

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH: 'F': NEW DELHI)**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 2504/Del/2016  
(Assessment Year: 2008-09)**

|   |     |                               |
|---|-----|-------------------------------|
| M/s P.K. Cotton Mills (P) Ltd.,<br>202, New Mohanpuri,<br>Meerut. | Vs. | ACIT,<br>Circle-2,<br>Meerut. |
| <b>PAN No:</b> AADCP4270D   |     |                               |
| <b>APPELLANT</b>  |     | <b>RESPONDENT</b>             |

**Assessee By** : Shri Rakesh Gupta, Adv.  
Shri Somil Agarwal, Adv. and  
Shri Pulkit Advani, Adv.

**Revenue By** : Shri Surender Pal, Sr. DR

**Per Anadee Nath Misshra, AM**

**(A)** This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals), Meerut, ["Ld. CIT(A)", for short], dated 07.03.2016 for Assessment Year 2008-09.

**(B)** Original Assessment Order was passed by the Assessing Officer ("AO", for short) under Section 143(3) of Income Tax Act, 1961 ("I.T. Act", for short) on 26.11.2010 wherein the net loss was assessed at Rs. 1,74,92,383/- as against loss of Rs. 1,75,55,380/- returned by the assessee. Vide Revisional order dated 18.03.2013 of

Learned Commissioner of Income Tax, Meerut, passed under Section 263 of the I.T. Act; the aforesaid Assessment Order was partly set aside with the direction given to the AO to pass fresh order. A fresh Assessment Order dated 28.03.2014 was passed by the AO under Section 263/ 143(3) of I.T. Act, in pursuance of the aforesaid order dated 18.03.2013 of the Ld. CIT(A); wherein total income was assessed at Rs. 95,10,830/- (rounded off) as against returned loss of aforesaid Rs. 1,75,55,380/-/. The relevant portion of aforesaid Order dated 18.03.2013 is reproduced as under:

In this case an assessment order under section 143(3) of the Income-tax Act, 1961 was passed on 26.11.2010 by the ACIT, Circle-2, Meerut.

2. On examination of records, it was found that the assessment was done without proper enquiry in so far as discussed in subsequent paras.

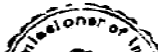
3. Accordingly, notice under section 263 of the Income-tax Act, 1961 was issued pointing out as follows:-

a) On the total turnover of Rs.1,69,62,106/-, loss of Rs. 1,75,74,887/- has been claimed. A.O. did not make any enquiry while accepting such huge unexplained loss.

b) Under the heads selling and administrative expenses of Rs.56,74,304/- debited in the Income & Expenditure A/c, the assessee has wrongly claimed a loss on sale of machinery at Rs.49,46,196/-. The AO has failed to enquire into the same and has failed to disallow the same.

c) The balance sheet as on 31.3.2007 showed the fixed assets as under:

|                       |                  |
|-----------------------|------------------|
| Gross Block           | Rs. 546,000.00   |
| Add. Addition         |                  |
| During                | Rs. 42163,589.80 |
| theyr.                | Rs. 42709,589.80 |
| Less:Sales During the | -                |
| Year                  |                  |
|                       | Rs. 42709,589.80 |



|                    |                        |
|--------------------|------------------------|
| Less: Depreciation |                        |
|                    | Rs. <u>1883,362.00</u> |
| Net Block          | Rs. 40826,227.80.      |

As against the same following is reflected in the balance sheet as on 31.3.2008:

|               |                        |
|---------------|------------------------|
| Gross Block   | Rs. 42709589.80        |
| Add. Addition |                        |
| during        | Rs. <u>22001.92</u>    |
| theyr.        | Rs. 43631591.72        |
| Less: Sales   |                        |
| During        | Rs. 10555232.07        |
| The Year      |                        |
|               | Rs. <u>33076359.65</u> |
| Less:         |                        |
| Depreciation  | Rs. <u>6308056.15</u>  |
| Net Block     | Rs. 26768303.50        |

It makes evident that following points which were required for proper examination by the AO -

- i. Entire machinery or at least a major part thereof was new as the addition was made in the year ending 31.3.2007 out of which the machinery worth Rs.1.05 crores was stated to have been sold on which loss (which was as such disallowable) to the tune of Rs.49,46,196 has been claimed and accepted by the AO. The AO has further failed to look into if the transaction was collusive one or if the sales were made to the parties covered under section 40A(2)(b) of the I.T. Act, 1961.
- ii. Though the major addition in the fixed assets was shown in the preceding year that is in the balance sheet as on 31.3.2007 and moreover the machinery worth Rs.1,05,55,232/- is stated to have been sold during the year under consideration. Claim of depreciation during the year is as high as Rs.63,08,056/- as against lat year's Rs.18,83,362/-. The AO appears to have not at all looked into the evidently highly inflated claim of depreciation during the year under consideration nor as he enquired into the correctness of the accretion in the fixed assets as was shown in the balance sheet ending on 31.3.2007 vis a vis 31.3.2008.

- d) AO has also failed to enquire into the correctness of the claims towards financial charges which have more than doubled during the year under consideration for no apparent reason.
- e) The assessee has claimed depreciation of Rs. 28,23,005/- on the plant and machinery and has simultaneously debited loss on sale of machinery amounting to Rs. 49,46,196/- in P&L account. When the depreciation has been claimed on the block on plant and machinery, loss on sale of plant and machinery sold out of block is not allowable. Sale and purchase of any asset under any block can only increase or decrease the value of block and depreciation can be accordingly claimed/ allowed.
- f) A.O. did not enquire into properly before accepting the unsecured loan of Rs. 30.00 lacs.
- g) A.O. did not enquire into properly before accepting the Sundry creditors of Rs. 7,16,533/-.
- h) Freight debited is amounting to Rs.6,93,425/- on which applicability of provisions of TDS have not been examined.

4. In view of above, the order passed by the AO was found to be erroneous and prejudicial to the interest of revenue since at the time of the assessment the AO was duty bound to call for such details and examine them. In the case of *M/s. Malabar Industries*, the Hon'ble Apex court has held that incorrect assumption of facts or incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall order passed without applying the principles of natural justice or without application of mind.

5. The fundamental principles emerged from the Hon'ble Apex Court judgement in *Malabar Ind. Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC)* include as follows:

- i. An incorrect assumption of facts or incorrect application of law will suffice the requirement of the order being erroneous.
- ii. If the order is passed without application of mind, such order will fall under the category of erroneous order.

5.1. Further, it has been held in *CIT vs. V.N.M.A. Rathinasabapathy Nadar, (1995) 215 ITR 309, 315 (Mad.)*, that if an order is passed in ignorance without taking into consideration of the relevant facts or is affected by the presence of any irrelevant fact into consideration, the same is erroneous.

5.2. It is beyond dispute that, under section 263, the Commissioner does have the power to set aside the assessment order and send the matter for a fresh assessment if he is satisfied that further enquiry is necessary, and that the order of the AO is prejudicial to the interest of the Revenue [*Swarup Vegetable Products Industries Ltd. vs. CIT, (1991) 187 ITR 412, 415-416 (All.)*]. In that case, refund of excise duty was received by the assessee and the same was placed in the suspense account and not in the P&L A/c. Such amount of refund was claimed not to be included in the income of the assessee because, apart from the above fact, a large part of that amount was claimed by a third party by filing a suit and also a writ petition and the same were pending. The officer accepted the claim of the assessee and did not include any part of the amount so refunded in the income of the assessee. In exercise of its power under section 263, the Commissioner set aside the assessment order as the same was erroneous and prejudicial to the interests of the revenue because the claim of the assessee was accepted without proper enquiries. The action of the Commissioner was upheld by the High Court. In the facts of *Umashankar Rice Mill vs. CIT (1991) 187 ITR 638-39 (Ori)*, the Tribunal was held justified in upholding the revisional order of the Commissioner which was passed by the Commissioner who felt that there should be a further enquiry. Reliance is further placed on the following:

- i. *Jagdish Kumar Gulati vs. CIT, 269 ITR 71 (All.)* in which it is held that while framing the assessment under section 143(3), it is expected from the AO that he will make a detailed inquiry to find out correct income of the assessee and not to facts placed by the assessee on their face value. Where the AO complete the assessment proceedings under section 143(3) and admitted that he could not make proper inquiries as assessment was



becoming time barred, there was valid assumption of jurisdiction under section 263 by Commissioner and the Tribunal, in such a situation, did not commit any error in law in confirming the order of CIT(A) for setting aside the assessment and directing the AO to make an order of assessment.

- ii. *Gee Vee Enterprises vs. Addl.CIT, 99 ITR 375 (Del.)* in which it is held that the Commissioner can regard the order as erroneous on the ground that in the circumstances of the case, ITO should have made further inquiries before accepting the statements made by the assessee in his return and it was observed that reason is obvious. The position and functions of the ITO are very different from that of civil court.

5.3. On the facts of the present case, it is evident that the AO accepted the version of the assessee without making any inquiry or verification, whereas it is very well settled that mere failure to make inquiries makes an order erroneous. In order that the Commissioner may consider an order to be "erroneous" for the purposes of section 263, the error of law may not be apparent on the face of the order. The Commissioner may consider an order of the AO 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 stereo-typed 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 [*Rampyari Devi Saraogi vs. CIT (1968) 67 ITR 84 (SC)* and *Tara Devi Aggarwal vs. CIT, (1973), 88 ITR 323 (SC)*].

5.4. It is not necessary for the Commissioner to make further enquiries before cancelling the assessment orders of the AO. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the AO should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. Unlike the Civil Court which is central to give decision on the basis of evidence produced before it, an AO is not only

an adjudicator but is also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke inquiry. The meaning to be given to the word "erroneous" in section 263 of the Act emerges out of this context. The word "erroneous" in that section includes cases where there has been a failure to make the necessary inquiries [*Gee Vee Enterprises vs. Addl.CIT*, (1975) 99 ITR 375, 386 (Del.)].

5.5. It is 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 inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.

[*Duggal & Co. vs. CIT*, (1996) 220 ITR 456, 459 (Del.)]

*CIT vs. Pushpa Devi*, (1987) 164 ITR 639 (Pat);

*CIT vs. Smt. Rambha Devi*, (1987) 164 ITR 658 (Pat);

*CIT vs. Belal Nisa*, (1988) 171 ITR 643 (Pat);

*CIT vs. Smt. Kaushalya Devi*, (1988) 171 ITR 686 (Pat);

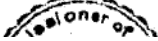
*CIT vs. Bibi Khodaija Khatoon*, (1988) 171 ITR (Sh.N.) ii (Pat);

*CIT vs. Smt. Chandrawati Devi*, (1988) 171 ITR (Sh.N.) III (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).



5.6. The Hon'ble Jurisdictional ITAT Delhi Bench In the case of Shri Virendra Kumar Gupta Vs CIT in ITA No2595/D/2009 dated 21/01/2011 relying upon aforesaid judgments has held that the facts of the case were in pari-materia with above judgments. Further, on consideration of these cases the Hon'ble ITAT viewed that the Id. CIT was right in exercising the revisionary jurisdiction dismissing the appeal filed by the assessee.

5.7. In view of the foregoing, it is evident that the order passed by the AO is erroneous as well as prejudicial to the interests of revenue for the reasons as stated above.

6. During the course of 263 proceedings, Shri Paramjit Singh, CA & counsel of the assessee attended and filed written submissions and the case was discussed with him.

7. As regards the points on which notice under section 263 was given, regarding point (a) the AO did not inquire into the loss to the magnitude which is even higher than entire turnover. Regarding point (b) Though the major addition in the fixed assets was shown in the preceding year that is in the balance sheet as on 31.3.2007 and moreover the machinery worth Rs.1,05,55,232/- is stated to have been sold during the year under consideration. Claim of depreciation during the year is as high as Rs.63,08,056/- as against last year's Rs.18,83,362/-. The AO appears to have not at all looked into the evidently highly inflated claim of depreciation during the year under consideration nor as he enquired into the correctness of the accretion in the fixed assets as was shown in the balance sheet ending on 31.3.2007 vis a vis 31.3.2008.

The balance sheet as on 31.03.2007 showed the fixed assets as under:

|                          |                         |
|--------------------------|-------------------------|
| Gross Block              | Rs. 546,000.00          |
| Add.                     |                         |
| Addition During the year | Rs. <u>42163,589.80</u> |
| TOTAL                    | Rs. 4,27,09,589.80      |
| Less                     |                         |

|                       |                           |
|-----------------------|---------------------------|
| Sales During the Year | (-)Rs. 42709,589.80       |
| Less: Depreciation    | (-)Rs. <u>1883,362.00</u> |
| Net Block             | Rs. 40826,227.80          |

The AO is directed to look in the same and verify the relevant accounts properly before ascertaining and determining the actual profit/loss and also after examining the books of account which were not produced during the course of 263 proceedings. As regards the loss on sale of machinery claimed at Rs.49,46,196/- is concerned which is debited under the head 'Administrative expenses' of Rs.56,74,304/-, evidently the assessee has claimed it wrongly.

Firstly, because the same was to be taken to the balance sheet in the fixed assets as the block of assets existed there and moreover the entire machinery or at least a major part thereof was new as the addition was made in the year ending 31.3.2007 out of which the machinery worth Rs.1.05 crores was stated to have been sold on which loss (which was as such disallowable) to the tune of Rs.49,46,196 has been claimed and accepted by the AO. The AO has further failed to look into if the transaction was collusive one or if the sales were made to the parties covered under section 40A(2)(b) of the I.T. Act, 1961. Hence, the claim of loss in the P&L A/c is a prima facie wrong claim which is added to the income of the assessee alongwith the initiation of penalty u/s 271(1)(c) of the I.T. Act, 1961 as assessee has evidently concealed income and furnished inaccurate particulars of income.

The AO is further directed to inquire into the correctness of the claim towards financial charges which are claimed at more than double of the previous year.

Regarding point (f) & (g), the unsecured loans and sundry creditors have also not been inquired into by the AO during the assessment proceedings and the assessee failed to explain the same for which the onus lies solely and squarely on the assessee. Reliance is placed on the following judgments:

- (i) CIT Vs. La Medica (2001) 250 ITR -575 (Delhi)
- (ii) Sri Ganesh Rice Mills Vs. CIT (2007) 294 ITR 316 (Alld.)
- (iii) CIT Vs. United Commercial and Industrial Co.(199) 187 ITR 596 Cal.
- (iv) CIT Vs Precision Finance Pvt. Ltd. (Cal) 208 ITR 465
- (v) CIT v/s Korlay Trading Co. Ltd. (Cal.) 232 ITR 820.
  
- (vi) Krishan Kumar Jhanb v/s ITO and Anr (Punjab & Haryana) 17 DTR 249
  
- (vii) M/s Sejai International Ltd v/s CIT Meerut (All.) Appeal No.306 of 2010.
  
- (viii) CIT Vs Durga Prasad More, 82 ITR 540 (SC)
  
- (ix) CIT Vs P. Mohanakala, 291 ITR 278 (SC)
  
- (x) CIT Vs Sumati Dayal, 214, ITR 801 (SC)
  
- (xi) ITO Vs Diza Holdings Pvt. Ltd. 255 ITR 573 (Kerla)
  
- (xii) CIT Vs Nova Promoters and Finlease Pvt. Ltd. 18 Taxmann 217
  
- (Xiii) VLS P. (P) Ltd. Vs. CIT (MP), 265 ITR 202

Further, section 68 does not confine to cash entries in the book. It has been held by their lordship of M.P. High Court in the case of V.I.S. P. (P) Ltd. Vs. CIT (MP), 265 ITR 202-

“If the liability shown in the account is found to be bogus and there is no plausible and reasonable explanation of the assessee, the amount can certainly be added towards the income of the assessee.”

As regards point (h), freight debited to the P&L A/c to the tune of Rs.6.93 lakh, the AO has not examined the applicability of the provisions of TDS and disallowances u/s 40(a)(ia) of the I.T. Act, 1961. The AO is further directed to inquire into the correctness of this claim.

8. As regards addition of Rs.49,46,196/- made above, the A.O is directed to issue fresh demand notice and challan. On the other issues on which the matter is restored back to the AO with the above directions. The assessment order passed by the AO is partly set aside with the direction that a fresh order, after examining the issues properly and considering all the points stated above, as also after considering all evidences and affording reasonable opportunity to the assessee, be passed by the AO expeditiously. //

**(B.2)** In the aforesaid Assessment Order dated 28.03.2014, the net profit of the assessee was estimated @ 5% of the business receipt, by invoking Section 145(3) of I.T. Act, after the assessee failed to produce books of accounts, bills, vouchers etc. for verification despite opportunities provided to the assessee by the AO. The gross receipts being Rs. 1,69,62,107/-, net profit was estimated @ 5% of the gross receipts, at Rs. 8,48,105/-. The AO, in addition to the aforesaid Rs. 8,48,105/- made further addition of Rs. 49,46,196/- (on account of loss of on sale of machinery), Rs. 30,00,000/- (on account of unsecured loans) and Rs. 7,16,533/- ( on account of sundry

creditors). The relevant portion of the Fresh Assessment Order dated 28.03.2014 is reproduced as under:

“

3. Regarding the claim of loss of Rs.1,75,74,887/-, the Id. CIT, Meerut has directed to look into the same and verify the relevant accounts properly before ascertaining and determining the actual profit/loss. Accordingly, the assessee, vide notice under section 142(1) of the Income Tax

Act, 1961 dated 4.2.2014 was required to submit the following details with supportive details as

1. *Please provide details of addition in Fixed asset along with details of purchases and put to use. (Provide supportive document in respect of assessee's claim)*
2. *Details of financial changes.*
  - i) *Provide details of interest paid during the year (partywise)*
  - ii) *Provide details of application where this fund were used.*
3. *Submit explanation regarding heavy loss in comparison with last two year.*
4. *Assessee is required to produce fresh confirmation with confirmed copy of a/c of sundry creditor, with list of complete current postal address, PAN details etc.*
5. *Assessee is required to produce a separate list of sundry creditor, where amount was outstanding more than 1 year.*
6. *Assessee is required to produce fresh confirmation of unsecured loan with list of complete current postal address & bank transaction details, (Copy of ITR for A.Y. 2008-09 & A.Y. 2007-08)*
7. *Provide details of freight debited with copy of ledger a/c. Provide list of all parties to whom payment were made along with TDS details.*
8. *Justify deprecation debited in P&L a/c*

4. In reply, the assessee has filed only ledger copy of account for some of the sundry creditors which were neither signed by the creditors nor by the assessee, which is not acceptable and still remain unverified. Even from the assessment record, it was found that assessee did not file any confirmations of these sundry creditors during the proceedings under section 143(3) of the Income Tax Act, 1961.

5. Regarding unsecured loan, the assessee filed confirmations of the loan depositors, none of the depositors has filed any information from which creditworthiness of the depositors could be proved. Also no PAN was mentioned in the copy of account, neither produce bank statements.

6. Regarding freight & cartage, the assessee has filed ledger copy of account, but no supportive details were filed by the assessee. All the payments were made in cash and even the party to whom payment were made, was not reflected in the ledger account. Since the books of account were not produced, all the payments remained unexplained and unverified.

7. Regarding the claim towards financial charges, the Id. CIT, Meerut directed to inquire into the correctness of the claim. In reply dated 14.2.2014, the assessee has submitted as under:

*"that the assessee has paid interest to bank only, the details of interest paid is duly supported by the Bank of Baroda CC limit and term loan account furnished earlier and again enclosed now. The details are as under:*

|                              |                      |
|------------------------------|----------------------|
| <i>Interest on CC limit</i>  | <i>Rs. 6,85,662</i>  |
| <i>Interest on term loan</i> | <i>Rs. 21,50,666</i> |
| <i>Bank charges</i>          | <i>Rs. 48,049</i>    |
|                              | <i>Rs. 28,84,377</i> |

*The term loan has been used to part finance the plant and machinery while CC limit is used for working capital which can be verified from the books of account to be produced on a later date."*

8. Enough opportunities were provided to the assessee to produce books of account, bill, vouchers etc. for verification and to ascertain the correctness of the Profit and Loss Account, but the assessee has failed to produce the same for verification, inspite of specifically asked the assessee to "produce the books, bills, vouchers etc. for verification on 21.3.2014, failing which adverse inference could be drawn. In spite of producing the books on the specified date, the assessee has sent a reply dated 21.3.2014 by post which was received in this office on 24.3.2014,

where it has been submitted by the assessee that they were unable to trace the bank account of the year in which they have received deposits from unsecured loan depositors at such a short notice. We may be given time to get the same from bank. But till date i.e. 28.3.2014, the assessee has neither attended the office nor filed any details regarding the unsecured loan depositors and sundry creditors.

9. Regarding the heavy loss, the assessee has submitted as under:

*".....The assessee company took a huge term loan of Rs.190 lakhs and CC limit of Rs.50 lakhs from Bank of Baroda. However, due to inexperience of the promoters the assessee company could not manufacture proper quality of goods. Further the unit was installed at Roorkee but the required skilled labour was not available there. Most of the textile business is centered at Meerut. The promoters had installed the factory at Roorkee to avail the benefit of Sales Tax at Uttaranchal (1% rebate is allowed in CST) and there is 100% exemption from Income Tax for first 5 years and 100% exemption from excise but they could not manage the factory by travelling daily from Meerut to Roorkee. The labour was also sourced from Meerut but the labour did not cooperate hence, there was lower production with inferior qualities of goods. The goods were sold at lower rate due to inferior quality. Therefore, huge interest burden of bank, depreciation of plant and machinery and building, and loss on sale of machinery were the reason for such a huge loss...."*

10. The assessee's submission is considered but not found convincing and acceptable. The assessee itself submitted that the factory was installed at Roorkee for getting tax benefits. According to this, the profit should have been increased. The other reasons are not having any base and afterthoughts. If the assessee was maintaining proper books, bills, vouchers etc., then he should have produced the books, bills and vouchers etc. during the current assessment proceedings. But in spite of sufficient opportunity, the assessee has failed to produce the books etc. even not presented in the office and sent a letter by post. Roorkee is not far from Meerut. If the assessee could make effort, he could produce the books. But the assessee has not availed any opportunity to produce the facts of the case regarding books or any other issue.

11. As discussed above, it is not ascertainable as to how from the final accounts, the profit could be deduced, ascertained or verified. The P&L A/c was as such not acceptable until and until the same was duly verified from the books of account and records which also needed to be correct and complete and maintained in such a manner from which true profit could be deduced, ascertained and verified. As discussed in the detail earlier, the book results, shown to the assessee cannot be accepted. As the books are not correct and complete and profit from business is to be estimated after rejecting the book results by invoking the provisions of section 145(3) of the I.T. Act, 1961, the undersigned is of the opinion that it would be fair and reasonable to estimate assessee's profit from the business receipts @ 5%.

12. Accordingly, the Net Profit is calculated as under:

|                |   |             |
|----------------|---|-------------|
| Gross receipts | : | 1,69,62,107 |
| 5% of receipts | : | 8,48,105    |

13. The income of the assessee is computed as under:

|  |   |           |
|--|---|-----------|
| Net Profit as estimated above.   | : | 8,48,105  |
| Add: Addition made by the Id. CIT, Meerut vide<br>Order u/s 263 of the I.T. Act, 1961 dated 18.3.2013.<br>on account of loss on sale of machinery. | : | 49,46,196 |
| Add: Addition made by the Id. CIT, Meerut vide<br>Order u/s 263 of the I.T. Act, 1961 dated 18.3.2013.<br>on account of unsecured loans            | : | 30,00,000 |
| Add: Addition made by the Id. CIT, Meerut vide<br>Order u/s 263 of the I.T. Act, 1961 dated 18.3.2013.<br>on account of sundry creditors.          | : | 7,16,533  |
| Total Income   | : | 95,10,834 |
| Rounded off  | : | 95,10,830 |



**(B.2)** The Assessee filed appeal before the Ld. CIT(A), Meerut. The Ld. CIT(A) decided the appeal vide the impugned appellate order dated 07.03.2016, wherein the aforesaid additions of Rs. 8,48,105/- and the aforesaid addition of Rs. 49,46,196/- were confirmed. This present appeal has been filed by Assessee against the aforesaid impugned appellate order dated 07.03.2016 of the Ld. CIT(A). The grounds of appeal, as revised by the assessee during appellate proceedings in Income Tax Appellate Tribunal ("ITAT", for short), are as under:

- "1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in disallowing the loss of Rs. 1,69,62,107/-.*
- 2. That in any case and in any view of the matter, disallowance of loss is double disallowance to the extent of Rs. 49,46,196/- & Ld. CIT(A) ought to have deleted the disallowance to that extent.*
- 3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in estimating the income at 5% of turnover and that too without allowing interest and depreciation.*
- 4. That having regard to the facts and circumstances of the case, brought forward losses for AY 2007-08 ought to be allowed.*
- 5. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other."*

**(B.3)** During appellate proceedings in ITAT, the Assessee filed Paper Book in two parts containing the following particulars:

- 1. Written submission*
- 2. Photocopy of Audit Report & Balance Sheet for the A.Y. 2008-09.*
- 3. Photocopy of Notice U/s 143(2) dt. 20-08-2010*

4. *Photocopy of Notice U/s 142(1) dt. 14-05-2010*
5. *Photocopy of reply before A.O. dt. 22-11-2010*
6. *Photocopy of Sale Bill and C Form issued for sale Of Plant & Machinery filed before A.O.*
8. *Photocopy of Notice U/s 142(1) dt. 23-06-2010*
9. *Photocopy of reply before DCIT, Circle-II, Meerut dt. 20-08-2010*
10. *Copy of A/c of Freight & Cartage, Power & Fule, Wages A/c, Interest on Ter Loan, Interest on C/CA/c, Bank Charges, Monthwise Purchase*
11. *Copy of A/c of Creditors*
12. *Photocopy of reply before DCIT, Circle-II, Meerut dated 21-10-2010 alongwith annexure*
13. *Photocopy of Confirmation of Creditors alongwith evidence*
14. *Photocopy of Notice U/s 143(2) dt. 11-10-2010*
15. *Photocopy of Return Receipts and Computation of Income for the A.Y. 2008-09*
16. *Photocopy of reply before CIT, Meerut*
17. *Photocopy of Depreciation Chart*
18. *Photocopy of Notice U/s 263 dt. 06-03-2013*
19. *Photocopy of case laws.*
20. *Written submission*
21. *Photocopy of Audit Report along with Profit & Loss A/c and Balance Sheet year ending on 31-03-2007 & 31-03-2009*
22. *Photocopy of Bills , Ledger & Trade Tax Order"*
23. *Copy of Acknowledgment of Return along with Computation of Income for A.Y. 2008-09*
24. *Copy of Acknowledgment of Return along with Computation of Income for A.Y. 2007-08*
25. *Copy of letter dated 19.03.2014 filed before the Ld. A.O.*
26. *Copy of original assessment order dated 26.11.2010 passed u/s 143(3) for AY 2008-09*

27. Copy of order u/s 263 for AY 2008-09 dated 128.03.2013.
28. Copy of order of Hon'ble ITAT in the case of M/s P.K. Cotton Mills Pvt. Ltd. vs. CIT, AY 2008-09, ITA No. 2055/2013, order dated 18.11.2016
29. Copy of Acknowledgment of Return along with Computation of Income for AY 2008-09.
30. Copy of Acknowledgment of Return for AY 2007-08."

**(B.3.1)** A compilation of case laws / CBDT circular was also filed from the Assessee's side during appellate proceeding in ITAT, containing the following particular:

1. *CIT vs. Bishambhar Dayal & Co., (1994) 210 ITR 0118, High Court of Allahabad.*
2. *Shri Ram Jhanwar Lal vs. ITO & Ors., (2010) 321 ITR 0400, High Court of Rajasthan.*
3. *CIT vs. Jain Construction Co. & Ors., (2000) 245 ITR 0527, High Court of Rajasthan.*
4. *CIT vs. Chopra Bros. India (P) Ltd., (2001) 252 ITR 0412, High Court of Punjab & Haryana.*
5. *Copy of CBDT Circular No: 29-D (XIX-14) dated 31.08.1965."*

**(B.3.2)** Moreover, Brief Synopsis was also filed from the assessee's side, the relevant portion of which is reproduced as under:

**"BRIEF SYNOPSIS BEFORE HON'BLE INCOME TAX APPELLATE TRIBUNAL AGAINST ORDER U/S 143(3)7263 FOR A.Y 2008-09 IN ITA NO. 2504/DEL-2016**

**Assessee's Appeal**

**GROUND NO. 1** it relates to the action of Ld. A.O. in disallowing the loss of Rs. 1,69,62,107/- which was confirmed by Ld. CIT(A). Ld. AO. has discussed this issue at **page 3-4 of the assessment order.**

-Appellant's detailed reply are reproduced at **page 3-4 of the assessment order** according to which there were bank loans on which interest was paid and detailed justification for the loss was given.

*PB 64 is submissions during original assessment proceeding in which books of accounts were produced.*

**GROUND NO. 2** it relates to the double disallowance to the extent of Rs. 49,46,196/- being the amount of loss on sale of machinery. This loss was directed to be disallowed by Ld. CIT in order u/s 263 (**PB 73-75**) but this loss was part of the total loss of Rs. 1,69,62,107/-, which is evident from **PB 66, 68, 73** and **PB 22** which is profit & loss account. Since, entire loss of Rs. 1,69,62,107/- has been disallowed which includes the loss of Rs. 49,46,196/-, separate disallowance of this very amount of Rs. 49,46,196/- is nothing but double disallowance which may please be deleted.

*Alternatively, the figure of total loss of Rs. 1,69,62,107/- ought to have been reduced by the said sum of Rs. 49,46,196/- so that total loss of Rs. 1,69,62,107/- at best would have been disallowed.*

**GROUND NO. 3** it relates the action of Ld. A.O. in estimating the income at 5% of turnover.

*Ld. A.O. ought to have allowed interest and depreciation as per the following judicial decisions:-*

- **CIT vs. Bishambhar Dayal & Co.,** (1994) 210 ITR 0118, High Court of Allahabad. — (**Para — 4**)
- **Shri Ram Jhanwar Lai vs. ITO & Ors.,** (2010) 321 ITR 0400, High court of Rajasthan.— (**Para—8**)
- **CIT vs. Jain Construction Co. & Ors.,** (2000) 245 ITR 0527, High Court of Rajasthan.— (**Para—8**)
- **CIT vs. Chopra Bros. India (P) Ltd.,** (2001) 252 ITR 0412, High Court of Punjab & Haryana. — (**Para 4-6**)
- **CBDT Circular No: 29-D (XIX-14), dated 31.08.1965—** reproduced in 245 ITR 527 (Raj.) in Para 8.

*Appellant's detailed reply with respect to interest paid is reproduced at **page 3 of the assessment order.***

***PB 64** is evidence to show that books were produced in original assessment proceeding.*

***GROUND NO. 4** is not pressed in view of the direction already given by Ld. CIT(A) at **page 4 of the CIT(A) Order.**"*

**(B.4)** At the time of hearing before us, we have heard both sides patiently. We have also perused the materials on record, carefully, including the materials referred to in the foregoing paragraphs **(B.3)**, **(B.3.1)** and **(B.3.2)** of this order. We accordingly proceed to decide the issues in dispute before us

**(C)** The first issue before us, is the estimation of profit @ 5% of gross business receipts, after the AO rejected the book results by invoking the provisions of Section 145(3) of the I.T. Act. The Ld. Counsel for assessee contended that the books of account, bills, vouchers etc. were produced by the assessee during first round of assessment proceeding (resulting in aforesaid Assessment Order dated 26.11.2010) which was examined by the AO on test check basis; and the trading results were accepted. The Ld. Counsel for Assessee submitted, that book results should have been accepted in the second round of assessment proceedings also (resulting in aforesaid Assessment Order dated 28.03.2014). However, the Learned Departmental Representative ("Ld. DR", for short) contended that the Ld. CIT vide aforesaid order dated 18.03.2013, which was passed under Section 263 of the I.T. Act, had restored the matter back to the AO with direction to pass fresh order after examining the issue properly. Therefore, the assessee was required to produce the books of account, bills, vouchers etc. before the AO in the second round of assessment proceedings also (resulting in aforesaid Assessment Order dated 28.03.2014). The Ld. DR further submitted that the aforesaid order dated 18.03.2013 of the Ld. CIT passed under Section 263 of I.T. Act has attained finality because the assessee's appeal against this order was dismissed by ITAT vide order dated 18.11.2016 passed by Co-ordinate Bench

of ITAT, Delhi in ITA No.- 2055/Del/2013. The relevant portion of which is reproduced as under:

*"This appeal by the assessee is directed against order dated 18/03/2013 passed by the learned Commissioner of Income Tax, Meerut under section 263 of the Income-tax Act, 1961(in short "the Act") revising the assessment order under section 143(3) of the Act for assessment year 2008-09. The assessee revised its grounds of appeal vide letter dated 07/07/2015, which are reproduced as under:*

*"1. That notice U/s 263 issued by CIT, Meerut was vague and is based upon incorrect facts and law and no reasonable and proper opportunity being heard was allowed. Hence, entire proceeding is against the principle of natural justice.*

*2. That Ld. CIT, Meerut has not justified in making addition of Rs. 49,46,196/- claimed by the assessee as loss on account of machinery, which is after due consideration accepted by the Ld. A.O.. This addition is against law and facts of the case.*

*3. That the Ld. CIT has given direction to the A.O. to inquire following:*

*(i) Correctness of the claim towards Financial Charges.*

*(ii) Correctness of the Unsecured Loan and Sundry Creditors.*

*(iii) Fright debited Rs. 6,93,000/- to examine the provision of TDS and disallow U/s 40A(ia).*

*These issues are already considered by the A.O. and after going through the books of account, bills and vouchers, the A.O. was satisfied and not made any addition in the total income of the assessee. The view taken by the A.O. one of the best, while he framing assessment U/s 143(3) of I.T. Act, to set aside these issues for further inquiry is nothing but duplicacy of work, which not permitted U/s 263 of I.T. Act*

*4. That penalty proceeding initiated by the CIT is arbitrary, unjust and routine & mechanical manner, which is against the law.*

*5. That the assessee has right to add, delete or modify any grounds during the appeal proceeding."*

*2. The facts in brief of the case are that the assessee, a private limited company, was engaged in the business of textiles. The assessee filed return of income on 30/09/2008, declaring net loss of Rs.1,75,55,380/-. The case was selected for scrutiny and notice under section 143(2) of the Act was issued and complied with. In the scrutiny assessment completed under section 143(3) of the Act on 26/11/2010, the Assessing Officer made following two additions:*

*1. disallowance of Rs.41,253/- towards expenses on duties and taxes on the ground that same were not related to business expenses and disallowed under section 43B of the Act;*

*2. disallowance of Rs.21,744/- to cover of the possible leakage due to self-made and internal vouchers under the head repair and maintenance, welfare*

*expenses, freight and cartage and vehicle maintenance, at the rate of 10% of the expenses.*

*3. Subsequently, the learned Commissioner of Income Tax examined the records and issued notice under section 263 dated 06/03/2013 stating that the assessment order was erroneous so as to be prejudicial to the interest of Revenue and it was passed without inquiring on the following points:*

*(a) the loss of Rs.1,75,74,887/- on the total turnover of Rs.1,69,62,106/-;*

*(b) the loss on sale of machinery at Rs.49,46,196/- under the head selling and administrative expenses of Rs.56,74,304/-;*

*(c)(i) the transaction of addition of new machinery in the year ending 31/03/2007 and out of which sale of machinery worth 1.05 crore resulting into loss to the tune of Rs.49,46,196/-, and whether it was a collusive one or if the sales made to the parties covered under section 40A(2)(b) of the Act;*

*(c)(ii) the highly inflated claim of depreciation during the year under consideration and correctness of the accretion in the fixed asset shown in the balance sheet ending on 31/03/2007 vis-a-vis 31/03/2008;*

*(d) the correctness of claims towards financial charges, which had doubled during the year under consideration for no apparent reason;*

*(e) the assessee claimed depreciation of Rs.28,23,005/- on plant and machinery and simultaneously debited loss on sale of machinery amounting to Rs.49,46,196/- in profit and loss account, whereas sale and purchase of any asset under any block can only increase/decrease in value of block and depreciation can be accordingly claimed/allowed and as such the loss on sale of plant and machinery was not allowable; (f) unsecured loan of Rs.30.00 lakhs*

*(g) Sundry Creditors of Rs.7,16,533/-;*

*(h) applicability of section 40(a)(ia) on freight expenses of Rs.6,93,425/-.*

*4. In response to the notice, the assessee submitted that all the details in respect of above issues were duly submitted before the Assessing Officer and considered by him and he formed an opinion on the basis of the material on record and hence power given under section 263 of the Act cannot be resorted to as the order of the Assessing Officer was neither prejudicial to the interest of Revenue nor erroneous.*

*5. However, the learned Commissioner of Income Tax held that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of Revenue. On the issue of loss from sale of machinery, the addition of Rs.49,46,196/- was quantified and on other issues, directions for making enquiries were given as under:*

*a. the Assessing Officer did not enquire into the loss of the magnitude, which is even higher than the entire turnover;*

*b. the AO is directed to look into and verify the relevant accounts properly before ascertaining and determining the actual profit/loss, after examining books of accounts which were not produced during the course of 263 proceedings;*

*c. the loss on sale of machinery amounting to Rs.49,46,196/- was claimed wrongly because the same was to be taken to the balance sheet in the fixed asset as block of asset existed there. The Assessing Officer also failed to look into whether the transaction was collusive one or whether the sales were made to parties covered under section 40A(2)(b) of the Act;*

*d. the AO is directed to inquire into correctness of the claim towards financial charges which claimed it more than double of the previous year;*

*e. the Assessing Officer did not enquire into unsecured loan and sundry creditors and the assessee failed to explain the same;*

*f. the AO is further directed to inquire into correctness of applicability of TDS and disallowance under section 40(a)(ia) of the Act in respect of freight expenses debited to the tune of Rs.6.93 Lacs.*

*4. Against the above order under section 263 of the Act passed by the learned Commissioner of Income Tax, the assessee is in appeal before the Tribunal raising grounds as reproduced above. 5. The ground No. 1 was not pressed by the learned Authorized Representative of the assessee and therefore dismissed as infructuous.*

*6. In ground No. 2, the assessee has challenged in making addition of Rs.49,46,196/- claimed by the assessee for loss on account of machinery. It was contended by the learned Authorized Representative that loss was accepted by the Assessing Officer after due consideration. It was submitted by the learned Authorized Representative that the assessee debited the loss on sale of machinery, which was an accounting entry made in accordance with Companies Act, 1956 and guidelines issued by the Institute of Chartered Accountants of India, and which is further supported by clause (1) of section 50 of the Act. He further submitted that the assessee sold a capital asset, which was part of block of asset and the assessee deducted the sale consideration of machinery from the written down value and the resultant figure being the loss was rightly debited to the profit and loss account. This loss was disclosed truly and correctly and which was checked by the Assessing Officer and accordingly accepted the same. It was further explained that sale of machinery was made to registered unrelated parties and copy of entire sale bills along with 'C' forms applicable in sales tax were submitted before the Assessing Officer. The Auditor has also not made any adverse reporting in tax audit in respect of the sale of machinery. The learned Authorized Representative further submitted that the Assessing Officer had made enough inquiry on the issue of acquisition of asset, loss on sale of machinery as well as depreciation claimed and, therefore, it was not of the case of lack of enquiry warranting invoking of jurisdiction by the learned Commissioner of Income Tax under Section 263 of the Act.*

*4. In ground No. 3, the assessee has raised the issue that enquiries were made by the Assessing Officer in respect of the issues of correctness of the claim towards*

*financial charges, correctness of unsecured loan and sundry creditors and provisions of TDS and disallowance under section 40(a)(ia) of the Act in respect of the freight expenses of Rs.6.93 lacs.*

*5. Before us, the learned Authorized Representative of the assessee referred to pages no. 14 and 15 of the assessee's paper book, which is a copy of notice under section 142(1) of the Act calling for information in respect of the assessment year and submitted that the Assessing Officer called for confirmation of sundry creditors & unsecured loan creditors and examined TDS liability. He submitted that the assessee also duly complied with the queries asked by the Assessing Officer and the assessment has been completed after considering all the submission of the assessee and, therefore, on those issues there is no lack of enquiry by the Assessing Officer. He further submitted that the view taken by the Assessing Officer was one of the best, while framing the assessment under section 143(3) of the Act and setting aside those issues for further Inquiry was nothing but duplication of work, which was not permitted under section 263 of the Act.*

*4.1 He further submitted that learned Commissioner of Income Tax has not carried out enquiries in the respect of the above issues himself and arrived at whether the order was erroneous as well as prejudicial to the interest of the Revenue.*

*4.2 In response to this, the learned Commissioner of Income Tax (Departmental Representative) submitted that the Assessing Officer did not call for any information in respect of loss claimed on sale of machinery and, therefore, this is the case of total lack of enquiry by the Assessing Officer, which rightly warranted invoking of jurisdiction by the learned Commissioner of Income Tax, under Section 263 of the Act. Further, in respect of the other issues, also he submitted that the Assessing Officer, though called for information in respect of sundry creditors and unsecured loans but no confirmations were filed in respect of sundry creditors and no banks and other details were filed in respect of unsecured loan. He further submitted that the Assessing Officer has not examined the liability of deducting TDS on freight expenses. He also submitted that it is evident from the questionnaire issued by the Assessing Officer, which has been submitted by the assessee in the paper book before the Tribunal, no query was raised in respect of claim of expenses toward finance charges. In view of the above facts, the case of the assessee falls under the category of the lack of enquiry. He further submitted that even single error found in the order of Assessing Officer, the Commissioner of Income Tax can revise that order. In support of the contention that the Commissioner of Income Tax could remand the matter to the Assessing Officer as the Assessing Officer had not conducted proper enquiry to verify cash credits and trade creditors etc, he relied on the judgment of the Jurisdictional High Court of Allahabad in the case of Meerut Roller Flour Mills Ltd Vs. Commissioner of Income-tax (2013) reported in 35 taxmann.com 183 (Allahabad). In support of the contention that it was not necessary for the Commissioner of Income Tax to come to a firm conclusion that the order of the Assessing Officer was erroneous, insofar as, it is prejudicial to the interest of Revenue and the Commissioner of Income Tax can remand the matter to the Assessing Officer to make fresh assessment after giving an opportunity of hearing to the assessee, he relied on the judgement of the Hon'ble Gujarat High Court in the case of Additional Commissioner of Income Tax Vs. Mukur Corporation reported in 111 ITR 312 (Guj).*

*4.3 We have heard the rival submissions of the parties and perused the relevant material on record including the paper book containing 32 pages filed by the assessee. The mandate of section 263 of the Act is attracted only when the assessment order is found to be erroneous insofar as to be prejudicial to the interest of the Revenue. These twin conditions have to be cumulatively satisfied for obtaining a valid jurisdiction under this section. If the assessment order is only prejudicial to the interest of the Revenue, it is not sufficient to invoke the jurisdiction under section 263, unless it is shown that it is erroneous also. An assessment order may be termed as erroneous in various circumstances. Not making enquiry on the relevant issues, which the Assessing Officer is required to look into, makes the assessment order erroneous. Similarly, after making investigation but thereafter taking the patently erroneous view, also makes an order erroneous. But, however, if there are two possible view on the point of issue, then order cannot be said to be erroneous. In other words, if issue is debatable and the Assessing Officer has taken one possible and legally sustainable view, then the Commissioner of Income Tax, cannot be allowed to substitute his view holding the order as erroneous. In another situation, any order may be erroneous due to lack of enquiry on the issue. When the investigation was made by the Assessing Officer, but the circumstances warrant that further investigation was required, and the Assessing Officer failed to carry out such enquiry, this would also make the assessment order erroneous. However, if the Assessing Officer carried out proper investigation and gets satisfied during the course of hearing after proper examination, the assessment order cannot be characterized as erroneous simply because there is no discussion in the assessment order on such aspects. In this regard, as long as there is material to suggest that enquiry was conducted by the Assessing Officer and the assessee filed complete information on that aspect, the assessment order cannot be held as erroneous, until it is shown that circumstances required the Assessing Officer to conduct further enquiries on that aspect.*

*4.4 Coming to the facts of the instant case, we find that the main issue into first five objections raised by the Commissioner of Income Tax was of no enquiry in respect of purchase and sales of assets, depreciation thereof and the loss claimed on sale of Machinery. We have perused the questionnaire issued by the Assessing Officer, which is available on pages 14-15 of the assessee's paper book. Before us, the assessee has not submitted copy of any other questionnaire issued or query raised by the Assessing Officer in order sheet other than questionnaire available on pages 14-15 of the paper book. It is evident that this notice was issued on 13/05/2010. According to the notice, the hearing was fixed on 20/05/2010 and the assessee was asked to furnish various details listed at serial Nos. 1 to 10, inter alia, business activity, audit report, bank accounts, Director/Shareholders, confirmation of sundry creditors, proof of payment under section 43B, confirmation of unsecured loans and details in table format, gross profit/net profit rate, liability of TDS etc. A further reminder/notice under section 142(1) of the Act was issued on 23/06/2010 calling for the reply in respect of the information as called for vide notice under section 142(1) of the Act dated 13/05/2010. In response to the said queries raised by the Assessing Officer, the reply submitted by the assessee is placed on pages 11 to 12 of the paper book. Before us, the assessee has also submitted a copy of reply dated 15/11/2010 claimed as submitted to the Assessing Officer on his verbal queries. This reply contains computation of loss on sale of machinery. One more reply of the assessee, which is*

*signed by the counsel of the assessee on 25/11/2010, is available on page 9 of the paper book, which contains justifications of the loss and sale of machinery to M/s Apin Tax. Both the reply dated 15/11/2010 and 22/11/2010 are not bearing any stamp of acknowledgement either by the Assessing Officer or by the Income Tax Department. A perusal of the questionnaire issued by the Assessing Officer manifest that no query in respect of acquisition and sale of assets including machinery was raised by the Assessing Officer. It is also clear that no query in respect of sale of machinery was made by the Assessing Officer. In absence of any stamp of acknowledgement by the Department on the letter dated 15/11/2010 and 25/11/2010, it cannot be treated that same were filed before the Assessing Officer. Even if it is considered that the assessee filed reply dated 15/11/2010 and 25/11/2010 before the Assessing Officer, the Assessing Officer was required to carry out Inquiry in respect of the claim of loss on sale of machinery, however, no such enquiry was made by the Assessing Officer, and, therefore, the case of the assessee falls in the category of complete lack of Inquiry on the issue of loss from sale of machinery. In view of above, we are of considered opinion that the assessment order on the issue is erroneous insofar as prejudicial to the interest of the Revenue and the learned Commissioner of Income Tax is right in assuming jurisdiction under section 263 of the Act.*

*4.5 Insofar as objections raised in ground No.3, in respect of correctness of the claim toward financial charges, correctness of unsecured loan in sundry creditors, to examine the provisions of TDS on freight debited of Rs.6,93,000/-and disallow under section 40(a)(ia) of the Act, we find from the questionnaire dated 13/05/10 that following queries were made in respect of sundry creditors, unsecured loans and TDS.*

***Query No. 5:*** Confirmation of sundry creditors alongwith there PAN and complete address and copy of return of income to prove their identity, genuineness of transaction and creditworthiness.

***Query No. 7:*** Confirmation of unsecured loans with the copy of the relevant page of bank passbook of the loan creditor, their PAN, profit of money availability as on the day of advancement of loan, assessment jurisdiction and copy of Return of Income.

***Query No. 9:*** Please furnish whether you were liable to deduct TDS and if yes the evidence of deduction of the same."

*4.6 In response to the above queries, the assessee replied vide letter dated 21/10/10, which is available on pages 11 of the assesses paper book, as under:*

***Answer No. 4:*** The details of sundry creditors are enclosed. We are trying to get their confirmation.

***Answer No. 6:*** The confirmation of Unsecured Loan of following with PAN are enclosed:-

|                     |              |
|---------------------|--------------|
| 1. Sanjay Bharadwaj | 70,00,000.00 |
| 2. Yash Pal Singh   | 10,00,000.00 |

*(Copy of his Kisan Bahi having agriculture land 4.290 hectare at village Rajpura is also enclosed.)*

4. Kamal Singh 50,00,00.00

*(Copy of his Kisan Bahi of agriculture land 1.292 hectare at Villate Rajpura is enclosed.)*

5. Brajpal Singh 80,00,00.00

*(Copy of his Kishan Bahi of agriculture land 2.2560 hectare at Village Rajpura is enclosed.)*

4.7 In reply dated 15/11/2010, which is placed on page 18 of the assessee's paper book, reply in respect of creditors was as under:

**Answer No. 2:** Copy of a/c of following creditors in our books of a/c:

(a) M/s. ABN Enterprises Hissar

(b) M/s. Apin Textiles.

4.8 Thus, it is evident from the submission of the assessee that no confirmation were filed in respect of the sundry creditors. Similarly, it is clear from the queries raised by the Assessing Officer that no details in respect of deduction of TDS on freight charges was examined by the Assessing Officer. Similarly, neither detail in respect of financial charges was also asked by the Assessing Officer nor any information was filed by the assessee. In view of the above, the learned Commissioner of Income Tax is correct in holding that further enquiry was necessary to examine the sundry creditors, financial charges, liability of TDS on freight charges.

4.9 The Hon'ble jurisdictional High Court in the case of Meerut Roller Flour Mills Ltd (*supra*) held the assessment order as erroneous and prejudicial to the interest of the Revenue when the Assessing Officer had not conducted a proper Inquiry to verify cash credits and trade creditors and the matter remanded to the Assessing Officer under section 263 of the Act. The relevant finding of the Hon'ble High Court is reproduced as under:

"16. It was incumbent upon the Assessing Officer to have examined the cash credit entries appearing in the accounts of the petitioner assessee in detail keeping in view the explanation furnished by the petitioner. Having failed to do so, it is but obvious that the assessment order is erroneous and prejudicial to the interest of the Revenue. Mere filing of the reply by the assessee to which the attention of the Court was invited is not sufficient. We find that with regard to the trade creditors, copies of their account books were filed vide letter dated 9th of November, 2010, ; that is all. There is no application of mind by the Assessing Authority with regard to the genuineness of the credit entries including that of trade creditors. Reference was made by the learned counsel for the respondents to the assessment order for the assessment year which is enclosed in the connected writ petition ( has been dismissed on 15th of May, 2013 on the ground of availability of statutory remedy) wherein on examination, it was found by the Assessing Authority that the assessee was not able to prove the genuineness of certain cash credits. Be that as it may, in

*view of the order which we are proposing to pass, it is not necessary to dwell upon the merits of the case. Prima facie findings have been recorded by us just to meet the argument of the petitioner."*

*4.10 The Hon'ble Gujarat High Court in the case of Mukur Corporation (supra) has upheld the action of the Commissioner of Income Tax in order under section 263 of the Act, remanding the matter to the Assessing Officer for fresh examination. The relevant finding of the Hon'ble High Court is reproduced as under:*

*"15. The third step is as regards an inquiry as the CIT "deems necessary". It is with regard to this step that Shri Patel vehemently contended that the CIT had committed an error in not allowing the assessee to cross-examine Dr. Vyas, whose affidavit dt. 10th March, 1971, was very material. Now, after reading the relevant portion of sub-s. (1) of s. 263, we do not find any justification for the view that in every case the CIT is expected to make an inquiry before passing the final order. The concluding portion of this sub-s. (1) of s. 263 shows that the CIT can pass various orders such as enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. If the CIT in this case had enhanced or modified the assessment, then looking to the facts of the present case, Shri Patel would have been justified in contending that, before passing the final order of enhancement or modification of the assessment, the assessee ought to have been given an opportunity to cross-examine Dr. Vyas. But here the CIT has not himself passed any final order as regards the assessment. What he has done is to cancel the original assessment and to direct a fresh assessment by the ITO with a further direction to the ITO to give proper opportunity to the assessee to substantiate its pleas as well as to cross-examine Dr. Vyas. Therefore, the question is whether it is obligatory on the CIT acting under s. 263 to enter into a regular inquiry in all cases before the original assessment order is cancelled and the ITO is directed to make a fresh assessment. There is nothing in the section itself which would justify such a view, because, on the question of inquiry, the section specifically says that that inquiry should be as "deemed necessary" by the CIT. In this connection, we may profitably refer to some of the observations of the Supreme Court in Rampyari Devi Saraogi vs. CIT (1968) 67 ITR 84 (SC) : TC57R.202. In that case, the order which was passed by the CIT mentioned some facts which were not indicated or intimated to the assessee and which the assessee had no opportunity of meeting. The assessee made a grievance of this but the Supreme Court disposed of the contention raised by the assessee by observing that all the additional material, on which the CIT had relied upon, was supporting material and did not constitute the basic ground on which the order under s. 33B (of the Act of 1922) was passed. The Supreme Court further observed that even if the facts, which the CIT introduced regarding the inquiries made by him, had been indicated to the assessee, the result would have been the same, because the assessee had not in any way suffered from the failure of the CIT to indicate the results of the inquiries. The Supreme Court ultimately held that in such a case the assessee would have full opportunity of showing to the ITO whether the income assessed in the assessment orders which were originally passed was correct or not, and, therefore, the assessee could not be said to*

*have been denied an opportunity of showing cause against the grounds and materials and the rules of natural justice were not violated. In CIT vs. Panna Devi Saraogi (1970) 78 ITR 728 (Cal) : TC57R.142, the High Court of Calcutta held that there was no violation of the principles of natural justice on the question of opportunity being given to the assessee. That opportunity was reasonably given, by stating the basic grounds on which the CIT thought that the ITO's order was erroneous and giving a reasonable opportunity to the assessee even to produce evidence along with facts of that case, the High Court further observed that all that the CIT did was to cancel the assessment and ask the ITO to make a fresh assessment according law after making proper enquiries and investigations with regard to the jurisdiction, carrying on the business, possession of initial capital and the sources of moneys invested in the name of the assessee and, therefore, the assessee would again get full opportunity to produce evidence, if any, in support of her case.*

*16. In view of this, we find that considering the facts of this case, the CIT was not bound to make any inquiry before passing the final order and that in substance no prejudice is caused to the assessee by failure of the CIT to give it any opportunity to cross-examine Dr. Vyas.*

*17. Next question is whether at the time of passing the final order, the CIT was bound to record final conclusion. Now, even on this question, we find that there is nothing in s. 263(1) to show that before passing the final order under that section, the CIT must necessarily and in all cases record final conclusions about the points in controversy before him. As already noted by us above, we would have expected him to record final conclusions, which he thought proper if he was to settle the assessment finally but since he has not settled the assessment finally, and has preferred to direct the ITO to make an order for fresh assessment, it was proper that he did not express any final conclusions and recorded only prima facie conclusions at which he had arrived with reference to the facts of the case. Here it should be noted that, as the assessment was to be freshly made by the ITO, the only proper course for the CIT was not to express any final opinion as regards the controversial points.*

*18. Shri Patel heavily relied upon the Allahabad High Court decision in J. P. Srivastava & Sons Ltd. vs. CIT (1978) 111 ITR 326 (All) : TC57R.331 for the proposition that it was obligatory on the CIT to examine the merits of the objections raised by the assessee and, therefore, it was not proper to "delegate" that power to the ITO by setting aside the assessment order and directing him to make fresh assessment. The facts of that case were that the only ground upon which action was taken by the CIT under s. 33B (of the Act of 1922) was that the ITO did not apply his mind to the claim of the assessee as contained in part D of the return. The Court found that the CIT himself did not apply his mind to the merits of claim and, in fact, he specifically refrained from going into the merits. In view of this, the Court held that the finding that the order of the ITO was erroneous, was by itself not enough to give jurisdiction to the CIT, because it was necessary to be shown further that the order was prejudicial to the interests of the Revenue. Since, in the opinion of the High Court, the CIT failed in finding that the erroneous order passed by*

*the ITO was against the interest of the Revenue, the High Court concluded that the order passed by the CIT in setting aside the original assessment was wrong. This case is easily distinguishable on facts because, so far as the case under consideration is concerned, it is evident that the failure of the ITO to make proper inquiry with regard to both the deductions during the course of his original assessment was clearly prejudicial to the Revenue, because the deductions in question were quite substantial in nature. In our opinion, therefore, the decision relied upon by Shri Patel is of no help to the respondent-assessee.*

*19. In view of what is stated above, we are of the opinion that the Tribunal was not justified in law in setting aside the order of the Addl. CIT under s. 263 on the ground that the Addl. CIT had not come to a firm conclusion that the order passed by the ITO was erroneous. In other words, our answer to the question referred to us is in the negative, i.e., in favour of the Revenue and against the assessee. The respondent-assessee shall bear the costs of the Revenue of this reference.*

*5. In the light of foregoing discussion and respectfully following the findings of the Hon'ble Allahabad High Court in the case of Meerut Rolling Mills Ltd. (supra) and Hon'ble Gujarat High Court in the case of Mukur Corporation (supra), we are satisfied that the learned Commissioner of Income Tax was justified in cancelling the assessment order by holding it as erroneous and prejudicial to the interest of the Revenue. The impugned order is accordingly upheld.*

*6. The ground No. 4 of the appeal was not pressed and, therefore, dismissed as infructuous.*

*7. The ground No. 5 of the appeal is general in nature, therefore, not required to be adjudicated upon by us.*

*8. In the result, the appeal filed by the assessee is dismissed. The decision is pronounced in the open court on 18th Nov., 2016."*

**(C.1)** He also submitted that the estimation of profit @ 5% of gross business receipt was a reasonable estimate, and should be confirmed. We have heard both sides. We have also perused the materials available on record. It is not in dispute that the assessee had failed to produce books of account, bills, vouchers etc. before the AO during the second round of assessment proceedings (resulting in aforesaid Assessment Order dated 28.03.2014). It is also not in dispute that the order of the Ld. CIT passed

under Section 263 of I.T. Act has attained finality and accordingly the directions given in this order by the Ld. CIT have also attained finality. Moreover, the Assessee has not offered to produce books of account, bills, vouchers etc. even during the appellate proceedings before the Ld. CIT(A) and in ITAT. Merely because the assessee had produced the books of accounts, bills, vouchers etc. during the first round of assessment proceedings which were accepted by the AO, it cannot be said that the assessee was not required to produce books of account, bills, vouchers etc. again during second round of assessment proceedings, having regard to direction of the Ld. CIT of aforesaid order dated 18.03.2013 under Section 263 of I.T. Act. Relevant portion of order of Ld. CIT, containing the directions given to the AO, has already been reproduced in foregoing paragraph **(C)** of this order. The assessee having failed to produce the books of accounts, bills, vouchers etc. during the second round of assessment proceedings; the AO had valid reasons to not be fully satisfied about the correctness and completeness of the accounts of the assessee; and therefore, the AO was justified in invoking the provisions of Section 145(3) of I.T. Act. Moreover, the Ld. Counsel for assessee has failed to bring any materials for our consideration to establish that the estimation of profit @ 5% of the gross business receipt is excessive, unreasonable, high pitched or contrary to law having regard to the facts and circumstances of the case. In view of the foregoing, we confirm the order of the lower authorities invoking provision of Section 145(3) of I.T. Act for the purpose of estimating business profits and we further confirm the estimation of business profits @ 5% of gross business receipts.

**(D)** The second issue before us, is regarding the aforesaid addition of Rs. 49,46,196/-. The Ld. Counsel for assessee contended that the aforesaid addition amounts to double addition of the same amount. He drew our attention to the fact that the entire loss claimed by the assessee has been disallowed by the AO and the profit of Rs. 8,48,105/- has been brought to tax on account of estimation of business profit. The aforesaid amount of Rs. 49,46,196/- was part of the business loss claimed by the assessee and once that loss is disallowed, and estimated net profit is assessed as income; the aforesaid amount of Rs. 49,46,196/- stands disallowed automatically. Therefore, the Ld. Counsel for the assessee submitted that there was no justification for once again making repeated addition on the aforesaid amount of Rs. 49,46,196/- in the Assessment Order. The Ld. DR agreed that the repeated addition made by the AO in respect of the aforesaid amount of Rs. 49,46,196/- amounts to double addition of the same amount and he left it to the discretion of the Bench to give appropriate direction to the AO for deleting the double addition. As both sides are in agreement that repeated addition of Rs. 49,46,196/- made by the AO amounts to double addition of the same amount; we accordingly direct the AO to delete the repeated addition, because double addition of the same amount is not sustainable in law.

**(E)** The third issue before us, is regarding the claim of depreciation. At the time of hearing before us, both sides were in agreement that the assessee was eligible for depreciation of Income Tax Act, 1961 and Income Tax Rules, 1962. As the AO has estimated net profit and not gross profit of business, both sides were also in agreement that the depreciation as claimed by the assessee in the books stands already allowed in

the estimation of net profit; and therefore, depreciation to be allowed to the assessee as per Income Tax Act, 1961 and Income Tax Rules, 1962 needs to be reduced by the amount of depreciation claimed by the assessee in the books of accounts. In view of the foregoing, and as both sides have agreed to this at the time of hearing before us, we direct the AO to allow depreciation as per Income Tax Act, 1961 and Income Tax Rules, 1962 as reduced by the amount of depreciation claimed by the assessee in the books of account.

**(F)** The next issue before us, is regarding the assessee's claim for interest expenses. The Ld. Counsel for assessee relied on the case of Hon'ble Rajasthan High Court in the case of CIT vs. Jain Construction Co. & Ors., (2000) 245 ITR 0527, High Court of Rajasthan. However, the Ld. DR submitted that the AO has estimated net profits, and not gross profits, therefore, the interest expenses are to be deemed to have already been allowed in the estimation of business profits @ 5% of the gross business receipt. We have heard both sides. We find that the decision in the case of CIT vs. Jain Construction Co. & ors. (supra) is not applicable to the issue in dispute before us. The case of CIT vs. Jain Construction Co. & ors. (supra) was on whether the payment of salary, bonus, commission or remuneration deductible to the extent of limit provided under Section 40(b) will be allowable to the assessee. However, the present appeal before us is related to the claim of interest expenses on business borrowing of the assessee and does not relate to interest paid / payable to the partner of partnership firm. Therefore, the aforesaid case of Hon'ble Rajasthan High Court in the case of CIT vs. Jain Construction Co. & Ors. (supra) has no application to the issue in dispute

before us, and does not advance the case of the assessee. We agree with the contention of the Ld. DR that in a case where the determination of income of the assessee is based on estimation of net profit (and not gross profit) interest expenses on commercial borrowing of the assessee are deemed to have already been allowed to the assessee. Therefore, this ground of appeal by the assessee is dismissed.

**(G)** In view of the foregoing, Ground 1 of appeal is dismissed, Ground 2 of appeal is allowed and Ground 3 of appeal is partly allowed. Ground 4 of appeal was not pressed by Ld. Counsel for assessee; and is accordingly dismissed being not pressed. In the result, appeal by the Assessee is partly allowed.

Order is pronounced in Open Court on 17/12/19.

Sd/-

**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Sd/-

**(ANADEE NATH MISSHRA)**  
**ACCOUNTANT MEMBER**

Dated: 17/12/19  
Pooja/-

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI

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| Date of dictation   |  |
| Date on which the typed draft is placed before the dictating Member                   |  |
| Date on which the typed draft is placed before the Other Member                       |  |
| Date on which the approved draft comes to the Sr. PS/PS                               |  |
| Date on which the fair order is placed before the Dictating Member for pronouncement  |  |
| Date on which the fair order comes back to the Sr. PS/PS                              |  |
| Date on which the final order is uploaded on the website of ITAT                      |  |
| Date on which the file goes to the Bench Clerk  |  |
| Date on which the file goes to the Head Clerk   |  |
| The date on which the file goes to the Assistant Registrar for signature on the order |  |
| Date of dispatch of the Order   |  |