

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH `E' NEW DELHI

BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER
AND
SHRI CHANDRAMOHAN GARG, JUDICIAL MEMBER

I.T.A.No.5701/Del/2014
Asstt.Year: 2009-10

Maya Gupta,
52/79, Ramjas Road,
Karol Bagh,
New Delhi.
(PAN: AAMPG7019F)
(Appellant)

vs Commissioner of Income Tax,
Central-II, New Delhi.

(Respondent)

Appellant by: Dr. Rakesh Gupta, Shri Ashwani Taneja, Advocate

Respondent by : Shri Gunjan Prashad, CIT DR

Date of Hearing: 29.06.2015

Date of pronouncement: 08/07/2015

ORDER

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

This appeal has been filed by the assessee against the order of CIT(A), Central-II, New Delhi dated 06.03.2014 for AY 2009-10 passed u/s 263 of the Income Tax Act, 1961 (for short the Act) in respect of assessment order dated 28.12.2011 passed u/s 143(3) r/w section 153 of the Act. The grounds raised by the assessee read as under:-

“1. That on facts and in law the Commissioner of Income Tax, Central-II, New Delhi {hereinafter referred to as the "CIT"} erred in assuming jurisdiction u/s 263 of the Act.

2. That on facts and in law the CIT erred in holding/observing that the original order of assessment dated 28th December 2011 is erroneous /prejudicial to the interest of revenue on following counts:

a. Allowing deduction u/s 24(b) of the Income Tax Act.

b. Not considering for taxation alleged income of Rs 1 cr being alleged unaccounted payment for purchase of property no. 56/7 DB Gupta Road, Karol Bagh, New Delhi.

c. Not making a reference to valuation cell for verifying the sale consideration of other properties sold by the appellant during the year under consideration.

c. Failure to conduct necessary / proper enquiry and verification on issues mentioned above.

3. That on facts and in law the CIT erred in assuming jurisdiction to pass revisional order u/s 263 on issues, which were subject matter of appeal.

4. That on facts and in law the CIT erred in setting aside the order of assessment dated 28th December 2011 for a de novo adjudication on issues mentioned above.”

2. Briefly stated the facts giving rise to this appeal are that a search and seizure operation was carried out in Mahesh Mehta group of cases on 30.6.2009. During the course of search at the residential premises at BA-17A, DDA Flats, Phase-I, Ashok Vihar, Delhi, certain documents belonging to the assessee were found and seized. On the basis of said documents so seized and after recording satisfaction, proceedings u/s 153C of the Act were initiated and the notice u/s 153C of the Act was issued on 21.6.2011. In response to the same, the assessee had filed a letter stating that the assessee has already filed her return which may be treated as filed u/s 153C of the Act. The assessment u/s 143(3) r/w section 153C of the Act was completed on 28.12.2011 by the

AO, Central Circle-3, New Delhi at the returned income of Rs.1,48,26,520 which was declared in the original return filed on 25.3.2010.

3. Subsequently, on examination of assessment records, the CIT observed that the assessment order passed by the AO dated 28.12.2011 (supra) is erroneous as well as prejudicial to the interest of revenue to the extent that assessment was completed without proper examination, inquiry and verification on three issues viz. claim of interest expenses amounting to Rs.6,36,111/-, issue of transaction of Rs.1 crore with regard to property purchased by the assessee jointly with her husband from M/s Honest Estates Pvt. Ltd. and issue of capital gain out of which Rs.1 crore was diverted from capital gain to income from other sources.

4. The assessee was asked to show cause as to why in the light of facts contained in the show cause notice dated 18.2.2014, assessment order dated 28.12.2011 may not be considered as erroneous and prejudicial to the interest of revenue as per provisions of section 263 of the Act.

5. In response to the said notice, the assessee filed written submissions through the AR vide letter dated 3.3.2014. After considering the submissions and reply of the assessee, the CIT held that the AO has failed to conduct proper inquiry and verification on the issues contained in the show cause notice. The CIT finally held that the assessment order passed u/s 143(3) r/w section 153C of the Act dated 28.12.2011 is erroneous and prejudicial to the interest of revenue

and the CIT invoking provisions of section 263 of the Act set aside assessment order with the direction to the AO to frame the assessment order after proper examination, inquiry and verification on all three issues. Being aggrieved by the above revision order of CIT u/s 263 of the Act, the assessee is before this Tribunal in this appeal with the grounds as reproduced hereinabove.

6. We have heard arguments of both the sides and carefully perused relevant material placed on record, inter alia original assessment order dated 28.12.2011 (supra), impugned order of the CIT passed u/s 263 of the Act, assessee's paper book spread over 205 pages and judgements and citations relied by both the parties.

7. Ld. counsel of the assessee submitted that the only issue in this appeal is against the assumption of jurisdiction u/s 263 of the Act by the ld. CIT, which according to the appellant assessee was not in accordance with law and valid. Ld. counsel of the assessee has also filed written submissions which are being reproduced below for the sake of brevity and clarity in our observations and conclusion:-

“SMT. MAYA GUPTA

The only issue in this appeal is against the assumption of jurisdiction u/s 263 by Ld. CIT, which according to the appellant, was not in accordance with law.

Ld. CIT assumed jurisdiction u/s 263 on the following grounds on which AO during the course of assessment proceeding has applied his mind and has taken a conscious decision which can not be said to be erroneous merely because

Ld. CIT holds otherwise in view of umpteen number of judicial decisions including the decisions which say that absence of enquiry and not inadequate enquiry can be the ground of holding an order as erroneous.

Proceeding under section 263

PB 188-190 is the copy of notice u/s 263 giving the show cause in respect of three issues.

PB 191-194 is the reply furnished by the assessee in response to notice u/s 263 submitting inter alia that there was no error nor any prejudice.

Scope of section 263 - Revising authority feeling inquiry inadequate -Revising authority must make enquiry and show that assessment order was erroneous-Revising authority has no power to remand and direct Assessing Officer to conduct enquiry-income-tax Act, 1961, s. 263 -DIT vs. Jyoti Foundation 357 ITR 388 (Delhi)

*Lack of proper enquiry-in cases where there is inadequate enquiry by the AO and not lack of enquiry, CIT must give and record a finding that the order / enquiry made is erroneous before passing an order under s. 263-Matter cannot be remitted for a fresh decision to the AO to conduct further enquiries without a finding that the order is erroneous-**ITO vs. DG Housing Projects Ltd. 74 DTR 153 (Del.)***

Lack of proper enquiry-Assessee having given complete details of the provisions of warranty in response to the query raised by the AO during the course of assessment proceedings and regarding claim of deduction under s. 35DDA AO accepted the assessee's claim after examining the same, order under s. 263 passed by the CIT cannot be sustained -CIT vs. Hero Auto Ltd. 74 DTR 164 (Del.)

*Power of commissioner -Assessment after enquiry-No error in order-Order cannot be revised on ground enquiry should have been more detailed-income-tax Act, 1961, s. 263-**CIT vs. Hindustan Marketing And Advertising Co. Ltd. 341ITR 180 (Delhi)***

Revision-Commissioner conceding Assessing Officer making inquiries, eliciting replies before treating expenses as revenue expenditure-Not a case of lack of inquiry- Department accepting accounting practice followed by assessee for past years and future-Revision questioning accounting practice not justified-CIT vs. Sunbeam Auto Ltd. 332 ITR 167 (Delhi)

243 ITR 83(SC)

Following pleadings and evidences would support the case of the appellant:-

1) Deduction on account of interest was allowed u/s 24 against the 'income from house property' though requisite certificate in terms of section 24(b) was not filed by the assessee.

PB 6-10 is the copy of computation of income, acknowledgment of return for A.Y. 2009-10, in which the assessee has shown deduction u/s 24 from the income from house property'.

PB 11-14 is the copy of questionnaire dated 30.06.2011 issued by Ld. A.O. during the course of assessment proceeding to show that Ld A.O. asked question relating to details of all properties and investment made, utilization of money, loans taken.

PB 15-16 is the copy of assessee's submissions dated 15.11.2011 filed to Ld. A.O. during the course of assessment submitting the copy of bank accounts, statements of assets and liabilities, confirmation of loan.

PB 152-153 is further submissions dated 02.12.2011 filed to Ld. A.O. during the course of assessment proceeding submitting the copy of bank accounts, and further submitting about the loan from HDFC bank and about the payment of interest on housing loan.

PB 156-157 is further submission of the assessee dated 05.12.2011 filed during the course of assessment proceeding again submitting about the claim of the interest of housing loan.

PB 158 is the copy of HDFC bank statement showing the amount of interest.

2) On the issue of Rs. 2 Crores as alleged unaccounted payment

PB 183-187 is the copy of assessment order passed u/s 143(3) I 153C with prior approval of Additional CIT, and a plain reading of this order would clearly show that the issue of Rs. 2 Crore was clearly discussed and mind was applied and a conscious decision was taken and capital gain income was brought to tax and so much so nature of part of the capital gain was changed from capital gain to income from other sources.

PB 1-5 is the copy of the statement recorded of the husband of the appellant during the course of survey in which the husband of the appellant was clearly asked about the details of various properties and consideration received and also about the purchase of Property No. 56/7, DB Gupta Road, Karol Bag, New Delhi and sale of Property No. 783/161, DB Gupta Road, Karol Bag, New Delhi in which the appellant's husband clearly stated that amount of Rs. 2 Crore to be paid by the assessee's husband was never paid but were retained by Mr. Mehta to be set off against the payment of Rs. 2 Crore, which he was to make.

It is important to submit that this statement was taken **on oath** and was considered by Ld. A.O. vide passing the impugned assessment order.

PB 6-10 is the copy of computation of income, acknowledgment of return for A. Y. 2009-10, in which the assessee has shown calculation of capital gain on the sale of Property No. 7821161, DB Gupta Road, New Delhi and other properties

PB 11-14 is the copy of questionnaire dated 30.06.2011 issued by Ld. A.O. during the course of assessment proceeding to show that Ld A.O. asked question relating to search of Mr. Mehta, details of all bank accounts of the assessee, details of all properties and investment made, utilization of money, and is specifically about the purchase of Property No. 56/7, D.B. Gupta Road, Karol Bag, New Delhi involving the alleged unaccounted payment of Rs. 2 Crore

PB 15-16 is the copy of assessee's submissions dated 15.11.2011 filed to Ld. A.O. during the course of assessment submitting the copy of bank accounts, statements of assets and

liabilities, note on the property purchased i.e. 56/7, DB Gupta Road, fact of sale of three properties and furnishing sale deed

PB 17-73, 87-126 are the copies of purchase/sale deed of both the properties 56/7, 783/161 DB Gupta Road, Karol Bag New Delhi

PB 152-153 is further submissions dated 02.12.2011 filed to Ld. A.O. during the course of assessment proceeding submitting the copy of bank accounts, affidavit of the assessee in respect of additional income in respect of sale of Property No. 783/161, DB Gupta Road, Karol Bag new Delhi, & further submitting about the loan from HDFC bank and about the payment of interest on housing loan.

PB 154-155 is the copy of affidavit of the assessee filed during the course of assessment proceeding before Ld. A.O., inter alia, submitting that undisclosed investment of Rs. 2 Crore made by the assessee in Purchase of 56/7, DB Gupta Road, Karol Bag, New Delhi was retained by Mr. Mehta against the unaccounted sale consideration of Rs. 2 Crore to be received in respect of sale of Property No. 7831161, DB Gupta Road, Karol Bag, New Delhi

PB 156-157 is further submission of the assessee dated 05.12.2011 filed during the course of assessment proceeding again submitting about the adjustment of Rs. 2 Crore made by Mr. Mehta.

PB 181-182 is the copy of order sheet entries showing the proceedings before Ld. A.O. and specific query regarding the adjustment of Rs. 2 Crore

3) Sale of other properties

PB 183-187 is the copy of assessment order passed u/s 143(3) / 153C with prior approval of Additional CIT, and a plain reading of this order would clearly show that the issue of Rs. 2 Crore was clearly discussed and mind by applied and a decision was taken and capital gain income was brought to tax and so much so nature of part of the capital gain was changed from capital gain to income from other sources.

PB 6-10 is the copy of computation of income, acknowledgment of return for A.Y. 2009-10, in which the assessee has shown calculation of capital gain on the sale of

Property No. 7821161, DB Gupta Road, New Delhi and other properties

PB 11-14 is the copy of questionnaire dated 30.06.2011 issued by Ld. A.O. during the course of assessment proceeding to show that Ld A.O. asked question relating to all bank accounts of the assessee, details of all properties and investment made, utilization of money.

PB 15-16 is the copy of assessee's submissions dated 15.11.2011 filed to Ld. A.O. during the course of assessment submitting the copy of bank accounts, statements of assets and liabilities, note on the property purchased i.e. 56/7, DB Gupta Road, confirmation of loan fact of sale of three properties and furnishing sale deeds.

PB 1-5 is the copy of the statement recorded of the husband of the appellant during the course of survey in which the husband of the appellant was clearly asked about the details of various properties and consideration received.

It is important to submit that this statement was taken on oath and was considered by Ld. A.O. vide passing the impugned assessment order.

PB 74-86 and PB 127-151 are the copies of sale deeds in respect of two other properties sold by the assessee filed to Ld. A.O. during the assessment proceedings.

PB 159, 160, 161 are the copies of summons dated 25.11.2011 sent by Ld. A.O. to the buyers of Property No. 7831160 and 783/162.

PB 162-163, 164-180 is the copy of reply dated 01.12.2011 filed by Mrs. Anita Chabra to Ld. A.O. in response to the summon confirming the purchase of Property No. 7831160, DB Gupta Road, New Delhi and giving various details / source and filing the copies of bank statements, her PPF account, PNB salary account, copy of income tax return filed by her etc.

PB 181-182 is the copy of order sheet entries showing the proceedings before Ld. A.O. and specific query regarding the adjustment of Rs. 2 Crore

There is no such mandate in law that a property be referred for valuation for determining the sale consideration and following are the decisions which say that capital gains is to be calculated with reference to the actual sale consideration, and not on the basis of valuation put by the valuation officer.

*- Valuation of property-Reference of Departmental Valuation Officer for valuation of investment -Additional solely on basis of valuation report-Not permissible-Income tax Act, 1961-**CIT vs. Lahsa Construction P. Ltd. 357ITR 671 (Delhi)***

- S. 69B-Unexplained investment-Investment in property-No evidence that extra consideration received-Addition to income based solely on report of District Valuation Officer -Not valid- CIT vs. Sadhna Gupta 352 ITR 595 (Delhi)

4) The impugned assessment order was passed with prior approval of an higher authority i.e. Additional Commissioner in terms of section 153D and therefore in view of the following judicial decisions, jurisdiction could not be assumed u/s 263

Goyal Iron & Steel Works (India) vs. Commissioner of Income Tax (2002) 76 TTJ(Agra) 578*

***Mehta Cut Piece Cloth House vs. Income Tax Officer** (1985) 23 TT J (CHD) 211*

Income Tax Officer vs. Arora Alloys Ltd. (2011) 12 ITR (Trib) 263 (Chd)

8. Ld. counsel of the assessee during argument before us reiterated and elaborated the above written submissions and submitted that the issue of claim of deduction on account of interest was allowed u/s 24 of the Act against the “income from house property” and was disputed by the CIT by observing that the same is not allowable as per third proviso to section 24B of the Act as the assessee had not furnished required certificate from the party or parties to whom this amount of interest was paid. Ld. counsel took us through paper book page no. 6 to 16 and 152 to 158 of the assessee and submitted that as per computation

of income and acknowledgement of return, it is clear that the assessee has shown deduction u/s 24 of the Act from the income from house property. Ld. counsel further submitted that in response to questionnaire dated 30.6.2011 issued by the AO, the assessee submitted detailed reply on 15.11.2011 along with copies of bank account, statement of assets and liabilities and confirmation of loan. Ld. counsel has also drawn our attention towards paper book page no. 152 to 158 and submitted that in further submissions dated 2.12.2011, the assessee filed copies of bank accounts about the loan from HDFC Bank and payment of interest on housing loan and also copy of HDFC Bank showing the amount of interest paid against housing loan by the assessee. Ld. counsel submitted that on the issue of interest claimed, the assessee properly explained and established the claim as per provisions of the Act which was wrongly disputed by the CIT and explanation in this regard was not properly considered by the CIT.

9. Ld. counsel of the assessee, on the issue of unaccounted payment of Rs. 2 crore has drawn our attention towards paper book page no. 1 to 73, 87 to 126, 152 to 157 and 181-182 and submitted that the impugned assessment order passed u/s 143(3) r/w section 153C of the Act was passed with prior approval of ACIT. On plain reading of this order, it is clear that the issue of Rs. 2 crore alleged unaccounted payment was clearly discussed with due application of mind and a conscious decision was taken while bringing capital gain income to tax and the nature of part of capital gain was changed from capital gain to

income from other sources on justified basis. Ld. counsel further pointed out in the statement recorded during the course of survey, the husband of the assessee was asked about the details of various properties and consideration received and also about the purchase or property wherein the assessee's husband clearly stated that the amount of Rs.2 crore to be paid by the assessee's husband was never paid but was retained by Mr. Mehta to be set off against the payment of Rs.2 crore which he was to make. Ld. counsel vehemently contended that this statement of assessee's husband was recorded on oath and was properly considered by the AO while passing the impugned assessment order. Ld. counsel submitted that during the course of assessment proceedings, the assessee submitted calculation of capital gain on sale of property No. 782/161, DB Gupta Road, New Delhi, supported by details of all bank accounts of the assessee, details of all properties and investment made, utilisation of money and specially about the purchase of property no. 56/7, DB Gupta Road, Karol Bagh, New Delhi involving the alleged unaccounted payment of Rs. 2 crore. Ld. counsel vehemently contended that in the written submission dated 2.12.2011, the assessee filed copies of bank account, affidavit of the assessee in respect of additional income from sale of property no. 783/161 DB Gupta Road, Karol Bagh, New Delhi and also the details of loan from HDFC Bank and payment of interest on housing loan. Ld. counsel finally submitted that the issue of transaction of Rs.2 crore was properly considered and adjudicated by the AO as

per facts and circumstances of the case after due application of mind and proper appreciation of the submission and evidence of the assessee in this regard.

10. In respect of last issue of sale consideration of other properties, ld. counsel of the assessee has further drawn our attention towards relevant pages of paper book of the assessee and submitted that in the impugned assessment order which was passed by the AO with prior approval of the ACIT, it is clear that the issue of Rs.2 crore was properly discussed and mind was applied, therefore, a conscious decision was taken and capital gain income was brought to tax and so much so, the nature of part of capital gain was changed from capital gain to income from other sources. Ld. counsel of the assessee has further pointed out that in reply to questionnaire dated 30.6.2011, the assessee submitted copies of all bank accounts, details of all properties and investment made and utilization of money with detailed submissions dated 15.11.2011 filed to the AO. Ld. counsel also submitted that the statement of assessee's husband recorded during the course of survey was also considered while adjudicating this issue. The ld. counsel also pointed out that in reply to summons dated 25.11.2011, Mrs. Anita Chabra filed reply on 1.12.2011 confirming the purchase of property no. 783/160, CB Gupta Road, New Delhi along with various relevant details, source of funds supported by copies of bank statement, PPF account, PNB salary account and copy of income tax return filed by her. Therefore, the impugned assessment order was passed after due application of mind on this issue and the

CIT was not justified in assuming jurisdiction u/s 263 of the Act for revising the assessment order and directing the AO to re-frame the assessment after verification and examination of the return of the assessee.

11. Ld. DR supporting the issuance of notice and impugned order passed u/s 263 of the Act submitted that as per contents of the notice dated 18.2.2014 issued to the assessee u/s 263 of the Act, it is amply clear that the order of the AO was not only erroneous but also prejudicial to the interest of revenue because the AO failed to conduct proper inquiry in respect to three issues viz. deduction of Rs.6,36,111 which was not allowable as per third proviso to section 24(b) of the Act, the second issue of Rs. 1 crore being unaccounted cash payment on purchase of property no.56/7, Deshbandhu Gutpa Road, Karol Bagh, New Delhi was not considered for taxation and third and last issue wherein the AO completed the assessment proceedings without making any inquiries/investigation on the issue of capital gain/income accrued to the assessee along with her husband. Ld. DR elaborately took us through the contents of the notice u/s 263 of the Act (supra) and submitted that in view of ratio of the decision of Hon'ble Jurisdictional High Court of Delhi in the case of Duggal & Co. vs CIT (1996) 220 ITR 456 (Del), the CIT(A) was competent to exercise his power u/s 263 of the Act where the ITO/AO while allowing deduction for interest and on other issues omitted to inquire into the matter in a proper way.

12. Ld. DR has also drawn our attention towards operative para 5.1 to 7 of the impugned order and submitted that from the discussion therein, it is clear that the AO has failed to conduct proper inquiry and verification on all three issues raised in the notice u/s 263 of the Act. Ld. DR vehemently contended that in various judicial pronouncements, it has been held that where inquiry or verification is warranted but not done, it would certainly cause prejudice to the interest of revenue and the Commissioner shall be justified in invoking provisions of section 263 of the Act and in remanding the matter back to the AO for making such necessary inquiry. Ld. DR parted with the argument with a final submission that the AO would allow the assessee to explain his stand on all three issues during reassessment proceedings in pursuance to order u/s 263 of the Act and therefore, no prejudice would be caused to the assessee and hence action of the AO invoking provisions of section 263 of the Act may kindly be upheld.

13. Ld. counsel of the assessee placing reliance on the ratio of the decision of **Hon'ble Jurisdictional High Court of Delhi in the case of ITO vs D.G. Housing Project Ltd. (2012) 343 ITR 329 (Del)** submitted that the Commissioner cannot remand the matter for a fresh decision to the AO to conduct further inquiry without a finding that the order of the AO is erroneous as well as prejudicial to the interest of revenue and such finding of the CIT that the order is erroneous is a consideration precedent for exercise of jurisdiction u/s

263 of the Act. Ld. counsel pointed out that the compliance of third proviso to section 24 (b) of the Act is not mandatory and there is no prescribed proforma in this proviso for the certificate as required under the said proviso, therefore, copy of statement of account with HDFC Bank, Pahar Ganj account no. 3224059 in the joint name of assessee and her husband Shri Uday Kumar Vaish was itself sufficient to establish and support the claim of the assessee. Ld. counsel has also drawn our attention towards letter of HDFC Bank dated 15.3.2011 and submitted that the assessee paid full and final amount of loan along with interest which was also certified by the concerned HDFC Bank Branch and when the AO has not raised any doubt about the genuineness of the payment of interest and repayment schedule/statement of accounts with the concerned HDFC Bank branch, then it cannot be said that the AO granted deduction to the assessee without any inquiry and against the provisions of the Act.

14. Ld. counsel on the second issue of over and above payment towards purchase of property situated at 56/7, Desh Bandhu Gupta Road and sale of property situated at 783/161, Deshbandhu Gupta Road Karol Bagh submitted that the AO made detailed inquiry and after considering the reply and other relevant documents submitted by the assessee during assessment proceedings in the light of statement of assessee's husband Shri Uday Kumar Vaish recorded on 18.8.2009 u/s 133 of the Act and held that the assessee has shown a capital gain at Rs.1,40,00,057 and offered additional income of Rs.1 crore as part of

income under capital gain. Ld. counsel has further drawn our attention towards reply of the assessee dated 3.3.2014 submitted before the CIT(A) replying to the notice dated 263 of the Act which is available at pages 191-194 of the assessee's paper book and submitted that the assessee has not either diverted its head of income which she actually earned under the capital gain nor withdrawn her stand which the spouse of the assessee gave in his statement before the survey team. Ld. counsel vehemently contended that the AO in fact has not given relief of special rate of income tax on long term capital gain and taxed the same amount at maximum rate of tax and shifted Rs. 1 crore to income from other sources instead of income from capital gain which attracts higher rate of tax and this action of the AO cannot be held as erroneous and prejudicial to the interest of revenue. Ld. counsel vehemently contended that how a particular additional income declared by the assessee during survey cannot be treated and taxed twice, once under the head of capital gains and secondly under the head of income from other sources. Ld. counsel also pointed out that the assessee has already preferred an appeal against the diversion of additional income of Rs.1 crore from capital gains to income from other sources which is pending before the ITAT Delhi Benches.

15. On the third issue of allegation of the AO that the AO completed assessment without making any inquiry/investigation regarding other property transactions, the ld. counsel of the assessee has drawn our attention towards

computation of income which was filed along with return available at page 10 of assessee's paper book and submitted that the assessee calculated the short term capital gain on the sale consideration of property at 783/162, Karol Bagh, Delhi for half share. Ld. counsel further submitted that the assessee also submitted statement of short term capital gain accrued to the assessee from sale of property at 16C, Motia Khan, Pahar Ganj, another property at 783/161, Deshbandhu Gupta Road, New Delhi and third property at 8750, Motia Khan, New Delhi and offered the amount of Rs.1,40,00,057 for taxation under the head of capital gain. Ld. counsel further took us through para no. 3 of the notice u/s 263 of the Act (supra) and submitted that any addition to aforesaid four properties, CIT picked up property no. 783/160, Deshbandhu Gupta Road, Karol Bagh and 49D, MIG Flat, Motia Khan which were not sold by the assessee and these two properties were in the name of assessee's husband Shri Uday Kumar Vaish and there was no need of any inquiry in regard to these properties during the assessment proceedings of the assessee. Therefore, the third issue raised by the CIT was also not justified and order of the AO cannot be held as erroneous and prejudicial to the interest of revenue on all three counts. Ld. counsel of the assessee lastly pointed out that the AO was very cautious in framing assessment order as he considered unaccounted amount of Rs.1 crore which was accrued to the assessee from sale of property at 783/161, Deshbandhu Gupta Road, Karol Bagh and also considered unaccounted consideration of Rs. 1 crore which was paid by the assessee as unaccounted consideration towards purchase of property

at 56/7, Deshbandhu Gupta Road, Karol Bagh. Ld. counsel also pointed out that the CIT was very casual in mentioning facts in the notice issued to the assessee u/s 263 of the Act as the CIT wrongly mentioned that the assessee has purchased the property at 783/161, Deshbandhu Gupta Road, Karol Bagh which shows non-application of mind and wrong appreciation of facts by the CIT prior to invoking provisions of section 263 of the Act and issuance of notice under this provision. Ld. counsel reiterated its reply to the notice u/s 263 of the Act and parted with the argument with a last submission that the assessee offered an amount of Rs.1,40,00,057 under the head of capital gain as the source of investment but the AO segregated Rs.1 crore from this amount and taxed the same under the head of income from other sources which attracts higher tax rate, then this action of the assessee cannot be said to be erroneous and prejudicial to the interest of revenue. But on the other hand, this action of the AO imposed higher tax liability on the assessee which brings more revenue to the department.

16. On careful consideration of above submissions and vigilant and careful perusal of relevant material placed before us, at the outset, we find it appropriate to deal with legal contention of the assessee that the impugned assessment order was passed by the AO with prior approval of higher authority i.e. Addl. Commissioner in terms of section 153D of the Act and therefore in view of various judicial pronouncements and judgments, jurisdiction u/s 263 of the Act cannot be validly assumed and invoked by the CIT. To support this legal

proposition, Id. counsel of the assessee has placed reliance on the orders of the Tribunal in the case of **Goyal Iron & Steel Works (India) vs. Commissioner of Income Tax**(supra, **Mehta Cut Piece Cloth House vs. Income Tax Officer (supra)**, **Income Tax Officer vs. Arora Alloys Ltd. (supra)**).

17. Replying to the above, Id. DR has submitted that the ratio of these decisions is not applicable to the facts and circumstances of the present case and ACIT who gave approval u/s 153D of the Act for passing assessment order u/s 143(3) r/w section 153C of the Act is not equivalent to the position of CIT in the hierarchy of the department, therefore, the impugned assessment order was very well within the valid jurisdiction of the CIT for invoking provisions of section 263 of the Act.

18. On careful consideration of orders of the Tribunal as related by the Id. counsel of the assessee and provisions of section 153D of the Act and hierarchy of the income tax department, we are of the considered view that admittedly, the impugned assessment order which was demolished by the CIT by invoking provisions of section 263 of the Act was passed with prior approval of ACIT, Central Range-2, New Delhi vide F.No.153A-03-Mahesh Mehta/11-12/607 dated 28.12.11. The CIT in any terms cannot be equated with ACIT because CIT holds higher position in the hierarchy of the department. In this situation, benefit of the ratio of the orders of the Tribunal as relied by the Id. counsel of

the assessee is not available and hence legal contention of the assessee is hereby jettisoned.

19. Coming to the issue as alleged by the CIT in the notice issued to the assessee u/s 263 of the Act (supra), we note that as per third proviso to section 24(b) of the Act, no deduction shall be made under the second proviso unless the assessee furnishes certificate from the person to whom interest is payable on the capital borrowed, specifying the amount of interest payable by the assessee for the purpose of such acquisition or construction of property was conversion of the whole or in part of the capital borrowed which remains to be repaid as a new loan. Meaning thereby that for making claim u/s 24(b) of the Act, a certificate specifying the amount of interest payable by the assessee has to be submitted before the AO. From careful reading of section 24 and all three proviso attached to this provisions, we note that there is no mentioning of any proforma on which required certificate has to be given. In absence of any prescribed proforma, the amount of interest payable may be substantiated by way of furnishing a normal certificate, statement of loan account and other supportive evidence or details pertinent to payment of interest which was claimed as deduction u/s 24(b) of the Act. In the present case, the assessee furnished all required detail before the AO during assessment proceedings along with reply dated 2.12.2011 and 5.12.2011. From a reply dated 5.12.2011 we note that in para 1, the assessee has mentioned details of claim of interest and has submitted all necessary evidence in respect of

interest paid along with this reply in the form of repayment schedule/copy of the bank statement with HDFC Bank. The AO during the assessment proceedings has made inquiry in this regard and after proper and reasonable verification and evaluation of explanation and supportive evidence, submitted by the assessee on this issue, allowed deduction to the assessee. The CIT has objected the allowance of deduction on the allegation of non-furnishing of required certificate as per third proviso to section 24(b) of the Act but there is no conclusion of the CIT that the amount claimed by the assessee was either wrong or it was a bogus claim. During the proceeding u/s 263 of the Act, the assessee also furnished a letter confirming the full and final repayment of loan along with interest but it was properly considered by the CIT.

20. Under above noted facts and circumstances, we are of the view that under third proviso to section 24(b) of the Act, the assessee is required to submit a certificate for making claim of interest under this provision and there is no prescribed form of certificate. During the assessment proceedings on the specific query of the AO, the assessee furnished detailed explanation supported by repayment schedule, copy of the bank statement to substantiate its claim and the amount of interest has not been disputed either by the AO or by the CIT. In this situation, merely non-compliance of directory provisions of the Act cannot make assessment order as erroneous and prejudicial to the interest of revenue, especially when the claim of the assessee regarding interest u/s 24(b) of the Act

is accepted as genuine and no incorrectness or infirmity has been brought out by the Id. CIT or any other revenue authorities therein. If for a moment it is accepted that order is erroneous on account of required certificate but at the same time, the same cannot be held as prejudicial to the interest of the revenue as the claim of interest paid by the assessee has not been alleged as bogus or not correct or not genuine by the Id. CIT.

21. Under above noted facts and circumstances, we are inclined to note that the view taken by the AO was a reasonable and plausible view which cannot be said as unsustainable or not in accordance with law and other relevant provisions of the Act on the issue of allowability of deduction or interest paid by the assessee.

22. While considering the second issue of Rs.1 crore being unaccounted cash payment on purchase of property no. 56/7, Deshbandhu Gupta Road, Karol Bagh, New Delhi, from relevant part of the notice u/s 263 of the Act on this issue, we note that the CIT has raised and agitated this issue with following facts and observations:-

“2.2.1 In para 5.3 page no. 2 of the assessment order the AO stated that "During the course of survey Sh. Uday Kumar Vaish admitted to purchase the property jointly with his wife Smt. Maya Gupta from M/s Honest Estates Pvt. Ltd. against Rs.4.51 crore consisting of 1st Floor, 2nd Floor and 3rd Floor with its terrace/roof rights. The registry was done of Rs. 2.51 crore whereas the amount paid to Sh. Mahesh Mehta on behalf of M/s Honest Estate Pvt. Ltd. was Rs. 4.51 crore.” The same fact is repeated in a way or the other in the assessment order in para 5.4, page no. 2, in para 5.7 page no. 4. in para 5.8, page no. 4 etc. This is a clear case of concealed unaccounted transaction of Rs.1 crore (the other 1 crore shared by the assessee's husband), the source of which was not enquired & examined.

2.2.2 The assessee has furnished a statement of short term Capital Gain/ Long Term Capital Gain and accordingly arrived at a total Capital Gain of Rs. 1,40,00,057/- and offered unaccounted transaction of Rs.1 crore as part of income under

Capital Gain. The AO neither rejected the assessee's capital gain shown at Rs. 1,40,00,057/- nor he made a recomputation of the capital gain showing its afresh how he arrived 01 Rs. 40,00,057 - only but he simply took out 1 crore from the Capital Gain and placed it under the head "Income from Other Sources".

2.2.3 It is to be noted that property situated at 56/7, D.B. Gupta was sold on 17.07. 2008 to Shri Mahesh Mehta and another property situated at 783/161. DB Road was purchased from Honest Estate (P) Ltd. on 11.07.2008. The date of sale of Property is subsequent to the date of purchase of property. This fact shows that unaccounted cash payment of Rs. 2 crore on purchase of property can not be set off against unaccounted receipt on sale of property. Both transactions are with different legal entities and purchase precedes sales.

2.2.4 While there is a clear Capital Gain statement furnished by the assessee showing it or Rs. 1,40,00,057/-, the AO's action in diverting 1 crore from the capital gain to income from other sources is not justified at all.

2.2.5 Simply diverting capital gain income to "Income from other Sources" does not imply taxing the unaccounted / concealed income of Rs.1 crore represented by cash investment in property purchased. The Capital Gain declared by the assessee with proper statement in no way can be reduced or overlapped considering the facts of this case.

2.2.6 Therefore. it is apparent that the assessment order passed by the A.O. is erroneous as well as prejudicial to the interest of the revenue as Rs. 1 crore being unaccounted cash payment on purchase of property no. 56/7, DB Gupta Rodd, Karol Bagh, New Delhi was not considered for taxation. ”

23. From the copy of the assessment order passed u/s 143(3)/153C of the Act, we note that the issue of unaccounted receipt from Shri Mahesh Mehta and issue of payment of unaccounted money to M/s Honest Estate (P) Ltd. has been dealt from para no. 5 to 5.8 elaborately. From the notices of the AO dated 30.6.11 along with letter (assessee's paper book page 11 to 14), we find that during the

course of proceedings, the AO showcaused the assessee asking question relating to search of Mr. Mahesh Mehta, details of all bank accounts of the assessee, properties and investment made, utilization of money and there is a specific query about the provisions of property no. 56/7, DB Gupta Road, Karol Bagh, involving the alleged unaccounted payment of Rs.2 crore out of which Rs.1 crore pertains to the assessee. We further observe from the copy of the assessee's submissions dated 15.11.11 filed before the AO replying to the questionnaire and notice dated 30.6.11, the assessee submitted copies of bank account, statement of assets and liabilities and a detailed note on the properties purchased by the assessee and property sold during the period under consideration. In assessee's paper book page 17 to 73, we observe that the assessee jointly purchased property no. 56/7, DB Gupta Road, with her spouse from M/s Honest Estates Pvt. Ltd. wherein three separate sale deeds have been executed in favour of the assessee, first sale deed was registered on 11.7.2008 and remaining two sale deeds were registered on 17.7.2008. From sale deeds pertaining to property bearing no. 783/160, 161 & 162, DB Gupta Road, New Delhi available from pages 74 to 171 of the assessee's paper book, we note that the assessee and her husband jointly sold one property to Mrs. Anita Chhabra and her son Sitaksh Chhabra, another property to Mrs. Gurcharan Kaur and two parts of this property have been sold to Mr. Mahesh Mehta by getting registered sale deed in his favour on the same date i.e. 17.7.2008.

24. If we further analyse this issue, then we observe that as per statement of assessee's husband Shri Uday Kumar Vaish recorded u/s 133 of the Act on 18.8.2009 at the time of survey of the assessee, we note that the husband of the assessee replying to question no. 6 at page no. 4 of the statement fairly admitted that a sum of Rs. 2 crore in cash on account of part of sale consideration of property no. 783/161 was kept by Mr. Mahesh Mehta as purchase consideration of newly purchased building at 56/7, DB Gupta Road, New Delhi purchased from him i.e. Mr. Mahesh Mehta himself, he was under the impression that no capital gain was to be invoked on this amount. However, in the subsequent part of the answer, assessee's husband submitted that if this is the capital gain against his old building as a part of sale consideration, then he is ready to pay the capital gain tax on this amount subject to no penalty proceedings just to buy peace. From the statement of short term and long term capital gain filed along with the return of income available at page 10 of the assessee's paper book, we note that the assessee offered short term capital gain of Rs.4,18,200 on sale consideration of property at 783/162, Karol Bagh for half share. In the second part of this statement, we see that the assessee has offered long term capital gain accrued to her from sale consideration of three properties viz. 16C, Motia Khan, Paharganj, property no. 8750, DB Gupta Road, New Delhi amounting to Rs.1,35,81,857 and in the calculation of taxable income, income from capital gain has been shown as Rs.1,40,00,057. At this point, it is relevant to consider the contention of the assessee which were placed before the

CIT in reply dated 3.3.2014 to notice u/s 263 of the Act wherein at page 5 middle para, it has been mentioned that the purchase from different persons and sale to different persons is apparent from the sale deed but the group and dealing person is the same i.e. Mr. Mahesh Mehta for the transaction and sale of property at 783/162 and purchase of property at 56/7, DB Gupta Road through Mr. Mahesh Mehta who is the authorised director of M/s Honest Estate (P) Ltd. and he entered into property transaction with the assessee for purchase of property in individual capacity and for sale of property in the representative capacity as director of the said company. This fact and contention of the assessee has not been demolished by the CIT and without bringing out any allegation that the purchase of property and sale of property was with different persons and entities, it cannot be held that the assessee had entered into property transaction with different persons/entities. Further, as we have already noted that the sale of property no. 783/161 was made to Shri Mahesh Mehta and purchase of property no. 56/7, DB Gupta Road was also made from M/s Honest Estates (P) Ltd. in which Mr. Mahesh Mehta is a director representative of the transaction, then in totality of the facts and circumstances, especially when the sale deeds of both the transactions are registered and executed on the same date i.e. 17.7.2011, then the half share of sale consideration received by the assessee amounting to Rs. 1 crore attracts capital gain which has been offered by the assessee in the statement of long term capital gain as discussed above. We further observe that while the assessee has shown unaccounted consideration in

the statement of capital gain filed along with the return of income, then it further explains the source of unaccounted payment of consideration of purchase of property bearing no. 56/7, DG Gupta Road, hence, no addition pertaining to undisclosed investment could have been made. However, as a vigilant tax collecting authority, the AO adopted a conservative approach and deducted Rs. 1 crore from capital gain and taxed the same under the head of income from other sources which obviously attracts higher tax rate, then this action of the AO is more favourable to the revenue which cannot be held as erroneous and prejudicial to the interest of revenue.

25. At this juncture, it would be appropriate to consider the ratio of the decision of Jurisdictional High Court of Delhi in the case of CIT vs DG Housing (supra) wherein it was held that the Commissioner cannot remit the matter for a fresh decision to the AO to conduct further inquiries without a finding that the order is erroneous as a condition precedent for exercise of jurisdiction u/s 263 of the Act.

26. From operative part of the order of the CIT at para 6 page 9, we note that the CIT has held that the assessment on the issues raised in the show cause notice was made without proper examination, inquiry and verification, therefore, revisional jurisdiction u/s 263 of the Act is warranted in a case where assessment has been made without inquiry or verification. In this para, the CIT contradicts himself in the first sentence. He mentions that the assessment was

framed without proper examination, inquiry and verification whereas in the second sentence, he writes that the assessment has been made without inquiry or verification which vitiate the impugned order.

27. Coming to the third and last issue raised by the CIT in the notice and impugned order u/s 263 of the Act (supra), is related to sale of several other properties during the relevant previous year. From para 3 of the notice u/s 263 of the Act issued to the assessee, we note that the CIT has picked up six properties to substantiate this issue against the assessee. Ld. counsel of the assessee submitted that property listed at Sl. No. 2 to 6 are related to assessee's husband Shri Uday Kumar Vaish and the assessee has nothing to do with the capital gain and consideration arising therefrom. Ld. counsel further pointed out that as far as property at sl. No.1, 3, 4 & 5 are concerned, assessee was holding these properties jointly with her husband and the assessee filed statement of short term capital gain in regard to all these four properties which was properly verified, examined and accepted by the AO. Ld. counsel vehemently contended that the CIT did not peruse the statements and calculation of income filed by the assessee along with her husband and the CIT has ignored statement of capital gain filed by the assessee at the time of framing impugned notice u/s 263 of the Act as well as impugned order.

28. Replying to the above, ld. DR submitted that mere query and reply of the assessee are not sufficient to meet the requirement of proper verification and

examination of the details filed by the assessee along with return of income and merely because some details have been filed along with return of income and some queries were raised by the AO which do not amount to an adequate and proper examination of the issue. Ld. DR pointed out that there was an understatement of consideration pertaining to property at 783/161, DB Gupta Road sold to Mr. Mahesh Mehta and the AO did not consider the issue of understatement of consideration and capital gain in regard to property no. 783/160 and 783/162, therefore, the action of the CIT was quite justified and correct. Replying to the above, ld. counsel of the assessee pointed out that there was no incriminating material against the assessee regarding understatement of sale consideration and capital gain except statement of her husband Shri Uday Kumar Vaish which was recorded during the survey u/s 133 of the Act and the AO very well examined all the relevant papers and documents pertaining to income of capital gain accruing to the assessee during the relevant period, therefore, the view taken by the AO was plausible and in accordance with law because despite deep inquiry during the assessment proceedings to the sale of other properties, there was no incriminating material or allegation against the assessee which could show the understatement of consideration and capital gain by the assessee on sale of other properties.

29. On careful consideration of above submissions, we are of the view that on careful perusal of the statement of capital gain undisputedly submitted by the

assessee along with return of income, we note that the assessee has declared capital gain on properties placed at sl. No. 1, 3, 4 & 5 in para 3 page 2 of the notice u/s 263 of the Act, properties at sl. No. 2 & 6 are not in the name of assessee, therefore, we are of the considered opinion that there was no requirement of any further examination and verification with regard to these properties. From para no. 3 of the impugned notice, we note that after placing table of properties, the CIT has simply mentioned that the AO has completed the assessment without making any inquiry or investigation on this issue, therefore, it is apparent that the assessment passed by the AO is erroneous and prejudicial to the interest of revenue. In view of documents placed by the assessee before the authorities below, we note that the CIT made a list of properties sold by the assessee during the period under consideration and also included two properties which were undisputedly related to her husband Shri Uday Kumar Vaish, therefore, there was no need of any further verification and examination in regard to sale consideration and capital gain accrued therefrom. As far as capital gain arising from other four properties listed at Sl. No. 1, 3, 4 & 5 is concerned, we note that the assessee declared sale consideration and capital gain in the statement filed along with her return of income. The AO properly considered understatement of consideration and capital gain accrued to the assessee after properly considering the statement of assessee's husband Shri Uday Kumar Vaish recorded u/s 133 of the Act. We are unable to see any other incriminating material or evidence which could establish the allegation of understatement of

sale consideration and capital gain on other properties. Per contra, from the assessment order, we note that the AO took a favourable view to the revenue by placing Rs. 1 crore under the head of income from other sources instead of income from capital gains as declared by the assessee. Without making any deliberation on the merit of this action of the AO, we are of the view that decision taken by the AO cannot be held as unsustainable or not in accordance with law.

30. From operative part of the impugned order, we note that the CIT has remitted all three issues to the file of AO by holding that the AO has failed to conduct proper examination and verification on three issues. The CIT further held that in view of various judicial pronouncements, it has been held that where the inquiry or verification is warranted but not done, it would certainly cause prejudice to the revenue and the Commissioner shall be justified in remanding the matter back to the AO for making such inquiry. At this juncture, it would be appropriate to consider the ratio laid down by the Jurisdictional High Court of Delhi in the case of ITO vs DG Housing Projects Ltd. (supra), wherein it was held that the Commissioner cannot remit the matter for fresh decision to AO to conduct further inquiry without a finding that the order of the AO is erroneous because such finding that the order is erroneous is condition precedent u/s 263 of the Act.

31. The relevant operative part of this order in para 10 and 11 and relevant para 16 to 18 read as follows:-

“10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. [Section 263](#) has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression „prejudicial to the interest of the Revenue“ is of wide import and is not confined to merely loss of tax. The term „erroneous“ means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.

11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word „erroneous“ includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

16. Thus, in cases of wrong opinion or finding on merits, the CIT 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 passed is not sustainable in law and the said finding must be recorded. CIT 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 CIT 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 CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT 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/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

17. This distinction must be kept in mind by the CIT while exercising jurisdiction under [Section 263](#) of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask

the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see [CIT vs. Shree Manjunathesware Packing Products](#), 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

18. It is in this context that the Supreme Court in [Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax](#), (2000) 243 ITR 83 (SC), had observed that the phrase „prejudicial to the interest of 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 interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue.”

32. In view of above, as per ratio laid down by Hon'ble Jurisdictional High Court, it is amply clear that in the cases where there is inadequate inquiry but not lack of inquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if inquiry and verification is conducted by the CIT and he is able to establish and show the error and mistake made by the AO, making the order unsustainable in law. Their lordships further made it clear that in some cases possibly though rarely, the CIT 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. In this situation, 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 inquiry without a finding that the order is erroneous. In this judgement, it was further held that the distinction must be kept in mind by the CIT while exercising judgment under [Section 263](#) of the Act and in absence of the finding that the order is erroneous and prejudicial to the interest of revenue, the exercise of jurisdiction under said section is not sustainable. The assessee has also held that the finding that the order is erroneous is the condition or requirement which must be satisfied for exercise of jurisdiction u/s 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean that the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question. In this

judgment, their lordships also guided us by saying that in the most of the cases of alleged inadequate investigation, it would be difficult to hold that the order of the AO, who had conducted inquiries and had acted as an investigator is erroneous without CIT conducting verification/inquiry. It was also laid down that the CIT can direct reconsideration of assessment on this ground but only when the order is erroneous and an order of remit cannot be passed by the CIT to ask the AO to decide whether the order was erroneous and such order is not permissible under the provisions of section 263 of the Act. Finally, the bottom-line of this judgment is that the jurisdictional pre-condition for invoking section 263 of the Act is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law.

33. Turning to the facts of the present case, we have already discussed elaborately hereinabove that the AO raised queries on all three issues and also considered explanation, evidence and other relevant material placed before him before framing impugned assessment order. The view taken by the AO on all three issues agitated and alleged by the CIT in the notice u/s 263 of the Act cannot be held as unsustainable and not in accordance with law. Per contra, from careful and logical analysis of the action of the AO, we observe that in regard to understatement of sale consideration received by the assessee and understatement of purchase consideration paid by the assessee, undisputedly both transactions were undertaken by the assessee and her husband jointly with Mr. Mahesh Mehta and his other group entities on the same date i.e. 17th July, 2008, hence, the share of Rs.1 crore paid by the assessee towards unaccounted purchase price of property no. 56/7, DB Gupta Road, the source of said investment is self speaking and explained when the revenue authorities have

noted that the assessee had received unaccounted consideration of Rs.1 crore on sale of property to Mr. Mahesh Mehta on the very same date. In this situation, the addition on account of unexplained investment could not be made and income of capital gain accrued to the assessee by way of unaccounted consideration received by her. The tax liability on capital gain attracts which was placed by the assessee along with her return of income available at page 10 of the paper book. The AO after consideration of capital gain statement accepted the amount of Rs. 1 crore as unaccounted consideration received by the assessee on sale of property and paid by the assessee on purchase of property on the very same date and the AO instead of taxing the capital gain taxed Rs.1 crore under the head of income from other sources which is a more favourable view for the revenue. In this situation, view taken by the AO in framing assessment order on all three issues cannot be held as unsustainable and not in accordance with law. In this situation, while the CIT himself is not sure about the issue of erroneousness of impugned assessment order, which is vivid from the contents of the notice issued to the assessee u/s 263 of the Act and in totality of the facts and allegations mentioned in the notice u/s 263 of the Act and in the impugned order passed u/s 263 of the Act, we note that the CIT simply alleged conclusion of the AO and held that the AO has failed to conduct proper inquiry and verification on the issues cited above and without holding any specific erroneousness and without any finding that the views taken by the AO on all three are unsustainable and not in accordance with law. The CIT cannot remit the matter for reassessment to AO. Finally, respectfully following the ratio laid down by jurisdictional High Court of Delhi in the case of DG Housing (supra), we are of the view that the conclusion of the AO on all three alleged issues was supported by reasonable and plausible query, verification and examination of relevant material which is reasonable and the same cannot be held as unsustainable and not in accordance with law. In this situation, invoking of provision of section 263 of the Act by issuance of notice and

passing impugned order, directing the AO to revisit the issue and to make further inquiry cannot be held as valid and in this situation, action of the CIT issuing notice and passing impugned order cannot be held as sustainable and valid and the same deserves to be quashed. We order accordingly.

34. Ground no. 1 to 4 of the assessee are allowed and notice issued by the CIT and impugned order passed u/s 263 of the Act are quashed.

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

Order pronounced in the open court on 08/07/2015.

Sd/-
(J.S. REDDY)
ACCOUNTANT MEMBER

Sd/-
(CHANDRAMOHAN GARG)
JUDICIAL MEMBER

DT. 8th JULY 2015
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. C.I.T.(A)
4. C.I.T.
5. DR

By Order

Asstt.Registrar