IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
[Before Shri A. T. Varkey, JM & M.Balaganesh, AM]

I.T.A. No. 904/Kol/2017
Assessment Year: 2012-13

M/s Rassco Steels Ltd. PAN AABCR 6022 K	Vs.	Pr.Commissioner of Income Tax-1, Kolkata
Appellant		Respondent

Date of Hearing	07.05.2018
Date of Pronouncement	20.07.2018
For the Appellant	Shri Miraj D.Shah, AR
For the Respondent	Shri G.Mallikarjuna, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal is against the action of the Pr. C.I.T.-I, Kolkata dated 02.03.2017 passed u/s 263 of the Act for A.Y.2012-13.

2. By raising ground no.1 to 3, the assessee has challenged the usurpation of jurisdiction of Pr. C.I.T. u/s 263 of the Act, to interfere in the order passed by Assessing Officer u/s 143(3) of the Act.

3. Brief facts of the case as noted by Pr. CIT is that the assessee company filed return for the A.Y.2012-13 declaring a total income of Rs.1,13,26,730/- and the assessment u/s 143(3) was completed on 27.03.2015 at a total income of Rs.1,53,77,400/-.

Thereafter the ld. Pr.CIT called for the assessment record of the assessee and examined it. Then it was noticed from the assessment order that a survey u/ s.133A of the Act. was conducted on 21.09.2011 and during the course of survey several

documents were impounded which included undisclosed sales of Rs.38,25,90,618/- for the FY 2011-12. It was further noticed that, during the assessment proceedings, the assessee suo motto had disclosed Rs.38,75,90,617/- as its undisclosed sales and after applying GP rate of 2.5%, the assessee increased its income by Rs.96,90,000/- while filing the Return of Income. Subsequently, while computing the assessed income the assessing officer applied the method of GP @3.5% to the undisclosed sale of Rs.38,75,90,617/- and increased the profit by Rs.1,37,40,672/-. As the assessee itself added back Rs.96,90,000/-, the final addition stood up to Rs.40,50,672/ -.

Further, the ld. Pr. CIT observed from the documents submitted by the assessee that the entire sale and purchase, which were not recorded in the regular books of accounts, were submitted in course of assessment proceedings. The assessee has furnished the undisclosed purchases to the tune of Rs.6,03,98,611/-. According to ld. Pr.CIT when the assessee itself had furnished all the related documents regarding undisclosed sales and purchase, the difference between the undisclosed sales and purchase ought to have been added back to the total income of the assessee. Therefore according to ld. Pr.CIT, the AO has failed to inquire into the undisclosed sales and undisclosed purchases and further failed to determine the undisclosed Profit in the undisclosed business of the assessee. In short, the ld. Pr. CIT concluded that the AO has passed the impugned assessment order without making enquiries or verification. Therefore, he issued show cause notices u/s 263 of the Act and after hearing the assessee the ld. Pr. CIT held that AO's order is erroneous and prejudicial to the revenue for no enquiry in respect of undisclosed purchases and was pleased to set aside the order of AO and directed him to pass fresh order after taking note of the aforesaid observation. Aggrieved by the aforesaid order of the ld. Pr. CIT, the assessee has preferred this appeal before us.

4. We have heard both the parties and perused the paper book and case laws cited by both the parties. We note that the assessee company is engaged in the business of

trading of Iron & Steel items. A survey was conducted u/s 133A of the Act on the premises of the assessee on 21.09.2011. During the survey, several documents were impounded, from which it transpired that assessee was engaged in purchase and sales of material which were undisclosed in the regular books maintained by the assessee. We note that the AO after taking note of the aforesaid facts have reproduced the undisclosed sale transactions for this relevant assessment year from page 2 of AO order to page 15 of his order i.e. from 01.04.2011 to 29.09.2011 which comes to Rs.38,25,90,618/-. The AO thereafter made the addition of Rs.40,50,672/- by recording his reason as under :

> "These transactions add up to Rs. 38,25,90,618/- As these transactions refer to undisclosed sales of the assessee, the assessee was asked to explain why profit at Gross Profit rate of 3.5% should not be applied to these undisclosed sales and added back to the income of the assessee. The assessee in his reply dated 02/02/2015 gave a detailed explanation of impounded material and working of income disclosed during the course of survey. The assessee himself has taken transaction of Rs. 38,75,90,617/- increasing *suo motto* the turnover by Rs.50,00,000/- The assessee himself has applied GP rate of 2.5% to these undisclosed transactions while disclosing income at the time of filing Return of Income at Rs. 96,90,000/-.
>
> I have carefully considered the submission of the assessee and have also noted the gross profit ratio shown by the assessee for last three years. I consider it fit to apply GP rate of 3.5% to the undisclosed sales of Rs. 38,75,90,618/- and add it to the income of the assessee. I further estimate a turnover of Rs. 50,00,000/· on adhoc basis to plug any leakage and apply GP Rate of 3.5% to it.
>
> 3.5% ofundisc1osed income of Rs. 38,75,90,618/· = Rs.1,35,65,672/·
>
> 3.5% of Rs. 50,00,0001 (on adhoc basis). = Rs. 1.75.000/·
> Total Income =Rs.l,37,40,672/·
> Less: Income already added back by the assessee = Rs. 96,90,00/·
> Balance = Rs. 40,50,672/·
>
> The assessee has already added Rs. 96,90,000/- in its total income, hence the balance amount of Rs. 40,50,672/- is added to the total income of the assessee. "

5. The aforesaid action of AO has been found fault by the Pr. CIT who has recorded his finding as under:-

> "9. The Assessing Officer failed to make relevant enquiry in this case. He has failed to examine the books of a/cs maintained by the assessee if any. In fact it is the case of non-enquiry with reference to undisclosed purchases, undisclosed sales and the profit in the undisclosed business of the assessee."

6. The ld. Authorized Representative assailing the very action of Pr. CIT in usurping the revisional jurisdiction submitted that AO has passed the assessment order after inquiry and after due application of mind. Therefore according to ld AR, the premise on which the Pr. CIT has found fault with the AO's action to term the assessment order as erroneous and prejudicial to the Revenue itself is wrong. It was pointed out by the ld. AR that the transaction on which addition was made by the AO is based on undisclosed transaction not booked in the regular books of the assessee. Therefore when the survey team entered the premises on 21.09.2011, all the papers may not be available and drew our attention to page 36 paper book which is a copy of the hand written chit and other paper chits/bills etc. on the basis of which later the purchase and sale accounts were prepared by the department after survey. And such prepared document of undisclosed sale details has been duly reproduced by AO from page 2 to 15 of assessment order. According to the ld AR, since certain customers insisted on sale of items without bills, the assessee in turn had resorted to buying goods without regular bills and thus the undisclosed purchases made of iron and steel items were brought to the store rooms of the assessee company and it was not properly accounted for. However when the sales of these undisclosed sales happens more attention was given to record the sales of the undisclosed items as there was collection of cash took place from the sale. According to the ld. AR, it is settled position that even if purchase details were not available, then also the entire sales cannot be added as the income of the assessee. According to ld. AR when sales figures have been accepted, then it goes without saying that there was definitely purchase of goods has taken place and thereafter the sale could happen. So according to the ld. AR, the entire thought

process of ld. Pr. CIT is flawed. The ld. AR drew our attention to page 15 to 17 of paper book which we note is the assessment order of the assessee for AY 2011-12 passed after reopening u/s. 147 of the Act, wherein AO after taking note of the survey report, has accepted the gross profit of 2.5% on the undisclosed sales amounting to Rs.33,36,84,250/- and thereby AO had duly accepted the revised return filed by the assessee pursuant to notice u/s 148 of the Act. In the said order a note of the AO is kept at page 17 of paper book which reads as under :-

> **"Note:- Not for the assessee.**
>
> During the survey u/s 133A on the assessee's business premises on 21.09.2011, a sum Rs. 83,42,000/- was declared as extra income by way of undisclosed sales of' Rs, 33,36,84.520/- on which 2".5% G.P. was calculated as given in the tax audit report filled with the original ITR. The revised return in response to 148 notice had been filed by adding up the extra income declared during the survey. The source and cost of purchase in relation to the undisclosed sale was disclosed at the time of survey and accordingly noted in the reasons for reopening u/s 147 as opening capital undisclosed Rs. 1,21,00,000/- in the A.Y. 2010-11. "(emphasis given by us)

7. So from a perusal of the note prepared by the AO in assessee's case though for A.Y.2011-12 (previous A.Y.) it is clear that source and cost of purchase in relation to the good for undisclosed sale was disclosed at the time of survey and accordingly opening capital undisclosed was taken as Rs.1,21,00,000/- for A.Y.2010-11. So we can safely infer why the AO has accepted the gross profit and did not make any addition of the undisclosed investment on goods purchased for A.Y.2011-12, since the capital for undisclosed investment for A.Y.2010-11 is in circulation and is used for subsequent A.Y. unless the Revenue is able to bring material on record to suggest that the investment made for undisclosed purchases in A.Y.2010-11 has been subsequently transferred for acquiring undisclosed assets or routed somewhere else which is not the case of ld. Pr. CIT. So as observed earlier the AO for A.Y.2011-12 after reopening the assessment has accepted the gross profit of 2.5% on the sales shown by the assessee on this factual matrix which is very important because the assessment order for A.Y.2011-

12 was passed on 25/11/2016 and the ld. Pr.CIT has issued the show cause notice on 27.01.2017 and the only fault he find in the assessment order for A.Y.2012-13 is no-enquiry to find out the undisclosed purchases.

8. With the aforesaid factual background, let us examine whether the finding of the Pr.CIT that the AO's order is erroneous and prejudicial to Revenue on account of no enquiry on the part of AO in respect of undisclosed purchases/sales.

9. We note that the assessee company has challenged in the first place, the very usurpation of jurisdiction by ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect assumption of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to

the interest of the revenue'' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue "**unless the view taken by the Assessing Officer is unsustainable in law".**

10. The only fault found by the ld. Pr. CIT to interfere with the order of AO is no-enquiry in respect of undisclosed purchases/sales and therefore the order is erroneous and prejudicial to Revenue. We are aware of the fact that the Assessing Officer's role while framing an assessment is not only an adjudicator. The AO has a dual role to dispense with i.e. he is an investigator as well as an adjudicator; therefore, if he fails in any one of the role as afore-stated, his order can be termed as erroneous. Here it will not be out of place to mention after perusal of the AO's order adopting 3.5% gross profit in place of 2.5% offered by the assessee for the reason (supra) and the details of undivided sales from 1.4.2011 to 29.09.2011 which also finds place from AO's order from page 2 to 15 of assessment order cannot be per-se termed as AO had done no sort of enquiry at all in respect of undisclosed purchases/sales to arrive at a reasonable income from sale of undisclosed items. So it cannot be said that AO did not do any enquiry on this issue. At the most it can be termed that the enquiry was not done at the expected standards of the ld. Pr.CIT., Then the question that arises is whether it is a case of lack of enquiry or inadequate enquiry. The settled position of law is that in a case of lack of enquiry on the part of AO on an issue makes his order erroneous on that issue; whereas inadequate enquiry cannot make the order erroneous unless, the ld. Pr.CIT himself conducts an inquiry on the issue in respect to question of fact or mixed question of fact and law and then demonstrate that the finding of AO on the issue is

unsustainable in law, then certainly the ld. Pr.CIT satisfies the jurisdictional fact which is required to interdict and exercise revisional jurisdiction u/s 263 of the Act of the impugned assessment order.

11. In order to understand the difference between "lack of inquiry" and "inadequate inquiry" and when it can be termed as erroneous, let us look at the following case laws wherein their Lordships explains the difference :-

INCOME TAX OFFICER vs. DG HOUSING PROJECTS LTD343 ITR 329 (Delhi)

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

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

Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under s. 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further

enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under s. 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the CIT while exercising jurisdiction under s. 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. It may be noticed that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

COMMISSIONER OF INCOME TAX vs. J. L. MORRISON (INDIA) LTD. 366 ITR

As regard the submission on behalf of the Revenue that power under Section 263 of the Act can be exercised even in a case where the issue is debatable, it was held that the case of CIT vs. M. M. Khambhatwala was not applicable. The observation that the Commissioner can exercise power under Section 263 of the Act even in a case were the issue is debatable was a mere passing remark which is again contrary to the view taken by the Apex Court in thecase of Malabar Industrial Company Ltd. & Max India Ltd. If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not

clothe the CIT with jurisdiction to exercise power under Section 263 of the Act. CIT vs. M. M. Khambhatwala reported in 198 ITR 144; CIT vs. Ralson Industries Ltd. reported in 288 ITR 322 (SC), not applicable; Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83, relied on.

(Para 72)

As regard the third question as to whether the assessment order was passed by the Assessing Officer without application of mind, it was held that the Court has to start with the presumption that the assessment order was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that the order was passed by the assessing officer after due application of mind. Meerut Roller Flour Mills Pvt. Ltd. vs. C.I.T., ITA No. 116 /Coch/ 2012; CIT vs. Infosys Technologies Ltd., 341 ITR 293 (Karnataka); S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984; A. A. Doshi vs. JCIT, 256 ITR 685; Hindusthan Tin Works Ltd. Vs. CIT, 275 ITR 43 (Del), distinguished.

12. We note that the AO has not accepted the return of income which was filed by the assessee showing gross profit rate of 2.5% on the undisclosed sales. We note that the AO had called for the explanation of the assessee as to why the gross profit should not be 3.5% for which we note that the assessee had filed a reply dated 02.0.2.2015 wherein it had given a detailed explanation of the impounded material and it justified the working of the income disclosed during the course of survey. The AO took note of the fact that though the undisclosed sales was to the tune of Rs.38,25,90,618/-, the

assessee had suo moto increased the turn over by Rs.50,00,000/- and had worked the gross profit at 2.5% of Rs.38,75,90,617/- (Rs.38,25,90,618/- + Rs.50,00,000/-) thereby showing income of the undisclosed transaction at the time of filing return of income at Rs.96,90,000/-. After taking note of the aforesaid facts as well as taking note of the gross profit ratio shown by the assessee in the last three years, the AO had applied gross profit rate of 3.5% to the undisclosed sales of Rs.38,75,90,618/- and added further Rs.50,00,000/- to it to plug any leakage and applied gross profit rate of Rs.38,75,90,618/- plus Rs.50,00,000/- thus estimated the total income of Rs.1,37,40,672/- after deducting Rs.96,90,000/- which comes to Rs.40,50,672/- and thereafter added the total income of the assessee. So we note that the AO had taken due cognizance of debit items in the profit and loss account, tax audit report, the impounded documents, statement recorded during the survey and during assessment proceedings, books of accounts and their documents, bills vouchers etc. We note that the sheet anchor on which the ld. Pr. CIT has found fault with the AO's action is that he has not made enquiry on the undisclosed purchase made by the assessee. In this context we would like to point out that there is a clear distinction between "lack of enquiry" and "inadequate enquiry. If there is an enquiry, even inadequate, that would not by itself give occasion to the ld. Pr.CIT to interdict and interfere by exercising his revisional jurisdiction merely because he is of opinion that some more enquiry should have been conducted in the matter. Then Ld. Pr. CIT should himself conduct the investigation and record a finding that the view of AO is unsustainable in law or else he cannot.

13. We note that the AO had called for explanation regarding his non acceptance of the gross profit rate of 2.5% shown by the assessee in its return of income in respect to the unrecorded sales and also suggesting as to why gross profit rate of 3.5% should not be applied and thereafter considering the reply as stated above and taking into consideration all the materials on record, the AO has taken a decision to apply gross profit rate of 3.5% by making additional ad hoc estimation of undisclosed sales of

Rs.50,00,000/-. Thus in this factual background we again say that AO has carried out inquiry and it is not a case of lack of enquiry (*no enquiry*) as held by the Ld. Pr. CIT. The ld. AR has brought to our notice that the view taken by the AO is in line with the ratio of the order of the Gujarat High Court in the case of President Industries Ltd. 258 ITR 654 b(Guj) and Delhi Tribunal in the case of India Seed House vs ACIT [2001] 69 TTJ Delhi 241 for the proposition that only gross profit on unrecorded sales need to be treated as income and not the entire undisclosed sale. So according to the ld. Counsel, the view taken by the AO in the facts and circumstances of the case is a plausible view and not a view which is unsustainable in law and therefore the ld. Pr.CIT could not have exercised his revisional jurisdiction to interfere with the order passed by the AO. We find considerable merit in the submission of the ld. Counsel for the assessee. We note that this is a case which cannot be termed as a case wherein the order of the AO on the issue can be termed as a case of no enquiry at all which falls in the realm of lack of enquiry which gives scope for the Ld. Pr. CIT to interdict exercising his revisional jurisdiction. However, it is at best a case of inadequate inquiry and in a case of adequate enquiry even at the cost of repetition, we again repeat that the ld. Pr.CIT has to inquire himself on the issue and factually hold that the finding of fact or mixed question of fact or law on the issue as found by AO is unsustainable in law. Without doing so, where there was a case of inadequate enquiry, the ld. Pr.CIT cannot hold that the order of the AO is erroneous as well as prejudicial to the interest of the revenue. Moreover, we note the important fact that in the *note* prepared by the AO for A.Y.2011-12 wherein the AO has accepted the gross profit rate of 2.5% on the undisclosed sales after having taken note of the fact that the assessee during the survey (i.e. in this AY) has admitted of having invested his undisclosed income of Rs.1.2 crores for the purpose of carrying out the undisclosed purchases which was the precise material on which the reopening was carried out for A.Y.2010-11 and that was the main reason the AO did not venture to make any addition on the undisclosed investment for purchases or [*apply the formula of sales minus purchase theory as suggested by the Pr.CIT in this case in hand*] to arrive at the profit from undisclosed

transaction was made by AO for that year, which applies to this assessment year also, because the undisclosed investment in AY 2010-11 of Rs.1.2 crore is circulated to make undisclosed purchases. And it is not the case of Ld. Pr. CIT that the undisclosed investments of Rs.1.2 crore for carrying out undisclosed purchases have been transferred for acquiring any undisclosed asset later after AY 2010-11.

14. Moreover, it is elementary that without purchases, there cannot be any sales. There is no quarrel even for the ld. Pr.CIT in respect to the sale figure which has been accepted by the AO. So therefore the Ld. Pr. CIT wants the AO to adopt the purchase figure collected during survey, and then he wanted the difference between the sale and purchases to be taken as profit, which proposition is attractive but not fair and reasonable in the facts and circumstances of the case. It is to be kept in mind that the amount of sales by itself cannot represent the income of the assessee. The sale only represented the price received by the seller of the goods of the acquisition on which it had already incurred the cost. It is the realization of excess cost over the cost incurred that only forms part of the profit included in the consideration of sales. It is not the case of the ld. Pr. CIT that investment by way of incurring the cost in acquiring the goods which has been sold has been made by the assessee and that has not been disclosed (*in the factual background which we discussed earlier in respect of A.Y.2010-11 the assessee had offered Rs.1.2 cr. as undisclosed investment*). Since the undisclosed investment to make the undisclosed purchases have been disclosed by the assessee during survey, the AO has estimated the gross profit taking into consideration the earlier three years' performance of the assessee company which is a plausible view and at any rate cannot be termed as an impossible view in the facts and circumstances of the case. It has to be kept in mind that the undisclosed income that shall form part of the total income would be so taken after defraying for all expenses that are incurred for earning such income by the assessee. Reference to the principle made in judgment rendered by the Hon'ble Supreme Court in CIT vs Pyara Singh 124 ITR 40 (SC) is relevant when undisclosed income is computed. The Ld. Pr. CIT has not found fault

with the estimation of income made by the AO. No attempt has been made by the Ld. Pr CIT to bring in any comparable cases to show that the difference between income arising from the sales and purchases figures collected during survey which result would have justified the profit/income of business that the assessee has carried out. If the difference between the sales and purchases found during survey is carried out then it would be Rs.38,25,90,618/- - Rs.6,03,98,611 = Rs..32,21,92,007/- which would be more than 80% profit which results itself show the flaw in the theory postulated by Ld. Pr. CIT in his show cause notice issued before intimation of 263 proceedings.

15. Therefore, in the facts and circumstances as discussed above, we find that the AO has discharged his duty as an investigator as well as that of an adjudicator and has applied his mind on the issue before him and taking into consideration the explanation rendered by the assessee, has taken a reasonable and plausible decision to impose gross profit rate of 3.5% and also making ad hoc addition of Rs.50,00,000/- on the undisclosed sales and has made the addition of Rs.40,50,672/-., which decision is in line with the ratio laid by Hon'ble Gujarat High Court decision in President Industries Ltd. (supra) and Tribunal's decision in India Seed (supra). Therefore, the order of AO cannot be termed as unsustainable in law. Therefore the jurisdictional fact for usurping the jurisdiction is absent and the action of Ld. Pr. CIT is without jurisdiction and all subsequent action is 'null' in the eyes of law. Therefore, we are inclined to quash the order impugned before us.

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

Order is pronounced in the open court on 20/07/2018

Sd/- Sd/-

(M.Balaganesh) (Aby. T. Varkey)
Accountant Member Judicial Member

Dated : July, 2018

JRG(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s Rassco Steels Ltd., Suite no.212/214, Mukti Chambers, 4, Clive Row, Kolkata-700001.

2 Respondent – Pr. C.I.T. -1, Kolkata

3. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.