

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 2725/DEL/2013 (A.Y 2008-09)

Sanjay Kumar Prop. Tyagi Associates H-45, Gandhi Nagar, Garh Road, Meerut ACZPK2030M (APPLICANT)	Vs	CIT Meerut (RESPONDENT)
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ITA No. 4979/DEL/2015 (A.Y 2008-09)

Sanjay Kumar Tyagi H. No. 45, Gandhi Nagar, Gali No. 3, Garh Road Meerut ACAPK2030M (APPLICANT)	Vs	ACIT Circle-2, Bhansali Ground Meerut (RESPONDENT)
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ITA No. 5235/DEL/2015 (A.Y 2008-09)

ACIT Circle-2, Bhansali Ground Meerut (APPLICANT)	Vs	Sanjay Kumar Tyagi H. No. 45, Gandhi Nagar, Gali No. 3, Garh Road Meerut ACAPK2030M (RESPONDENT)
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Applicant by	Sh. Sandeep Sapra, Adv
Respondent by	Sh. S. S. Rana, CIT DR

Date of Hearing	11.01.2018
Date of Pronouncement	27.02.2018

ORDER

PER N. K. SAINI, AM

This is an appeal by the assessee against the order dated 30.10.2007 passed by the ld. CIT, Meerut, u/s 263 of the Income Tax Act, 1961

(hereinafter referred to as the Act) and the Cross Appeals by the assessee and the Department are directed against the order dated 9/6/2015 of the CIT(A), Meerut.

2. Since, the appeals were heard together so these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. In ITA No. 2725/Del/2013, following grounds have been raised by the assessee:

"1. That the impugned order as passed by the Id. CIT u/s 263 of the Income Tax Act, 1961 is arbitrary, unjust & illegal on various factual and legal grounds including the followings:-

- (a) The asstt. Order dated 06.12.2010 as passed by the A.O, was neither erroneous nor prejudicial to the interest of revenue.*
- (b) The Id. CIT had no jurisdiction to invoke section 263 of the I.T. Act,1961.*
- (c) The Id A.O. has passed the order dt. 06.12.2010 u/s 143(3) after proper application of mind.*
- (d) Various Observations made by the Id. CIT in his section 263 order are either incorrect or are untenable in law and various case laws relied upon by the Id. CIT are not applicable to the appellant's case, being distinguishable on facts.*
- (e) Various directions made by the Id. CIT in his 263 order are unjust, unwarranted, and unlawful and therefore the order under appeal needs to be cancelled.*

2. That, without prejudice to ground no.1, there is no evidence and / or material on record on the basis of which the Id. CIT has arrived at the conclusion that the Ld. A.O has accepted the expenses on consumables and labour wages and the net profit of the appellant, without making any enquiry or verification and as such the directions of the Id. CIT, to make further enquiry or verification of expenses and to arrive at reasonable profit say at least 8% of contract receipt plus other receipts i.e. interest income etc, are totally unjust, unlawful, and unwarranted as the Id. A.O had passed the assessment order after proper application of mind considering all relevant material and therefore the impugned order passed by the Id. CIT needs to be set aside.

3. That without prejudice to above grounds, the Id. CIT has grossly erred in law by making additions of Rs.1,26,48,735/- as suppressed receipts, holding that the difference in total contract receipts as per the TDS certificates and contract receipts shown by the appellant were suppressed by him, without considering the details and reconciliation of gross receipts for F.Y. 2006-07 and 2007-08 as submitted during Sec. 263 proceedings in right perspective thereof and the action of the Id. CIT is perverse and has caused gross & great injustice to the appellant having been taken without affording proper opportunity of being heard to the assessee on the issue and the order under appeal is based on incomplete and inadequate appreciation of facts of the case.

4. That the impugned order of the CIT u/s 263 deserves to be cancelled/ annulled.

5. The appellant craves leave to add, delete and/or modify and grounds of appeal.”

4. From the above grounds, it is gathered that only grievance of the assessee relates to the order passed by the Ld. CIT u/s 263 of the Act by considering the assessment order passed by the A.O u/s 143(3) of the Act after proper application of mind, as erroneous and prejudicial to the interest of revenue.

5. Facts of the case in brief are that, the assessee filed the return of income on 30/09/2008 declaring an income of Rs.5,64,250/- which was processed u/s 143(1) of the Act. Later on, the case was selected for scrutiny. The A.O framed the assessment u/s 143(3) of the Act by making the addition of Rs.1,60,000/- on account of scrap sales and Rs.44,544/- on account of labour of hutments and accordingly the income was assessed at Rs.7,68,794/-. Thereafter, the Ld. CIT, Meerut exercised his powers u/s 263 of the Act and observed that the assessee had shown gross receipts of Rs.3,24,60,558/- against which the expenditure shown were of Rs.1,06,72,293/- on account of consumable consumed and Rs.1,84,57,209/- on account of labour wages which had been accepted by the AO without making any enquiry or

verification. He also pointed out that as per the TDS certificate, there were following receipts during the year under consideration:-

“1.	<i>Kumbhi Chini Mills</i>	<i>Rs.2,30,53,030/-</i>
2.	<i>Akbarpur Chini Mills</i>	<i>Rs. 3,42,928/-</i>
3.	<i>Nanglamal Sugar Complex</i>	<i>Rs.20,34,471/-</i>
4.	<i>Bajaj Hindustan Sugar</i>	<i>Rs.35,98,890/-</i>
5.	<i>Shriram Engineering Works</i>	<i><u>Rs.1,60,79,974/-</u></i> ”
	<i>Total</i>	<i><u>Rs.4,51,09,293/-</u></i>

6. As against the same only receipt of Rs.3,24,60,558/- were returned leaving a sum of Rs.1,26,48,735/- where as credit of entire TDS had been given. He also pointed out that the assessee had not shown interest income on the bank balances and that the creditors of Rs. 2,34,75,799/- and unsecured loans of Rs.8,10,850/- had not been enquired into properly before accepting the same. In view of the above, the Ld. CIT was of the view that the order passed by the A.O was found to be erroneous and prejudicial to the interest of the Revenue since at the time of the assessment, the A.O was duty bound to call for such details and examined them. Reliance was placed on the following case laws:-

- *Malabar Ind. Co. Ltd. Vs. CIT(A) (2000) 243 ITR 83 (S.C)*
- *CIT Vs. V. N. M.A Rathinasabapathy Nadar, (1995) 215 ITR 309 (Mad)*
- *Swarup Vegetable Products Industries Ltd. Vs. CIT, (1991) 187 ITR 412 (All.)*
- *Umashankar Rice Mill Vs. CIT (1991) 187 ITR 638-39 (Ori)*
- *Jadgish Kumar Gulati Vs. CIT, 269 ITR 71 (All)*
- *Gee Vee Enterprises Vs. Addl. CIT, 99 ITR 375 (Del)*
- *Rampyari Devi Saraogi Vs. CIT (1968) 67 ITR 84 (S.C)*
- *Tara Devi Aggarwal Vs. CIT (1973) 88 ITR 323 (S.C)*

7. The Ld. CIT further observed that the A.O accepted the version of the assessee without making any enquiry or verification where as it is very well settled that mere failure to make enquiries makes an order erroneous and that the Commissioner may consider an order of the AO to be erroneous. He further observed that for the purposes of Section 263, the error of law may not be apparent on the facts of the order and the Commissioner may consider an

order of the A.O to be erroneous not only if it contains some apparent error of reasoning or of law or of fact on the face of it but also because it is a stereotyped order which simply accepts what the assessee has stated in his return and fails to make enquiries which are called for in the circumstances of the case. He further observed that it was incumbent on the officer to investigate the facts stated in the return when circumstances would make such an enquiry prudent and the word erroneous in Section 263 includes the failure to make such an enquiry and that the order becomes erroneous because such an enquiry has not been made and not because there is anything wrong with the order, if all the facts stated there in are assumed to be correct. The reliance was placed on the following case laws:

- *Duggal & Co. vs. CIT (1996) 220 ITR 456 (Del.)*
- *CIT vs. Pushpa Devi (1987) 164 ITR 639 (Pat)*
- *CIT vs. Smt. Rambha Devi (1987) 164 ITR 658 (Pat)*
- *CIT Vs. Belal Nisa (1998) 171 ITR 643 (Pat)*
- *CIT vs. Smt. Kattshalya Devi (1988) 171 ITR 686 (Pat)*
- *CIT vs. Bibi Khodaija Khatoon, (1988) 171 ITR 11 (Pat)*
- *CIT vs. Smt. Chandrawati Devi, (1988) 171 ITR 111 (Pat)*
- *CIT vs. Smt. Devi (1987) 59 CTR (Pat) 3*
- *CIT vs. Bhagwant Kaur (1987) 63 CTR (Pat) 326*
- *CIT vs. Pushpa Devi (1988) 173 ITR 445 (Pat).*

8. The Ld. CIT pointed out that gross receipts in the contract account for the year ended on 31/3/2007 as per TDS certificate were at Rs.4,51,09,293/- while the assessee had shown at Rs.3,24,60,558/- against which the huge expenses of Rs.2,91,29,504/- were shown and the only explanation given was the comparison with the preceding year stating that due to increase in labour expenses and due to less turnover during the Financial Year under consideration, the percentage of two viz. labour charges and consumable increased where as the percentage of NP-as such very low at 2.51% of declared gross profit. He also pointed out that the books of accounts were not reliable and results not acceptable as the tax audit report states in Para 28 (a) that "it was not possible to provide quantitative details of goods traded as the items

were of numerous quality and sizes". According to the Ld. CIT, the A.O accepted the books as such after making an ad-hoc petty addition. He, therefore, set aside the matter to the A.O with specific directions to verify the claim of the expenses and allow only such expenses which were verifiable having supporting material or evidence to have incurred the same exclusively for the business purposes. The Ld. CIT also stated that the assessee had claimed TDS on the entire receipts of Rs.4,51,09,293/-, on which credit of TDS had also been given by the AO where as the contract receipt shown were of Rs.3,24,60,558/-. Therefore, the receipts to the magnitude of Rs. 1,26,48,735/- were included in this year's income as suppressed gross receipts. He directed the A.O to obtain the books of account, work out the interest income and bring the same to the purview of tax on mercantile basis. He also directed the A.O to enquire into the Sundry Creditors of Rs.2,34,79,799/- and unsecured loans of Rs.8,10,850/- and verify from the records if proper confirmations were filed by the assessee and asked for the same if not so. The Ld. CIT partly revised and partly set aside the assessment order to the A.O with the direction that a fresh order after examining the issues properly and considering all evidences and affording reasonable opportunity to the assessee be passed expeditiously.

9. Now the assessee is in appeal. The Ld. Counsel for the assessee submitted that the Ld.CIT directed the A.O to verify the following expenses:-

(i)	<i>Consumable Consumed</i>	<i>Rs.1,06,72,293/-</i>
(ii)	<i>Labour Wages</i>	<u><i>Rs.1,84,57,209/-</i></u>
	<i>Total</i>	<u><i>Rs.2,91,29,502/-</i></u>

It was stated that the above said expenses were allowed after proper verification by the A.O and the assessee vide letter dated 27/8/2010 furnished the list of Sundry Creditors along with their confirmation. The reference was made to Page Nos. 3 to 19 of the assessee's paper book. It was further stated that the A.O vide order sheet entry dated 29/10/2010 sought justification of

consumable consumed and labour charges paid. Reference was made to Page Nos. 212 to 214 of the assessee's paper book which is the copy of order sheet entry. It was submitted that the assessee explained vide letter dated 16/11/2010, copy of which is placed at page nos. 43 & 44, stating therein as under:-

"We do fabricate and erection of machinery used by sugar mills. Our main consumables are Electrodes, Gas Cylinders, Welding Materials, Wires, pipes, Clips, Nozzles, black glass, gloves etc. This is our main expenditure which comes around 30 to 35% of gross receipts.

Our total is depending on labour. We have to engage labour as per requirement. All work from fabrication to installation is done by labour only. The total cost of labour comes around 55% to 60%. Other expenses are nominal.

These two expenditure costs us nearly 90%. Rest of gross receipts are our other expenses and profit".

10. It was further submitted that the A.O vide order dated 16/11/2010 asked the assessee to explain as to why no scraps sale on consumable consumed was shown and as to why 2.5% of the total amount be not treated as scrap sale and added to the income of the assessee. In response the assessee vide letter dated 23/11/2010 furnished the list of Sundry Creditors with addressees, PAN Nos. and their copies of ledger accounts in the assessee's books of account, month wise details of labour charges and details of consumable consumed. Reference was made to Page No. 56 to 158 of the assessee paper book. It was also submitted that the assessee during the course of assessment proceedings furnished the books of account which had been examined by the A.O. A reference was made to the assessment order dated 22/12/2010 wherein the A.O mentioned that the assessee furnished required details and the case was discussed with Shri Manoj Jain, C.A and that the books of accounts were produced which had been examined on test check basis. It was contended that the A.O added 1.5% of the total consumable consumed and made the addition of Rs.1,60,094/- on account of scrap sales.

Therefore, it is evident that the A.O accepted the book results and explanation after verification of books of account etc. after proper application of mind. It was further contended that the Ld. CIT completely ignored the reply of the assessee filed in response to notice u/s 263 (copy of which is placed at Page No. 159 to 161 of the assessee's paper book) wherein it was submitted as under:-

“Details of consumable consumed and detailed list of labour wages has already been submitted in reply Dt. 23.11.2010 at the time of hearing u/s 142(1). Comparison chart of consumables consumed and labour charges paid is enclosed for verification.

Particulars	F.Y 2006-07		F.Y 2007-08	
	Amount (Lacs)	% to GR	Amount (Lacs)	% to GR
Gross Receipt	612.17		324.61	
Consumable consumed	202.83	33.12	106.72	32.88
Labour wages	308.95	50.47	184.57	56.86

In the financial year 2006-07, we have consumed consumable of Rs.202.83 Lacs which is 33.13% of gross receipts. The same is 32.88% in the financial year 2007-08.

In the financial year 2006-07 labour charges were Rs.308.95 Lacs which is 50.47% of gross receipts. The same is 56.86% in the financial year 2007-08. The increase in labour expenses is due to less turnover during the financial year 2008-09”.

11. Therefore, the observations of the Ld. CIT were factually incorrect and legally untenable. The Ld. Counsel for the assessee submitted that the ld. CIT referred to para 28(1) of the tax audit report, wherein it was stated that:

“It is not possible for us to provide quantitative details of goods traded as the items are of numerous quality and sizes.”

It may also be noted here that the assessee has shown gross receipts from the contract business of erection of plants and has not admitted any goods traded as such, which further enhances the inaccuracy of the books which are unreliable and business results

showing gross suppression of profits by claiming huge unexplainable expenses which are as such inflated grossly as discussed above”.

The ld. Counsel for the assessee stated that the Ld. CIT had not raised the aforesaid issue relating to the quantitative details in the show cause notice dated 4/3/2013. A reference was made to Page No. 215 to 217 of the assessee's paper book and it was submitted that the Ld. CIT had not brought any evidence on record to prove that the books of account were not reliable or the assessee was carrying on any trading activity.

12. It was further submitted that interest on the income tax refund amounting to Rs.47,649/- had been credited to the contract account. A reference was made to Page No. 193 of the assessee's paper book. It was stated that the interest on income tax refund was duly accounted for in the books of accounts, therefore, the Ld. CIT was not justified in directing the A.O to make the verification again, when the A.O himself applied his mind and framed the assessment u/s 143(3) of the Act after proper verification. As regards to the observation of the Ld. CIT that the assessee had shown net profit of Rs.8,14,254/- on the total contract receipts of Rs.3,24,60,558/-, the ld. Counsel for the assessee submitted that the GP rate shown by the assessee in the year under consideration was better than the earlier years wherein the GP rate was 1.70% while for the year under consideration, it was 2.51%. As regards to the observation of the Ld. CIT that a sum of Rs.1,26,48,735/- was suppressed contract receipts. The Ld. Counsel for the assessee submitted that during the course of assessment proceedings, the A.O raised a specific query and mentioned in the assessment order as under:

“Shri M. Jain attended and was confronted 26AS statement which showed total turnover of Rs.4,51,09,293.52 while the Audit report shows gross turnover of Rs.3,24,60,558/-. Hence, it is asked why the excess sales should not be added and income be calculated thereupon.”

A reference was made to the Page No. 212 to 214 of the assessee's paper book, which is the copy of the order sheet entry dated 21/12/2010. It was stated that in response to the aforesaid query, the assessee vide letter dated 22/12/2010 (copy of which is placed at page no. 202 of the assessee's paper book) submitted that difference was due to working progress shown in the earlier year and the following details were filed:

Details of receipt for the F.Y 2006-07

<i>Particulars</i>		<i>Amount</i>
<i>Receipt during the year</i>		<i>4,89,86,960.90</i>
<i>Add: Closing work in progress (work completed but not certified/billed)</i>		<i>1,22,29,648.00</i>
	<i>Total</i>	<i>6,12,16,608.90</i>

Details of receipt for the F.Y 2007-08

<i>Particulars</i>		<i>Amount</i>
<i>Receipt during the year</i>		<i>4,38,54,956.19</i>
<i>Add: Closing work in progress (work completed but not certified/billed)</i>		<i>8,35,250.00</i>
	<i>Total</i>	<i>4,46,90,206.19</i>
<i>Less: Opening work in progress</i>		<i>1,22,29,648.00</i>
<i>(The same has been taken as gross receipts during the Financial Year 2007-08)</i>		<i>3,24,60,558.19</i>

Copy of ledger A/c of gross receipts for the F.Y. 2007-08 is placed at pages 204-211 of the supplementary paper book from which it is evident that gross receipts are Rs.4,46,90,206/- (Rs.4,64,59,906 minus Rs.17,69,700/- being service tax debited to the said account.)

13. It was emphasized that the aforesaid submission was also made before the Ld. CIT during the course of proceedings u/s 263 of the Act vide letter dated 13/3/2013 copy of which is placed at Page No. 159 to 161 of the assessee's paper book. Accordingly, it was submitted that there was no

discrepancy between the receipts shown as per Form No. 26AS/TDS Certificate and the gross receipts shown by the assessee. It was stated that the Ld.CIT had not appreciated the submissions of the assessee and confused herself by considering only the closing stock which pertained to the consumables and not to the working progress. It was further stated that there was no discrepancy in the gross receipt, closing stock and work progress as was evident from the audited balance-sheet and the contract account (copies of which are placed at Page No. 176 & 177 for the Assessment Year 2007-08 and Page No. 192 & 193 for Assessment Year 2008-09 of the assessee's paper book). Therefore, the observations of the Ld. CIT relating to gross receipt , opening stock, closing stock and magnitude of difference amounting to Rs.1,26,48,735/- was factually wrong.

14. As regards to the non charging of the interest on the bank balances, the Ld. Counsel for the assessee submitted that all the bank accounts mentioned by the Ld. CIT were the "current accounts" which do not provide any interest, therefore, the question of earning any interest did not arise. As regards to the verification of the Sundry Creditors and the unsecured loans, the Ld. Counsel for the assessee submitted that during the course of assessment proceedings, the A.O vide order sheet entry dated 16/11/2010 asked the assessee to furnish the PAN Nos. of the Sundry Creditors and in response, the assessee furnished the PAN Nos., copies of ledger accounts of all the Sundry Creditors in the books of the assessee. The reference was made to Page No. 54 to 74 of the assessee's paper book. It was stated that the A.O accepted the creditors after proper application of mind and verification of books of accounts, therefore, the revision on such issue u/s 263 was not justified. As regards to the unsecured loans, the Ld. Counsel for the assessee submitted that those were the opening balances and the assessee furnished the copies of confirmations from all the parties. A reference was made to Page no. 49 to 53 of the assessee's paper book. It was also stated that submissions were made before the Ld. CIT but

the same were totally ignored. A reference was made to Page No. 159 to 161 of the assessee's paper book. It was accordingly submitted that when the A.O after proper verification and application of mind framed the assessment u/s 143(3) of the Act. The direction of the Ld. CIT to re-examine and verify the same again while invoking the provisions of Section 263 of the Act was not justified. The reliance was placed on the following case laws:-

- *CIT Vs Rashid Exports Industries and Ors. 389 ITR 293 (All.)*
- *CIT Vs. Ashish Rajpal 320 ITR 674 (Del.)*
- *CIT Vs. Contimeters Electricals Pvt. Ltd. 317 ITR 249 (Del.)*
- *CIT Vs. G. K. Kabra 211 ITR 336, (A.P.)*
- *CIT, Ghaziabad Vs M/s Raj Shyama Construction (P) Ltd. in ITA No.40 of 2011 order dated 04.10.2017 (All. HC)*

15. In his rival submissions, the Ld. CIT DR strongly supported the order of the Ld. CIT and reiterated the observation made in the impugned order. It was further submitted that the A.O did not make proper enquiry while making assessment and accepted the explanation of the assessee and that the Ld. CIT simply directed the A.O to carry out the detailed enquiry, therefore, the powers exercised u/s 263 of the Act were fully justified. The Reliance was placed on the judgment dated 29/11/2017 of the Hon'ble Apex Court in the case of Denial Merchants Pvt. Ltd. & anr Vs. ITO & anrs wherein the SLP filed by the assessee was dismissed against the order of the Hon'ble Calcutta High Court in G.A No. 599/2016 order dated 10/4/2017. The reliance was also placed on the following case laws:-

- *Malabar Industrial Co. Ltd. Vs CIT (2000) 243 ITR 83 (SC)*
- *Rajmandir Estates (P.) Ltd. Vs PCIT (2016) 386 ITR 162 (Cal.)*

16. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the A.O passed the assessment order u/s 143(3) of the Act and the Ld. CIT exercised his revisionary powers u/s 263 of the Act and held that the order passed by the A.O was the erroneous and prejudicial to the

interest of the Revenue, he directed the A.O to make the proper verification and pass the assessment order afresh, after affording a due and reasonable opportunity of being heard to the assessee. The powers u/s 263 of the Act may be summarized as under:-

- (i) *“The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interests of the Revenue. Both the conditions must be fulfilled.*
- (ii) *Sec. 263 of Act cannot be invoked to correct each and every type of mistake or error committed by the AO and it is only when an order is erroneous, that the section will be attracted.*
- (iii) *An incorrect assumption of facts or an incorrect application of law will suffice for the requirement of an order being erroneous.*
- (iv) *if the order is passed without application of mind, such order will fall under the category of erroneous order.*
- (v) *Every loss of revenue cannot be treated as prejudicial to the interest of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view -with which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under the law.*
- (vi) *If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the CIT, while exercising his power under Sec. 263 of the Act, is not permitted to substitute his estimate of income in place of the income estimated by the AO.*
- (vii) *The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrives at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.*

- (viii) *The CIT, before exercising his jurisdiction under section 263, must have material on record to arrive at a satisfaction.*
- (ix) *If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allowed the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.”*

17. In the present case, it is noticed that the Ld. CIT directed the A.O to verify the consumables consumed and labour wages amounting to Rs.1,60,72,293/- and Rs.1,84,57,209/- respectively, so as to arrive at a reasonable rate of profit say at least 8% of the contract receipts. The said expenses were debited in the books of accounts and were verified by the A.O. It is also noticed that the consumable consumed for the year under consideration were 32.88% of the gross receipt while in the earlier year, it was 33.12%, therefore, there was reduction in the consumables. However, the labour charges were at 56.86% in the present year while it was at 50.47%, in the preceding year which shows that there was some increase, the explanation was given by the assessee that it was due to less turnover which increased the percentage of the expenses. In the present case, the net profit of the assessee for the year under consideration was at 2.51% while in the earlier year, it was at 1.70% of the gross receipt, in other words, there was increase in the net profit, so it cannot be said that the A.O had not verified those expenses while framing the assessment u/s 143(3) of the Act particularly when the assessee furnished monthwise details of the labour charges and the consumables which is evident from Page No. 75 to 158 of the assessee's compilation. As regards to the next objection of the Ld. CIT relating to the difference in the turnover shown in 26AS statement and the audit report, the assessee explained that the difference was on account of closing working in progress which was ignored by the Ld. CIT. It is relevant to point out that the explanation was given by the

assessee on the specific query raised by the A.O during the course of assessment proceeding which is evident from Page No. 212 to 214 of the assessee's paper book. The assessee explained that there was no difference at all, because the amount was shown as closing work in progress which is evident from Page No. 203 & 204 of the assessee's paper book. Therefore, the Ld. CIT was not justified in holding that there was a suppressed gross contract receipt. In the instant case, the Ld. CIT also directed the A.O to verify as to why the interests on the bank accounts were not credited by the assessee. However, he ignored this vital fact that the accounts maintained with the banks were current account on which no interest is paid by the bank as is done in the case of the saving bank accounts. The Ld. CIT also directed the A.O to verify the Sundry Creditors and unsecured loans. However, he ignored this fact that unsecured loans were outstanding from the earlier years and those were shown as opening balance. As regards to the Sundry Creditors, the A.O asked the assessee to furnish the confirmation and PAN Nos. and the assessee vide letter dated 23/11/2010 furnished the list of Sundry Creditors, their PAN Nos and copies of ledge accounts which are placed at Page No. 54 to 74 of the assessee's paper book. Similar submissions were furnished to the Ld.CIT in response to the notice issued by him u/s 263 of the Act. Copy of which is placed at Page NO. 159 to 161 of the assessee's paper book. Therefore, it cannot be said that the AO has not verified the Sundry Creditors.

18. By considering the totality of the facts as discussed hereinabove, we are of the view that the Ld. CIT was not justified in holding that the A.O had not properly verified the expenses, Sundry Creditors, unsecured loans and that the order passed by him was erroneous and prejudicial to the interest of the Revenue.

19. On a similar issue, the Hon'ble Jurisdiction High Court in the case of CIT Vs Rashid Exports Industries and Ors reported at 389 ITR 293 (supra) held as under:-

“It is apparent that the expression "prejudicial to the interests of revenue" appearing in Section 263 of the Act has to be read in conjunction with "erroneous" and that every loss of revenue as a consequence of the assessment order could not be treated as prejudicial to the interest of the revenue. Where the Assessing Officer has adopted a view, which is permissible in law or where two views are possible and the Income Tax Officer has taken one view, we are of the view that the Commissioner of Income Tax could not exercise its power under Section 263 of the Act to differ from the view of the Assessing Officer even if there was a loss of revenue. There is no doubt that the provision cannot be invoked on each and every type of error committed by the Assessing Officer. It is only when an order is erroneous then Section 263 of the Act could be invoked.

21. In the light of the aforesaid, we are of the opinion that the Tribunal was justified in setting aside the order of the Commissioner of Income Tax passed under Section 263 of the Act. The appeal fails and is dismissed. The question of law as modified above is answered in favour of the assessee and against the Department. The appeal is dismissed”.

20. A similar view has also been taken by the Hon'ble Jurisdiction High Court in the case of CIT, Ghaziabad Vs. M/s Raj Shyama Construction Pvt. Ltd. in ITA No. 40/2011 order dated 4/1/2017 (copy of which was furnished by the Ld. Counsel for the assessee during the course of hearing) wherein it has been held as under:-

“ The Tribunal has recorded categorical findings of fact tht all the materials were there before the Assessing Officer with regard to expenditure and after considering the bills of expenditure and the details, the Assessing Officer had identified the vouchers and thereafter passed the assessment order. The Tribunal also recorded in paragraph 39 of the order that the Commissioner (Appeals) could not demonstrate anywhere in the order that there is any lawful loss of revenue or any prejudice was caused to the department. The Tribunal, therefore, comes to the conclusion that the invocation of powers under Section 263 of the Act was not justified and, therefore, set aside the order passed under Section 263 of the Act.

In view of the findings as recorded by the Tribunal as well as by

the Assessing Officer, questions of law are answered in favour of the assessee and against the department.”

21. As regards to the decision relied by the Ld. DR in the case of Denial Merchants Pvt. Ltd. & Anr. Vs ITO & Anr. (supra), it is noticed that in the said case A.O did not make any proper enquiry while making the assessment and accepted the explanation of the assessee, in so far as receipt of share application money was concerned. However, in the present case, there was no such issue relating to share application money. Moreover, the A.O made the detailed enquiries before finalizing the assessment. Therefore, the said case is of no help to the department. Similarly, in the case of M/s Malabar Industrial Company Ltd. Vs CIT (supra), the A.O had accepted entry in statement of accounts filed by the assessee in the absence of any supporting material without making any enquiry. However, in the present case the facts were altogether different as the A.O made the proper enquiry and the assessee also furnished the requisite details with the supporting material. Therefore, the said case is also no help to the Department. We, therefore, considering the totality of the facts as discussed hereinabove are of the view that the Ld. CIT was not justified in holding the assessment order passed by the A.O as erroneous and prejudicial to the interest of the Revenue. Therefore, the same is set aside and the original assessment order dated 22/12/2010 passed by the A.O u/s 143(3) of the Act is restored.

22. The another Cross Appeals in ITA Nos. 4979 and 5235/Del/2015 filed by the assessee and the Department are related to the order passed by the A.O in consequence to the directions given by the Ld. CIT vide order dated 18/3/2018 which we have already set aside and restored the original assessment order passed by the A.O. Therefore, these appeals now become infructuous.

23. In the result, the appeal of the assessee in ITA No. 2725/Del/2013 is allowed and Cross Appeals i.e. ITA No 4979/Del/2015 by the assessee and 5235/Del/2015 by the Department are dismissed as infructuous.

Order pronounced in the Open Court on 27th FEBRUARY, 2018.

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Sd/-

**(N. K. SAINI)
ACCOUNTANT MEMBER**

Dated: 27/02/2018
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT NEW DELHI**