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(AM) (JM)

ITA No. 2193/Del/2016

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E": NEW DELHI**

**BEFORE SHRI C.M. GARG, JUDICIAL MEMBER  
AND  
SHRI ANADI N MISHRA, ACCOUNTANT MEMBER**

**ITA No.:- 2193/Del/2016  
Assessment Year: 2010-11**

BSES Rajdhani Power Ltd. BSES Bhawan, Nehru Place, New Delhi – 110 019 PAN AAGCS3187H (Appellant)	Vs.	Pr. CIT Delhi-02 New Delhi (Respondent)
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Assessee by :	Shri Ajay Vohra, Sr. Advocate Shri Rohit Jain, Adv Ms. Deepashree Rao CA
Department by:	Shri Ramesh Chander, CIT DR
Date of Hearing	25/10/2016
Date of pronouncement	16/12/2016

**ORDER**

Per ANADI N MISHRA, A.M.

(A). This appeal filed by the assessee is directed against the order of Ld.CIT (Appeals) New Delhi dt. 31.3.2016 for the Assessment Year 2010-11 on the following grounds :-

- 1. That on the facts and circumstances of the case and in law, the impugned order dated 31.3.2016 passed by the Commissioner of Income-tax (CIT), under section 263 of the Income-tax Act, 1961 (the Act) is without jurisdiction, illegal, bad in law and void-ab-initio.*

2. *That on the facts and circumstances of the case and in law, the impugned revisionary proceedings having been initiated at the fag-end of the limitation period, without affording reasonable opportunity of being heard to the appellant, is illegal and bad in law.*
3. *That the CIT erred on facts and in law in failing to appreciate that the order passed under section 143(3) of the Act was not erroneous, much less prejudicial to the interest of Revenue to warrant exercise of revisionary jurisdiction under section 263 of the Act.*
4. *That on the facts and circumstances of the case and in law, the CIT erred in alleging that the assessment order dated 29.10.2013 passed by the assessing officer was erroneous and prejudicial to the interests of the revenue inasmuch as the assessing officer had not examined the issue of 'variation in cost of assets' in respect of panels, cables, capacitor, circuit breakers, feeder pillar, etc*
  - 4.1. *That on the facts and circumstances of the case and in law, the CIT failed to appreciate that the order of the assessing officer stood merged with the order of the CIT(A) qua the aforesaid issue and consequently, revisionary jurisdiction stood ousted.*
  - 4.2. *That on the facts and circumstances of the case and in law, the revisionary proceedings under section 263 of the Act having been initiated by the CIT on a mere 'change of opinion' as regards the issue of allowability of depreciation, the impugned order passed pursuant thereto is without jurisdiction and bad in law.*
  - 4.3 *That on the facts and circumstances of the case and in law, the CIT failed to appreciate that the assessment order dated 29.10.2013 had been passed after due and adequate inquiries/ investigation and application of mind in respect of the aforesaid issue of capitalization of assets and allowability of depreciation thereon.*
5. *That the CIT erred in setting aside the order dated 29.10.2013 passed by the assessing officer on following issues that were not even specified in the show-cause notice dated 16.3.2016 and for which on opportunity of being heard was provided to the appellant :*
  - (a) *Applicability of TDS provisions under section 194 r.w.s. 40(a)(ia) of the Act in respect of lease rentals, security expenses, satellite call center expenses and advertising expenses ;*
  - (b) *Examination of the arm's length nature of the transactions undertaken by the appellant with its group concerns in the year under consideration.*

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6. *That the CIT failed to appreciate that revisionary proceedings under section 263 of the Act could not be initiated merely to (a) conduct vague/roving enquiries; or (b) authorize the assessing officer to conduct roving/fishing enquiries, by merely setting aside the assessment.*

*The appellant craves leave to add, alter, amend or vary from the aforesaid grounds of appeal before or at the time of hearing.*

(B) Assessment order was passed by the Assessing Officer u/s 143(3) of Income Tax Act on 29.10.2013. The assessee filed appeal before Ld. CIT(A) which was disposed off vide order dated 3.5.2014 of the Ld. CIT(A). Ld. Pr. CIT issued a show cause notice dated 16.3.2016 relevant portion of the show cause notice is reproduced as under :-

"On an examination and review of the assessment order along with the data submitted by the company in the course of the assessment, proceedings there are certain omissions in the body of the assessment order, which has a cascading effect on the total assessable income for the year under consideration. The company had claimed depreciation on fixed assets amounting to Rs. 299 crores approximately. The depreciation on these assets was allowed as claimed except for a sum of Rs. 13,02,778/- was held as inadmissible under the head addition on account of recapitalise assets.

In the questionnaire issued by the A.O requisite details on the issues were called for, the company vide its letter dated 28.10.2013 the company has admitted as under :-

"The company has admitted that there is a variation in cost. The cost of repairs is being charged to revenue even though it should be capitalized."

The examination of the record further reveal that the variation is not limited to Transformers only but it also include Panels', Cables, Capacitators, Circuit Breaker and Feeder Pillars etc. The company had submitted that :-

"It will take a substantial time to prepare the exhaustive details as required in the questionnaire. All these aspects of the matter pertaining to cost of the fixed assets actually installed by the company , which were wholly, and exclusively for the

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purpose of its day to day running of the business had remained unverified.

In view of the above facts, I have reason to believe that the assessment order passed u/s 143(3) dated 29.10.2013 for the year under consideration needs a review u/s 263 of the I.T. Act, 1961.

In accordance with the section 263 of the Income Tax Act , 1961. I hereby require you to appear before the undersigned in Room No. 394, 3<sup>rd</sup> Floor, C.R. Building at 11 A.M. on 22.3.2016 and to submit your reply on the issue on or before the said date."

(B.1) The assessee filed written submissions before the Ld. Pr. CIT vide reply dated 29.3.2016 and vide supplementary submissions dated 30.3.2016. Ld. Pr. CIT passed order dated 31.3.2016 u/s 263 of I.T. Act whereby he set aside the order of the AO with a direction to the AO to pass an order afresh after making due inquiries and verifications. The operative portion of the order dated 31.3.2016 u/s 263 passed by the Ld. CIT is reproduced as under for ready reference :-

*"I have carefully perused the assessment records and considered the assessee's submissions. The assessee has emphasized upon -a legal point that the CIT(A) had already considered the issue of depreciation of Rs. 66,27,782/- disallowed by the AO and, therefore, the assessment order merges with the order of the CIT(A) and proceedings u/s 263- could not be initiated. Facts are actually not so. The AO considered depreciation in respect of total assets of Rs. 6,44,81,091/- only while the same should have been considered with reference to total fixed assets amounting to Rs. 2,98,93,99,552/- which is clear from a perusal of the Tax Audit Report. The present proceedings, therefore, are validly initiated because these relate to an omission on the part of the AO which was not there before the CIT(A).*

*The reply of the assessee vide letter dated 28.10.2013 before the AO during the assessment proceedings was that there was a variation in cost. The statement of the assessee called for extensive examination which was not done by the AO. Besides Transformers, there was variation in cost in respect of Panels, Cables, Capacitor, Circuit Breakers, Feeder Pillar etc. which has not at all been looked into by the AO. It*

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*has been assessee's own admission before the AO that it was going to take substantial time for them to prepare the exhaustive details called for by the AO. Obviously, the details called for were neither furnished nor examined.*

*It is also seen that the applicability of TDS provisions u/s 194 r.w. 40(a)(ia) in respect of Lease rentals was not examined by the AO. The AO further ought to have verified whether security expenses of Rs. 4.88 Crores, satellite call centre expenses of Rs. 1.30 crores & advertising expenses of Rs. 0.70 crores were subject to TDS or not.*

*The Auditor has given a break-up of expenses debited to P & L account w.r.t transactions with group concerns. The AO has not considered and examined these transactions with group concerns for determining whether the dealings with group companies were at Arms Length Price.*

*In view of the points as discussed above, the order of the AO is clearly erroneous in so far as it is prejudicial to the interest of revenue in terms of Explanation 2 below section 263(1). The order of the AO, is therefore, set aside with a direction to pass an order afresh after making due inquiries and verifications. He shall give an opportunity of being heard to the assessee while doing so."*

(C) At the time of hearing before us the Ld. Counsel for assessee explained to us that Ld. Pr. CIT has exercised powers u/s 263 of I.T. Act on the following three issues

- I. Depreciation on fixed assets as far as variation in cost of fixed assets is concerned.
- II. Applicability of TDS provisions u/s 194 r.w.s 40 (a) (ia) of I.T. Act in respect of lease rentals, security expenses, satellite call center expenses and advertising expenses.
- III. Examination of arms length nature of the transactions undertaken by the assessee with group concerns.

(C.1) As far as the first issue is concerned, the Ld. Counsel for assessee submitted that this issue had already been considered by the AO before he passed the assessment order and drew our attention to the fact that an amount of Rs.

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66,27,782/- was even disallowed by the AO out of depreciation claimed by the assessee on the ground that the assessee failed to furnish evidence regarding cost of the capitalised assets. He also informed that this disallowance was contested by the assessee in appeal before Ld. CIT(A) and the Ld. CIT(A) had decided the issue vide order dated 31.3.2016. . Ld. Counsel further drew our attention to the fact that before the assessment order was passed the AO already had the benefit of special audit conducted u/s 142 (2A) of I.T. Act. While admitting that all the details called for by the Assessing Officer as required in the questionnaire during the assessment proceedings had not been submitted because, in the words of the assessee, *"it will take a substantial time to prepare the exhaustive details as required in the questionnaire."*; the ld counsel for the assessee, however, emphasized with the help of paper book filed in appellate proceedings in ITAT, that substantial volume of details had in any case been submitted to the Assessing Officer. Ld. Counsel contended that the impugned order dated 31.3.2016 u/s 263 of I.T. act is unsustainable because of the following reasons :-

- i) Proceedings u/s 263 of I.T. Act were initiated and order passed by Ld. Pr. CIT on a mere change of opinion as regards the allowability of depreciation as the AO had passed assessment order after due and adequate inquiries / investigations and application of mind.
- ii) The assessment order of the AO had merged with the order of the Ld. CIT(A) and consequently revisionary jurisdiction u/s 263 of I.T. Act stood ousted.
- iii) Reasonable opportunity of being heard was not provided to the assessee during proceedings u/s 263 of I.T. Act
- iv) The impugned order dated 31.3.2016 u/s 263 of I.T. Act does not clearly bring out how the order of the AO was erroneous and prejudicial to interests of revenue.

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(C.2) As far as the second and third issues mentioned in aforesaid paragraph (C) is concerned the Ld. Counsel for the assessee submitted that the impugned order dated 31.3.2016 u/s 263 of I.T. Act is unsustainable especially because these issues were not included in show cause notice dated 16.3.2016 issued to the assessee; and secondly because reasonable opportunity of being heard was not provided by the Id Pr. CIT to the assessee on these issues in the course of proceedings u/s 263 of I.T. Act.

(C.3) Ld. Counsel for the assessee relied on the following case laws :

1. Malabar Industries Co. Ltd. vs. CIT 243 ITR 83
2. CIT vs. DLF Ltd. 350 ITR 555
3. CIT vs. Vikas Polymers 341 ITR 537
4. Jewel of India vs. ACIT 325 ITR 92
5. Hari Iron Trading Co. vs. CIT 263 ITR 437
6. CIT vs. Sunbeam Auto Ltd. 332 ITR 167
7. ITO vs. DG Housing Projects Ltd. 343 ITR 329
8. CIT vs. Nirav Modi 71 taxmann.com 272
9. Oil India Ltd. vs. CIT 138 ITR 836
10. CIT vs. Sashi Theatre Pvt. Ltd. 248 ITR 126
11. CIT vs. Nirma Chemicals Works (P.) Ltd. 182 Taxman 183
12. CIT vs. K. Sera Sera Productions Ltd. 374 ITR 503
13. CIT vs. Salonah Tea Co. Ltd. 62 taxman 51
14. Mrs. Sujata Grover vs. DCIT 74 TTJ 347

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15. Sonal Garments vs. JCIT 95 ITD 363
16. Marico Industries Ltd. vs. ACIT 27 SOT 73
17. DIT vs. Jyoti Foundation ; 357 ITR 388
18. CIT vs. Leisure Wear Exports Ltd. 341 ITR 166
19. CIT vs. Hindustan Marketing and Advertising Ltd. 341 ITR 180
20. CIT vs. Ashish Rajpal 320 ITR 674
21. CIT vs. Contimeters Electricals (P) Ltd. 317 ITR 249

(D) Ld. CIT (DR) appearing for Revenue strongly supported the impugned order u/s 263 of the Act and relied on it heavily. He also drew our attention to order of apex court in the case of CIT vs. Amitabh Bachchan 384 ITR 200 (SC) to support the impugned order u/s 263 of I.T. Act.

(E) We have heard both sides and we have also perused the materials on record carefully. As far as first issue, numbered (I) in foregoing paragraph C of this order is concerned, we find that it is not in dispute that the details as required by the Assessing Officer in the questionnaire during the assessment proceedings were not submitted by the assessee either during the assessment proceedings or during proceedings u/s 263 of IT Act before Id Pr. CIT; although as claimed by the Id Counsel for the assessee, substantial volume of details had been submitted to the Assessing Officer. It is also not the case of the assessee that inquiries / verification proposed to be done by the Assessing Officer should not have been made. The case of the assessee before the Assessing Officer , and before Ld. Pr. CIT was that it will take a substantial time to prepare the exhaustive details as required in the

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questionnaire. The Assessing officer completed assessment without obtaining details asked for by him through the questionnaire. Therefore, it can be said that the Assessing Officer concluded the assessment and allowed depreciation without making inquiries / verification which should have been made and which he himself had initiated through questionnaire issued by him; and allowed relief (depreciation) without completing inquiries / verification into the claim of depreciation initiated by himself. In that view of the matter, explanations 2(a) and 2(b) to section 263 (1) of the IT Act are applicable and the reliance by Id Pr. CIT , in his impugned order u/s 263 of I.T. Act , on explanation 2 below section 263(1) of IT Act is, therefore, acceptable. Relevant part of explanation 2 to section 263(1) of IT Act is reproduced below for ready reference:-

*"Explanation 2.- For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if , in the opinion of the Principal Commissioner or Commissioner-*

- (a) the order is passed without making inquiries or verification which should have been made;*
- (b) the order is passed allowing any relief without inquiring into the claim; "*

(E.1) Also, as the Ld. Pr.CIT specifically referred to explanation 2 below s.263 (1) of I.T.Act in his impugned order dated 31.3.2016 u/s 263 of I.T. Act ; it cannot be said, in the facts and circumstances of this case, that the impugned order does not clearly bring out how the order of the AO was erroneous and prejudicial to interests of revenue.

(E.2) Also the Id Pr. CIT, in his order dated 31.03.2016 u/s 263 of IT Act has explained why doctrine of merger will not apply, and his jurisdiction u/s 263 of IT Act does not get ousted despite the order of Id CIT(A), relevant portion of his order is reproduced as under:-

*"I have carefully perused the assessment records and considered the assessee's submission. The assessee has emphasized upon a legal point that the CIT(A) had already considered the issue of depreciation of Rs. 66,27,782/- disallowed by the AO and, therefore, the assessment order merges with the order of the CIT(A) and proceedings u/s 263 could not be initiated. Facts are actually not so. The AO considered depreciation in respect of total assets of Rs. 6,44,81,091/- only while the same should have been considered with reference to total fixed assets amounting to Rs. 2,98,93,99,552/- which is clear from a perusal of the Tax Audit Report. The present proceedings, therefore, are validly initiated because these relate to an omission on the part of the AO which was not there before the CIT(A)."*

(E.2.1) Further, legal position regarding the doctrine of merger and the related legal issue regarding jurisdiction u/s 263 of IT Act is stated in explanation 1(c) of Section 263(1) of IT Act, wherein, it is explicitly stated that powers of the Pr. Commissioner/ Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in appeal. Explanation 1(c) of Section 263(1) of IT Act is reproduced as under for ready reference:-

*"(Explanation.1.) For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-*

- (a) .....
- (b) .....

*(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal (filed on or before or after the 1<sup>st</sup> day of June, 1988), the powers of the (Principal Commissioner or) Commissioner under this sub-section shall be deemed always to have extended) to such matters as had not been considered and decided in such appeal."*

(E.2.2) As the Assessing Officer considered disallowance of depreciation in respect of total assets of Rs. 6,44,81,091/- only and not in respect of total fixed assets amounting to Rs. 2,98,93,99,552/- ; the subject matter of appeal before the learned CIT(A) was limited to depreciation in respect of total assets of Rs. 6,44,81,091/- only and not in respect of claim of depreciation in respect of total fixed assets amounting to Rs. 2,98,93,99,552/- . Thus, in respect of those assets which were not part of the assets amounting to aforesaid Rs. 6,44,81,091/-, allowability of depreciation had not been the subject matter of appeal before the learned CIT(A), and had not been considered or decided by him. A perusal of grounds of appeal filed by the assessee in appeal before Ld.CIT(A) and a further perusal of appellate order of Ld. CIT(A) also shows that neither was allowability of depreciation in respect of those assets which were not part of the assets amounting to aforesaid Rs. 6,44,81,091/- a subject matter of appeal before the Ld. CIT(A), nor had the matter been considered or decided by him. Thus, the jurisdiction of Ld. Pr.CIT u/s 263 of I.T.Act, in the specific facts and circumstances of this case, was not ousted in respect of those assets which were not part of the assets amounting to aforesaid Rs. 6,44,81,091/- . In view of the foregoing discussion, including foregoing paragraphs (E .2) and (E.2.1) of this order, we are of the view that the exercise of jurisdiction by Id Pr. CIT u/s 263 of IT Act was correct and valid in law in

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respect of those assets which were not part of the assets amounting to aforesaid Rs. 6,44,81,091/- .

(E.3) We find that Id Pr. CIT has not directed the Assessing Officer, in his impugned order u/s 263 of IT Act, to make any addition, or to disallow the claim of depreciation partly or wholly. The Id Pr. CIT has merely set aside the assessment order with a direction to the Assessing Officer to pass an order afresh after making due inquiries and verifications. A direction of Id Pr. CIT to pass a fresh assessment order after due inquiries and verifications does not amount to a direction to disallow depreciation partly or wholly or to make any addition and therefore, it cannot be said that order passed by the Id Pr. CIT amounted to a change of opinion as regards allowability of depreciation.

(E.4) As far as reasonable opportunity of being heard during proceedings u/s 263 of IT Act is concerned, we find that notice u/s 263 of IT Act was issued on 16.03.2016. The assessee submitted written submissions vide letter dated 29.03.2016 (pages 109 to 121) of Paper Book filed during appellate proceedings before ITAT and supplementary submission dated 30.03.2016 were also filed by the assessee before Id Pr CIT (pages 122 to 349) of paper book filed during appellate proceedings before ITAT. Thus, we find that the assessee made detailed submissions before the Id Pr. CIT for which the assessee got reasonable opportunity. The order u/s 263 of IT Act was eventually passed by Id Pr. CIT on 31.03.2016, the last day of limitation period, and it was not possible for him to provide any further

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opportunity. In any case, as we have mentioned already, the assessee did get reasonable opportunity.

(E.5) It is of no relevance whether or not the Assessing Officer had the benefit of audit report u/s 142(2A) of I.T.Act. There are numerous provisions under Income Tax Act,1961 and Income Tax Rules, 1962 under which audit report is made available to the Assessing Officer. That, however, does not preclude inquiries and verifications by the Assessing Officer himself. It is explicitly provided in Explanation 2(a) to s.263(1) of I.T.Act that order passed without making inquiries or verification which should have been made *shall be* (emphasis added) deemed to be erroneous in so far as it is prejudicial to the interests of the revenue. There is nothing in the scheme of s.263 of I.T.Act to lead to an inference that jurisdiction of Pr. CIT u/s 263 of I.T.Act to revise order of Assessing Officer is barred if the Assessing Officer had the benefit of audit report u/s 142(2A) of I.T.Act. What is of relevance is whether the assessment order was passed without making inquiries or verification which should have been made. In the instant case, as we have noted earlier, it is not in dispute that the details as required by the Assessing Officer in the questionnaire during the assessment proceedings were not submitted by the assessee either during the assessment proceedings or during proceedings u/s 263 of IT Act before Id Pr. CIT; although as claimed by the Id Counsel for the assessee, substantial volume of details had been submitted to the Assessing Officer. It is also not the case of the assessee that inquiries / verification proposed to be done by the Assessing Officer should not have been made. The case of the assessee before the Assessing Officer , and before Ld. Pr. CIT was that it will take a substantial time to prepare the

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exhaustive details as required in the questionnaire. The Assessing officer completed assessment without obtaining details asked for by him through the questionnaire. Therefore, it can be said that the Assessing Officer concluded the assessment and allowed depreciation without making inquiries / verification which should have been made and which he himself had initiated through questionnaire issued by him; and allowed relief (depreciation) without completing inquiries / verification into the claim of depreciation initiated by himself. Accordingly , in the facts and circumstances of this case, we are of the view that even though the Assessing Officer had the benefit of audit report u/s 142(2A) of I.T.Act, he passed assessment order without making inquiries / verification which should have been made and which he himself had initiated.

(E.6) We have considered the various case laws relied upon by the Id counsel for the assessee. However, we are of the view; considering specific facts and circumstances of this case noted by us earlier at relevant places in this order; and also considering the legal position as reproduced earlier at relevant places in this order ; that these case laws do not advance the cause of the assessee. Moreover, stronger judicial precedents by Hon'ble Apex Court in the cases of CIT Vs. Amitabh Bhachan 384 ITR 200 (SC) and Malabar Industrial Co. Ltd. Vs. CIT 343 ITR 83 (SC), are against the assessee and in favour of revenue. In the case of CIT Vs. Amitabh Bhachan (supra) the Hon'ble Apex Court upheld the order passed by the CIT u/s 263 of IT Act on the ground that there was necessity of further inquiry in the interest of revenue. Similarly, in the case of Malabar Industrial Co. Ltd. Vs. CIT (supra), Hon'ble Supreme Court upheld the order passed u/s 263 of IT Act on the ground that the claim of the

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assessee was accepted by the Assessing Officer in absence of any supporting material and without making any inquiry.

(E.7) In view of the foregoing paragraphs No. E to E.6, as far as first issue, numbered as (I) in foregoing paragraph C is concerned; we are of the view that the impugned order dated 31.03.2016 u/s 263 of IT Act is to be sustained to the extent of directions issued by the Ld. Pr.CIT pertaining to claim of depreciation in respect of those assets which were not part of the assets amounting to aforesaid in respect of those assets which were not part of the assets amounting to aforesaid Rs. 6,44,81,091/- but were part of assets amounting to aforesaid Rs. 2,98,93,99,552/- . However, we find that in his impugned order u/s 263 of I.T.Act , the learned Pr. CIT has not specifically identified those assets ( which were not part of the assets amounting to aforesaid Rs. 6,44,81,091/- but were part of assets amounting to aforesaid Rs. 2,98,93,99,552/- ) in respect of which claim of depreciation was neither a subject matter of appeal before the Ld. CIT(A), nor had the matter been considered or decided by Ld. CIT(A). Therefore, impugned order of Ld. Pr.CIT u/s 263 of I.T.Act is set aside with a direction to pass a fresh order as per law; after identifying those assets ( which were not part of the assets amounting to aforesaid Rs. 6,44,81,091/- but were part of assets amounting to aforesaid Rs. 2,98,93,99,552/-) in respect of which claim of depreciation was neither a subject matter of appeal before the Ld. CIT(A), nor had the matter been considered or decided by Ld. CIT(A); and restricting his order u/s 263 of I.T.Act to claim of

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depreciation in respect of assets so identified. Before passing the fresh order u/s 263 of I.T.Act, Id. Pr.CIT is free to ascertain facts from Ld. CIT(Appeals) and from the Assessing Officer. Also, Ld. Pr. CIT is directed to provide reasonable opportunity to the assessee, before he passes fresh order u/s263 of I.T.Act, to provide any further materials. Ld. Pr.CIT is directed that before he passes the fresh order, he is to consider all materials that the assessee may furnish and also the materials that the assessee has already furnished during assessment proceedings and during revision proceedings u/s 263 of I.T.Act .

(F) As far as the second and third issues numbered as II and III in foregoing paragraph C are concerned; it is not in dispute that these issues were not mentioned in show-cause notice dated 16.03.2016 issued by the Id Pr. CIT to the assessee. However, on perusal of section 263 of IT Act it is seen that there is no requirement to issue any specific show-cause notice to the assessee. Rather, what is required is an opportunity of hearing to the assessee. This issue was considered by the Hon'ble Supreme Court in the case of CIT Vs. Amitabh Bhachan (supra) and it was held that there was nothing in section 263 of IT Act to raise the said notice to the status of a mandatory show-cause notice affecting the initiation of the exercise in the absence thereof or to require the CIT to confine himself to the term of the notice and foreclosing consideration of any other issue or question of fact. For ready reference the following portion of the order of Hon'ble Apex Court in the case of CIT Vs. Amithabh Bhachan is reproduced:-

*"10. Reverting to the specific provisions of Section 263 of the Act what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the Revenue is the basic precondition for exercise of jurisdiction under Section 263 of the Act. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the Section to give the assessee an opportunity of being heard. It is in the context of the above position that this Court has repeatedly held that unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed. Such a notice is not required. What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice. Reference in this regard may be illustratively made to the decisions of this Court in Gita Devi Aggarwal vs. Commissioner of Income Tax, West Bengal and others and in The C.I.T., West Bengal, II, Calcutta vs. M/s Electro House. Paragraph 4 of the decision in The C.I.T., West Bengal, II, Calcutta vs. M/s Electro House (supra) being illumination of the issue indicated above may be usefully reproduced hereunder:*

*"This section unlike Section 34 does not prescribe any notice to be given. It only requires the Commissioner to give an opportunity to the assessee of being heard. The section does not speak of any notice. It is unfortunate that the High Court failed to notice the difference in language between Sections 33-B and 34. For the assumption of jurisdiction to proceed under Section 34, the notice as prescribed in that section is a condition precedent. But no such notice is contemplated by Section 33-B. The jurisdiction of the Commissioner to proceed under Section 33-B is not dependent on the fulfilment of any condition precedent. All that he is required to do before reaching his decision and not before commencing the enquiry, he must give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary. Those requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner. At present we are not called upon to consider whether the order made by the Commissioner is vitiated because of the contravention of any of the principles of*

*natural justice. The scope of these appeals is very narrow. All that we have to see is whether before assuming jurisdiction the Commissioner was required to issue a notice and if he was so required what that notice should have contained? Our answer to that question has already been made clear. In our judgment no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed under Section 33-B. Therefore the question what that notice should contain does not arise for consideration. It is not necessary nor proper for us in this case to consider as to the nature of the enquiry to be held under Section 33-B. Therefore, we refrain from spelling out what principles of natural justice should be observed in an enquiry under Section 33-B. This Court in Gita Devi Aggarwal v. CIT, West Bengal ruled that Section 33-B does not in express terms require a notice to be served on the assessee as in the case of Section 34. Section 33-B merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice under Section 34 cannot, therefore, be applied to a proceeding under Section 33-B." (Page 827-828).*

*[Note: Section 33-B and Section 34 of the Income Tax Act, 1922 corresponds to Section 263 and Section 147 of the Income Tax Act, 1961]*

*11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to the status of a mandatory show cause notice affecting the initiation of the exercise in the absence thereof or to require the C.I.T. to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the C.I.T. is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the C.I.T. prior to the finalization of the decision."*

Therefore, we reject the contention of the Id counsel for the assessee that the order u/s 263 of IT Act was unsustainable on the points numbered as II and III in foregoing paragraphs C on the ground that these issues were not mentioned were not mentioned in the show-cause notice dated 16.03.2016. However, what also needs to be seen is whether Id Pr. CIT provided an opportunity to the assessee on

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these issues before passing order u/s 263 of IT Act. The Id CIT DR appearing for Revenue failed to show from records that the Id Pr CIT had provided an opportunity to the assessee on these issues. The perusal of order dated 31.03.2016 u/d 263 of IT Act does not mention when and how the assessee was confronted by him on these issues. Further, in impugned order u/s 263 of I.T.Act, there is no discussion of whether the assessee was provided an opportunity by Ld. Pr.CIT on these issues before the Ld. Pr.CIT passed impugned order u/s 263 of I.T.Act. Therefore, we infer that the Id Pr. CIT did not provide an opportunity to the assessee on these issues before passing order u/s 263 of IT Act. Therefore, in the interest of justice we set aside the impugned order dated 31.03.2016 of Id Pr. CIT passed u/s 263 of IT Act on these issues; with the direction to the Id Pr. CIT to pass fresh order as per law on these issues after providing reasonable opportunity to the assessee.

G. In the result, impugned order dated 31.03.2016 of Id. Pr. CIT u/s 263 of I.T.Act is set aside and restored back to the file of Ld. Pr. CIT with direction to pass a fresh order, after providing reasonable opportunity to the assessee, in accordance with directions issued earlier in this order at relevant places. This appeal is treated as partly allowed for statistical purposes.

**Order pronounced in the open court on 16/12/2016.**

Sd/-  
(C.M. GARG)  
JUDICIAL MEMBER

sd/-  
(ANADI N MISHRA)  
ACCOUNTANT MEMBER

Dated: 16/12/2016

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(AM) (JM)

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Copy forwarded to:

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

TRUE COPY

By Order,

ASSISTANT REGISTRAR