudal" and the said place happened to be the assembly constituency from where the assessee had won elections. He submitted that the assessing officer did not make enquires about these facts, which create link between the assessee and the incriminating document. He submitted that all these factual aspects clearly point out that the entries made in the impugned incriminating document are factually correct. Further he did not make any enquiries with M/s R.N.S Infrastructure, from whom the document was seized. He further submitted that the assessing officer should have made necessary enquires and

should have provided opportunity to the assessee to cross examine them. Accordingly he submitted that the assessing officer has completed the assessment upon incorrect presumption of facts and without making proper enquiries and without taking a view. The Ld D.R placed reliance on the decision rendered by Hon'ble Madras High Court in the case of CIT Vs. Amalgamations Ltd (238 ITR 963) to contend that the incorrect assumption of facts renders the assessment order as erroneous. He further relied upon the decision rendered by Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd (supra) to contend that non-application of mind on the part of the AO on the facts collected would render the assessment order erroneous. He further submitted that omission on the part of the assessing officer to consider various factual aspects such as the date of birth of the assessee, date of assumption of public officer, constituency form which he won election etc. has led the AO to frame the assessment in an arbitrary manner and hence the said assessment order is liable for revision as held in the case of CIT Vs. V.P. Agarwal (68 Taxman 236)(All). He further submitted that the Explanation 2 given under sec. 263(1), which was inserted by the Finance Act 2015 w.e.f. 1.6.2015, provides that the order passed without making inquiries or verification which should have been made shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue. He submitted that the said Explanation 2 is clarificatory in nature and hence the same should be applied retrospectively.

11. In the rejoinder, the Ld A.R submitted that the assessing officer has made due enquiries with regard to the impugned incriminating document, since the AO has reopened the assessment to examine the same only. He submitted that the alleged incriminating document was a dumb document and even the person from whom it was seized, did not implicate the assessee at all in the statement taken from him u/s 132(4) of the Act. He submitted that the assessing officer

has accepted the explanations of the assessee by considering all these factual details and hence he did not make any addition. He further submitted that the assessment orders of the two years under consideration have been passed by two different assessing officers and both have taken the view that no addition was called for on the basis of the impugned incriminating document. The Ld A.R further submitted that the assessing officer has carried out necessary enquiries with regard to the impugned incriminating documents and was satisfied with the explanations given by the assessee. He submitted that, even though the Ld Pr. CIT was not satisfied with the scope of enquiry conducted by the AO, yet the Ld CIT himself has not conducted any enquiry to prove that the entries made in the document could be linked to the assessee, particularly in view of the fact that the official of M/s RNS infrastructure did not implicate the assessee in the statement taken with regard to the impugned document. He further submitted that the Ld CIT did not show as to how the entries made in the document could be considered as income in the hands of the assessee, even if it is taken for a moment that the entries made in the document did relate to the assessee. Accordingly the Ld A.R submitted that the Ld CIT has not brought on record any corroborative material to show that the said document relates to the assessee and further there is any income element therein causing prejudicial to the interests of the revenue. Accordingly he submitted that the Ld CIT could not have taken support from the Explanation 2 inserted by Finance Act, 2015 prospectively. He submitted that the Ld Pr. CIT has thrust upon the assessing officer his views through this revision orders and hence the same are not sustainable.

12. We have heard rival contentions and perused the record. Before going into the merits of the issue, we would like to discuss about the legal position with regard to the power of Learned CIT to invoke revision proceedings under

section 263 of the Act. The scope of revision proceedings initiated under section 263 of the Act was considered by Hon'ble Bombay High Court, in the case of Grasim Industries Ltd. V CIT (321 ITR 92) by taking into account the law laid down by the Hon'ble Supreme Court. The relevant observations are extracted below:

> "Section 263 of the Income-tax Act, 1961 empowers the Commissioner to call for and examine the record of any proceedings under the 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, to pass an order upon hearing the assessee and after an enquiry as is necessary, enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. The key words that are used by section 263 are that the order must be considered by the Commissioner to be "erroneous in so far as it is prejudicial to the interests of the Revenue". This provision has been interpreted by the Supreme Court in several judgments to which it is now necessary to turn. In Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83, the Supreme Court held that the provision "cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer" and "it is only when an order is erroneous that the section will be attracted". The Supreme Court held that an incorrect assumption of fact or an incorrect application of law, will satisfy the requirement of the order being erroneous. An order passed in violation of the principles of natural justice or without application of mind, would be an order falling in that category. The expression "prejudicial to the interests of the Revenue", the Supreme Court held, it is of wide import and is not confined to a loss of tax. What is prejudicial to the interest of the Revenue is explained in the judgment of the Supreme Court (headnote) :
>
> "The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."
>
> The principle which has been laid down in Malabar Industrial Co. Ltd. [2000] 243 ITR 83 (SC) has been followed and explained in a subsequent judgment of the Supreme Court in CIT v. Max India Ltd. [2007] 295 ITR 282."

13. In the instant case, the assessing officer has reopened the assessment only to assess the income, if any, that has escaped the assessment for the years under consideration. The assessments have been reopened only on the basis of the impugned incriminating document found at the premises of M/s RNS infrastructure. We also notice that the search team has recorded a statement from VP – Finance of M/s RNS Infrastructure Ltd u/s 132(4) of the Act on 16.12.2012 and he was confronted with the impugned incriminating document. In the reply given by the VP – Finance, he has stated that the entries were made by him on the basis of information given to him over phone from its Kudal Maharashtra branch. With regard to the entry made as "Rane-CM" also, he simply stated that the information was received from the branch. Thus, we notice that in none of the answers given, the VP- finance has implicated the assessee. In spite of these facts, the investigation wing has passed on these documents and information to the assessing officer and accordingly he has also reopened the assessments of the two years under consideration.

14. The assessing officer has also furnished to the assessee the reasons for reopening of the assessments and the assessee has also objected to the reopening. The assessing officer has specifically addressed those objections and has also rejected the same. In the notice issued u/s 142(1) of the Act, the assessing officer has asked the assessee to clarify about the impugned incriminating document and also to give explanations as to why the amounts mentioned therein should not be added back to the total income of the assessee. In response thereto, the assessee has filed a reply, wherein he has denied any connection with the incriminating document. The assessing officer was satisfied with the said explanations and accordingly did not make any addition to the total income in both the years.

15. However, the Ld Pr. CIT has taken the view that the assessing officer has completed the assessments without making proper enquiries with regard to the incriminating documents. According to Ld Pr. CIT, the AO should have made further enquiries in this matter. Accordingly he has passed the impugned revision order.

16. We have noticed earlier that the Ld Pr. CIT can revised the order only if it is shown that the assessment order is erroneous in so far as prejudicial to the interests of the revenue. The question as to when an order can be termed as "erroneous" was explained by Hon'ble Bombay High Court in the case of Gabriel India Ltd (supra) as under:-

> "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 the 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 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 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 a 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 the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been impsed"

The Hon'ble High Court has considered the definitions given to the words "erroneous", "erroneous assessment" and "erroneous judgment" in Black's Law Dictionary and and accordingly held that an order cannot be termed as erroneous unless it is not in accordance with law. An order can be termed as "erroneous" only if it is not in accordance with the law.

17. The Hon'ble Delhi High Court has also followed the above said view in the case of CIT Vs. Sunbeam Auto Ltd (2011)(332 ITR 167). The Hon'ble Delhi High Court has also extracted following observations made by the Tribunal:-

> "38. Still further, the Hon'ble Supreme Court in Malabar Industrial Co. (2000) 243 ITR 83 has held that when two views are possible and the Assessing Officer has taken one of the possible view, then the order cannot be held to be prejudicial to the interest of the Revenue. Since the Commissioner of Income tax could not come to a definite finding that the expenditure in question was a capital expenditure in the proceedings under section 263, in our opinion, the order of the assessing officer could not be held to be erroneous."

18. In the case of Nagesh Knitwears P Ltd (2012)(345 ITR 135), the Hon'ble Delhi High Court has elucidated and explained the scope of the provisions of sec. 263 of the Act and the same has been extracted by the Delhi High court in the case of CIT Vs. Goetze (India) Ltd (361 ITR 505) as under:-

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

and mean the Commissioner of Income tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question…."

Similar view has been expressed by Hon'ble Madras High Court in the case of CIT Vs. Amalgamations Ltd (238 ITR 963).

19. The law interpreted by the High Courts makes it clear that the Ld Pr. CIT, before holding an order to be erroneous, should have conducted necessary enquiries or verification in order to show that the finding given by the assessing officer is erroneous, the Ld Pr. CIT should have shown that the view taken by the AO is unsustainable in law. In the instant case, the Ld Pr. CIT has failed to do so and has simply expressed the view that the assessing officer should have conducted enquiry in a particular manner as desired by him. Such a course of action of the Ld Pr. CIT is not in accordance with the mandate of the provisions of sec. 263 of the Act. The Ld Pr. CIT has taken support of the newly inserted Explanation 2(a) to sec. 263 of the Act. Even though there is a doubt as to whether the said explanation, which was inserted by Finance Act 2015 w.e.f. 1.4.2015, would be applicable to the year under consideration, yet we are of the view that the said Explanation cannot be said to have over ridden the law interpreted by Hon'ble Delhi High Court, referred above. If that be the case, then the Ld Pr. CIT can find fault with each and every assessment order, without conducting any enquiry or verification in order to establish that the assessment order is not sustainable in law and order for revision. He can also force the AO to conduct the enquiries in the manner preferred by Ld Pr. CIT, thus prejudicing the independent application of mind of the AO. Definitely, that could not be the intention of the legislature in inserting Explanation 2 to sec. 263 of the Act, since it would lead to unending litigations and there would not be any point of finality in the legal proceedings. The Hon'ble Supreme Court has held in the case of

Parashuram Pottery Works Co. Ltd Vs. ITO (1977)(106 ITR 1) that there must be a point of finality in all legal proceedings and the stale issues should not be reactivitated beyond a particular stage and the 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.

20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provison shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquries or verification that would have been carried out by a prudent officer. Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant.

21. In the instant case, as noticed earlier, the AO has accepted the explanations of the assessee, since there is no fool proof evidence to link the

assessee with the document and M/s RNS Infrastructure Ltd, from whose hands it was seized, also did not implicate the assessee. Thus, the assessee has been expected to prove a negative fact, which is humanely not possible. No other corroborative material was available with the department to show that the explanations given by the assessee were wrong or incorrect. Under these set of facts, the AO appears to have been satisfied with the explanations given by the assessee and did not make any addition. We have noticed that the Hon'ble Supreme Court has held in the case of Central Bureau of Investigation Vs. V.C. Shukla and Others (supra) that the entries in the books of account by themselves are not sufficient to charge any person with liability. Hence, in our view, it cannot be held that the assessing officer did not carry out enquiry or verification which should have been done, since the facts and circumstances of the case and the incriminating document was not considered to be strong by the AO to implicate the assessee. Thus, we are of the view that the assessing officer has taken a plausible view in the facts and circumstances of the case. Even though the Ld Pr. CIT has drawn certain adverse inferences from the document, yet it can seen that they are debatable in nature. Further, as noticed earlier, the Ld Pr. CIT has not brought any material on record by making enquiries or verifications to substantiate his inferences. He has also not shown that the view taken by him is not sustainable in law. Thus, we are of the view that the Ld Pr. CIT has passed the impugned revision orders only to carry out fishing and roving enquiries with the objective of substituting his views with that of the AO. Hence we are of the view that the Ld Pr. CIT was not justified was not correct in law in holding that the impugned assessment orders were erroneous.

22. We have also seen that, in order to invoke the provisions of revisional proceedings, it is required to be shown that the assessment order was not only

erroneous, but also prejudicial to the interests of the revenue. At the time of hearing, it was pointed out to Ld D.R that there are references to various names such as Mumbai Naveen, Ravi Mumbai, Vijaya Mum, Sanjeev Shetty etc. Further the entries are dated from March 99 to February, 2012. Under these set of facts, a specific question was asked to Ld D.R as to how these entries can transalate into income in the hands of the assessee, since the same lists out payments made to various persons on various dates. Unless it is established that these payments can be taken as income in the hands of the assessee, they cannot be assessed in his hands. In that case, it cannot be said that these entries would cause any prejudice to the interests of the revenue, if they are not assessable in the hands of the assessee. The Ld D.R replied that these aspects require examination at the end of the assessing officer. The said stand taken by the department clearly shows that they are also not sure as to whether these entries could be considered as income in the hands of the assessee. Further, we notice that the Ld Pr. CIT has not brought on record any material to show that these amounts were paid to the assessee or on his behalf. Even if it is considered for a moment that the assessee could be linked with it, without showing that the entries noted down in the impugned document results in income in the hands of the assessee, in our considered view, it cannot be said that the assessment orders passed by the AO could be taken as prejudicial to the interests of the revenue. Accordingly we are of the view that the revision orders passed by Ld Pr. CIT falls on this ground also.

23. In view of the foregoing discussions, we are of the view that the Ld Pr. CIT has failed to show that the impugned assessment orders passed by the assessing officer were not only erroneous but also prejudicial to the interests of the revenue. It is a well established proposition that both the above said conditions are required to be satisfied before invoking the revisional powers

given u/s 263 of the Act. In the instant case, we are of the view that the Ld Pr. CIT has failed to show that both the conditions exist in the instant case. Accordingly we find merit in the contentions of the assessee that the revision orders passed by Ld Pr. CIT for the years under consideration are beyond the scope of sec. 263 and hence not valid. Accordingly we set aside the revision orders passed by Ld CIT for the two years under consideration.

24. In the result, both the appeals filed by the assessee are allowed.

Order has been pronounced in the Open Court on 6.5.2016.

Sd/-	Sd/-
(AMIT SHUKLA)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 6/5/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS