fit for hearing.

(JM)

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

BEFORE SHRI N.K.KARHAIL, JM AND SHRI P.M.JAGTAP, AM

I.T.A.No.2572/Del/2005
Assessment Year : 2000-01

Smt.Zubi Kochar, **26/1, III Floor,** **East Patel Nagar,** **New Delhi – 110 008.** (Appellant)	**Vs.**	**Asstt.Commissioner of Income Tax,** **Circle-31(1),** **New Delhi.** (Respondent)

Appellant by : Shri Ved Jain & Shri Himanshu Goyal, CAs.
Respondent by : Ms.Smita Jhingran, CIT-DR.

ORDER

PER P.M.JAGTAP, AM :

This appeal by the assessee is directed against the order of learned CIT, Delhi-XI, New Delhi dated 31.3.2005 passed u/s 263.

2. The relevant facts of the case giving rise to this appeal are that a return of income for the year under consideration was filed by the assessee on 30.3.2002 declaring a total income of Rs.2,13,35,044/-. In the assessment completed u/s 143(3) vide an order dated 27.3.2003, the income of the assessee, however, was assessed by the Assessing Officer at Rs.2,19,42,040/- after making certain disallowances out of various expenses aggregating to Rs.6,06,993/-. The record of the said assessment was subsequently came to be examined by the learned CIT and on such examination, he arrived at a prima-facie conclusion that there were certain errors committed by the AO in completing the said assessment which were prejudicial to the interest of the Revenue. He, therefore, issued a notice u/s 263 to the assessee on 27.1.2004 enumerating such errors in detail before finally summarizing the same in paragraph No.9 as under:-

"9. It is thus clear that at no stage of the assessment proceedings did the assessing officer place on record and verify the particulars of vendors, suppliers, contractors, professionals etc. to whom payments aggregating to Rs.285.41 lacs were made. He accepted the expenses

aggregating to as much as 285.41 lacs under as many as 15 heads in undue haste without making proper inquiry as to their genuineness, which was called for on the facts and in the circumstances of the case. It was particularly necessary to inquire into the setting expenses of Rs.82.85 lacs given the fact that you had separately incurred expenses of Rs.64.60 lacs on wages and consumable stores as well. It was also necessary to inquire as to whether the scrap value of the sets after they were dismantled was duly accounted for, since the value of the sets does not figure among your assets as on 31.12.99 which were transferred to the newly formed company to which all your assets and liabilities as on that date were transferred. It was further necessary to verify the genuineness of expenditure of Rs.2959500/- mentioned in para 6 above."

3. In view of the aforesaid errors pointed out by the learned CIT which, according to him, were also prejudicial to the interest of the Revenue, he proposed to revise the assessment framed by the AO exercising the powers conferred on him u/s 263 and afforded an opportunity to the assessee of being heard before he did so. Initially, there was no compliance from the assessee's side to the notice issued by the learned CIT u/s 263 and as a result of the said non-compliance, a survey u/s 133A was carried out by the department at the business premises of the assessee on 27.2.2004 apparently to make spot enquiry. During the course of survey operation, certain books of account, documents and files were impounded by the department. As stated by the learned CIT in his impugned order passed u/s 263, the scrutiny of the said material impounded during the course of survey revealed that the assessee had received a sum of Rs.13.50 crores from M/s Creative Eye Ltd. towards goodwill by way of allotment of 7,39,132 shares of the said company at Rs.115/- per share (value Rs.8.50 crores) and the remaining amount of Rs.5.30 crores by way of a cheque. Vide a notice dated 5.5.2004, the assessee was required by the learned CIT to show cause as to why the said sale of goodwill should not be assessed to capital gain in the assessment for the year under consideration. It was also informed by the learned CIT in the said letter to the assessee that the receipt of Rs.13.50 crores was apparently held back by her from the Assessing Officer during the course of assessment proceedings. The assessee was also called upon by the learned CIT to file valuation report of PricewaterhouseCoopers (PWC) regarding the goodwill of M/s Namoh Shivay Enterprises, proprietary concern of the assessee. Thereafter, the learned CIT proceeded to examine this issue in detail during the course of proceedings u/s 263 and in as many as 14 hearings held during the course of the said proceedings, affidavits

and supplementary affidavits of the assessee as well as her husband Shri Dhiraj Kumar who was also Chairman & Managing Director of M/s Creative Eye Ltd. were filed before the learned CIT. The assessee was also asked by the learned CIT to appear before him for examination which she failed to do on the ground of health. She, however, offered herself for examination at Bombay. On 22.3.2005, a copy of agreement dated 28.2.2000 between the assessee and M/s Creative Eye Ltd. was filed by the assessee before the learned CIT alongwith a copy of valuation report dated 24.2.2000 of PWC. On examination of the said documents, the following doubts were raised by the learned CIT about the valuation:-

> "(1) No consideration has been made for special purchaser premium, if any, that may be agreed for purchasing the business of an ongoing undertaking, which is expected to make profits without any gestation period normally required for setting up a new venture. A special purchaser is one who, for reasons such as competitive advantage, economies of scale and others, may pay a premium to purchase the business of the entity.
>
> (2) The projected income and expenses for the three years ending December, 31, 2002 are based on the assumption that the television serials "Om Namah Shivay", "Brahma Vishnu Mahesh" and "Jay Jay Shree Ganesh" would be telecast on the television channels as per planned schedule. As per the terms of agreement dt. June 16, 1996 with Creative Eye Limited for sale of ownership rights for 91 episodes, the prescribed rate was Rs.19,00,000/- per episode. The subsequent reduction in rate to Rs.15,50,000/- per episode has been agreed orally between Namay Shivay Enterprises and Creative Eye Limited. Further, the formal agreements for telecast of "Brahma Vishnu Mahesh" and "Jay Jay Shree Ganesh" on the respective television channels are yet to be finalized. Accordingly, the financial projections and the business valuation of Namah Shivay Enterprises would be different, if there is any change in the scheduled plan of the telecast of the said television serials. Subsequent to December 31, 2002, as the minimum level, by exploring opportunities for production of new television serials on completion of above mentioned serials, our reliance on and the use of the future prospects and projections of income and expenses should not be considered as an expression of our opinion on it, and we do not and will not accept any responsibility or liability for the impact of any inaccuracies in it on our valuation report.
>
> (3) Valuation report is found to be base on -
>
> (i) reviewed the Management's projections of revenue and expenses of Namah Shivay Enterprises for the three years ending 31 Dec 2002.

(ii) considered specific representations made by you and the Management of M/s Namah Shivay Enterprises in respect of matters relevant to this valuation, which have been detailed in this report, wherever considered necessary;

(iii) considered the royalty income to be received by M/s Namah Shivay Enterprises from M/s Creative Eye Limited on sale of ownership rights of the television serials for the years ending March 31, 1999, which has not been accounted in the books of Namah Shivay Enterprises; and,

(iv) not considered the non-business assets and the income and expenses arising from non-business assets such as investments, which are not proposed to be transferred to M/s Creative Eye Limited."

4. Before the learned CIT, it was submitted on behalf of the assessee that the valuation has been done by an independent valuer M/s Pricewaterhouse Coopers of international repute and since the said valuer is not related to the assessee, the valuation made by them could not be questioned or doubted. This submission of the assessee, however, was not found to be of any force by the learned CIT and keeping in view the aforesaid defects noticed by him in the valuation report, he was of the opinion that the valuation made by PWC was entirely based on the projection given by the assessee which was not fair. He also observed that proper valuation of assets relating to the Serials 'Brahma Vishnu Mahesh' and 'Jai Shree Ganesh' was apparently not made. As noted by him in the impugned order, these serials were telecast immediately after the date of sale and therefore, the same were at the advance stage of readiness for telecast when the business of the assessee was transferred to M/s Creative Eye Ltd. He noted that this significant aspect, however, was not disclosed by the assessee to the valuer. He also noted that the entry showing amount receivable at Rs.13.50 crores from M/s Creative Eye Ltd. on account of sale of business was made in the books of account of the assessee on 1.1.2000 whereas PWC was engaged by the assessee for making the valuation on 18.2.2000. He held that the valuation report prepared and furnished by PWC thus was only a self-serving document obtained to justify the valuation shown in the books. He also noted that the agreement between the assessee and M/s Creative Eye Ltd. was dated 28.2.2000 which, according to him, was leading to the belief that the said document was also an after-thought and collusive. He held that all these aspects, however, need to be examined before a definite and final conclusion could be reached.

5. Accordingly, the assessment made by the AO u/s 143(3) was set aside by the learned CIT exercising the powers conferred upon him u/s 263 with a direction to him to frame the same afresh for the following reasons given in paragraph No.8 of his impugned order passed u/s 263:-

> "8. I have considered the submission of the assessee and also the facts and circumstances of the case. It is notable that the assessee has submitted copy of business Valuation Report by PWC alongwith the copy of Agreement with M/s Creative Eye Limited for transfer of running business and the so called brand name at the fag end of the year when these proceedings are getting barred by limitation and that the assessee had not presented herself for cross examination in relation to the affidavits filed by her and Sh.Dheeraj Kumar (Chairman and Managing Director of M/s Creative Eye Ltd.), husband of the assessee. In this background it is essential to examine the basis of valuation by making reference to valuer and also to examine to assessee who could not appear before the CIT on each occasion in order to establish the veracity of the agreement signed by the assessee and her husband. Thirdly, it is also necessary on the basis of the aforesaid two actions that the AO is required to find out true value of business assets keeping in view the correct value of serials 'Brahma Vishnu Mahesh' and 'Jai Jai Sri Ganesh' and value of brand name, if any.
>
> Keeping in view that the assessing officer passed the assessment order dated 20/3/03 in a routine manner without proper verification of genuineness and admissibility of various expenses debited to profit and loss account under various heads and that the assessee also with-held the information regarding receipt of Rs.13,50,00,180/-, which was neither disclosed in the return of income nor during the assessment proceedings, I hold that the assessment made was erroneous and prejudicial to the interest of the Revenue. Therefore I cancel the assessment made vide order dated 20.3.2003 with the direction to the assessing officer to find out the value of the running business assets and value of brand, if any and also to verify the genuineness and admissibility of various expenses debited to the profit and loss account and to examine the admissibility and veracity of agreement between the assessee and M/s Creative Eye Limited. He is further directed to pass a fresh assessment order after ascertaining the true value of business assets in order to compute the capital gain liable to tax."

6. The learned counsel for the assessee submitted before us that in order to assume jurisdiction u/s 263 for revising the order of assessment passed by the AO, it is incumbent upon the learned CIT to point out in the notice issued by him u/s 263 itself as to how the

said order being sought to be revised is erroneous as well as prejudicial to the interest of the Revenue. Relying on the decision of Hon'ble Supreme Court in the case of Malabar Industries – 243 ITR 83, he contended that the order of the AO has to be erroneous as well as prejudicial to the interest of the Revenue for giving jurisdiction to the learned CIT to revise the same and unless these two conditions are found to be satisfied by the learned CIT, he cannot exercise the powers conferred upon him to revise the assessment order u/s 263. He took us through the notice dated 27.1.2004 issued by the learned CIT u/s 263 and submitted that nowhere in the said order, it was pointed out by the learned CIT as to how the relevant assessment order passed by the AO was prejudicial to the interest of the Revenue. He contended that in the absence of such specific finding given by the learned CIT(A) pointing out the prejudice caused to the Revenue as a result of errors allegedly committed in the order of the Assessing Officer, the assumption of jurisdiction u/s 263 itself was not in accordance with law and the impugned order passed by him invoking his powers u/s 263 is unsustainable on this ground itself. He submitted that the expression "prejudicial to the interest of the Revenue" used in Section 263 means a loss caused to the Revenue as a result of errors allegedly committed by the AO and unless the learned CIT points out specifically in the notice as to how the said errors have resulted in the revenue loss actually, the prerequisite condition for assuming jurisdiction u/s 263 cannot be said to be satisfied.

7. The learned counsel for the assessee then took us through the copy of fresh assessment passed by the AO as per the directions of the learned CIT given u/s 263 placed at page Nos.32 to 34 of the paper book and pointed out that the fresh/new addition made by the AO as against the assessment originally completed was only on account of alleged sale of goodwill. He also pointed out from the copy of appellate order of the learned CIT(A) placed at page No.40 to 55 of assessee's paper book that the said addition made by the AO in the assessment completed u/s 143(3)/263 has already been deleted by the learned CIT(A) which clearly shows that there was ultimately no prejudice caused to the Revenue as a result of the assessment originally completed by the AO u/s 143(3). He contended that this very fact that the major addition made by the AO in the assessment completed u/s 143(3)/263 on account of sale of her business by the assessee along with brand name has already been deleted by the learned CIT(A) clearly shows that the

inference drawn by the learned CIT that the assessment originally completed by the AO was prejudicial to the interest of the Revenue is not correct.

8. The learned counsel for the assessee also submitted that the issue relating to taxability of capital gain arising as a result of sale of her business by the assessee alongwith brand name was not raised by the learned CIT in the notice dated 27.1.2004 issued initially while assuming jurisdiction u/s 263. He submitted that there was no reference whatsoever to the said issue in the notice dated 27.1.2004 issued by the learned CIT u/s 263 and this issue was raised only subsequently by the learned CIT on the basis of some material stated to be found during the course of survey and the further enquiries made by the learned CIT giving rise to some doubts in his mind as mentioned in his impugned order passed u/s 263. He submitted that although the assessee was informed by the learned CIT vide a so-called notice dated 5.5.2004 about this aspect calling for her explanation, there was nothing in the said notice pointing out any error committed by the AO in his order on this issue which was prejudicial to the interest of the Revenue. He contended that this notice thus stated to be issued by the learned CIT u/s 263 was not valid for the reasons that no error in the order of the AO was specifically pointed out therein, that the same was issued to make roving/fishing enquiry which was not permissible during the proceedings u/s 263 and that the scope of proceedings initiated u/s 263 was attempted to be expanded by raising an altogether new issue. He contended that this new issue raised by the learned CIT on the basis of fishing/roving enquiries made on the basis of extraneous material thus was beyond the scope of proceedings u/s 263 and the direction given by him to the AO vide his impugned order to examine this issue and bring the capital gain, if any, to tax as a result of sale of her business and brand name by the assessee is liable to be quashed.

9. In support of the aforesaid contention raised by him, the learned counsel for the assessee has relied, *inter alia*, on the following judicial pronouncements:-

(i) Dinesh Chand & Others Vs. JCIT – 95 ITD 209 (Del).
(ii) P.L.Chemicals Ltd. Vs. ACIT – 86 ITD 46 (Mad).
(iii) Saroj Kumar Poddar Vs. JCIT – 77 ITD 326 (Cal).
(iv) Malabar Industrial Co.Ltd. Vs. CIT – 243 ITR 83 (SC).

(v) S.S.I.Ltd. Vs. DCIT – 85 TTJ (Chennai) 1049.

(vi) CIT Vs.L.F.D'Silva – 192 ITR 547 (Karn).

10. The learned DR, on the other hand, has submitted that the subsequent events such as the final outcome of the revised order passed by the AO as per the direction of the learned CIT u/s 263 on merits as well as the decision of learned CIT(A) on the appeal filed by the assessee against such revised order are not relevant to decide the validity of jurisdiction assumed by the learned CIT u/s 263 especially when the errors pointed out by him in the order of the AO are about the lack of proper and adequate enquiries conducted by the AO while completing the assessment. She contended that if the assessment order completed by the AO is found to be made without conducting the proper and adequate enquiries as were required in the facts and circumstances of the case, the order of the AO becomes erroneous as well as prejudicial to the interest of the Revenue on this ground itself giving jurisdiction to the learned CIT to proceed u/s 263. She pointed out that in the notice issued by the learned CIT u/s 263 on 27.1.2004, such enquiries which ought to have been made by the AO were listed/identified by the learned CIT and there being no case made out by the learned counsel for the assessee to point out that the said enquiries were not required to be made by the AO or that such enquiries in fact had been actually made by the AO, it follows that the order of the AO completed without making the said enquiries was erroneous as well as prejudicial to the interest of the Revenue and the assumption of jurisdiction by the learned CIT was in accordance with law. In support of this contention, she also relied on the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co.Ltd. (supra). As regards the reliance of the learned CIT on the material found during the course of survey to hold the order of the AO erroneous as well as prejudicial to the interest of the Revenue on the issue of taxability of capital gain arising to the assessee as a result of transfer of her business as well as brand name, she contended that in view of clause (b) of Explanation to Section 263(1), the learned CIT is empowered to rely upon even those information, document, report etc. which came to light subsequent to the passing of the order of the Assessing Officer. She submitted that since the said material found during the course of survey as well as further enquiries made by the learned CIT clearly revealed that the issue relating to taxability of the said capital gain arising to the assessee was not examined by the AO, the assessment order passed by him was rendered erroneous as well as prejudicial to the interest of the

Revenue on this ground also as rightly held by the learned CIT in his impugned order passed u/s 263.

11. We have considered the rival submissions and also perused the relevant material on record. Before us, the main contention raised by the learned counsel for the assessee while challenging the validity of assumption of jurisdiction by the learned CIT u/s 263 in the present case is that there was failure on the part of the learned CIT to point out in the notice issued u/s 263 as to how the errors allegedly committed by the AO in completing the assessment were prejudicial to the interest of the Revenue. In this regard, it is observed that the order passed by the AO in this case was held to be erroneous and prejudicial to the interest of the Revenue by the learned CIT u/s 263 on the ground that proper enquiries as required to be made in the facts and circumstances of the case were not made by the Assessing Officer while completing the assessment. As is evident from the notice dated 27.1.2004 issued by him, such enquiries were also specifically pointed out by him and there is no case made out on behalf of the assessee before us to show either that such enquiries, as pointed out by the learned CIT, were not required to be made by the AO in the facts and circumstances of the case or that such enquiries had actually been made by the AO during the course of assessment proceedings.

12. A perusal of the notice issued by the learned CIT u/s 263 on 27.1.2004 clearly shows that it was not a case where the view taken by the Assessing Officer on any issue was held to be erroneous by the learned CIT on merits for assuming jurisdiction u/s 263 in order to substitute the same with his own view by exercising the powers conferred on him u/s 263. On the other hand, the assessment made by the AO was held to be erroneous as well as prejudicial to the interest of the Revenue by him for the reason that no proper enquiries as required in the facts and circumstances of the case were made by the AO while completing the assessment and even such proper enquiries which the Assessing Officer ought to have made were also precisely identified by him in the said notice. In the cases of Smt.Tara Devi Aggarwal Vs. CIT – 88 ITR 323 and Ram Pyari Devi Sarogi Vs. CIT – 67 ITR 84, it was held by the Hon'ble Supreme Court that the CIT can regard the order of the Assessing Officer as erroneous on the ground that in the facts and circumstances of the case, the ITO should have made further enquiries before accepting the statements made by the assessee in his return. Following these two

decisions of Hon'ble Supreme Court, Hon'ble Allahabad High Court has held in the case of Smt.Lajja Wati Singhal Vs. CIT – 226 ITR 527 that an assessment made on income surrendered by the assessee without making any enquiry whether the same was in fact taxable in his hands was erroneous and prejudicial to the interest of the Revenue. Further, as held by Hon'ble Delhi High Court in the cases of G.V.Enterprises Vs. Addl.CIT – 99 ITR 375 and Duggal & Co. Vs. CIT – 220 ITR 456, it is incumbent on the Assessing Officer to further investigate the facts stated in the return when circumstances would make such an enquiry prudent and his order becomes erroneous if such an enquiry has not been made. Moreover, as held by Hon'ble Gujarat High Court in the case of Addl.CIT Vs. Mukur Corporation – 111 ITR 312, an order of assessment passed by the AO without making necessary enquiries on certain important points connected with the assessment would be erroneous and prejudicial to the interest of the Revenue. To the similar effect is the decision of Hon'ble Calcutta High Court in the case of CWT Vs. Ramnarayan Bhojnagarwala – 194 ITR 489 wherein it was held that whenever a question arises as to whether a correct and proper assessment has been made upon due enquiry and it is found that no such enquiry was made, the CIT has jurisdiction in such a case to set aside the assessment by invoking the powers conferred upon him u/s 263. In the case of Malabar Industrial Co.Ltd. (supra) relied upon by both the sides at the time of hearing before us, Hon'ble Supreme Court has held that the phrase "prejudicial to the interest of the Revenue" is not an expression of art and is not defined in the Act. Explaining further, it was observed by the Hon'ble Supreme Court that understood in its ordinary meaning, the said expression is of wide import and is not confined to loss of tax.

13. A resume of the aforesaid judicial pronouncements clearly shows that the very fact that assessment was made by the Assessing officer without proper and sufficient enquiries, as warranted in the facts and circumstances of the case, makes it erroneous as well as prejudicial to the interest of the Revenue giving jurisdiction to the learned CIT u/s 263 at that stage and even if it is ultimately found on merits after conducting such enquiries that there was in fact no loss to the Revenue, the same would not have any bearing on the jurisdiction of the learned CIT which was otherwise validly assumed at the time of initiating the proceedings u/s 263. As such, keeping in view all the facts of the case as well as the legal position emanating from the various judicial pronouncements discussed above, we are of the view that the assumption of jurisdiction by the learned

CIT by issuance of notice on 27.1.2004 was in accordance with law and there was no legal infirmity in the impugned order passed by him on this count as alleged by the learned counsel for the assessee. We, therefore, find no merits in the contentions raised by him on this issue and reject the same.

14. Before us, the learned counsel for the assessee has also raised a contention that the issue raised by the learned CIT about the taxability of capital gain arising as a result of sale of her business as well as brand name by the assessee was beyond the scope of proceedings u/s 263 for the various reasons as put forth by him. In order to appreciate this contention of the learned counsel for the assessee, it is pertinent to refer to the second notice stated to be issued by the learned CIT u/s 263 on 5.5.2004 raising this issue, the contents of which are extracted below:-

> "Dear Madam,
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> Please refer to the earlier notice dated 27.1.2004 issued under section 263 of the Income-tax Act 1961 for the above noted assessment year. No reply or objections to the above notice have been received from you so far. You are hereby given a further opportunity of being heard in the matter on 12.5.2004. In case there is no compliance on that date, it shall be presumed that you have no objection to the assessment order reference being set aside or appropriately modified.
>
> 2. Meanwhile, from a scrutiny of the books, documents and files impounded from your premises under section 133A of the Act on 27.2.2004, it is further noticed that while transferring your running business known as M/s Namah Shivay Enterprises to M/s Creative Eye Limited as on 31.12.1999, you also received an amount of Rs.135000180/- by way of goodwill. While making an entry in respect of this amount in your books on 1.1.2000, the narration given was:
>
> "amount received for brand name sold to creative eye ltd. as valued by pwe:
> 13,50,00,180.00"
>
> The company M/s Creative Eye Ltd. while making the corresponding entry dated 1.1.2000 in their books (as per copy of your account in their ledger as found among the documents impounded from your premises) gave the following narration:
>
> "being purchase of brand Namah Shivay Enterprises on future maintainable profit basis :
> 13,50,00,180.00".

Subsequently, on 29.2.2000, while making the entry for the allotment of shares worth Rs.8,50,00,180/- to you against the aforesaid amount of Rs.13,50,00,180.00 company M/s Creative Eye Ltd. gave the following narration :

"739132 shares allotted to Mrs.Zubi Kochar and Mr.Dheeraj Kumar Kochar towards goodwill for purchase of Namah Shivay Enterprises @ Rs.115/- per share : 8,50,00,180.00"

The balance amount of Rs.5,30,00,000/- was received by you by cheque dated 31.3.2000 and was adjusted against the balance receivable of Rs.13,50,00,180 – 8,50,00,180 = 5,30,00,000/-.

3. Although the aforesaid amount of Rs.13,50,00,180/- was duly credited to your capital account in the books of M/s Creative Eye Limited as well as in your own books, and was fully received within the financial year 1999-2000, partly by way of shares of Creative Eye Limited and partly by way of cash, yet no capital gain was declared by you in respect of this receipt in the return of income or during the course of the assessment proceedings for the above noted assessment year. This fact was apparently held back from the assessing officer, as neither any copy of the capital account for the full financial year 1999-2000 was filed nor it was mentioned in the notes to your audited accounts. In fact Working Note (1) to the audited accounts mentioned that "During the year the assessee has sold its running business of Namah Shivay Enterprises to M/s Creative Eye Limited comprising of net business assets of Rs.5913948/- for a sum of Rs.5913948/- resulting in NIL capital gain". Clearly, this note was false, understating the amount for which the business was sold by as much as Rs.13,50,00,180/-. Further, the statements of account accompanying the return were as at 31.12.99 only. Even though the relevant previous year to which the return pertained was the financial year 1999-2000, yet no accounts for the period 1.1.2000 to 31.3.2000 (in which the aforesaid entries for the sale of goodwill were made) were filed.

4. You are therefore further requested to show cause why the sale of goodwill for an amount of Rs.135000180/- should not be assessed to capital gains for the assessment year under consideration. In this connection you are also requested to produce the following:

Your ledger for the period 1.1.2000 to 31.3.2000.

- Ledger of the company M/s Creative Eye Limited for the period 1.1.2000 to 31.3.2000.
- Valuation report of PWC regarding the goodwill of Namah Shivay Enterprises.
- A copy of the original contract with Doordarshan pertaining to the production and telecast of the serial OM NAMAH SHIVAY along with all subsequent amendments or supplements to the original contract;

- Details and the extent to which the contract had been performed as on 31.12.1999; and
- Details and the extent of the pending rights and obligations as on 31.12.1999 which were transferred to M/s Creative Eye Limited.

5. The matter is fixed for this purpose for 14.5.2004 at 11 AM in my office at Room No.398, C.R.Building, I.P.Estate, New Delhi."

15. As is evident from the contents of the aforesaid notice dated 5.5.2004 issued by the learned CIT, an altogether new issue relating to taxability of capital gain arising as a result of sale of her business by the assessee alongwith its brand name was raked up by the learned CIT for the first time. The said issue was not there in the first notice issued by him u/s 263 on 27.1.2004 after assuming jurisdiction u/s 263 nor the same was linked with any issue that was raised in the said notice. In the case of Maxpack Investment Ltd. Vs. ACIT – 104 TTJ 881, it was held by Delhi Bench of ITAT that revision u/s 263 on a ground different from the one stated in notice issued u/s 263 after invoking jurisdiction conferred on learned CIT is invalid and the order passed by him u/s 263 to that extent will have to be set aside as not based on any ground which might justify his belief that the order passed by the AO was erroneous insofar as it is prejudicial to the interest of the Revenue. In the case of S.S.I.Ltd. Vs. DCIT (supra) cited by the learned counsel for the assessee, it was held by Chennai Bench of ITAT that proceeding u/s 263 has to be strictly confined to the notice issued invoking the jurisdiction under that Section for the reasons stated therein and law does not permit expanding proceedings u/s 263 after its initiation beyond what is stated in the notice itself. It was also held that whether the impugned assessment is erroneous and prejudicial to the interest of the Revenue is to be judged only with reference to the reasons stated in the notice issued at the time of invoking the jurisdiction u/s 263 and it is impermissible to extend the proceedings by resorting to issue subsequent communications to the assessee. It was held that in respect of a proceeding u/s 263, the bedrock on which the entire proceeding rests is the show cause notice and so the proceeding u/s 263 has to be strictly confined to the notice issued invoking the jurisdiction u/s 263 for the reasons stated therein. In the said case, the question as to whether the increase due to the exchange fluctuation was revenue in nature was not even in the mind of the CIT when he had issued the notice and as the said issue was not part of the show cause notice issued initially by the CIT u/s 263 on 22.12.2003, it was held by the Tribunal that it was not permissible to expand the said notice by resort to letters as

done therein observing that if the same is permitted, then there would be no end to the proceeding and it will go on expanded and expanded which is not permissible under law. It was held that the law does not permit expanding proceedings u/s 263 after its initiation beyond what is stated in the notice itself. To the similar effect is the decision of Hon'ble Karnataka High Court in the case of CIT Vs. L.F.D'Silva (supra) cited by the learned counsel for the assessee wherein it was held that the scope of proceedings u/s 263 has to be ascertained with reference to the purpose and basis of initiation of the proceedings. In the case of Shyam Biri Works (P) Ltd. – 84 ITD 124, Allahabad bench of ITAT has held that no new case could be or rather should be set up by the CIT which was never brought to the notice of the assessee at the time of commencement of the proceeding u/s 263 or which was not the part of record before proceeding in the matter

16. Moreover, the aforesaid new issue was stated to be raised by the learned CIT on the basis of some material impounded from the premises of the assessee during the course of survey carried out u/s 133A on 27.2.2004 i.e. after issuance of first notice by the learned CIT u/s 263 on 27.1.2004. It is no doubt true, as rightly submitted by the learned DR relying on the provisions of clause (b) of explanation to Section 263(1), that the CIT is empowered to rely on even those information, document, report etc. which came to light subsequent to passing of the order of the Assessing Officer. However, at the same time, it is also true that such information, document, report etc. can be relied upon by the learned CIT only if the same form part of the record when the CIT takes action u/s 263 considering the express provision of explanation (b) to Section 263 wherein it is prescribed that "Record shall include and shall be deemed always to have included relating to any proceeding under this Act **available at the time of examination by the CIT**" (emphasis supplied in bold letters). As provided in section 263(1), the learned CIT can call for and examine the record of any proceeding and if he considers on such examination that any order passed therein by the AO is erroneous in so far as it is prejudicial to the interests of the Revenue, he is empowered to revise the same after assuming jurisdiction u/s 263 and after issuing notice to the assessee. The issue of notice u/s 263 thus succeeds the examination of record by the learned CIT and since the examination of record is done by the learned CIT before issuing the notice u/s 263, the record coming to his possession after the issuance of notice u/s 263 in so far as the same is not related to any issue raised in the said notice, in our opinion, could not be said to be

the record available to him at the time of examination. In the present case, the assessment records were examined by the learned CIT and on such examination, a notice u/s 263 was initially issued by him on 27.1.2004 and this being so, we are of the view that the information or documents collected during the course of survey admittedly carried out on 27.2.2004, which was totally unrelated or irrelevant to the issues raised in the said notice, could not be said to be the record available at the time of examination by the learned CIT as envisaged in explanation (b) to Section 263 and the reliance placed by the learned CIT thereon to allege that the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue was not in accordance with law

17. The contents of the notice dated 5.5.2004 issued by the learned CIT u/s 263, which are already reproduced hereinabove, also show that there was nothing given therein to suggest or indicate as to how the order of the AO was found/considered by him to be prima-facie erroneous as well as prejudicial to the interest of the Revenue on the concerned issue. Such a specific finding was absent in the said notice stated to be issued u/s 263 and this essential ingredient was completely missing in the said notice. In the case of CIT Vs. Sattandas Mohandas Sidhi – 230 ITR 591 (MP) and in the case of Garden Silk Vs. CIT – 221 ITR 861, it has been held that a vague notice issued u/s 263 without giving any reason as to how the order is erroneous and prejudicial to the interest of the revenue is bad in law and is liable to be quashed. As a matter of fact, the contents of the said notice clearly indicate that fishing or roving enquiries were sought to be made by the learned CIT in the matter of taxability of capital gain, if any, arising from the sale of her business and brand name by the assessee. It is by now well settled that the power of suo-moto revision can be exercised by the learned CIT only if, on examination of records of any proceedings under the Act, he considers that any order passed by the AO is erroneous insofar as it is prejudicial to the interest of the Revenue. It is not an arbitrary or uncharted power. It can be exercised only on fulfillment of the requirements laid down in Section 263(1) and the consideration of the CIT as to whether an order is erroneous insofar as it is prejudicial to the interest of the Revenue must be based on materials on record of the proceedings called for and examined by him. The CIT cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-settled policies of law that there must be a point of finality in all legal proceedings and stale issues should not be

reactivated beyond a particular stage. A lapse of time must induce, repose in and set at rest judicial and quasi-judicial controversies. As held by the Hon'ble Gujarat High Court in the case of Rayon Silk Mills Ltd. Vs. CIT – 221 ITR 155, the powers u/s 263 are not conferred on the CIT to direct for making an enquiry on mere suspicion to disturb a completed assessment.

18. Keeping in view the reasons given above, we hold that the issue relating to taxability of capital gain arising from the sale of her business and brand name by the assessee raised by the learned CIT was beyond the scope of revision proceedings u/s 263 and the direction given by him to the AO in his impugned order passed u/s 263 to examine the said issue was not tenable. We, therefore, delete/cancel the said direction and modify the impugned order of the learned CIT to that extent.

19. In the result, the appeal of the assessee is partly allowed.

Decision pronounced in the open Court on 24th August, 2007.

(N.K.KARHAIL)
JUDICIAL MEMBER

(P.M.JAGTAP)
ACCOUNTANT MEMBER

Dated : 24.08.2007.
VK.

Copy forwarded to: -

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

By Hand

Deputy Registrar