

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

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER
AND

SHRI J.S. REDDY, ACCOUNTANT MEMBER

I.T.A.No.2454/Del/2012, 2455/D/12, 2456/D/12, 2457/D/12
2458/D/12, 2459/D/12, 2460/D/12

Assessment Years : 2002-03 to 2008-09

Smt. N.K. Vinayak, vs Commissioner of Income Tax,
66, Lok Nayak Apartment, Central-II, New Delhi.
Sector 9, Rohini,
New Delhi.

I.T.A.No.2447/Del/2012, I.T.A.No.2448/D/2012, 2449/D/2012,
2450/D/12, 2451/D/12, 2452/D/12, 2453/D/12

Assessment Years : 2002-03 to 2008-09

Shri B.K. Vinayak, vs Commissioner of Income Tax,
New Delhi. Central-II, New Delhi.
(Appellant) (Respondent)
Appellant by: Shri Kapil Goel

Respondent by: Shri A. Mishra, C.I.T. DR

PER BENCH

This is a group of appeals filed by both assesseees who are husband and wife against the orders of CIT- Central Circle II, New Delhi passed u/s 263 of the I T Act, revising the respective assessment orders passed by AO u/s 153A read with section 143(3); holding them to be erroneous and prejudicial to the interest of

revenue. By and large following common grounds are raised in both the cases of

husband and wife:

1. *That on the facts and circumstances of the case, the order passed by the Hon'ble CIT is bad both in the eye of law and on facts.*
2. *That the Hon'ble CIT erred on facts and in law in holding that the assessment order passed by the Ld. AO were considered as erroneous and prejudicial to the interest of revenue by the Hon'ble CIT and restored back to the file of the Ld. AO.*
3. *That the Hon'ble CIT has grossly erred in not considering the details and documentary evidences provided by the assessee in respect of cash seized of the appellant during the course of search proceedings.*
4. *That the Hon'ble CIT erred in holding that no source of professional fee received has been submitted by the appellant.*
5. *That the Hon'ble CIT has erred in not considering the information/detail provided by the appellant in respect of opening cash balance and holding that the Ld. AO during the course of assessment proceedings has not examined the opening cash in hand.*
6. *That on the facts and circumstances of the case, the Hon'ble CIT has grossly erred in holding that the Ld. AO erroneously accepted all the FDRs etc. as submitted by the appellant during the course of assessment proceedings without making any verification, examination and application of mind.*
7. *That the Hon'ble CIT completely erred on facts and in law in holding that investigation, verification and examination were not conducted by the Ld. AO during the course of assessment proceedings.*

8. *That on the facts and circumstances of the case and in law, the order is made in haste and the Hon'ble CIT erred in not providing the appellant adequate opportunity of being heard.*
9. *That the appellant craves leave to add, amend or alter any of the grounds of the appeal.*

2. Brief facts in this behalf are, Search and Seizure operation under section 132 of the Income Tax Act, 1961 (“ the Act”) were conducted by the investigation Wing of the Income Tax department on both the appellants on 24.10.2007 in connection with other searches conducted on one Era Group to which the appellants are claimed to have relations. The search was followed by assessment proceedings in terms of sec 153A read with section 143(3).

3. All the return of Income u/s 153A, were filed on 14.10.2009 for the assessment years under consideration. It is claimed by the assesseees that during the course of assessment proceedings all the relevant explanations and documents as required by the Id. AO were duly submitted. After considering the DIT's appraisal report, detailed investigation of the documents and explanations submitted by the assessee, Id. ACIT, Central Circle-8, New Delhi passed the assessment orders dated 23.12.2009 at the returned income.

4. Subsequently, Show Cause Notices were issued by the Id. Commissioner of Income Tax Central-II under the provisions of section 263 of the Act, as to why

the Assessment orders passed by the Ld. AO may not be considered as erroneous and prejudicial to the interest of the revenue, on various counts mentioned as under:

- (i) In respect of cash of cash found in locker and at residence, no documentary evidence has been furnished. In the bank accounts there were no corresponding withdrawal and in PNB a/c, there were cash deposits; Ld. AO has failed to enquire the source of these deposits.
- (ii) The opening cash is not supported by any documents.
- (iii) Qua the source of bank FDRs found the explanation of renewal of earlier FDRs was unacceptable as no interest income from FDRs was offered in the original returns of incomes. The interest has been shown in the returns filed under section 153A of the Act. Thus the Ld. AO has accepted the FDRs without any verification.
- (iv) Apropos interest income from banks, no breakup/details have been submitted during the course of assessment proceedings.
- (v) The Ld. AO accepted all the assets, cash, jewelry, FDRs, etc. on an explanation as submitted by assesses, without making any verification and application of mind.
- (vi) The LD. AO failed to examine and verify the fact that, Smt. N.K. Vinayak has no source of income, in that situation all the cash, assets and

FDRs found during the search and seizure operation did not belong to her and should have been added in the hands of Shri B K Vinayak.

5. Assessee replied that all these aspects were duly considered by Id. AO during the course of assessment proceedings. All the proper explanation along with all the necessary documents/ evidences were furnished in respect of sources of cash found, interest income, FDR's and other assets found during the search as well assessment. The returned income in 153A returns was accepted by AO after due enquiries and verification, consequently the impugned assessment orders were neither erroneous nor prejudicial to the interest of revenue.

6. According to assessee, Id. CIT did not peruse the record carefully and summarily rejected the explanations and details/documents filed by them in respect of the issues mentioned in show cause notices. Vide orders under section 263 of the Act dated March 28, 2012 for assessment years 2003-03 to 2008-09 Id. CIT held that the assessment orders in question were erroneous and prejudicial to the interest of revenue as proper investigation, verification and examination were not conducted by the AO during the course of assessment proceedings. As a result the assessments were set aside and restored back to the file of the Ld. AO for fresh investigations and framing the assessments afresh.

7. Aggrieved assesseees are before us challenging the validity of impugned orders u/s 263. Ld. counsel for the assessee Shri Kapil Goel contends that the Id.CIT's final notices U/S 263 were duly replied by the assesseees as under:

In reply to this notice, Shri B K Vinayak submitted as under:

"1 (a) I am enclosing herewith the Cash Flow Statement along with the documentary evidences for the same for the period F.Y. 2001-02 to 2007-08, which includes Bank Statements confirming my withdrawals from banks my deposits into the bank. .

(b) Household Expenses: I have submitted vide letter dated, 26.10.2009 (copy enclosed) that I do not deep details of daily expenses, but cash withdraws from banks and Post office broadly covers it rather I save out of it. Cash statements in regard to that are already submitted. The fixed expenses like electricity bill, telephone bill, foreign tour expenses are met up by Cheques. I am tea to taller and try for more savings. Also I live with my wife with no other dependents so expenses are very limited.

(c) there is no cash deposit in the account with Punjab Notional Bank during the F.Y. 2007-08 and I am enclosing herewith the copy of bank statement for the F.Y. 2007-08. However, there is only one cash deposit of Rs. 10000/- on 14.01.2003 and the same is duly reflected in details furnished in point 1 (a) of my reply. I am also enclosing herewith the bank statements for all the years of account with Punjab National Bank which shows that there has been no cash deposits excepts Rs. 10000/- as mentioned above.

2 (a) I am enclosing herewith details of Fixed deposits found and seized during the course of search proceedings along with sources of each fixed deposits with supporting documents. It would not be out of place to mention that the undersigned has been working in senior position in Government of Indian and the Private enterprises and have served for more than 50 years and

the amount of FDR's is very negligible in view of the length and position of service.

(b) That interest income earned on these FDR's has been disclosed in the returns filed in response to the notices u/s 153A as has been rightly mentioned in the show cause notice and as such it does not call for any interference in the order passed by the Ld. Assessing Officer.

(c) I am also enclosing herewith the details of interest income of Rs. 2015144/- from banks during the F.Y. 2007-08.

I hope the above details shall serve your purpose and request your goodself to drop the proceedings u/s 263 of the Income Tax Act, 161 and oblige. If your goodself require any other details/clarification, I shall be eager to provide the same to you.

Assessee further explained that before ADIT investigation, in response to your summon u/s 131 (IA) of Income Tax Act 1964, all the relevant explanations were filed for both the assesses, summary thereof is as under :

“Explanation regarding cash found

1. Cash found in Lockers	Rs. 15 lac
2. Cash found in Residence	<u>Rs. 92,926</u>
Total	<u>15,92,926</u>

Source

1. Advance Received against plot at Gurgaon (Copy of Agreement enclosed)	Rs. 6.25 lac
2. Advance against collaboration agreement, For development Construction at Gurgaon (Copy enclosed)	Rs. 7.00 lac
3. Withdrawal from Bank; Savings kept for emergency treatment requirements as my Wife is chronic patient	Balance 15,92,926

Annexure 'A'

1. *Myself is a senior citizen of 70 years old. Retired from P.S.U. (N.B.C.C. Ltd.) in 1996 and thereafter worked with Era Construction till July 2006 and thereafter joined Omaxe Limited Oct. 2006 .*
2. *I and my wife live at 66, Lok Nayak Apartments in Sec-9, Rohini, Delhi. We have two sons. Elder one is working with Seimens Ltd. At Gurgaon and the younger one is in U.S.A. My main source of Income is salary.*
3. *Presently employed with Omaxe Infrastructure Private Limited. Kalkaji, Delhi My source of income is from salary interest on investments.*
4. *Copies of Income Tax return for the A.Y.S. from 2003-03 to 2007-08 are already submitted as desired.
 My Pan No. is ACCPV7041A
 Last return filed with ward 21 (1) and earlier in ward 46 (2)*

5. *Details of Immovable Assets:-*

6.

S.No.	Size and Complete address of Property	Cost of Acquisition	Date of Acquisition	Income from Property if any
1	66, LokNayak Apartments, Sector-9, Rohini, Delhi (1400 Sq. ft. Flat)	Rs. 2.13 Lac	1986	-
2.	Saraswatikunj Co-operative Housing Society, Gurgaon (Plot of 502 sq.yd.)	Rs. 10.54 Lac	1996	

7. Complete details of shares in Demat Accounts-

Name of Demat Account Holder	Demat/Ac No.	Details of Shares	No. of Units	Cost Price per share	Date of Acquisition
NirmalKanta Vinayak&Balram KrishanVinayak	IN302902 42884707	(i) Bengal Tea	50	10	March 98
		(ii) Cairn India Ltd.	245	160	Dec. 06
		(iii) ESSAR Steel	45	10	Dec. 90
		(iv) G.R. Cables	100	10	Feb. 95
		(v) Gujrat Industries	100	10	Sept. 92
		(vi) IDEA Cellular	172	75	Feb. 0

		(vii) IFCI	100	10	Feb. 94
		(viii) Kirloskar FERR	100	10	March 94
		(ix) Kohinoor Foods	140	10	April 94
		(x)L & T.	150	75	March 92
		(xi) Morepen lab.	500	10	Aug. 92
		(xii) PARASNATH	20	300	Oct. 06
		(xiii) Power Grid	134	52	Sept.07
		(xiv) SBI	50	100	Feb 94
		(xv)	60	75	March 92 (Against L&T)
B.K. Vinayak	10133966	Omaxe Ltd.	902	310	July 07

8. A. Share Capital and application money – Nil

B. Loans and Advances.-

Rs. 2.50 lac paid on 08/09/2006 to Trivent Infrastructure Development Co., as advance for flat. Payment made through cheque from saving Account 18473 with ICICI Bank.

9. Liabilities, Loans and Advances.

A. *Rs. 6.25 lac advance received in Nov. 06 against sale of plot at Gurgaon.*

Copy of agreement already available with the department.

b. *Rs. 7.00 Lac advance received in Oct. 07 against collaboration agreement for development of plot at Gurgaon. Copy of agreement is enclosed.*

c. Except above, there is no further liability.

d. As regards moveable properties, the original FDR' are physically available with the department. These investments are made from personal and salary savings and have been reinvested from time to time on maturity of the same.

10. Copies of Bank Statements are enclosed. For entries in Accounts exceeding. One Lac, a list is enclosed.

It is further pleaded that based on ADIT report and appraisal report consequent to search and during the course of 153A assessment, Id. AO raised various queries which were replied by the assessee vide letter dtd. 26-10-2009 as under:

- 1. I am not involved in any business activity. I have worked with Era Group as a regular employee and left the job there in April 2006. Since I am not in any business and have worked as salaried employee, I do not maintain any Capital Account or Balance Sheet. Returns have duly been filed with the Income Tax Department every year. However returns for the year 2002-03 onwards under section 153 A as asked for have already been submitted to your office on 12.10.2009.*
- 2. Form 16 in support of salary income is already submitted along with the I.T. Returns for the respective years.*
- 3. No formal agreement has been signed and the property is situated in Rural Area (Lal Dora).*
- 4. We have not maintained any account of house hold expenses.*
- 5. That I do not constitute any HUF. Thus the same may be considered as not applicable.*
- 6. List of Transactions above Rs. One lac is enclosed. Copies of Bank Statements/ Passbook have already been provided to Ld. I.O.*
- 7. Details of Foreign trips made in personal capacity to USA are enclosed.*

8. *I do not run any firm nor involved as Director on share holding pattern except that I was working with the Era Group as salaried employee. I resigned from Era Group in year 2006. I did not hold any share holding or Capital /Loan with that organization.*

9. *Details of Property are as under :-*

		Value	Year of Purchase	
a)	Flat in LokNayak Group Housing Society Rohini Delhi.	Rs. 2.00 Lacs	1989	Self Occupied
b)	Flat in village Sultanpuri, Gurgaon MehrauliRaod Lal Dora Rural Area	Rs. 3.00 Lacs	1992	Occupied in Feb. 2001

10. *There is no capital gain or loss on assets during the year under assessment.*

11. *I am not actively involved in transaction of Shares/Mutual Funds.*

12. *I have not shown any exempt Income. Hence it may be treated as NIL.*

13. *Advance of Rs. 2.50 Lac paid on 08.09.2006 to Triveni Infrastructure and Development Company as booking amount for flat.*

14. *Information may please be treated as NIL.*

15. *Information may please be considered as Not Applicable.*

16. *As far as my knowledge is concerned, no major amount of interest is received in the I.T. refunds.*

17. *I have already reconciled and accounted for the TDS while submitting my Taxable Income in the Income Tax Returns.*

18. *I do not have any agriculture Income.*

19. *I am not member of any club etc. hence the information may please be considered as Not Applicable.*

20. *Syndicate Bank 3033 9891 4400 8320.*

Bank of India 5420 3430 0742 2001

21. Complete detail of FDR's as per list already available with the department are enclosed.

22. I did not make any investment in the name of minor. Thus it may be treated as Not Applicable.

23. Assessment order not yet received.

24. I do not possess any jewellery/STREEDHAN except one finger ring which I got from my in laws. Rest of information has been made clear in the statement of my spouse.

Cash	Rs. 92,026/-	Was from Cash Withdrawals and savings kept at residence to meet emergent requirement as my wife is a chronic patient.
	Rs. 3.00 Lacs	Amount kept by my co-brother for Treatment. As he was suffering from cancer and was under Treatment at Ganga Ram Hospital at Delhi and his only son was at Bangalore. Unfortunately he had expired last year.
	Rs. 7.00 Lacs	Was advance received against collaboration agreement for development and construction of Plot in Gurgaon.
	Rs. 6.25 Lac	Advance against sale of plot.

The deal could not materialize as the party failed to get the registration of plot done. It is still pending as members of the Society has again filed writ in Punjab and Haryana High Court to enforce registration of Plots and the case is sub judice.

Fixed Deposits:

Total value of FDR's is Rs. 32.52 Lacs instead of Rs. 33.77 lac as shown by Department. All FDR's have been got issued from Savings. Some of these FDR's are in the joint name with my wife. These FDR's have originated since the year 1991 onwards and have been renewed on maturity from time to time. To the extent the information could be collected from different sources, the origin of the FDR's their subsequent renewals and funding is indicated in the statement enclosed. It may however be mentioned that the undersigned has been working in Senior position in Government of India and private enterprises and have served for more than 50 years. Thus the value of

FDRs and saving keeping in view of length of service has a very negligible impact.

The above information as desired is submitted for your kind consideration.”

8. Thus, apropos assets found during the course of search relating to the husband Shri B K Vinayak, were duly explained before ADIT; they were mentioned in the appraisal report; thereafter they were fully explained before Id AO during the course of 153A assessment proceedings on various occasions. Besides they were fully explained again before Id. CIT during the course of 263 proceedings hearings in response to points raised in show cause notices and personal queries.

9. The record before Id. CIT clearly demonstrates that all the relevant issues were duly inquired, explained and Id. ADIT and Id. AO, after completing a due process of investigation and assessment u/s 153A passed the impugned assessment orders. Therefore the impugned assessment order neither suffer from any error nor they are prejudicial to the interest of revenue. Ld. CIT in the name of 263 power wants to review the assessment orders which is not permissible under the law. Ld. CIT wants to adopt another possible view over the evidence, quantification of income and views adopted by Id. Assessing Officer in due discharge of his statutory power of assessment. The 263 proceedings being for review of a lawfully

passed and sustainable order can neither be termed as erroneous nor prejudicial to the interest of revenue.

10. Similarly Smt. N V Vinayak, wife of the assessee submitted her reply dtd. 10-2-2012 to the 263 proceedings as under:

“1. I am also enclosing herewith the details of interest income of from banks during the relevant years.

2. It has been submitted during the course of assessment proceedings vide letter dated 11.11.2009 (copy enclosed) that I do not have any individual bank account and the details of the accounts alongwith bank statements has been filed during the course of assessment proceedings of my husbands.

3. I am enclosing herewith the details of Fixed Deposits found and seized during the course of search proceedings along with sources of each fixed deposits with supporting documents.

4. Regarding cash i.e. 13.25 Lacs, I am enclosing the Sale Agreement showing that the amount of 6.25 lacs was received in A.Y. 2007-08 and 7 lacs in A.Y. 2008-09.

5. Agreement Dated 02.06.2007:-

a) As per your query it is true that agreement has not been registered, but the registration of agreement for transfer of a property is not compulsory as per the provisions of law and also being an old lady it is not possible for me to do so. It would not be out of place to mention that most of the agreement to sell, for transfer of property are not registered in general.

b) *The case of Registration was pending in the Delhi High Court and also, I was trying for registration otherwise with the Department. The case is still pending in the court. The copy of the petition to High Court is enclosed.*

6. *Agreement dated 17.10.2007:-*

a) *As per your query it is true that agreement has not been registered, but the registration of agreement for transfer of a property is not compulsory as per the provisions of law and also being an old lady is it not possible for me to do so. It would not be out of place to mentioned that most of the agreement to sell, for transfer of a property are not registered in general.*

c) *As regard to your query the Sale agreement for the plot at SaraswatiKunj was signed but since the party failed to get the registration done with the Haryana Authority the agreement could not matured. At the request of the other party that they would ensure the registration of the plot from the Haryana Government, the second agreement on Collaboration basis, for construction was signed.*

1. *The parties have responded to the Assessing Officer's Notice and have given the statement accordingly and confirmed the transactions as stated by us because that is the reality also.*

2. *I have already submitted to you vide letter dated 11.11.09 that the plot at Saraswati Kunj, measuring 502 square yards was purchase by me in 1996 out of sale proceeds of built up House at Karnal in 1978-79. It was further informed that the plot purchased from Co-operative society was fallen under dispute with local authorities and matter is pending before the High Court of Haryana. It become difficult for me to obtain clearance for the construction of House over the plot that's why I decided to dispose it off.*

9. As regard jewelry I have already informed you that the I got that in my marriage and for the valuation for the sake of Wealth Tax, I am enclosing the details of valuation of Wealth for the A.Y. 2008-09.

I hope the above details shall serve your purpose and request your goodself to drop the proceedings u/s 263 of the Income Tax, 1961 and oblige. If your goodself require any other details/ clarification, I shall be eager to provide the same to you.”

11. Ld. Counsel thus pleads that all the relevant material concerning these issues being on search record, appraisal report and duly considered in the assessment proceedings, there is no case whatsoever in terms of sec 263 to set aside the assessment to AO for fresh consideration. Assessee having demonstrated that every thing having been duly considered, CIT was under statutory obligation to consider the explanation instead of summarily rejecting it and setting aside.

12. Ld counsel further contends that the observations of CIT are mistaken and misplaced in as much as:

i. Ld CIT- observation that bank statement was not provided to Ld AO is contrary to record as they were supplied. A reference can be made to pg. 6 point no. 6 (B.K.Vinayak paper book); page 22 point no. 3 (B.K.Vinayak paper book); page 32 (B.K.Vinayak paper book); point no. 6 at page 4 of N.K.Vinayak paper book) Thus, the observation is factually incorrect. This was also re-clarified in our reply to CIT during revision proceedings at PB pages 25, 31,34,40,45

- a. Ld CIT- again made factually wrong allegation that source of FDR remained unverified in as much as detailed and extensive inquiry is demonstrated by detailed show cause issued by Ld AO dated 14/10/2009 replied on 24/10/2009 and 11/11/2009 (pages 3, 5,10_for enquiry before Ld AO: N.K.Vinayak)& (pages 5,8,11 to 13, 23 to 28: B.K.Vinayak paper book – assessment stage replies);
 - b. Ld CIT allegation that interest income is not reconciled and checked is again factually incorrect, this can be clarified by a reference to page 2 and (point no. 17) and its reply at page 5/point no. 17 & pages 25, 31,34,40,45 (paper book- N.K.Vinayak-1) :
- ii) The other issues raised in aforesaid show cause notice are:
- a. Cash found during the course of search proceedings from joint locker: Rs. 13.25 lacs (pertaining to assessee Mrs. N.K.Vinayak), this aspect is duly examined by AO as is evident from :
 - i. Reply filed to investigating wing at the stage of section 131(1A) proceedings (*post search*)pages 28 to 32 paper book (B.K.Vinayak) and *supplementary* paper book (N.K.Vinayak) pages 1 to 5;
 - ii. Show cause notice during assessment proceedings by Ld AO pages 1 to 3 of paper book (N.K.Vinayak – Ist paper book)
 - iii. Reply filed to Assessing Officer during assessment proceedings refer pages 4 to 14 N.K.Vinayak – Ist paper book) & *page 8 (paper book -B.K.Vinayak)*; evidence at pages 16 & 17 of paper book and pages 55 to 57 of N.K.Vinayak – Ist paper book; last para :page 14 paper book N.K.Vinayak-1;

- iv.* Locker operation proof and affidavit at pages 6 to 12 of supplementary paper book N.K.Vinayak
 - v.* Ld CIT in impugned order at page 2 of impugned order made contrarious allegation that assessee filed no reply on above issue in post search proceedings where as facts state otherwise;
 - vi.* On conjecture and surmises, assessee's explanation is doubted by Ld CIT whereas Ld AO & Investigation wing has duly applied his mind by taking reply from assessee on the above issue;
 - vii.* It is not alleged that cash found during search vis a vis appellant's explanation gives rise to any unexplained income u/s 69A of the Act, in appellant's hands, neither in show cause notice u/s 263 nor in final revision order u/s 263 ;
 - viii.* Whereas appellant being house wife not engaged in any trade, given explanation vis a vis cash found, as per SC order in P.K.Noorjahan case 237 ITR 570 is plausible and do not fall for correction u/s 263 of the Act;
- b. Jewellery found during the course of search proceedings:
- i.* Assessee is a senior citizen ; Married in year 1963 ;
 - ii.* Total jewellery weight 940 grams ;
 - iii.* CBDT instruction No. 1916 dated 11.05.1994 squarely covers the present case ; refer our reply to Ld AO during assessment at Page 5 & 13 paper book paper book -1 N.K.Vinayak;
 - iv.* Refer show cause notice issued by Ld AO page 3 during assessment of our paper book showing due application of mind by Ld AO; our reply at page 5 to Ld AO during assessment proceedings;

v. It is not wealth escaping assessment or wealth tax revision;

c. Source of FDR's

- i. Ld CIT again made factually wrong allegation that source of FDR remained unverified at page 2 of above show cause notice in as much as detailed and extensive inquiry is made as evident from cursory look to detailed show cause issued by Ld AO dated 14/10/2009 replied on 24/10/2009 and 11/11/2009
- ii. pages 3, 5,10 for enquiry before Ld AO: N.K.Vinayak) & (pages 5,8,11 to 13, 21, 23 to 28: B.K.Vinayak paper book –at assessment stage proper replies were filed;
- iii. Assessee's reply on subject issue given the fact that assessee is not is any business and source of fund is husband's money and maturity of earlier FDR's as very well explained in replies to investigation wing at pages 28 to 32 paper book (B.K.Vinayak) and supplementary paper book (N.K.Vinayak) pages 1 to 5 is supported by SC order in P.K.Noorjahan case 237 ITR Page 570;
- iv. Reply dated 12/11/2009 in case of B.K.Vinayak to Ld AO during assessment proceedings at pages 22 to 27 of paper book in B.K.Vinayak case;

In the case of B.K.Vinayak

Three issues have been raised by Ld CIT in show cause dated 11.01.2012 viz:

i) Source of cash of Rs. 417,926/-:

- a. which is thoroughly enquired by Ld AO during assessment as visible from pages 6, 8, 22, 29, 30 of paper book (also explained to investigation wing in post search proceedings);
- b. Ld CIT himself admits that full cash flow statement was given during assessment proceedings reproduced at page 2/3 of impugned revision order, which is sufficient as per Hon'ble Delhi High Court judgment

in the case of DLF 350 ITR 555 that revision proceedings can not be initiated unless it is held that Ld AO's order is unsustainable in the eyes of law;

- c. Assessee has stated that he has been in service for more than 50 years with govt. of India in senior position and private enterprises;
- d. Ld CIT do not dispute the capacity of assessee to possess the marginal cash from available accumulated savings in given fact situation;
- e. Assessee's two sons one in Siemens at Gurgaon and one is USA as stated before investigation wing during post search proceedings, can very well gift to their parents the meager amount;
- f. Further, in case on an issue two views are inherently possible, it oust the jurisdiction of CIT on that issue like one here (cash to the extent of Rs. 4.17 lacs) reliance is placed on Hon'ble Delhi High Court in DLF judgment (supra) & Hon'ble AP high court in 354 ITR 35
- g. On this issue, making no addition of Rs 4.17 lacs cash found during search by Ld AO during assessment proceedings, do not make the order of Ld AO unsustainable on that count;

ii) **Source of FDR's**

- i. Ld CIT- again made factually wrong allegation that source of FDR remained unverified at page 2 of above show cause notice in as much as detailed and extensive inquiry is made as evident from cursory look to detailed show cause issued by Ld AO dated 14/10/2009 replied on 24/10/2009 and 11/11/2009

- ii. pages 3, 5,10 for enquiry before Ld AO: N.K.Vinayak)& (pages 5,8,11 to 13, 21, 23 to 28: B.K.Vinayak paper book – assessment stage replies;
 - iii. Assessee’s reply on subject issue given the fact that assessee is not is any business and source of fund is husband’s money and maturity of earlier FDR’s as very well explained in replies to investigation wing at pages pages 28 to 32 paper book (B.K.Vinayak) and supplementary paper book (N.K.Vinayak) pages 1 to 5 is supported by SC order in P.K.Noorjahan case 237 ITR Page 570;
 - iv. Reply dated 12/11/2009 in case of B.K.Vinayak to Ld AO during assessment proceedings at pages 22 to 27 of paper book in B.K.Vinayak case;
 - v. Assessee categorically submitted to CIT u/s 263 that given the length and position of service amount of FDR’s is negligible which explanation is plausible to be accepted and proves application of mind on part of Ld AO;
 - vi. Total FDR in question in assessee’s and her wife is Rs. 32.60 lacs which is commensurate to tax profile and 50 year service track of assessee;
- iii) It is vehemently argued that the third issue raised by CIT u/s 263 is beyond the show cause notice issued u/s 263 of the Act and hence deserves to be set aside on this limited count itself as evident from case records below (being claim of expenses against professional income). Further this issue did not emanate from any incriminating material found during the course of search u/s 132 of the Act, on this count also order of Ld AO on this issue do not require interference in limited jurisdiction u/s 263 of the Act .

(refer Raj HC Jai Steel 259 CTR 281 & All cargo SB ITAT order 147 TTJ 513);

- iv) It is pleaded that ld. CIT except holding that proper mind was not applied by AO. Nowhere has given any finding as to how the orders have caused any prejudice to revenue. Without such finding order of revision is bad in law. Reliance in this behalf is placed on- **S.S.I. Ltd. vs DCIT** 85 TTJ 1049 (para 50) holding:

“A proceeding under s. 263 has a very limited scope and can be invoked only under special circumstance and not for the purpose of launching a roving enquiry. Error in assessment resulting in prejudice to Revenue has to be demonstrated while invoking s. 263, which is conspicuous by its absence in the order passed by the CIT under s. 263.”

13. Ld. counsel for the assessee further relied on following case laws:

- i. AP High Court in **Spectra Shares and Scrips (P) Ltd. vs CIT** 354 ITR 35

“61. We are of the view that the Assessing Officer had not only taken a possible view but in the circumstances the only view possible and therefore his order could not have been termed as erroneous or prejudicial to the revenue warranting exercise of revisional jurisdiction u/s.263 of the Act by the respondent. The respondent had no different or new material to take different view from the one taken by the Assessing Officer and the reasons given by him to reopen the assessment and sustain the revision are totally unacceptable. The respondent is not vested any power u/s.263 to initiate proceedings for revision in every case and start re-examination and fresh enquiries in matters which have already been concluded under the law. The Tribunal in our view had grossly erred in agreeing with the order of the respondent and in upholding it on grounds which have not been found in the show cause notice of the respondent, that too without considering the several issues of fact and law raised by the assessee in his written submissions

and grounds of appeal. Both the respondent and the Tribunal have based their orders on preconceived notions, conjunctures and surmises, manifestly misread the facts and twisted them to justify their conclusions. “

ii. *Lalchand Bhagat Ambica Ram v. CIT (1959) 38 ITR 288 (SC), held at Page 295 for the [proposition:*

Para 31: (a) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted.

(b) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an enquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under sec. 263 merely because he has a different opinion in the matter, that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; 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, as lesser tax than what was just, has been imposed.

(c) The power of the Commissioner under sec. 263(1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interest of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him

and to take into consideration even those events which arose subsequent to the order of assessment.

Further reliance is placed on:

i. Malabar Industrial Corpn. 243 ITR83(SC) for the proposition that revision cannot be invoked in cases where the view adopted by AO is one of the possible view and CIT wants to adopt another possible view.

ii. Sunbeam Auto 289 Taxmann 436 (Del) for the proposition that revision cannot be invoked in cases where CIT is of the view that inadequate enquiries were made by AO. It is only where no enquiry is made, revision can be exercised.

iii. Vikas Polymers 194 Taxmann 57(Del) for the proposition that

“The provisions of section 263, when read as a composite whole, make it incumbent upon the Commissioner before exercising revisional powers to: (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter, to make or cause to be made such an enquiry as he deems necessary. It is only on fulfilment of these twin conditions that the Commissioner may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the Commissioner may call for the records and if he prima facie considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the revenue, he may pass such order thereon as the circumstances of the case justify. After giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary. The twin requirement of the section is manifestly for a purpose. Mere fact that the Commissioner considers on examination of the record that the order

has been erroneously passed so as to prejudice the interest of the revenue, will not suffice. The assessee must be called, his explanation sought for and examined by the Commissioner, and thereafter, if the Commissioner still feels that the order is erroneous and prejudicial to the interest of the revenue, he may pass revisional orders. If, on the other hand, the Commissioner is satisfied after hearing the assessee that the orders are not erroneous and prejudicial to the interest of the revenue, he may choose not to exercise his power of revision. This is for the reason that if a query was raised during the course of scrutiny by the Assessing Officer, which was answered to the satisfaction of the Assessing Officer, but neither the query nor the answer was reflected in the assessment order, that would not, by itself, lead to the conclusion that the order of the Assessing Officer called for interference and revision. In the instant case, the Commissioner had observed in the order passed by him that the assessee had not filed certain documents on the record at the time of assessment. Assuming it to be so, that did not justify the conclusion arrived at by the Commissioner that the Assessing Officer had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the Commissioner, was duly reflected in the respective assessments of the partners who were income-tax assesseees and the unsecured loan taken from chit fund company was duly reflected in the assessment order of the said chit fund company which was also an assessee. [Para 18]

14. In view of the aforesaid, the Tribunal was correct, in law, for holding that the provisions of section 263 had not rightly been invoked in the instant case.

Max India ltd. 295 ITR 282 (SC)

15. Ld. Counsel for the assessee contends that, looking under the light of all these applicable laws case law following proposition emerge from the assessee's case:

- i) There were proper enquiries by the ADIT during the course of search proceedings and thereafter, by Id AO during the course of assessment proceedings.
- ii) It is not a case of lack of enquiries, which is evident from the copious record.
- iii) It is not a case of taking an unsustainable view, the view taken by Id. AO based on his enquiries and investigation is one of the possible view. It cannot be substituted by CIT by another possible view while exercising 263 jurisdiction.
- iv) CIT has not given any objective findings that how the impugned assessment orders are prejudicial to the interest of revenue, in view thereof the revision proceedings are bad in law.
- v) AO having done the enquiries as per his understanding and discretion as a quasi judicial authority, it cannot be assumed that he shirked his responsibility and did not carry out the enquiries.

16. Looking from all these angles and parameters, the exercise of power u/s 263 qua the issues raised in 263 notices is bad in law. It is pleaded that the impugned 263 orders passed by Id CIT may be set aside.

17. Ld DR relied on the orders of CIT. It is contended that the assessment procedure has a set protocol and if AO is found not to have adhered to the minimum required for ensuring a fair assessment, the assessment order is erroneous and therefore, prejudicial to the interest of revenue.

18. We have heard the rival contentions, material available on the record and case laws cited by both the parties. From the facts narrated above and the paper books filed it emerges that during the course of assessment proceeding questions, enquiries and explanation on the relevant issues were called for by the Id AO and were replied by the assessee. Thus these are not the assessments where there was no enquiry on the relevant aspect. The questionnaires, order sheet entries, assessee's submissions and explanations make it quite clear. Thus we are unable to hold that assessment orders suffer from lack of enquiries. In sunbeam Auto case Hon'ble Delhi High Court has held that though revision can be made in a case when there is lack of enquiry in the order, however, inadequate inquiries cannot be a basis of revision as it depends on the perception of the officer exercising assessment powers. A mere deference is

perception of CIT and AO cannot make the order erroneous and prejudicial to the interest or revenue. Hon'ble Delhi High Court in the recent judgment in the case of DLF Ltd. squarely held that:

“It is not mere prejudice to the revenue, or a mere erroneous view which can be revised under section 263. There should be the added element of 'unsustainability' in the order of the Assessing Officer, which clothes the Commissioner with jurisdiction to issue notice and proceed to make appropriate orders. [Para 10]”

19. Looking at the entirety of facts, it cannot be held that the impugned assessment orders suffer from unsustainability also.

20. Since reasonable enquiries were made, assessee was called on to file their explanation and submissions on relevant issue and besides the assessment orders are sustainable, it cannot be held that these are cases of any manifest inadequate inquiry or impossible view or unsustainability.

21. We also find merit in the argument of Id. counsel that CIT must in demonstrative terms establish as to what prejudice is caused to the revenue. In these cases instead of establishing this mandatory condition Id. CIT has merely chosen to set aside the assessments back to AO to conduct further enquiries. ITAT judgment in the case of - **S.S.I. Ltd** (supra) supports the view of the assessee.

22. In view of the entirety of facts, circumstances, arguments and case laws mentioned above we are of the view that the exercise of jurisdiction u/s 263 by Id. CIT in setting aside the impugned assessments passed u/s 153A r/w sec 143(3) in the case of both the assessee is bad in law, his orders are quashed.

23. In the result assessee's appeals are allowed.

Order pronounced in the open court on 28.3.2014.

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

Sd/-
(R.P. TOLANI)
JUDICIAL MEMBER

DT. 28th MARCH 2014
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT(A)
4. CIT 5. DR

By order

Asstt. Registrar

