

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR
श्री संदीप गोसाईं, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No. 04/JP/2021
Assessment Year: 2014-15

Shree Cement Limited, Bangur Nagar, Post Box No. 33, Beawar.	बनाम Vs.	Pr.CIT, Udaipur.
PAN No.: AACCS 8796 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Dilip Desai (CA)
Shri Vijay Shah (CA)
Shri Mohit Choudhary (CA)

राजस्व की ओर से / Revenue by : Shri B.K. Gupta (CIT-DR)

सुनवाई की तारीख / Date of Hearing : 01/04/2021
उदघोषणा की तारीख / Date of Pronouncement : 23/06/2021

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

The present appeal has been filed by the assessee against the order of Ld. PCIT, Udaipur dated 03.02.2021 passed u/s 263 of the Income Tax Act, 1961 (in short the Act) for the assessment year 2014-15. The grounds of appeal taken by the assessee are as under:

"1. That on the facts and in the circumstances of the case, the Learned Principal Commissioner of Income Tax – Udaipur, (here- in- after referred to as Ld. Pr. CIT) was not justified in initiating proceedings u/s 263 of the Income Tax Act, 1961 since the order passed by the Assessing Officer (A.O.) was neither erroneous nor prejudicial to the interest of the revenue.

2. *That on the facts and in the circumstances of the case, the impugned order passed u/s 263 is grossly arbitrary and bad in law in relation to the issues raised and adjudicated therein and needs to be summarily quashed.*
3. *That the Ld. Pr. CIT has erred both on facts and in law, in assuming and exercising the jurisdiction u/s 263 of the Income Tax Act, 1961 without considering the material fact that during the course of the assessment proceedings, the assessee had brought on records all the materials and evidences relating to the issues and the same were duly verified by the AO before passing the impugned assessment order.*
4. *That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of decline in Gross profit ratio.*
5. *That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of taxability of interest on bonds of Rs. 10,68,82,173/-.*
6. *That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of taxability of Excise duty exemption of Rs. 100,11,40,737/- & Deferred Sales Tax subsidy of Rs. 29,87,23,294/-.*
7. *That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of taxability of pre-operative expenses of Rs. 53,19,04,544/-.*
8. *That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of taxability of profit on sale of investment and asset.*
9. *That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of taxability of penalty of Rs 25,000/-.*
10. *That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of details of cash deposit.*

11. That on the facts and in the circumstances of the case and without prejudice to Ground No. 1, 2 & 3 above, the Ld. Pr. CIT was not justified and grossly erred in directing AO to examine the issue of details of ITNS.

12. That the appellant craves leave to add, to amend, modify, rescind, supplement or alter any of the Grounds stated here-in-above, either before or at the time of hearing of this appeal.”

2. The brief facts of the case are that the assessee has filed its return of income on 29.11.2014 declaring Total Income of Rs. 696 Crs. u/s 115JB of the Act. Notice u/s 143(2) of the Act was issued on 28.08.2015 followed by various notices u/s 142(1). Assessment was completed under section 143(3) r.w.s 144C of the Act vide order dated 23.02.2018 after making disallowance of Rs. 553 Crs. under normal provisions and Rs. 146 Crs under the provisions of Sec 115JB of the Act.

3. The case of the assessee was then taken up for revisionary proceedings u/s 263 by Ld. PCIT and notice u/s 263 of the Act was issued on 11.10.2018 proposing to revise the above order of the A.O. on certain grounds. Subsequently, the Ld. PCIT passed order dated 03.02.2021 setting aside all issues to the file of the A.O. for re-verification and re-examination of all the issues raised vide notice u/s 263 of the Act. Ld. PCIT was of the view that the level of enquiry what should have been done have not been carried out by the A.O. and hence this has made the order u/s 143(3) erroneous and prejudicial to the interest of revenue.

4. The main grievance of the assessee relates to initiation of proceedings u/s 263 of the Act by the Ld. PCIT on the facts of the case.

5. Learned AR appearing on behalf of the assessee submitted before us that all the issues were verified by A.O. after detailed inquiry, verification of facts and relying on principles laid down by various judicial authorities during the course of assessment proceedings u/s 143(3). A statement showing details of various queries raised by A.O. and replies filed by the assessee during the course of assessment proceedings in respect to the impugned issues raised by Ld. PCIT was submitted at Pg No. 15 & 16 of Paper Book. Hence, it was pleaded that there was due enquiry by the A.O., there were replies filed by the assessee, based on those replies there were counter queries raised by the A.O. and based on same further replies were filed by the assessee. Hence, it cannot be said that based on above facts the A.O. did not carry out enquiry or he did not applied his mind before passing the order and therefore the same is neither erroneous nor prejudicial to interest of revenue.

5.1 Submission filed by the assessee is reproduced as under:-

"Ground 1 to Ground 3 -

Challenging the jurisdiction of the Ld. CIT in initiating proceedings u/s 263

1.0 Brief Facts

*The appellant is a **Listed Public Company** having Cement Plants across the country. It is established in the year 1979 and ranks among top 3 cement companies of the country.*

*For the year under appeal it has a **turnover** of Rs. 6,311 Crs. (PY Rs. 6,160 Crs.) and an annual **Net Profit** of Rs. 812 Crs. (PY Rs. 1,203 Crs.).*

*The accounts of the company are not only subjected to **Statutory Audit** under the Companies Act, but being a listed company, the functioning of the company is overseen by **number of multi-disciplinary regulators** including SEBI, ROC, I. Tax, VAT, RBI, minority shareholders, ICAI, etc.*

*The **Income Tax Return** of the company is selected for scrutiny year on year. However, the Profits of the company, which has been certified by the statutory auditor, has never been modified in the case of the appellant in any of the years since inception.*

*The current year under appeal is AY 2014-15 relevant to FY 2013-14. For the year under appeal, the appellant filed its return of income showing Gross Total Income of Rs. 710 Crs. (before claiming deductions under Chapter VIA), (AY 13-14 Rs. 1,117 Crs.) Total Income at Nil (AY 13-14 Rs. 273 Crs.) after claiming Deductions under chapter VIA and showing Book Profit of Rs. 696 Crs. (AY 13-14 Rs. 721 Crs.) u/s 115JB of the Act. **Tax liability** as per the return was **computed under MAT at Rs. 146 Crs. (AY 13-14 Rs. 144 Crs.)** and the same has been duly paid. Hence, tax liability paid by the appellant for the year under appeal was higher than the tax liability of immediately preceding year.*

1.1 Return was selected for scrutiny assessment u/s 143(3) of the I.T. Act and 1st notice u/s 142(1) dated 04-12-2015 was issued by A.O. seeking various replies and documents. The assessment proceedings including the Transfer Pricing proceedings went on for a period of 30 months by 3 different AOs. During this period, four notices u/s 142(1) were issued by the A.O. dated 04-12-2015 raising 12 queries (PB Pg. No. 257), 04-01-2016 raising 29 queries (PB Pg. No. 17-20), 09-11-2016 raising 10 queries (PB Pg. No. 105-108) & 02-11-2017 raising 21 queries (PB Pg. No. 21-24) and three notices by the TPO.

In aggregate, 131 number of queries were raised vide above notices and during the course of assessment proceedings (87 by AO & 44 by TPO) and the assessee filed details to each & every query as asked by the A.O. during the course of assessment proceedings. Copies of replies filed during the course of assessment proceedings before the A.O. runs

into thousands of pages and were produced before the Hon'ble Bench during the course of hearing in 6 volumes of files. Also, apart from this there are 3 volumes of files which contains submissions filed before the TPO. With this volume of replies, details and evidences filed in pursuance of queries raised by the A.O. during assessment proceedings, it could be concluded that the A.O. not only applied his mind but also did investigative assessment and went into each and every aspect of the return with all diligences.

The above background was in the context of the fact that each of the issues raised in the impugned notice u/s 263 stand covered multiple times by the aforesaid 131 queries raised at the assessment stage. A chart has been filed at Page 15 & 16 of Paper Book which depicts the issues raised by the CIT in his notice u/s 263, the queries raised on the same issues by the A.O. during 143(3) proceedings vide notice u/s 142(1) and the replies filed by the appellant before the A.O. against those queries raised during assessment proceedings.

Not only this, AO called for and the assessee produced all its computerised books of accounts including cash book, journal voucher book, purchase ledger, purchase journal, sales journal, general ledger, raw material suppliers ledger, stores material suppliers ledger, sales party ledger, production register etc. and the same were verified by the AO during the assessment proceedings. This fact is also recorded by the AO at para 5 internal page 2 of the assessment order (Appeal Papers Pg. 57 and Pg. 58).

The appellant appeared before the A.O. for around 11 times and before the TPO for around 6 times for the personal hearing and made representations and explained the documents as submitted after detailed deliberations on all the queries raised vide the notice. The representations made by the appellant during the course of the hearing are over and above the details and documents filed before the A.O.

*1.2 After verifying all the documents and the return of income as filed by the appellant, the A.O. passed a very detailed order u/s 143(3) on 23-02-2018 running into 98 pages making multi crore disallowances on various issues (Refer Pg. 57-154 of Appeal Papers). Further, before passing the final assessment order, draft assessment order u/s 144C dated 28-12-2017 was forwarded by the A.O. to the Ld. PCIT. Total disallowances made in the order aggregates to **Rs. 699 Crs.** (Rs. 553 Crs. under normal provisions and Rs. 146 Crs. under the provisions of Section 115JB of the Act). As a result the refund claim of*

Rs. 29 Crs. was converted to demand of Rs. 4 Crs., which effectively resulted in **additional tax liability of Rs. 33 Crs.** AO also initiated penalty proceedings u/s 271(1)(c). The appellant's appeal before Ld. CIT (Appeals) against above order u/s 143(3) of the A.O. is pending as on date for disposal.

1.3 Post the above, Ld. CIT issued notice u/s 263 of the Act on 11-10-2018 to revise the above order of the A.O. Copy of the notices dated 11-10-2018 and 16-11-2020 issued by the CIT are at Page 1 and Page 9 respectively of the Paper Book. The 2nd notice is verbatim the same as the 1st notice.

Issues on which proceedings u/s 263 initiated are as below –

Issue 1 – Decline in Gross Profit Ratio (GP Ratio) as compared to last year

Issue 2 – Taxability of interest on bonds not accrued during the year & accrued and offered to tax next year

Issue 3 – Taxability of capital receipt in the form of excise exemption and deferred sales tax subsidy

Issue 4 – Taxability of Preoperative expenses as revenue in nature and allowable as deduction u/s 37(1)

Issue 5 – Taxability of profit on sale of investment & profit on sale of fixed assets. All duly offered to tax and no exclusion claimed for the above profit

Issue 6 – Allowability of penalty whether for violation of any law

Issue 7 – Source of Cash deposited in bank account

Issue 8 – Non examination of ITS details from the system

All the issues raised in the notice are arising from the notices issued by the A.O. during 143(3) proceedings and the replies filed by the appellant before the A.O. against those issues. The Ld. CIT has raised eight issues in his notice. All the above eight issues were duly raised by A.O. multiple times, replies were filed by the appellant against those issues, the A.O. had raised further follow up queries on those issues and the appellant had filed further replies clarifying the further doubts raised by the A.O. Therefore, it is incorrect to state that the order u/s 143(3) has been passed without enquiry and without application of mind by the A.O.

Please refer to synopsis provided at Page 15 of PB which was also filed before the Ld. CIT during proceedings u/s 263 wherein issues raised vide said proceedings have been highlighted and multiple queries on the same very issues were raised by the A.O. during assessment proceedings vide notice u/s 142(1) and against which detailed replies were filed by the appellant against each of the queries so raised.

Further, the assessment was carried out by 3 different A.Os. It may be alleged that one of the A.O. has not applied his mind but stating that all the 3 A.Os have not applied his mind and has passed the order without making any inquiry clearly shows that the impugned notice was issued by the Ld. CIT without going into the records of the assessment proceedings.

1.4 During the 263 proceedings, the Ld. CIT issued two notices u/s 263 on identical issues (Pg 1 and 9 of PB). Detailed replies running into 389 pages were filed before the Ld. CIT on all the issues by the appellant vide submissions dated 05-01-2021 [copy of submission not filed along with Paper Book but produced during the course of hearing before the Hon'ble Bench]. There were multiple hearings taken up during the Covid period and personal hearings were made by the appellant before the Ld. CIT.

On the entire submissions filed, the Ld. CIT could not find any issue which was grossly and erroneously allowed by AO and for which addition or disallowance could be proposed by him in the order u/s 263. Further, on perusal of the submissions, Ld. CIT also got convinced that due enquiries were carried out by the A.O. which he has accepted as well in the order u/s 263. However, instead of dropping the proceedings, Ld. CIT continued with the revision proceedings and raised various queries and asked for detailed workings of the Gross Profit and other issues which were also duly filed by the appellant. In the order, the Ld. CIT based on the said queries and submissions held that the enquiries conducted by the A.O. were not sufficient and held that there was lack of enquiry on above issues during the assessment proceedings.

Ld. CIT passed 48 Page order dated 03-02-2021 [Appeal Papers Pg. 9-56] whereby all the issues were set aside to the file of the A.O. for re-verification and revision, if required.

2.0 Grounds in Appeal challenging the jurisdiction of proceedings u/s 263

Based on above facts, the question before this Hon'ble Bench is that can 263 be done in above situation?

Can Ld. CIT state that the order passed by A.O. is erroneous & prejudicial because A.O. should have made further enquiry on the issues which were verified by the A.O. himself or to do enquiry in a particular manner as stated by the Ld. CIT in the order to find out whether there is any further scope of disallowance or addition?

Can Ld. CIT without pointing out any specific disallowance which has been missed to be assessed, set aside the issues to the file of the A.O. for him to again verify the same thing in a 2nd inning and to do roving and fishing enquiries?

2.1 Our humble submissions is that based on the current facts and the settled law as laid down by various courts, Ld. CIT erred in passing order u/s 263 and hence the same needs to be quashed.

3.0 Submissions

3.1 As submitted earlier the issue raised by Ld. CIT is not the case of 'No enquiry'. Ld. CIT in his order itself while discussing all the eight issues have produced details of multiple notices issued by the A.O. for enquiring about the above eight issues. CIT also have duly admitted in the order that against above notices, the appellant has filed details and submissions vide various letters before AO during the course of assessment proceedings.

3.2 However, his only concern is that the replies filed were inadequate and that the AO should have conducted further enquiry before allowing or not disallowing the claims of the appellant.

3.3 Although there is no dispute that queries on all issues were raised by the A.O. and replied there against filed by the appellant, reference may be made to Page 15 & Pg 16 of Paper Book wherein a statement has been filed to justify the above. The above statement was also filed before the Ld. CIT during proceedings u/s 263 along with written submission on 05-01-2021.

3.4 The appellant would humbly like to submit few principle w.r.t power of CIT to initiate revisionary proceedings u/s 263 which are now settled by various courts

including the jurisdictional Rajasthan High Court and which are duly applicable to the present facts of the case :-

Principle 1 -

Proceedings u/s 263 cannot be initiated on the issues where enquiries have been duly conducted by the A.O. during 143(3) proceedings.

*Refer – (1) **PCIT -vs.- Dilip Kumar Swami (2019) 106 taxmann.com 59 (Raj.)**: Held that PCIT cannot invoke revision proceedings u/s 263 ignoring the factum of inquiry by AO, material on record and conclusions arrived. Proceeding initiated by the PCIT u/s 263 of the Act is without examining the records of assessment proceedings in its entirety and objectivity and without application of mind and thereby, the appeal is not acceptable and thus dismissed. **[Para 10 & 11, Pg. 3 of the order]***

*(2) **Rajmal Kanwar -vs.- CIT (2017) 82 taxmann.com 119 (Jai.)**: Held that when AO had made sufficient enquiries, considered the survey records and the surrender made by assessee and after considering the submissions of the assessee and due application of mind completed the assessment proceedings u/s 143(3) of the Act, assessment order could not be held to be an erroneous order which was prejudicial to interest of revenue. **[Para 5, Pg. 11 of the order]***

Principle 2 -

Jurisdiction u/s 263 cannot be invoked for want of further enquiry or to carry out enquiry in a particular manner.

*Refer – (1) **PCIT -vs.- Smt. Nirmala Devi Chordia (DBITA No. 182/2015 /Raj HC dated 06-12-2016)**: Held that there is a conspicuous difference between the lack of enquiry and perception about level of enquiry. If AO's order and record reflects that reasonable inquiries were conducted, the order cannot be held as erroneous and prejudicial to the interest of the revenue merely because CIT holds another plausible view about the manner of inquiry. Powers of Section 263 of the Act cannot be exercised for want of enquiry in a particular manner. **[Pg. 4-5 of the order]***

- (2) **CIT -vs.- Ganpat Ram Bishnoi (2008) 296 ITR 292 (Raj)**: Held that when enquiry has been conducted and AO has reached a particular conclusion, then jurisdiction u/s 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something. **[Para 11, Pg. 3 of the order].**
- (3) **Om Prakash Badya (HUF) -vs.- Pr. PCIT (ITA No. 217/JP/2020 dated 19-11-2020)**: Held that CIT cannot pass order u/s 263 of the Act on the ground that thorough enquiry should have been made by the AO. If the AO had given a specific notice regarding the referred transactions and the assessee has also given specific reply to the show cause notice issued by the AO, then it is not a case where the AO has not made any enquiry regarding impugned transactions but the PCIT invoked the provisions of section 263 on the ground that the enquiry was not made in the manner, it should have been made. Such action of PCIT is not justified. **[Para 12, Pg. 36 of the order]**
- (4) **Smt. Shruti Rahul Mane -vs.- PCIT (In ITA No. 1056/Pun/2016 dated 27-06-2019)** Held that where enquiries have been made by the Assessing Officer even though they are inadequate, the provisions of Sec. 263 cannot be invoked. Lack of enquiry and inadequate enquiries are on different pedestal. The revisional jurisdiction can certainly be invoked where the AO has failed to conduct enquiries/verifications at all. **(Para 5, Pg. 5 of the order)**

Principle 3 -

Where AO after thorough enquiry has taken a particular view, order of AO cannot become erroneous because CIT is of a different view than the view taken by A.O.

Refer – (1) **CIT -vs.- Kwalitiy Steel Suppliers Complex (2017) 395 ITR 1 (SC)**: Held that where two view are possible and the AO has taken one view and the CIT again revised the said order on the ground that he does not agree with the view taken by the AO, in such circumstances the assessment order cannot be

treated as an order erroneous or prejudicial to the interest of the Revenue.
[Para 8 & 9, Pg 5 of the Order]

- (2) **CIT -vs.- Chambal Fertilizers & Chemicals Limited (2014) 360 ITR 225 (Raj)** : Held that it is clear that CIT does not have unfettered and unchequered discretion/power to reverse the order. AO exercises quasi-judicial power vested in him and if he exercises such powers in accordance with law and arrives at a just conclusion, such conclusion cannot be termed to be erroneous only because the CIT does not feel satisfied with the conclusion. **[Para 18, Pg 7 of the Order].**
- (3) Identical principle held in **CIT -vs.- Kailash Chand Methi (2014) 366 ITR 337 (Raj) [Para 16, Pg No. 6 of Order]**
& **CIT -vs.- Shri Parmanand (DB ITA No. 137/2014 dated 07-11-2017) (Raj HC) [Page 2 & 3 of the Order]**

Principle 4 -

CIT cannot set aside the issue to AO without pointing out specific unsustainability in the claims allowed by A.O. and without conducting enquiry on his own and giving a specific finding about the same.

- Refer - (1) **Narayan Tatu Rane -vs.- ITO (2016) 70 Taxmann.com 227 (Mum Trb):**
Held that CIT, before holding an order to be erroneous, should have conducted necessary enquiries or verification in order to show that the finding given by the assessing officer is erroneous and should have shown that the view taken by the AO is unsustainable in law. In the instant case, CIT has failed to do so and has simply expressed the view that the assessing officer should have conducted enquiry in a particular manner as desired by him. Such a course of action of CIT is not in accordance with the mandate of the provisions of sec. 263 of the Act. [Para 19 of Order, Pg 8 of order].
- (2) **Arun Kumar Garg HUF -vs.- Pr CIT (ITA No. 3391/Del/2018 dated 08-01-2019):** *The principles as held in the above decision is directly applicable in the present facts of the case. It has been held that it is not the case where no enquiry has been made by the A.O. Merely because the Ld. Pr. CIT felt that further inquiry should have been made does not make the order of the*

assessing officer erroneous and prejudicial to the interest of the revenue. It is for the assessing officer to decide the extent of inquiry to be made and it is his satisfaction which is required under the law.

Ld. Pr. CIT has merely remitted the matter back to the Assessing officer without making any inquiry himself and without discussing as to why he does not agree with the contentions of the assessee. The exercise of the jurisdiction u/s 263 cannot be outsourced by the PCIT to the assessing officer. It is a settled law that Ld. PCIT cannot pass the order on the ground that thorough inquiry should have been made by the A.O. Although, there has been an amendment in provisions of Sec 263 of the Act by which Explanation 2 has been inserted w.e.f. 01-06-2015 but the same does not give unfettered powers to the Commissioner to assume jurisdiction u/s 263 to revise every order of the AO to re-examine the issues already examined during the course of assessment proceedings. [Para 5.1, Page 6-7 of the Order].

Principle 5 -

Order u/s 263 cannot be passed to make roving queries on the basis of whims or surmises of the revising authority.

*Refer- (1) **CIT -vs.- Gabriel India Ltd. (1993) 203 ITR 108 (Bom)**: It was held that the CIT cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. [Para 9 & 10, Page 4 & 5 of the Order].*

Principle 6 -

Non discussion of the issue in the assessment order does not render the order to be erroneous although this is an issue undisputed here.

*Refer **CIT -vs.- Reliance Communication Ltd. (2016) 76 taxmann.com 226 (SC)** : Hon'ble Apex Court affirmed the decision of Hon'ble High Court of Bombay that where detailed enquiries were made by the AO on an issue, then mere fact that*

AO did not make any reference to said issue in assessment order, would not entitle Commissioner to pass a revisional order.

Principle 7 -

Explanation 2 to Sec. 263 could not be invoked to make inquiry on each and every issue. Only gross case of inadequacy in inquiry & lack of application of mind can result an order to be termed as erroneous.

*Refer **Torrent Pharmaceuticals Ltd. -vs- DCIT (2018) 97 Taxmann.com 671 (Ahd ITAT)**: Held that expecting an AO to examine each and every item of income and expenditure and other transactions to the hilt is fraught with serious constraints and does not appear feasible. Noticeably, the assessee is a listed company and accounts are subjected to multiple audits by expert professionals. Ordinarily, it is only in a very gross case of inadequacy in inquiry and lack of application of mind that the order of AO is open to attack as erroneous. **[Para 8.3, Par 9.2 & Para 9.4, Pg 28, 31 and 32 of order]**.*

Principle 8 -

Explanation 2 to Sec 263 has been introduced w.e.f. 01-06-2015 and hence is not applicable for AY 2014-15 & earlier years.

*Refer- (1) **M/s Arun Kumar Garg HUF -vs.- PCIT (ITA No. 3391 of 2018 dated 08-01-2019)(Del)** Held that Explanation 2 to Section 263 of the Act introduced by Finance Act, 2015 is prospective in nature and is not applicable for AY 2014-15. **(Para 5.7, Pg. 10)***

*(2) **Smt. Shruti Rahul Mane -vs.- PCIT (ITA No. 1056 of 2016 dated 27-06-2019) (Pun)** Held that amendment to section 263 brought by the Finance Act, 2015 is effective from 01-06-2015 and does not operate retrospectively. **(Para 7, Pg. 6)***

*(3) Identical principle also held in **Indus Best Hospitality & Realtors Pvt. Ltd. -vs.- PCIT [ITA No. 3125/Mum/2017 dated 19-01-2018]** **(Para 23, Pg. 10)***

Without prejudice to the above submissions that proceedings u/s 263 are invalid, please find below the submission on merit on each of the issues.

Ground No. 4: Decline in GP Ratio

1.0 The appellant is a Listed Public Company and its accounts are subject to various statutory audits, scrutiny by various regulatory bodies and specific tax audit by the tax auditor.

2.0 On perusal of the data of past 3 assessment years and subsequent 3 assessment years, it could be noted that there has been fluctuations year on year on the gross profit. In AY 2012-13 and AY 2013-14, the gross profit has increased from Rs. 714 Crs. to Rs. 1,682 Crs. When the said increase in profit of ~ Rs. 1000 Crs. is not questioned or doubted by the department, the decrease in the year under consideration should also be accepted more so because there is no finding by the revenue of any irregularity in the books of accounts. Also, it is not AY 2014-15 which is exceptional year but it was AY 2013-14, since in AY 2013-14 GP margin of the company was substantially higher as compared to earlier years.

3.0 Further, as explained to Ld. CIT during the proceedings u/s 263, the GP ratio of the appellant for the year under consideration is the highest among all the peer cement companies in the country. (Refer profitability of top 10 cement companies derived from public domain as per statement filed during the course of hearing before the Hon'ble Bench.) It was also duly explained to the Ld. CIT that the above year was not as good as earlier year for the cement industry. Gross profit of all the cement companies had fallen substantially for the year under consideration and the fall in the case of the appellant is one of the lowest. Hence the sectoral impact to the cement industries also needs to be considered before directing to make roving enquiries.

4.0 Ld. CIT needs to acknowledge the fact that cement industry is cyclical in nature and increase and decrease in the profit is the part of cycle. If the contention of the Ld. CIT is accepted then every company should report exactly same amount of profit each year which is not tenable.

5.0 Ld. CIT in its order u/s 263 has himself made contradictory statement that A.O. has failed to make any inquiry or investigations that led to decline in GP margin (Para 4.1, Pg. 4 of the order) as in the same para the Ld. PCIT has also mentioned that queries have been raised by the A.O. vide notice dated 04-01-2016 u/s 142(1) during the course of assessment proceedings. Also, in Para. 4.1.2 of the order (Pg. 5 of the order), Ld. PCIT has duly taken cognizance of the fact that further query has been raised by

the A.O. on the same issue against which further reply has been duly submitted by the appellant.

6.0 In submission dated 05-01-2021, as required by Ld. PCIT a detailed statement showing comparison of computation of Gross Profit for AY 2014-15 and AY 2013-14 was furnished. From, the said statement it was clear that turnover of the appellant has increased due to increase in the quantum of sale of cement in spite of reduction in cement realisation rate, thereby resulting in increase in manufacturing and other direct expenses and decrease in GP margin.

7.0 Ld. PCIT has erroneously alleged that the reasons for decrease in the GP margin and increase in the expenses have been submitted for the first time by the appellant and neither such reasons were furnished by the assessee before the A.O. during the course of assessment proceedings nor such reasons were examined by the A.O. (Para 4.1.5, Pg. 14 of the order). It is humbly submitted that the submission were made first time because Ld. PCIT has specifically asked the assessee to submit in such a manner. However, no new details have been furnished before the Ld. PCIT since all details of turnover, quantitative details as furnished before the Ld. PCIT were all available to the A.O. and verified by him.

8.0 Further, it is important to note that the A.O. has raised multiple queries w.r.t closing stock & opening stock, reconciliation of turnover, details of other expenses, reasons for increase in depreciation and has also specifically asked to furnished copies of sales tax return and service tax return during the course of assessment proceedings. (Refer Page 24 of Paper Book wherein query raised by AO from item no 15 to item no 19 all pertained to queries raised in relation to sales, stock, purchase, production which determines the Gross Profit of the company). Therefore, all the details were with the A.O. which has not only been examined but detailed investigating enquiries were conducted by the AO before passing the assessment order.

9.0 Further, Ld. PCIT in his order has alleged that A.O. has not mentioned in the assessment order as to how and in what manner such books of accounts were verified by him more particularly with reference to fall in G.P. ratio. It is humbly submitted that no section of the Income Tax Act prescribe the manner in which order u/s 143(3) should be drafted. If this is a valid ground then every order u/s 143(3) shall be

subjected to revision u/s 263 of the Act. Hon'ble Supreme Court in **CIT -vs.- Reliance Communication Ltd. (supra)** has also affirmed the said principle.

10.0 Further, the Ld. PCIT has failed to point out any error either in the submission dated 05-01-2021 of the appellant or replies furnished during the course of assessment proceedings. He has simply remanded the matter to the file of A.O. for making further enquiries which is uncalled for on mere presumption that A.O. has failed to verify the books of accounts properly.

11.0 Lastly, Ld. PCIT has directed the A.O. to correctly compute the Gross Profit of the company in accordance with the provisions of the Income Tax Act. It is humbly submitted that the job of the AO is to compute the correct tax liability of the company and never to compute the correct gross profit. This direction of the Ld. PCIT is itself arbitrary and in gross violation of the basic principles of the Income Tax Act of computing correct income of the appellant.

12.0 In support of the above contentions the appellant would like to rely on the decision of **Torrent Pharmaceuticals Ltd. -vs.- DCIT (Supra)** wherein it has been held that due cognizance needs to be given to the fact that the assessee is a listed company and the accounts are subject to multiple audits by expert professionals. The assessment is also carried on year to year basis by the department. Considering the turnover and scale of operation of this magnitude, it cannot be alleged that AO has omitted to apply his mind. It is only in the gross case of inadequacy in inquiry and lack of application of mind that the order of AO is open to attack as erroneous. Further, the appellant would also like to rely upon the decision of Hon'ble Rajasthan High Court in **CWT -vs.- Girdhari Lal (2002) 258 ITR 331 (Raj.)** wherein the court has specifically held that merely because low profit was shown by the assessee, that in itself did not render the order as erroneous.

Ground No. 5: Taxability of interest income on bonds

1.0 The appellant has recorded notional interest income on Listed PSU Bonds in the P&L A/c, the right to receive of which shall arise on the due date of the receipt of interest. If the said bonds are sold before the due date, then although interest income is recorded in the books, no interest shall be received by the appellant. It is the person who holds the bond on the record date has the right to receive the interest.

2.0 In absence of any right to receive the said interest, the appellant has claimed the same in the computation of income for AY 2014-15 and the said interest income has duly been offered in the year in which it is due to be received i.e. AY 2015-16.

3.0 Year on year the appellant has been following the above practice of claiming the amount of interest on bonds which has not accrued during the year and offering the same in the immediately next year when is same accrues. The above practice has since been accepted by department in all earlier years without any dispute as could be noted from the statement filed during the course of hearing before the Hon'ble Bench. The alleged amount of Rs. 10.68 Crs. has been duly offered by the appellant in its return of income for AY 2015-16. Consequentially, amount of interest claimed in earlier assessment year of Rs. 10.67 Crs. has also been offered to tax in the current assessment year under appeal. Hence, if the contention of the Ld. CIT is accepted that there is a prejudice to the department of Rs. 10.68 Crs. on account of interest income claimed during the year, then the Ld. CIT has grossly erred in not considering the fact that the interest income for the earlier years of Rs. 10.67 Crs. has duly been offered to tax in AY 2014-15 and hence, there is no income which has remained untaxed.

4.0 It has been judicially held that in such a scenario there is no prejudice to the department since taxes has been duly recovered on the alleged income. Refer **Canara Bank -vs.- JCIT (2003) 84 ITD 310 (Bang Trb)** wherein it was held that when interest on bonds on accrual is offered to tax in subsequent assessment year, there is no loss to the Revenue except that the year of chargeability is different. In the circumstances of the case it is not proved that there is any prejudice to the Revenue by way of less tax payable by the assessee. Hence, the action of the CIT in invoking the provisions of s. 263 is not warranted since no prejudice is caused to the Revenue action under s. 263. Further, in **CIT -vs.- Karnataka Bank Ltd (2014) 49 taxmann.com 246 (Karnataka H.C.)** it has been held that AO has no right to charge interest which has not become due and payable. Also, the said treatment of excluding interest on bonds from Taxable Income is in accordance with the decision of Hon'ble Bombay High Court in **DIT -vs.- Credit Suisse First Boston Ltd. (2013) 351 ITR 323 (Bom)** wherein it has been held that right to receive interest in the government securities vested in the assessee only on the date mentioned in the securities. Consequently,

interest accrues on the securities only on the due dates and cannot be said to have accrued to the taxpayer on any date other than date stipulated therein.

Ground No. 6: Taxability of capital receipt in the form of excise exemption and deferred sales tax subsidy

*1.0 Above two receipts are held to be capital in nature by the decision of Hon'ble Apex Court in the case of **CIT -vs.- Shree Balaji Alloys (CA No. 10061 of 2011 dated 19-04-2016)** [Excise duty exemption] and **CIT -vs.- Balkrishna Industries Ltd. (2018) 300 CTR 209 (SC)** [Deferred subsidy]*

2.0 Since the issue is already settled by the Apex Court, proceedings u/s 263 on the above two issues are not warranted and CIT therefore, grossly erred in directing the AO to re-examine the same. Furthermore, the above issues are present year on year and department since inception has allowed the claim of the appellant following the judicial precedence.

*3.0 As far as the issue of taxability of deferred sales tax subsidy is concerned, besides the Apex Court, the jurisdictional Rajasthan High Court in the case of **PCIT -vs.- Chambal Fertilizers (DBITA No. 129/2017 dated 08-08-2017)** and **CIT -vs.- Mangalam Cement (DBITA No. 138/2014 dated 19-09-2017)** has also held that waiver on pre-payment of deferred sales tax subsidy is a capital receipt.*

4.0 As far as giving different treatment to sales tax subsidy and electricity duty exemption by the AO, it was duly submitted to the CIT that the above two issues have been disallowed by the AO following the principle of consistency and more so department has preferred appeal before supreme court on the above issues. Therefore, to keep the matter alive for the current year also, disallowance was made u/s 143(3) to maintain the consistency in the approach for all years.

Ground No. 7: Allowability of Pre-operative expense

*1.0 The above issue is also squarely covered in favour of the appellant by the decision of Hon'ble Apex Court in the case of **CIT -vs.- Relaxo Footwears Ltd. (2007) 293 ITR 231 (Del)** SLP dismissed by Supreme Court vide **SLP No. CC 12361/2007 dated 03-01-2008***

2.0 The appellant year on year makes huge addition in the fixed assets to increase its existing cement capacity. As on 31-03-2014, the appellant has a closing CWIP of Rs. 801 Crs (Pg. 387 of PB). Considering the huge quantum of CWIP of the appellant, preoperative expenditure of Rs. 53 Crs. accounts for only 6% of CWIP. Further, it is the nature of expenditure and not the quantum of expenditure which decides whether the amount needs to be capitalised or needs to be claimed as revenue expenditure.

3.0 Further, the appellant has also forgone the year on year benefit of depreciation on pre-operative expenditure by not capitalising the same. Hence, allowability of preoperative expenditure is neither erroneous nor prejudicial to the interest of revenue. The above issue is also allowed by the AO year on year from AY 2006-07 to AY 2013-14 in the order u/s 143(3) following the above judicial precedence as could be noted from the statement filed during the course of hearing before the Hon'ble Bench.

Ground No. 8: Profit on sale of investment and profit on sale of assets.

1.0 The above amount were excluded in computing book profit u/s 115JB. In the order u/s 143(3) [Refer Pg. 94 - 97 of order], the AO has duly disallowed both the amount in computing book profit and hence since the amount already stands disallowed, the Ld. Assessing Officer had applied his mind while making assessment. Therefore, there is no justification for the CIT to refer the matter to the AO to re-examine its taxability. This itself shows non application of mind by the Ld. CIT in passing order u/s 263.

2.0 As far as verification of transaction of sale of property from the ITS details is concerned, it has already been pointed out that the appellant has not sold any property during the year and hence, the ITS details does not reflect any transaction relating to sale of property. Thus, there is no point or justification for instructing the AO to verify the ITS details as far as sale of property is concerned.

Ground No. 9: Allowability of penalty u/s 37(1)

1.0 During the assessment, the AO after fully satisfying that the above penalty is compensatory in nature and not for violation of any law, has not made any addition on the same. The fact that the above penalty is compensatory in nature i.e. not for any violation of law, was also specified by the tax auditor in his tax audit report by reporting the said amount under the head "Expenditure by way of any other penalty or

fine not covered above” and not reporting under the head “Expenditure by way of penalty or fine for violation of any law for the time being in force” [Refer Pg. No 134 of PB]. Hence, CIT was wrong in referring the above matter to the AO for re verification.

Ground No. 10: Cash deposit in bank

1.0 The source of the cash deposited in bank was duly filed both before the AO as well as the Ld. CIT. It is pertinent to mention that the reply as made before AO was again reiterated before PCIT. While the AO was satisfied with the reply, the Ld. CIT could not point out any error or raised any suspicion. Hence, without any finding about the irregularity CIT erred in referring the matter to the AO since there is no prejudice to the revenue which the CIT could point out in the above transactions. Further, source of cash deposit being deposit back of excess cash withdrawn earlier, scrap sale, etc were duly reflected in books of accounts. Even otherwise, the volume and value of the cash deposits is miniscule as compared to the overall size and strength of the appellant. [Refer Pg. No 364-365 of PB]

2.0 The appellant would also like to rely on settled principle that proceedings u/s 263 cannot be done to carry out roving and fishing enquiries.

Ground No. 11: Non verification of ITNS details

1.0 Summary of all the details as referred to in ITNS is enclosed in Pg. No. 16 of the paper book. From perusal of the said statement, it could be noted that the majority of the ITNS transactions were duly verified by the AO during the course of assessment proceedings.

Decisions relied upon by Ld. PCIT are not applicable in present facts of the case and are totally distinguishable

1.0 The case laws relied upon by the Ld. PCIT is distinguishable and is not applicable in the instant case.

Sify Software –vs.– ACIT (2017) 80 taxmann.com 273 (Chennai - Trib.)

In the said decision CIT had invoked proceedings u/s 263 on the contention that AO has failed to enquire into the substantial increase in the personal expenses of the

company without proportionate increase in the revenue of the company and such increase of employee cost was abnormal in case of Software Industry. However, there is no such issue in the instant case.

Further, in the aforesaid case the order sought to be revised contains error of reasoning or of law or of fact on the face of it. However, in the instant case no allegations has been pointed out by Ld. PCIT that order of A.O. contains any error of reasoning of any law or facts.

CIT -vs.- Bhawal Synthetics (India) Udaipur (2017) 297 CTR 104 (Raj)

In the aforesaid case, assessment order was passed by A.O. without taking into consideration the binding order of Hon'ble Supreme Court. However, in the instant, A.O. has not bypassed any of the decision of Hon'ble Supreme Court or Hon'ble Jurisdictional High Court.

Further, in the aforesaid case CIT has specifically pointed out the error in the order of the A.O. that deduction of interest income has been allowed without considering the decision of Hon'ble Supreme Court which is in favor of the revenue. Therefore, the order was declared by the Hon'ble High Court as erroneous and prejudicial to the interest of revenue. However, in the instant case of, Ld. PCIT has not pointed out any specific error in the submission of the assessee or in the assessment order.

PCIT -vs.- Venus Woollen Mills (2019) 412 ITR 188 (P&H)

In the aforesaid case large amount of undisclosed income was suo moto offered by the assessee during the survey proceedings which were not recorded in the books of accounts after survey proceedings. However, the instant case no such discrepancy is pointed by the Ld. PCIT in his order in the book of accounts.

Further, in the aforesaid case A.O. has accepted that the books of accounts was test checked in spite of the fact that huge undisclosed income was surrendered by the assessee. However, in the present case, the assessment order was passed after marathon assessment proceedings of 30 months led by three different A.Os enquiring multiple times on all the issues raised in the notice u/s 263.

Further, in the aforesaid case the CIT had the material in hand to show that claims have been allowed incorrectly, therefore the order of AO was erroneous and prejudicial

to the interest of revenue. However, in the instant case, Ld. PCIT without pointing out any error in the order of A.O. or submission of assessee has rushed to remand back all the matters to A.O. on the mere suspicion that further enquiry should have been made.

The assessee craves leave to file further submission, if occasion so arises". The Ld. AR also filed a compilation of case law paper book wherein all decisions referred herein above were compiled and filed and a copy of the same was also filed with the Ld. DR.

6. Per Contra, the Ld. CIT-DR has vehemently supported the order of the Id. PCIT and filed a compilation of 28 case laws alongwith the detailed submission which is reproduced as under :-

"During the course of hearing, the Id. AR has filed comparative trading results of various companies in the business of manufacturing of cement in order to justify fall in its GP rate. It may be submitted that these details were not produced before the AO/PCIT during assessment/revision proceedings and thus, should not be given any cognizance, especially looking to the fact that the same were produced before the Hon'ble Tribunal without making any prayer for their admission as additional evidence. Further, nothing has been brought on record to establish that these entities were also producing "power' as in the case of the assessee and their assessed GP rate i.e. whether their trading results were accepted or some additions were made thereof. The groundwise submissions are as under:

Ground 1 to Ground 3 - Challenging the jurisdiction of the Ld. CIT in initiating proceedings u/s 263

1. The Id. AR has submitted that books of accounts of the assessee are subjected to scrutiny of various statutory authorities being a listed company and its turnover was more than Rs. 6,000/- crore.

*1.1 Your honour may recall that books of accounts and financial statements of M/s Satyam Computers Ltd., a listed company, having huge turnover, were manipulated. Further, as per Constitution of India, everyone is equal before law. It does not make any difference whether an assessee is having turnover of few crores or thousand crores of rupees. **Mere size does not absolve the assessee from the applicability of provisions of section 263 of the Act, if the facts and circumstances of the case, warrants such action.***

1.2 It has been submitted by the Id. AR that the assessment proceedings were completed in 30 months by 3 AOs after issue of 4 notices u/s 142(1) of the Act and these AOs have applied their minds to the details submitted by the assessee and

representative of the assessee appeared before the AO 11 times during assessment proceedings.

*1.2.1 It is evident from the order sheet entries as submitted before the Hon'ble Tribunal that the assessee did not file complete details as required by the notices issued u/s 142(1) of the Act at one go and only part details were filed on different dates of hearing. The assessee now cannot be allowed to take benefit on account of span of 30 months of assessment proceedings. **The question arises whether details submitted by the assessee, ipso facto, leads to the inference of application of mind by the AO, as submitted by the Id. AR and according to my humble submission, the answer is a big NO. In the impugned order, the Id. PCIT has discussed the submissions of the assessee in respect of queries raised by the AO during assessment proceedings.***

1.2.2 Further, assessment order was passed by one AO and not by 3 AOs and thus, it cannot be said that these 3 AOs have applied their mind while passing the assessment order.

1.3 It has been emphasised by the Id AR that books of accounts were produced, which were verified by the AO as mentioned by him at para 5 internal page 2 of the assessment order.

*1.3.1 This argument of the Id AR is not supported with the order sheet entries (copies "filed before Hon'ble Tribunal) as recorded by the AOs. It is pertinent to mention that there is no entry in the order sheet about production of books of accounts before AO and thus, there was no question of their verification by the AOs. It may be mentioned that order sheet is a very important piece of evidence, which records the flow of proceedings in a case and recordings therein cannot be ignored. Further, it is noted from the various notices issued u/s 142(1) of the Act as well as various submissions placed in the paper book filed by Id. AR that neither the AO required the assessee to produce its books of accounts nor any averment was made by the Id. AR regarding production of the books of accounts before the AO. **Thus, it is humbly submitted that books of accounts were not produced before the AO and thus, there was no question of their verification by the AO.***

1.4 It has been submitted by the Id AR that before passing the final assessment order, draft assessment order u/s 144C dated 28-12-2017 was forwarded by the AO to the Ld. PCIT. I fail to understand on what basis this averment was made by the Id AR as there is no such requirement in law to send a copy of the draft order to the Ld. PCIT.

1.4.1 It has been submitted by the Id. AR that all the 8 issues raised by the Ld. PCIT in the notice issued u/s 263 of the Act were duly raised by AO multiple times, which were replied by the appellant and against those issues, the AO had raised further follow up queries, which were further replied clarifying doubts of the AO. Therefore, it is incorrect to state that the order u/s 143(3) has been passed without enquiry and without application of mind by the A.O.

1.4.2 It is submitted that it is evident from the order of Ld. PCIT that the AO has raised various queries during assessment proceedings and collected information and he totally relied upon the submissions of the assessee without further probe till the logical conclusion or without their verification with the books of accounts. **Thus, it cannot be said that the AO has applied its mind.**

1.5 It was submitted by Id AR that during proceedings u/s 263 of the Act, detailed replies were filed before Id POT and the Ld. PCIT could not find any issue which was grossly and erroneously allowed by AO and for which addition or disallowance could be proposed by him in the order u /s 263. It was further submitted that during the revision proceedings, the Ld. PCIT asked for detailed workings of the Gross Profit and other issues which were also duly filed by the appellant. In the order, the Ld. CIT based on the said queries and submissions held that the enquiries conducted by the AO were not sufficient and held that there was lack of enquiry on these issues during the assessment proceedings.

1.5.1 In this regard, it is humbly submitted that it is evident from the impugned order of the Ld. PCIT that certain queries were do raised by the AO but the replies to the same were accepted by the AO on their face value without examining them and without looking whether such reply answer to his relevant query or not. It may be mentioned that vide notice dated 04.12.2016 (**Refer PB-128**), the AO required the assessee to furnish details of cash deposits in bank account and it was replied that source of cash deposit in bank account is collection from scrap buyer and deposits from unutilized cash withdrawals. It appears after receiving the above reply, no further queries were raised i.e. total cash deposit in bank and the amount received from scrap buyers along with documentary evidences thereof. **Thus, where is the question of application of mind by the AO on this issue when the complete facts were not before him.** It appears that date wise statement of cash withdrawals and deposits (**PB-364-365**) were filed first time before the Id PCIT on 05.01.2021 and that too without explaining the source of each deposit i.e. from out of unutilized cash withdrawal or from out of sale proceeds of scrap.

1.5.2 Further, vide notice dated 04.01.2016 (**PB-17**), the assessee was required to furnish comparative GP/NP rate chart for 3 years and reasons for decline in GP/NP rate, if any and in response, vide reply dated 19.01.2016 (**PB-25, 28**), **only a comparative chart was filed and the reasons for decline in GP rate was not filed.** Vide notice dated 02.11.2017 (**PB-24**), the AO required the assessee to explain reasons for shortfall in GP rate from 27.3% on turnover of Rs. 6160 Crore in the immediate preceding year to 18.59% on turnover of Rs. 6311 Crore during the year under consideration. Vide letter dated 10.11.2017 (**PB-41**), it has been submitted by the assessee that shortfall in GP rate is on account of:

(a) increase in **depreciation** by Rs. 145.02 Crore due to new capital expenditure incurred during the year and

(b) due to **increase in sales quantity** by 10%, there has been increase in related expenses.

Thus, the decline in gross profit rate for the year under consideration can be bifurcated as under:

Shortfall in Gross Profit On Account of	In Rs. Crore
(a) increase in depreciation	145.02
(b) increase in sale quantity and increase in related expenses	404.07
Total	549.09

1.5.3 It appears that the AO has accepted the above cryptic submission of the assessee without making further enquiry relating to the huge amount of Rs. 404.07 Crore on account of increase in expenses related to increase in sale quantity by 10%. Thus, it could not be said that the AO has conducted proper enquiries and applied his mind by accepting one line explanation of the assessee relating to such a huge amount of Rs. 404.07 Crore. It may be mentioned that before Ld PCIT (page 8 of PCIT order), the assessee has given a number of reasons for increase in this expenditure of Rs. 404.07 Crore, which are as under:

- (i) Decrease in sale realization
- (ii) Increase in excise duty on account of increased production
- (iii) Increase in cost of material consumed
- (iv) Increase in Employee expenses
- (v) Increase in freight and forward
- (vi) Increase in Other Cost
- (vii) Increase in Stores and spares consumed

It may be mentioned that since the AO did not ask the above breakup, the same was not furnished and consequently, not examined by the AO. Thus, it is evident that the issue of decrease in gross profit on account of increase in other expenses has not been looked into by the AO. In view of these facts, it cannot be said that the AO has taken a plausible view in the absence of relevant details/facts.

1.5.4 The second component of such huge shortfall is stated to be on account of excess depreciation of Rs. 145.02 Crore on new capital expenditure incurred by the assessee. Vide notice dated 05.01.2016 (PB 17), the AO has required the assessee to furnish the following information along with supporting evidence thereof:

S.No.	Name	Place of Installation	Date of Purchase	Date of Put to use	Cost of the asset	Rate of depreciation	Amount of depreciation
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1.5.5 It appears that vide its reply dated 29.1.2016 (PB-110), the assessee has filed only depreciation chart (PB-115) as per Income tax Act, without furnishing item wise information in the desired format as required by the AO. However, in the paper book from pages 170 to 256 (PB 170 to 256), the assessee has filed details of additions to fixed assets at its different units stating Description, Date of Capitalisation and amount only. It is difficult to understand that without the rate of depreciation for individual items, how the correctness of claim of depreciation could be verified. It goes without saying that for allowing depreciation, it is important that asset must be put to use in the relevant year. The date of capitalisation is nothing but an entry in the books of accounts and in the absence of documentary evidence that the assets were put to use during the year under consideration, the depreciation could not be allowed. Thus, in the absence of evidences establishing that the new assets were put to use during the year under consideration, it cannot be said that the AO has made any inquiry thereof. Further, invoices of the fixed assets were submitted on sample basis only. It may be mentioned that the assessee has capitalised items at RAS Infrastructure Facility Railway System (PB 255) as per following details:

Description	Units	Date of Capitalisation	Amount (Rs)
Railway Track from Bangur Nagar to Ras	1	20.03.2014	15,81,95,527
Broadgauge Locomotive Engine	1	20.03.2014	2,11,19,202

1.5.6 Though these assets were stated to be capitalized on 20.03.2014 i.e. towards the end of the financial year, still AO has not required the assessee to furnish evidence to support that these assets were put to use before 31.03.2014. It appears that the assessee has not filed any evidence establishing that the fixed assets acquired during the year were put to use on or before 31.03.2014. However, the AO has allowed huge amount of depreciation on these assets without verification, which prima facie, he should have verified.

He has to see that the queries raised by him should be replied properly by the assessee. Could it be said that the AO has applied his mind and has conducted proper enquiries? It may be mentioned that as per PB 101 to 104, the assessee has filed communications to stock exchanges relating to commissioning of its cement/clinker manufacturing facilities.

It may be mentioned that as per PB-101 and 102, relating to commissioning of cement/clinker manufacturing units are dated 14.02.2015 i.e. not relevant to the year under consideration. Further, these communications to the stock exchanges are not sufficient to establish the commissioning of these Units in the absence of documents evidencing production/trial run during the period. Further, there were additions to various units but these communications were furnished in respect of only few units.

1.5.7 Similar, is the position in respect of other issues raised by the Id. PCIT in the impugned order, which would be discussed later.

*1.5.8 Further, the PCIT has directed the AO to examine various issues in the set aside assessment proceedings and there is no requirement, in law, that the Id. PCIT should propose some addition or disallowance as **it would prejudice the mind of the AO, which would again be challenged for passing the assessment order on the directions of Id. PCIT. The Id. AR himself admitted that detailed working of gross profit and other issue were filed during revision proceedings, which implied that such details were neither sought by the AO nor submitted by the assessee during assessment proceedings.***

1.5.9 In its arguments, the Id. AR has postulated various principles, these principles would be replied in the later part.

Ground NO. 4 Decline in GP rate

*4. The factual aspects on this issue has already been submitted earlier. Hence, for the sake of brevity, the same are not being reproduced here. In continuation of earlier submissions, it would be appropriate to mention that in the case of **M/s Arsh Vision Vs. DCIT, Ajmer in ITA No. 592/JP/2019**, the similar issue of depreciation was there in order passed u/s 263 by the Id PCIT and vide order dated 12.10.2020, it has been held by the Hon'ble Jaipur Tribunal that:*

"14. Firstly, regarding claim of depreciation on the residential property and whether the same is used by the assessee firm for business purposes, the Id AR has referred to questionnaire dated 2.0B.2017 issued by the Assessing officer and the response filed by the assessee vide submission dated 22.08.2017. On perusal of the same, we find that the question which has been raised by the Assessing officer relates to addition to fixed assets by way of construction of building worth Rs 46,92,600/- wherein he has asked for documentary evidence, detailed construction account of new building and whether the cost of construction includes cost of land and whether any valuation has been done from a Registered valuer. In response to the same, the assessee has submitted that they have not constructed any property but purchase one property for which copy of registry was also submitted. There is no finding of the Assessing officer in terms of whether he has examined the contents of the said registry. Further, there is nothing on record which suggests that the AO has raised any query to the assessee regarding the actual usage of such property for business purposes especially given the description

*and site plan of the property and eligibility of the assessee to claim depreciation thereon. We find that there is no such finding on face of the assessment order and further, nothing has been brought to our notice either in terms of any further queries by the AO and submissions filed by the assessee or any entry in this regard recorded by the AO in the order sheet. The Id. Pr CIT has examined the contents of the Registry and has stated that the description of the property in terms of site plan and internal construction shows that it was a residential property and not a commercial property and the photographs so submitted by the assessee during the revisionary proceedings doesn't support the claim of the assessee that the property has been used for business purposes. We are therefore of the view that had the AO carried out even preliminary verification and examined the contents of the registry, the AO would have noted the similar description of the property which is clearly discernible from the reading of the contents of the Registry and would have raised similar questions regarding conversion and more importantly, the usage of such property for business purposes in order to examine the assessee's eligibility to claim depreciation. However, we don't find any such basic enquiries and investigation being carried out by the AO. We therefore find that it is case of complete lack of enquiry on part of the AO to examine the description of the property and also whether the same is used for business purposes in order to examine the eligibility of the assessee to claim depreciation where one of the cardinal rule is the property should be used for purposes of business. A reference can be drawn to observations of the Coordinate Bench in case of *Subhlakshmi Vanijya (P.) Ltd. Vs Commissioner of Income-tax*-, Kolkata, reported in 60 taxmann.com 60 (Kolkata-Trib.) wherein it was held under:*

"It is imperative for the Assessing Officer to conduct enquiry to satisfy himself about the genuineness of transactions. Scope of the term 'enquiry' can be diverse in different circumstances. There cannot be straight jacket formula to positively conclude as to conducting or non-conducting of 'enquiry' by the Assessing Officer. It depends on the facts and circumstances of each case. Where the facts are just ordinary and prima facie there is nothing untoward the recorded transaction in such circumstances, the obtaining of the documents and the application of mind thereon, without a further outside enquiry, may mean that the Assessing Officer did conduct enquiry, leaving the question open as to whether it was a proper or an improper enquiry. But, where the factual scenario of a case prima facie indicates abnormalities and cry or looking deep into it, then a mere collection of documents cannot be held as conducting enquiry, leave aside, adequate or inadequate. In such later cases, only when the Assessing Officer, after collection of the initial documents, embarks upon further investigation, that it can be said that he initiated enquiry. Where the facts of a particular transaction cry hoarse about its non-genuineness and even a casual look at such facts, prima facie, divulges foul play, then the alarm bell must ring in the mind of the Assessing Officer examination. Collection of papers on record in such circumstances cannot be construed as conducting a proper enquiry. If in such circumstances, the Assessing Officer simply gathers documents and keeps them on record, then such nominal enquiry falls within the overall category of 'no enquiry' because of the inaction on the part of the Assessing Officer to read a writing on the wall."

15. In the instant case, where the matter was selected for complete scrutiny and there are addition to the fixed assets during the year, it is ordinarily expected that the Assessing officer examines these transactions thoroughly from the perspective of satisfying the twin test of ownership and usage for purposes of business rather than merely relying on the information submitted by the assessee company. It is not a question of kind and extent of enquiry and hence, a difference of approach and methodology of examination of a particular transaction as done by the AO and as suggested by the Id Pr CIT. No doubt every Assessing officer has his unique style of functioning and no hard and fast rule can be laid down as to how he should conduct the enquiry in discharge of his statutory functions. However, where the factual scenario of a case prima facie shows the description of property as residential and cry for looking deep into it in terms of actual usage for the purposes of business, then a mere collection of registry document and keeping that on record cannot be held as conducting an enquiry. In our considered view, it is a clear case of lack of enquiry on part of the Assessing officer and the order thus passed is clearly erroneous and prejudicial to the interest of the Revenue. Therefore, the finding of the Id Pr CIT that the order so passed by the AO is erroneous in so far as prejudicial to the interest of Revenue is upheld."

4. In para 9.0 of its written submissions, the Id. AR has stated that the Id. PCIT in his order has alleged that A.O. has not mentioned in the assessment order as to how and in what manner such books of accounts were verified by him more particularly with reference to fall in G.P. ratio.

4.1 It is humbly submitted that no section of the Income Tax Act prescribe the manner in which order u/s 143(3) should be drafted. **Further, it is reiterated that in the order sheets maintained by the AO (submitted by the department in the form of paper book), there is no entry of production of books of accounts before the AO and thus, there is no question of verification of the same by the AO during the assessment proceeding. Further, it is pertinent to mention here that as per various notices issued by the AO u/s 142(1) of the Act and various written submissions made by the Id. AR during the assessment proceedings, neither the AO has requisitioned the assessee to produce books of accounts nor the assessee has produced the same on its own before the AO for verification of such books of accounts. This leaves no room for doubt that the books of accounts were not examined and verified by the AOs during the course of assessment proceedings. Thus, the assessment order was passed on presumption and without application of mind and is clearly erroneous and prejudicial to the interest of revenue.**

4.2 It was submitted by the Id AR that the Id PCIT has directed the A.D. to correctly compute the Gross Profit of the company in accordance with the provisions of the Income Tax Act and the job of the AO is to compute the correct tax liability of the company and never to compute the correct gross profit and this direction of the Id. PCIT is itself arbitrary and in gross violation of the basic principles of the Income Tax Act of computing correct income of the appellant.

4.2.1 It is humbly submitted that this contention of the Id. AR has no merit as the gross total income consists of various heads and under each head, the AO has to determine the income thereof and finally to determine the total income and tax liability of an assessee and there is no violation of any provision of income tax Act if AO is required to compute business income correctly, which includes determination of gross profit.

Ground No. 5: Taxability of interest income on bonds

5 Suffice is to say that the assessee has not filed the relevant documents in respect of PSU bonds before the AO. In fact, except, the copies of some of the bonds of Power Grid Corporation, no other evidence was filed in respect of bonds of other PSUs evidencing the terms and conditions of such bonds including the date of payment of interest thereof, even before the PCIT in revision proceedings. Thus, where is the question of judicial pronouncements as relied upon by the Id. AR, when complete facts were neither brought before the AO during the assessment proceedings nor before the Ld. PCIT in revision proceedings. I fail to understand that how the law can be applied, as pronounced judicial pronouncements as relied upon by the Id. AR, when primary facts are not there before the AO.

Ground No. 6: Taxability of capital receipt in the form of excise exemption and deferred sales tax subsidy

6.1 **Excise Incentive:** In its reply dated 26.09.2016 (PS-S3), the assessee has submitted that it has received Excise Incentive in terms of New Industrial Policy, 2003 issued by the Govt. of Uttarakhand and under Excise Notification No. 50/2003 and the same is capital receipt in view of Hon'ble Apex Court judgement in the case of Ponnai Sugar & Chemicals Ltd. In para 5.0, it has been submitted by the assessee that:

5.0 After analysing various issues, the Hon'ble Apex Court held as under:

(a) Character of receipt of subsidy under a scheme has to be determined with reference to the purpose for which subsidy is granted Le. the purpose test

(b) If the object of the assessee under the scheme was to enable the assessee to set up new unit or expand existing unit, then the receipt is on capital account.

6.1.1 This explanation of the assessee was accepted by the AO without requiring the assessee to file the relevant documents of the said scheme/policy and the relevant excise notification and thus, without examining, whether the case of the assessee falls in the said scheme and to determine the nature of receipt in view of the above principles of Hon'ble Apex Court. **Can it be said that the AO has made enquiries on this issue and applied his mind without having the basic documents which must be examined before allowing claim of the assessee. Thus, it is a case of lack of enquiry and non-application of mind by the AO.**

6.2 Justification on preponement waiver of deferred sales tax as capital receipt:

In its reply dated 26.09.2016 (PB-SS), it has been submitted by the assessee that it was

availing subsidy in the form of sales tax exemption under "**The Rajasthan Sales Tax/Central Sales tax Exemption Scheme for Industries 1998**" upto 31st March, 2006. W.e.f. 01.04.2006, the said scheme was rescinded and a new deferment scheme was introduced by Commercial tax department of Govt of Rajasthan vide Notification F.No. F-12(63)FD/tax/200S-171 dated 31.03.2006. Under the said scheme, it availed the option to defer payment of sales tax by 7 years without payment of any interest which was considered as loan. It has further relied upon Notifications dated 09.03.2007 and 24.08.2007 issued by the Govt of Rajasthan regarding premature repayment of deferred sales tax liability at Net Present Value and it has availed waiver of loan to the tune of Rs. 29.87 Crore thereof. Since the entire waiver was in respect of principal amount of loan, the same was on capital account and thus was excluded while computing taxable income. It has relied upon the judgement of Suzler India Ltd., which was rendered in the context of section 41(1) of the Act.

6.2.1 As in the case of Excise Duty exemption, the assessee has not filed the relevant schemes, notifications before the AO nor the AO required the assessee to file the same. I fail to understand, how it could be said that proper inquiries were conducted on this issue and the AO has applied his mind, when the basic documents of the relevant schemes, notifications were neither asked by the AO nor submitted by the assessee. It is difficult to understand that how judicial pronouncements as relied upon by the assessee can be applied to the instant case, when primary facts are not there before the AO.

6.2.2 It is pertinent to mention that in the notice dated 02.11.2017 (**PB-23**) issued u/s 142(1) of the Act, the AO has required the assessee to explain why the sum of Rs. 29.87 Crore under reference may not be treated as revenue receipt under the provisions of section 28(1) of the Act. However, in its reply, the assessee has relied on the judicial pronouncements relating to section 41(1) of the Act. In view of the above, it is humbly submitted that the AO has neither conducted the proper inquiry nor applied his mind even to the queries raised by him.

Ground No. 7: Allowability of Pre-operative expenses

7.1 The assessee has claimed pre-operative expenses of Rs. 53.19 crore, which has been allowed by the AO. During the assessment proceedings, vide its reply dated 10.11.2017 (**PB-43**), it has been submitted by the assessee that these expenses were incurred in respect of expansion carried out in its existing business and it has furnished the break-up of preoperative expenses (**PB-46**) of Rs. 53.19 crore under different heads. Further, vide its reply dated 17.11.2017 (**PB-63**), it has furnished unit wise pre-operative expenses (**PB-99**).

7.1.1 It may be submitted that on the basis of the above details, the AO has allowed the same without examining the basis for allocation of such expenses under different heads i.e. Salary, wages & bonus, Contribution to PF, Superannuation & gratuity, Employee welfare expenses, rent rates and taxes, Travelling & conveyance, General & Misc. expenses, Insurance charges, stores spares consumption, power, fuel & water, legal

*consultancy, bank charges, technical consultancy charges to various units viz-a-viz the total expenditure incurred thereof and without examining what expansion has taken place at different units. He has accepted the submissions of the AO without bringing on record the relevant facts, which are required for allowance of such expenditure. **Though the AO has raised query relating to allowability of such pre-operative expenses u/s 35D of the Act but there is neither any reply with reference to section 35D nor the AO has sought any further clarification.** The Id. AR had relied upon the judgement of Hon'ble High Court of Delhi in the case of Relaxo Footwear Ltd, against which SLP filed by the **department has been dismissed without a speaking order and thus, no law has been declared by the Hon'ble Apex Court therein.***

*7.1.3 It may be mentioned that section 35D of the Act is applicable where an assessee incurs any expenditure after the commencement of his business, in connection with the extension of his undertaking or in connection with his setting up a new unit for the specified purposes as stated in the said section. **Thus, provisions of section 35D are applicable even if there is expansion of existing business. It has been claimed by the assessee that these preoperative expenses were incurred for expansion of existing line of business i.e. cement manufacturing but it is to be examined by the AO whether any of the expenditure falls in clauses of section 35D(2) or not, but the same has not been examined. Further, it may be mentioned that if any expenditure is covered from section 30 to 36 of the Act, then the same cannot be allowed u/s 37 of the Act.***

*7.2 It may be mentioned that in its **Notes forming part of computation of taxable income (PB-370)**, it has been stated that these pre-operative expenses have been debited to the fixed assets/CWIP as the case may be. However, the AO has not required such bifurcation. It is interesting to mention that on a cursory comparison of the above details (PB-99) with details of additions to fixed assets **(PB 170 to 256)**, it has been observed that **total pre-operative expenses in respect of Unit-X was claimed at Rs. 10.81 Crore, whereas the total addition to the fixed assets in the said Unit-X (PB-21S) was to the tune of Rs. 4.29 Crore only which is quite strange and should have forced AO to examine the details of closing CWIP of Rs. 801 Crore to find out, whether the same is appearing thereon or not and the share of the said Unit-X in the closing CWIP.***

Ground No. 8: Profit on sale of investment and profit on sale of assets.

Reliance is placed on the impugned order of Id. PCIT.

Ground No.9: Allowability of penalty u/s 37(1)

9.1 It has been submitted that the said penalty was compensatory in nature and was not levied in infraction of any law by placing reliance on the Tax Audit Report. It may be submitted that the AO has not required the assessee to file the documentary evidences in support of its claim that the said penalty was compensatory in nature, as without examining the same, it cannot be determined whether the said penalty is

*compensatory in nature or not or whether it was paid for infraction of any law. It may be mentioned that **Tax Audit Report are not sacrosanct.***

Ground No. 10: Cash deposit in bank

10.1 It has been stated that the source of cash deposit in the bank account was on account of being deposit back of excess cash withdrawn earlier, scrap sale, which were duly reflected in books of accounts and the volume and value of the cash deposits is miniscule as compared to the overall size and strength of the appellant.

*10.2 It is humbly submitted that the AO has simply accepted the contentions of the assessee without verifying the same from the cash book, ledger account of the assessee, as the same were not produced before the AO, as stated earlier. Further, volume and value of the cash deposits is miniscule as compared to the overall size and strength of the appellant could not be the reason for non-verification of cash deposit in the bank account of the assessee as in income tax, **there is no concept of materiality. It is difficult to believe that such a large company sold its scrap in cash to scrap dealers. Further, the sale bills and cash receipts have not been brought before the AO or Id. PCIT.***

Ground No. 11: Non verification of ITNS details

11.1 It was submitted by the Id. AR that majority of the ITNS transactions were duly verified by the AD during the course of assessment proceedings. It may be submitted that this is a very general statement. These details contain specific details of the transactions executed by the assessee and each and every transaction as appearing therein is to be verified by the AO in scrutiny assessment. It may be mentioned that the said transactions in the case of the assessee were running into number of pages, all of them were not verified by the AO, as admitted by the Id. AR.

12 Principles postulated by Ld. AR

12.1 The Id. AR has stated various principles in his arguments and supported them with various case laws. It is humbly that first it is to be seen whether the facts of these cases are identical or similar to the facts of the instant case under consideration or not and if facts are identical or similar, only then the law stated in these cases may be applied. Further, it may be mentioned that except few orders of Hon'ble Tribunals, most of the judgements did not discuss Explanation 2 to section 263, which has been brought on statute w.e.f 01.06.2015 and thus, these are not applicable to the instant case under consideration. However, my arguments on these principles are as under:

12.2 Principle 1 - Proceedings u/s 263 cannot be initiated on the issues where enquiries have been duly conducted by the A.O. during 143(3) proceedings.

Principle 2 - Jurisdiction u/s 263 cannot be invoked for want of further enquiry or to carry out enquiry in a particular manner

12.2.1 The proper enquiries should be conducted by the AO as a prudent man would conduct looking to the facts and circumstances of the case. The enquiries should not be superficial and the submissions made by the assessee should not be accepted on their face value as done by the AO in the instant case under consideration. Some of the judicial pronouncements are as under:

(a) In the case of Daniel Merchants P ltd and others (SLP No. 23976/2017 dated 29.11.2017), it has been held by Hon'ble Apex Court that:

*"In all these cases, we find that the Commissioner of Income Tax had passed an order under Section 263 of the Income Tax Act, 1961 with the observations that the **Assessing Officer did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned.***

*On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, **simply directed the Assessing Officer to carry thorough and detailed inquiry.** It is this order which is upheld by the High Court. We see no reason to interfere with the order of the High Court. The Special Leave Petitions are dismissed."*

(b) In the case of Nagal Garment Industries (P.) ltd. v. CIT [2020] 113 taxmann.com 4 (Madhya Pradesh), the Hon'ble High Court has upheld the findings of Hon'ble Tribunal:

*"8. The Income Tax Appellate Tribunal, by relying on the decision of the Supreme Court rendered in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83/109 Taxman 66, the order passed by the Supreme Court in the case of Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 and CIT v. Amitabh Bachchan [2016] 69 taxmann.com 170/240 Taxman 221/384 ITR 200 (SC) relevant extracts of which have been quoted by the Income Tax Appellate Tribunal in paragraphs 4.2 and 4.3 of its order, has arrived at a conclusion that as **the Assessing Officer has passed the order of assessment without making a proper enquiry and without applying his mind to the return and the documents filed by the assessee, as such the order is erroneous as well as prejudicial to the interest of revenue.** The Tribunal has also recorded a finding of fact, on the basis of the record available, that in the instant case, **though the Assessee has submitted records before the Assessing Officer he has simply accepted the claim of the assessee without examining the same and therefore, the present case is one where the impugned order of assessment is erroneous as well as prejudicial to the interest of revenue on account of lack of enquiry and application of mind to the facts of the case by the Assessing Officer.***

9. On a careful perusal of the record, it is apparent that the Commissioner of Income Tax as well as the Income Tax Appellate Tribunal both have recorded a finding to the effect that though the records were filed before the Assessing Officer and a detailed questionnaire was also issued to the appellant by the

Assessing Officer to which a reply was filed by the appellant in that regard, the Assessing Officer did not apply his mind nor did he conduct an enquiry into the matter although he has recorded in the note-sheet that the reply filed by the appellant was not satisfactory and did not explain all the facts.:

*(c) In the case of Kerala State Electricity Board Ltd. v. DCIT [2019] 111 taxmann.com 353 (Cochin - Trib), it has been held that Section 263 of the Income-tax Act empowers the Commissioner to initiate suo moto proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or **he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner is well within his powers to treat an order as erroneous on the ground that the Assessing Officer should have made further inquiries before accepting the wrong claims made by the assessee. The Assessing Officer cannot remain passive in the face of a claim, which calls for further enquiry to know the genuineness of it. It has been further held that the Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return. The order passed by the Assessing Officer becomes erroneous when an enquiry has not been made before accepting the genuineness of the claim which resulted in loss of revenue.***

(d) In the case of Gee Vee Enterprises v, Addl. CIT [1975] 99 ITR 375 (Delhi), it has been held by the Hon'ble Court that the Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is a 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 an inquiry.

(e) In Malabar Industrial Co case (2000) 243 ITR 83 (SC), it has been held by the Hon'ble Apex Court that there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. The AO accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. in these facts the conclusion that the order of the Income-tax Officer was erroneous is irresistible.

12.2.2 In the instant case, though detailed questionnaires were issued by the AOs and replies were also filed by the assessee but the AO has accepted the explanation of the assessee without making further probe on various issues highlighted by the Ld. PCIT in the impugned order. In respect of depreciation and when the assets were put to use, the assessee did not furnish the information in the format as required by the AO. Further, reasonable enquiries were not conducted by the AO as a prudent man would conduct in the facts and circumstances of the case, in respect of various issue raised by the Id. PCIT. Even the AO has not requisitioned production of books of account for verifying claims of the assessee as could be seen from

various notices issued u/s 142(1) of the Act and has accepted various submissions made by the assessee on their face value.

12.3 Principle 3 - Where AO after thorough enquiry has taken a particular view, order of AO cannot become erroneous because CIT is of a different view than the view taken by A.O.

12.3.1 The important word in the above principle is 'thorough enquiry'. In the instant case, the Id. PCIT has invoked provisions of section 263 of the Act as the AO has not made thorough enquiries and did not apply his mind to the various issues raised by the Id. PCIT. Therefore, in the absence of thorough enquiries, it cannot be said that the view was formed after thorough examination. **The view should not be formed on the basis of incorrect presumption of facts as held by Hon'ble apex Court in the famous case of Malabar Industrial Corporation. Therefore, in the absence of full facts on a particulars issue, it cannot be said that the AO has taken one of the plausible view.** Some judicial pronouncements are as under:

(a) In the case of **Kirtidevi S. Tejwani v. PCIT (2020) 116 taxmann.com 965 (Mumbai-Trib.)**, it has been held that it is well settled in law that when an Assessing Officer remains passive on the facts which call for further inquiry, such an inertia on the part of the Assessing Officer also renders the order erroneous and prejudicial to the interests of the revenue as held in the case of *Gee Vee Enterprises v. Addl. CIT (1975) 99 ITR 375 (Delhi)*.

(b) In the case of **CIT Vs Ballarpur Industries Ltd. (2017) 85 taxmann.com 10 (Bombay)**, it has been held by the Hon'ble High Court that:

" It is now settled that non-enquiry before allowing the claim would make the order of the Assessing Officer amenable to jurisdiction under section 263. The non-enquiry by the Assessing Officer gives jurisdiction under section 263. Merely because the issue was debatable, it did not absolve the Assessing Officer from examining the issue and taking a view on the claim after examination. Similarly because the two views are possible and or that there are contrary view of higher forums. does not permit non-examination of the claim and taking one of the possible view by giving reasons. In this case no examination of the claim under section 80HHC was done by the Assessing Officer, therefore, the exercise of jurisdiction by the Commissioner under section 263 was valid. [Para 13]

- Mere taking of a view by the Assessing Officer without having subjected the claim to examination would not make it a view of the Assessing Officer. A view has necessarily to be preceded by examination of the claim and opting to choose one of the possible results. In the absence of view being taken, merely because the issue itself was debatable, would not absolve the Assessing Officer of applying his mind to the claim made by the assessee and allowing the claim only on satisfaction after verification/enquiry on his part. A view in the absence of examination is no view but only a chance result. [Para 14]

• Therefore, the Assessing Officer cannot abdicate his responsibility of examining the claim for deduction before allowing it. Absence of examination of the claim made by the assessee while passing an assessment order and allowing the claim made, would render the order of the Assessing Officer erroneous and coupled with the fact that in this case it is admitting prejudicial to the interest of the revenue, exercise of the revisional jurisdiction under section 263 by the Commissioner proper and valid. [Para 16]

(c) In the case of **Jeevan Investment & Finance (P.) Ltd. Vs CIT [2017] 88 taxmann.com 552 (Bombay)**, it has been held by the Hon'ble High Court that:

" merely asking a question which goes to the **root of the matter and not carrying it further is a case of non-enquiry**, if the query is not otherwise satisfied while responding to another query. In the instant case, the Assessing Officer raised query regarding valuation of shares in question to which response was only that the unquoted shares were valued at costs. No method of valuation of the shares was submitted to the Assessing Officer during the proceedings, leading to the assessment order. **It, therefore, appeared that the Assessing Officer after having asked a pertinent question of the method of valuing unlisted shares did not pursue that line of enquiry. Thus, this was a case of non-enquiry and not inadequate enquiry. Therefore, the order of the Assessing Officer was certainly erroneous and prejudicial to the revenue.**"

(d) In the case of **Hunumesh Realtors (P.) Ltd. Vs PCIT [2017] 88 taxmann.com 185 [Mumbai - Trib.]**, it has been held by the Hon'ble Tribunal that:

" The view which was adopted by the Assessing Officer based on material available on record could not have been adopted by the Assessing Officer as material was not sufficient to come to such conclusion as no proper enquiry/verifications were conducted by the Assessing Officer making assessment order erroneous so far as prejudicial to the interest of Revenue amenable to exercise of revisionary powers by the Pr. Commissioner under section 263

The Assessing Officer even did not have course content with him before arriving at the conclusion that these are business expenses. Thus, there was complete lack of application of mind by the Assessing Officer before allowing these education expenses as business expenses of the assessee under section 37(1).

(e) In the case of **CIT Vs Maithan International [2015] 56 taxmann.com 283 (Calcutta)**, it has been held by the Hon'ble High Court that:

" It is well established that credits allegedly based on loan from parties, who are not possessed of sufficient means cannot be accepted as genuine. The Assessing Officer was required to make proper investigation to determine whether the money was really lent by the third party or it has come out of the resources of the assessee himself. Thus the Assessing Officer has failed to apply his mind to all aspects of the case is self-evident.

Such non-application of mind constituted passing of an erroneous order which is also prejudicial to the interest of revenue. (Para 11)

- *In the instant case, the Commissioner had reasons to hold that creditworthiness of the alleged lenders was not enquired into. Mere examination of the bank pass book, profit and loss account and balance sheet of the creditors is not enough. When the requisite enquiry was not made, the order is bound to be erroneous and prejudicial to the interest of the revenue. The Tribunal proceeded on the theory that it was not a case of no enquiry; that no doubt is true, but that is not enough. If the relevant enquiry was not made, it may in appropriate cases amount to no enquiry and may also be a case of non-application of mind. [Para 121]*

- *It is not the law that the Assessing Officer occupying the position of an investigator and adjudicator can discharge his function by perfunctory or inadequate investigation. Such a course is bound to result in erroneous and prejudicial orders. Where the relevant enquiry was not undertaken, as in this case, the order is erroneous and prejudicial too and therefore revisable. Investigation should always be faithful and fruitful. Unless all fruitful areas of enquiry are pursued the enquiry cannot be said to have been faithfully conducted. [Para 19]"*

12.4 Principle 4 - *CIT cannot set aside the issue to AO without pointing out specific unsustainability in the claims allowed by A.O. and without conducting enquiry on his own and giving a specific finding about the same.*

Principle 5 - *Order u/s 263 cannot be passed to make roving queries on the basis of whims or surmises of the revising authority.*

12.4.1 *There is nothing in section 263 of the Act which requires the Id PCIT to give specific findings on the issue involved in 263 proceedings. As per the provisions of section 263 of the Act, the PCIT can modify or enhance the assessment or cancel an assessment and directing a fresh assessment. The following judicial pronouncements are relied upon:*

(a) In the case of CIT v. Assam Tea House (2012) 25 taxmann.com 93 (Punjab & Haryana), it has been held by the Hon' ble court that

*"10. A perusal of the reasons given by the Tribunal as also the Commissioner quoted above shows that the **Tribunal assumed it to be the requirement that the Commissioner should have recorded final conclusion on taxability. This view is legally erroneous.** The Commissioner could have proceeded under section 263 of the Act if the Assessing Officer had made assessment without application of mind. The Commissioner held that as per the order sheet no record was produced while in the order a contrary statement was made. The order of the Assessing Officer did not show the verification of closing stock, purchases and transportation and other items mentioned above. **These reasons were valid reasons for exercise of power under section 263 of the Act.** The Tribunal held that the Assessing Officer was not required*

to discuss these aspects in its order and that the assessee had explanation to the points made by the Commissioner. This approach of the Tribunal cannot be sustained.

(b) In the case of **Addl. CIT v. Mukur Corpn. (1978] 111 ITR 312 (Guj.)**, it was observed (page 325),

"Next question is whether at the time of passing the final order, the Commissioner was bound to record final conclusions. Now, even on this question, we find that there is nothing in section 263(1) to show that before passing the final order under that section, the Commissioner 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 Income tax Officer 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 Income-tax Officer, the only proper course for the commissioner was not to express any final opinion as regards the controversial points."

(c) In the case of **Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC)**, it has been held by the Hon'ble Apex Court that:

"It was not necessary to further detail the reasons given by the Commissioner because on the face of the record the orders were prejudicial to the interest of the revenue, and even if the facts which the Commissioner introduced regarding the enquiries made by him had been indicated to the assessee, the result would have been the same. The assessee, had not in any way suffered from the failure of the Commissioner to indicate the results of the enquiries. Moreover, the assessee would have full opportunity of showing to the ITO whether he had jurisdiction or not and whether the income assessed in the assessment orders which were originally passed was correct or not."

(d) Reliance is also placed on the judgement in the case of Vedanta ltd. v. CIT [2021] 124 taxmann.com 435 (Bombay)

12.4.2 It may be mentioned that in the instant case, in the assessment order, the AO has stated production of books etc. but such is not supported either by order sheet entries or notices issued u/s 142(1) or submissions of the assessee that books of accounts were requisitioned or produced before the AO.

12.6 **Principle 6** - Non discussion of the issue In the assessment order does not render the order to be erroneous although this is an issue undisputed here.

12.6.1 The AO has accepted various claims of the assessee without making any discussion in the assessment order, though these have large revenue implications. Reliance is placed on the following judicial pronouncements:

12.6.2 In the case of CIT Vs Bhawal Synthetics (India), Udaipur [20171 81 taxmann.com 478 (Rajasthan);, it has been held by the Hon'ble High Court that:

"6 So far as the second question is concerned as to whether the Commissioner of Income Tax was justified in invoking powers under Section 263 of the Act of 1961 by holding that the enquiry conducted by the Assessing Officer before the assessment order was neither proper nor adequate, we would like to state that the order passed by the Assessing Officer nowhere reflects about any enquiry said to be made. It simply refers the explanation given by the assessee and nothing beyond that."

*(b) In a very recent judgement dated 02.11.2020 in the case of Sesa Starlite limited, Erstwhile **Sesa Goa Ltd. vs CIT in Tax Appeals No. 27/2015 and 28/2015**, it has been held by the Hon'ble High Court of Bombay at Goa that:*

"31. The material on record does indicate that the AO, in this case, sought for information from the Assessee with regard to its claim for deduction under Section 10B of the IT Act vide its communication dated 2/12/2009. However, according to us, this by itself can never be regarded as sufficient. What is further necessary is that the AO actually applies his mind to the information that may be supplied by the Assessee and considers such information and thereafter forms an opinion whether the Assessee is actually entitled to deduction under Section 10B of the IT Act for the relevant assessment year. There is a distinction between merely calling for information on a particular issue and considering such information with due application of mind if and when such information is actually provided by the Assessee.

32. Now, if the order dated 23/12/2009 made by the AO is perused, we find merit in the contention of Ms. Linhares that there was no consideration whatsoever of the information provided by the Assessee in the context of its claim for deduction under Section 10B of the IT Act. The assessment order dated 23/12/2009 indicates that the AO has not even considered, much less applied his mind to such information before allowing the deduction under Section 10B of the IT Act. On perusal of the assessment order dated 23/12/2009, an impression is created that the AO proceeded on the basis that such deduction was allowable without considering whether the same was actually allowable at all in the context of the various prerequisites provided in Section 10B of the IT Act.

39. In Gabriel India Ltd. (supra), this Court has held that the decision of the AO cannot be regarded as erroneous simply because the AO did not make an elaborate discussion in the order. In our case as noted earlier there is no discussion whatsoever much less any inadequate discussion"

12.7 Principle 7 · Explanation 2 to Sec. 263 could not be invoked to make inquiry on each and every issue. Only gross case of inadequacy in inquiry & lack of application of mind can result an order to be termed as erroneous.

12.7.1 There is no legal provision to support above principle. In a case of complete scrutiny, the AO is required to examine each and every issue having implication on the

taxable income of the assessee. It has been held in various judicial pronouncements that proper enquiries should be made by the AO during the course of assessment proceedings. If the AO does not make proper enquiries or does not apply his mind to the explanation submitted by an assessee, it's a case of lack of enquiry and provisions of section 263 are clearly attracted in such cases. While determining income in a scrutiny assessment, the AO is duty bound to examine each and every issue which has bearing on the tax liability of the assessee.

(a) In a recent order dated 09.12.2020, in the case of **L G Electronics India (P) Ltd. v. PCIT in I.T.A. No. 3307/OEL/2017 (A.Y 2010-11)**' it has been held by Hon'ble Tribunal that;

"7. We have heard both the parties and perused the material available on record. The Assessing Officer/TPO at the time of allowing expenses has not looked into each and every expenses/provisions which was shown in the return and audited accounts of the assessee during the assessment proceedings. During the hearing, the Ld. AR has submitted that the audited financial statements was filed and these facts were brought on record vide reply dated 28/07/2016 to the show cause notice u/s 263. But nowhere, the ld. AR has shown that the Assessing Officer/TPO has specifically asked the details and bifurcations of the expenses claim by the assessee including the provisions of service warranty. The aspect of provision for service warranty has to be looked into year to year basis and it cannot be said that since the said provision has been allowed in prior years by the Tribunal, gives the permission to the Assessing Officer/TPO not to look into the year under scrutiny in which the actual expenses or provisions was made by the assessee. In fact, the Assessing Officer/TPO never raised any query as relates to provisions for service warranty at the time of Assessment Proceedings/ TP proceedings. There is no explanation asked by the Assessing Officer/ TPO to verify the actual claim of the provisions for service warranty in the present assessment year."

12.8 Principle 8 - Explanation 2 to Sec 263 has been introduced w.e.f. 01-06-2015 and hence is not applicable for AY 2014-15 & earlier years.

12.8.1 Explanation 2 to section 263 of the Act, inserted by FA 2015 is applicable w.e.f. 01.06.2015 and is clarificatory and retrospective in nature. Therefore, it is applicable to all the pending proceedings including the assessment year under consideration. Reliance is placed on the following judicial pronouncements:

(a) **Anuj Jayendra Shah v. PCIT (2016] 67 taxmann.com 38 (Mumbai - Trib.):** The amendment to section 263 with effect from 1-6-2015 by insertion of Explanation 2 to section 263 is declaratory in nature and is inserted to provide clarity on the issue.

(b) **Crompton Greaves Ltd. v. CIT [2017] 82 taxmann.com 246 (Mumbai - Trib.):** Explanation 2 to section 263 of the Act is declaratory and clarificatory and therefore retrospective in nature.

(c) **Lally Motors India (P.) Ltd. v. PCIT [2018] 93 taxmann.com 39 (Amritsar - Trib.):** The impugned order being after the date of amendment (by way of Explanation

2) to section 263, i.e., 1-6-2015, the same is an equally valid ground for the exercise of revisionary power under section 263 That is, the law, with effect from 1-6-2015, deems an order as so, where any of the circumstances specified is, in the opinion of the competent authority, satisfied. It has nothing to do with the date of the passing of the order deemed erroneous, or the year to which it pertains. Being a part of the procedural law, the provision shall have effect from 1-6-2015.

12.8.2 It may be mentioned that these orders are very detailed one wherein the Memorandum to the Finance Act, meaning of "Explanation" to a section, in view of judgement of Hon'ble Apex Court, has been discussed and these orders propounded the correct position of law.

13. It has been submitted by the Id. AR that there was no addition in earlier years on account of "Interest on bonds" and "Pre-operative expenses". It may be submitted that the principle of res judicata does not apply to income tax proceedings as each assessment year is a separate and independent one. Further, it could not be presumed that these issues were raised and thoroughly examined by the AO in the absence of any documentary evidence to support such claim. **It may be mentioned that the instant proceedings before the Hon'ble Tribunal are in respect order passed u/s section 263 of the Act and it cannot be compared with appeals on additions made by the AO.**

13.1 Further, in proceedings u/s 263 of the Act, the Hon'ble Tribunal should not go into the merit of the case as held by the Hon'ble Delhi High Court in the case of CIT v. Eastern Medikit Ltd. [2011] 12 taxmann.com 427 (Delhi) as under:

"12. Thus, the conjoint and accumulative reading of the order in its entirety would clearly show that the CIT had not conclusively determined that the year of commencement of the business was financial year 1994-95. On the contrary, he had categorically stated that before coming to any such conclusion, it was necessary to verify the records and for this purpose, he referred the matter back to the Assessing Officer for afresh assessment after giving the assessee reasonable opportunity of being heard. In a case like this, the Tribunal could not have gone into the merits which also, according to us, is done in a perfunctory manner as it would be clear from the reading of Para 7. Once it is found that the invocation of the provisions of section 263 of the Act was proper and valid, such an order passed by the CIT could not have been tinkered with by the Tribunal by going into the merits of this issue. Since these contentions were satisfied and the matter was relegated to the Assessing Officer to conduct an inquiry, the Tribunal should have limited its discussion focusing on the propriety of order by the CIT invoking his power under section 263 of the Act and keeping in view the scope of that provision."

13.2 In view of the above submissions and also relying upon the findings of the Id. PCIT in the impugned order and other judicial pronouncements as contained in compendium of case laws as submitted before the Hon'ble Tribunal, it is humbly submitted that in the instant case under consideration, the AO has not conducted

proper enquiries on various issues as raised by the Id. PCIT and has merely obtained the explanations of the assessee and accepted them on their face value without making further probe and this is to be treated as a case of no enquiry as held in various judicial pronouncements as submitted earlier. Thus, it is humbly submitted that the grounds of appeal raised by the assessee may please be rejected and consequently, appeal of the assessee may please be dismissed.

14 The Ld. AR has relied upon a number of judicial pronouncements. It may be mentioned that these are distinguishable on facts of these cases as these judgements were delivered in the peculiar facts and circumstances of these cases as summarised as under:

PCIT v Dilip Kumar Swami (2019) 264 taxman 33 (Raj): There was cash deposit of Rs. 33.31 lac which has been found explained by the AO as stated in the office note and thus, it was held that proper enquiries were conducted by the AO.

Rajmal Kanwar v CIT (2017) 82 taxmann.com 119 (Jaipur Trib.): It is a survey case. The issue relating to increase in consumption was looked into by the survey team and the excess stock, found during the course of survey, was surrendered by the assessee during the course of survey itself.

PCIT v Nirmala Devi Chordia in DBITA No. 182/2015: The AO has made enquiries from the companies whose shares were transferred for a consideration of Rs. 67,99,500/- u/s 133(6) of the Act.

CIT V Ganpat Ram Bishnoi (2006) 152 Taxman 242 (Raj): In fact in para 9, it has been held that in a given case, not holding of any enquiry, which is relevant for the assessment may indicate non-application of mind by the AO. In that case.

Om Prakash Badya HUF V PCIT in ITA No. 2 17/JP/2020: In that case, a 3 page (internal page 6 of ITAT order) show cause was issued to the assessee by the AO on the issue of genuineness of long term capital gains of Rs. 11.52 lac declared by the assessee and after obtaining detailed submissions from the assessee and only then accepted such claim.

CIT V Kwalitiy Steel Suppliers Complex (2017) 84 taxmann.com 234 (SC): The issue was whether the AO has taken a plausible view in accepting valuation of closing stock at cost price in the circumstances of the case.

CIT V Kailash Chand Methi (2014) 47 taxmann.com 59 (Raj.) : On the issue of jurisdiction of AO to pass the assessment order. Further, proceedings initiated earlier u/s 263 were also dropped.

CIT V Parmanand in DBITA No. 137/2014: On the issue whether the AO can propose action u/s 263 by the CIT.

Narayan Tatu Rane v ITO (2016) 70 taxmann.com 227 (Mum Tri): Assessment Years involved were 2007-08 and 2008-09. In para 20, it has been held that the question whether the amendment brought by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant.

Arun Kumar Garg HUF V PCIT in ITA No. 3391/De1/2018 for AY 2014-15: There is difference between lack of inquiry and inadequate inquiry. Explanation 2 to section 263 is prospective in nature as held by Mumbai Tribunal in the case of Indus Best Hospitality & Realtors P Ltd.

CIT Vs Gabriel India Ltd. (1993) 71 Taxman 585 (Born): Para 5 - The assessment order cannot be held as erroneous and prejudicial to the interest of revenue simply because in the assessment order, the AO did not make an elaborate discussion in that regard.

CIT vs Reliance Communication ltd. (2016) 76 taxmann.com 226 (SC): SLP of the department was dismissed without a speaking order and thus, does not lay down any law.

Torrent Pharmaceutical Ltd. Vs OCIT (2018) 97 taxmann.com 671 (Ahmd Trib.): Para 8.3 The AO has disallowed expenditure of Rs. 5.51 Crore being 10% of expenditure claimed by the assessee. In that background some observations have been made, as relied upon by the Id. AR in his written submissions.

Para 8.4 The AO has re-allocated expenses and re-determine amounts eligible to deductions u/s 80IC and 80IE of the Act. Para 9.2 Explanation 2 to section 263 is clarificatory in nature.

Indus Best Hospitality & Realtors P Ltd v PCIT in ITA No. 3125/Mum/2017 for AY 2012-13: Para 16 - according to Id. CIT, the source of the source was to be examined by the AO, which is beyond his purview.

Para 20 Proper enquiries have been made by the AO including through notices issued u/s 133(6) of the Act.

Para 23 Relied on some decisions of Tribunal for holding that Explanation 2 to section 263 inserted by FA 2015 was prospective in nature.

Shruti Rahul mane V PCIT in ITA No. 1056/Pun/2016 dated 27.06.2019: Amendment to section 263 by way of insertion of Explanation 2 is prospective in nature. Reliance was placed on the decision Narayan Tatu Rane wherein no such proposition was pronounced.

CIT Vs Girdhari Lal (2002) 123 Taxman 973 (Raj): The AO has rejected the books of accounts.

CIT Vs Credit Suisse First Boston (Cyprus) Ltd (2012) 23 taxmann.com 424 (Born.): Relating to interest on deep discount bonds.”

7. In the rejoinder, the Ld. AR has filed detailed counter arguments before the Bench as well as before Ld. DR and the same is reproduced below.

“That at the outset the assessee repeats, reaffirms and reiterates, all the statements, averments and submissions made in the Key submission vide mail dated 24-03-2021 as if these are specifically set out herein. Any averments, contentions and allegations contended in reply of the DR which is in any way inconsistent therewith and / or contrary thereto is denied and disputed except to the extent specifically admitted herein.

Submission by DR

1.0 The DR has submitted that comparative trading results of various cement companies were neither produced before the AO nor before the Ld. PCIT during the assessment/revisionary proceedings and thus, should not be given any cognizance, especially looking to the fact that the same were produced before the Hon'ble Tribunal without making any prayer for their admission as additional evidence. Further, nothing has been brought on record to establish that these entities were also producing 'Power' as in the case of the assessee and their assessed GP rate i.e. whether their trading results were accepted or some additions were made thereof. **[Pg 2 of the submission]**

Our Submission

1.1 It is humbly submitted that the data of peer companies which are listed entities have been collated from a public database "CapitaLine". Further since the said data is readily available in public domain it cannot be termed as additional evidence as envisaged by the DR. Reliance in this regard is placed on the decision of Hon'ble Kolkata Tribunal in the case of **DCIT -vs.- M/s. Rungta Mines Ltd (ITSS No. 30 to 33/Kol/2015 dated 09-03-2018).**

1.2 Further the peer companies apart from cement business, is also involved in the business of generation of power which can be easily verified from the financial statement which is available in public domain. Further, the DR is in a position to find out the assessment records of the peer companies to check as to whether any additions were made or not during the assessment proceedings.

1.3 Even though the arguments of the DR is considered and the comparative statement of peer companies is to be ignored, then also reliance can still be placed on the statement showing comparison of GP ratio of the appellant company itself over different years. On perusal of the said statement it may be noted that, GP ratio for AY 2014-15 is higher than the GP ratio for AY 2011-12, 2012-13, 2015-16 & 2016-17. Hence, it would not be correct to state that there has been an abnormal decline in the GP ratio for AY 2014-15 but it was substantially high in AY 2013-14.

1.4 Further without prejudice to the above, assessee had also submitted before PCIT reasons for decline in GP, reiterating submission made before AO. PCIT has not controverted or found error in those submissions, however remanded the matter to AO for conducting roving enquiry.

Submission by DR on Ground No.1 to 3- Challenging the jurisdiction of Ld PCIT in initiating proceedings u/s 263

2.0 The DR has submitted that as per Constitution of India, everyone is equal before law. It does not make any difference whether an assessee is having turnover of few crores or thousand crores of rupees. **[Para 1 & 1.1 of submissions]**

2.1 The DR has submitted that Assessment order passed by 1 AO and not by 3 AO and thus it cannot be said that all the 3 AOs have not applied their mind. **[Para 1.2.2 of submissions]**

2.2 Further, DR has cited the instance of Satyam Computers and has contended that books of accounts of a listed company may be manipulated. Mere size does not absolve the assessee from the applicability of provisions of section 263 of the Act, if the facts and circumstances of the case, warrants such action. **[Para 1.1 of submissions]**

Our Submission

2.3 The instance of Satyam Computers is one of its kind and it cannot be generalised and compared with the instant case since there is no allegations of any manipulation either by PCIT or AO or any other statutory authorities in present case.

2.4 Further, in order sheet there is clear mentioning by the succeeding AO about verification of details called by the predecessor AO, therefore there is application of mind by AO.,.

2.5 Further, it has never been contended that due to the size of the appellant company the provisions of Sec. 263 could not be invoked. The intention of the appellant was to provide a brief understanding of the company and to bring notice before this Hon'ble bench that assessee being such a large company is subjected to audits by various professional under different laws and hence reasonable reliance may also be placed on such reports. Considering above facts & even otherwise, there is no reason for doubting the books of accounts/submissions of assessee.

Submission by DR

3.0 Against the contention of the AR that books of accounts have been produced and have been verified by AO during the assessment proceedings which is also mentioned in the order u/s 143(3), the DR contends that **(Para 1.3 of the submission):-**

- Nowhere in the order sheet entries it has been mentioned that books of accounts were produced before the AO **(Para 1.3.1 of the submission)**

- *In none of the notices issued u/s 142(1), neither AO has required the assessee to furnish books of accounts nor any averment were made by the AR regarding production of books of accounts by the AO. (Para 1.3.1 of the submission)*

Our Submission

3.1 *It is humbly submitted that the DR has erroneously contended that AO during the course of assessment proceedings has never required the assessee to furnish books of accounts. The AO vide notice u/s 143(2) dated 18-08-2016 has specifically required the assessee to produce any documents, accounts, and any other evidence on which reliance is placed by the assessee. Further AO vide notice dated 04.12.2015 (Pg. 257 of PB) had also required from appellant to submit copy of Audit report, audited profit and loss account, audited balance sheet and director's report which were duly submitted by assessee.*

3.2 *Further, AO himself in the para 5 of order u/s 143(3) dated 23.02.2018 has clearly stated that the books of accounts were produced and he has also categorically specified the list of books of accounts which were produced before him during assessment proceedings. Above observation of AO has also not been challenged by the Ld. CIT in his order and the contention raised by DR that the books of accounts were never asked for and not produced is factually incorrect.*

Submission by DR

4.0 *The DR has argued that raising of further queries by AO does not substantiate that AO has applied his mind as AO has totally relied upon the submissions of the assessee without making further probe or verification to reach the logical conclusion. (Para 1.4.2 of the submission)*

Our Submission

4.1 *Neither the Ld. PCIT nor the DR has denied the fact that queries were raised in respect of all the issues mentioned in the order u/s 263 which was also followed up by a further query/Show cause notice and further reply. Despite this the DR contends that the AO has simply accepted the reply of the assessee without proper verification and application of mind. If the contention of DR is accepted then it will lead to second round of assessment as there is no end of inquisitiveness. Sufficient information & evidences were available with the AO, to conclude the issue within the time period available to conclude the assessment..*

Further it also needs to be considered that AO, during assessment proceedings, had raised subsequent queries after going through reply filed by assessee. The subsequent queries were also replied by assessee. Considering this fact, it is clear that AO had applied his mind while passing assessment order

Submission by DR

5.0 *The DR has contended that replies were accepted by the AO without examining them or without looking whether assessee has replied to his relevant query or not. Accepting of reply without having complete facts before him itself depict that there was no application of mind. (Para 1.5.1 of the submission)*

5.1 AO vide notice dated 04-12-2016 sought the details of cash deposit from the assessee and it was replied that source of cash deposit in bank account is collection from scrap buyer and deposits from unutilized cash withdrawals which was accepted without making any further query. **(Para 1.5.1 of the submission)**

5.2 Similarly w.r.t the issue of decline in GP ratio although queries were raised by the AO vide notice dated 04-01-2016 and 02-11-2017 but proper reply was not submitted by the appellant. A mere cryptic reply was submitted by the appellant that decrease in GP ratio was due to increase in depreciation, sales quantity and expenses which was accepted by AO without making further query. However, number of reasons were submitted by the appellant before the Ld. PCIT for decline in GP ratio which were not furnished before the AO since the AO didn't ask the same, hence AO could not have taken a plausible view in absence of relevant details/facts. **(Para 1.5.2 & Para 1.5.3 of the submission)**

5.3 Further with respect to the claim of depreciation the DR has contended that although query was raised by the AO but the assessee has not furnished the details in the manner desired by AO. Further, assessee has furnished the date of capitalisation of the asset which is mere a book entry and not the actual date of put to use of the asset which was also not sought by the AO. Also, invoices of the fixed assets were submitted on sample basis only. Further, without rate of depreciation for individual items, how can AO verify the claim of depreciation. Therefore, the AO has allowed the claim of depreciation without proper verification. Moreover, the assessee has filed communication to stock exchange relating to commencement of cement/clinker units which is not pertaining to year under consideration. Further, these communications were not sufficient to establish for commissioning of the said units. **(Para 1.5.4, Para 1.5.5, Para 1.5.6 of the submission)**

Our Submission

5.4 Again it is humbly submitted that AO has never accepted the reply of the without application of mind. The appellant has made a cash deposit of mere Rs. 7.87 Crs. which is around 0.1% of its turnover. Considering the huge scale of operation of the appellant with a turnover more than Rs. 6,000 Crs. the amount of cash deposit is minuscule. Further, details of TCS on scrap sales was also submitted before AO vide Reply dated 19-01-2016. AO after having satisfied himself about the said issue of cash deposit finalised the assessment proceedings. Further, it is well established principle that PCIT cannot ask AO to conduct enquiry in a particular manner, particularly in a situation when AO has taken a plausible view on any issue.

5.5 Regarding, decline in GP ratio it is humbly submitted although AO has not raised the query in the manner the Ld. PCIT has raised but AO has raised multiple queries w.r.t closing stock & opening stock, reconciliation of turnover, details of other expenses, reasons for increase in depreciation and has also specifically asked to furnish copies of sales tax return and service tax return during the course of assessment proceedings which is related to decline in GP ratio. [Refer PB Pg No..]

Therefore, all the details were with the AO which has not only been examined but detailed enquiries were conducted by the AO before passing the assessment order.

Hence, the contention of the DR that reply has been accepted without proper application of mind is not tenable.

5.6 Further, it is humbly submitted that regarding the claim of depreciation the DR has itself referred to number of queries raised by the AO which were also replied by the appellant. Details of description of all the assets along with rate of depreciation and amount of depreciation was also submitted before the AO vide reply dated 29-01-2016 [PB Pg No. 110]. Hence the contention of DR that rate of depreciation has not been verified by AO while allowing depreciation is totally unjustifiable. Also, in the case of appellant the date of capitalisation is the date of put to use, as also explained before the AO during course of personal hearing which was also substantiated by submitting sample invoices of fixed assets vide reply dated 05-12-2017 [PB Pg No. 288- 318]. Moreover, asset wise details along with location of installation was also furnished by the appellant before the AO vide reply dated 18-12-2016 [PB Pg No. 128]. Even after that if DR is not satisfied, then there is no end to his inquisitiveness. Then DR may allege that physical verification should be carried out across all the units, invoices of each and every asset should be checked, cross-checking should be done from the supplier of fixed assets and others which shall lead to endless round of assessment. It needs to be noted here that the entire claim of depreciation is duly certified by the Tax Auditor in their Tax Audit Report without any qualification or adverse comments. Despite above facts, the AO has fully verified the depreciation issue and has raised multiple queries to verify the same since that the major reason for reduction in GP. Hence, it cannot be said that the issue of fall in GP was not verified by AO.

Submission by DR on Ground 4 decline in GP Ratio

6.0 The DR has relied on the decision of Jaipur Tribunal in the case of **M/S Arsh Vision –vs.- DCIT (ITA No. 592/JP/2019 dated 12-10-2020)** wherein the tribunal has allowed the revisionary proceedings u/s 263 of the Act since the AO has simply accepted the reply of the assessee without proper inquiry as to the property on which depreciation has been claimed was used for business purpose or not, especially given the description of property in terms of site plan in the registry deed as residential property. Mere collection of documents cannot be considered as proper inquiry and will fall under the category of no inquiry. **(Para 4 of the submission)**

Our Submission

6.1 In the case of **Arsh Vision –vs.- DCIT (ITA No. 592/JP/2019 dated 12-10-2020)** depreciation on property was allowed by the AO although the same was residential property. Particular error was pointed out by the PCIT that AO has failed to examine even the preliminary verification of the registry deed as it would have clearly prompt the AO to make further enquiries regarding conversion of aforesaid property into commercial property and usage of same for business purpose before allowing the claim of depreciation. It was the aforesaid fact which was brought to the notice of the Bench that gross error was committed by the AO before allowing claim of depreciation, such case of revisionary proceedings was upheld by the bench on the contention that when factual scenario itself indicates abnormalities and cry for looking deep into it, then such normal enquiry results in case of non enquiry.

The facts of the said case is distinguishable from the present case of appellant, since in the present case, the issue of depreciation has undoubtedly been examined by the AO

multiple times and the DR could not point out any shortfall either in the details furnished by the assessee or claims allowed by the AO during the course of assessment proceedings.

Submission by DR on Ground No. 5: Taxability of Interest on Bond

7.0 The DR contends that assessee has neither submitted the documents evidence before the AO during the assessment proceedings nor before the Ld. PCIT during the revisionary proceedings. Hence, the factual aspect remained unchecked. **(Para 5 of the submission)**

Our Submission

7.1 The DR has erroneously alleged that documentary evidence were not submitted before AO during the assessment proceedings and before the Ld. PCIT during the revisionary proceedings. That all the documents depicting the due date of interest payment w.r.t all the bonds have been duly submitted before the Ld. PCIT vide reply dated 05-01-2021 in **Annexure-18** of the said reply and vide reply dated 26-09-2016 before the AO during assessment proceedings.

Submission by DR on Ground No. 6: Taxability of capital receipt in the form of excise exemption and deferred sales tax subsidy

8.0 That with respect to the taxability of excise incentive the DR contends that the AO has merely accepted the explanation of the assessee without requiring the assessee to file the relevant documents of the said scheme/policy and the relevant excise notification and thus, without proper examination. Further, understanding the applicability of judicial pronouncements without verification of factual aspects is of no merit. **(Para 6.1, Para 6.1.1 and Para 6.2.1 of the Submission)**

8.1 That with respect to the claim of prepayment waiver of deferred sales tax subsidy as capital receipt the DR contends that AO has required the assessee to explain why it should not be treated as revenue receipt under the provisions of section 28(1) of the Act. However, in its reply, the assessee has relied on the judicial pronouncements relating to section 41(1) of the Act which was accepted without applying the mind. **(Para 6.2 and 6.2.2 of the submission)**

Our Submission

8.2 That the excise incentive was first granted in AY 2011-12 when the same was duly allowed by the AO in the order u/s 143(3) itself after examining the copy of the scheme and other documents which was placed on record. Further, the excise incentive has been allowed year on year and hence the scheme was already available in the file of the AO. Further, the details of notification no. and name of the Schemes under which excise incentive & prepayment waiver of deferred sales tax along with relevant extract of the scheme specifying the purpose of the scheme was duly furnished before the AO (vide letter dated 26.09.16 at Pg. 53 of PB). Copy of the said schemes are also available in the public domain. Also the issue of excise incentive & prepayment waiver of deferred sales tax being capital receipt has already been allowed by Hon'ble Apex Court in **CIT -vs.- Shree Balaji Alloys (CA No. 10061 of 2011 dated 19-04-2016)** and **CIT -vs.- Balkrishna Industries Ltd. (2018) 300 CTR 209 (SC)** respectively. The

said decisions pertains to consolidated order passed by the Supreme Court in case of various appeals filed on the same issue by the petitioners from various states. Hence, the principles laid down by the Supreme Court is binding on all the lower courts.

8.3 That w.r.t prepayment waiver of deferred sales tax detailed explanation was duly furnished as to why the said incentive should be treated as capital receipt and not revenue receipt. Once the said incentive is treated as capital receipt, the same falls outside the purview of Sec. 28 which is the charging section for taxing Business Income. Furthermore, to rule out any possibility if taxability u/s 41(1), the appellant has furnished the explanation on how the same shall also not attract the provisions of Sec. 41(1) in view of the decisions of Hon'ble Apex Court in **CIT -vs.- Balkrishna Industries Ltd. (2018) 300 CTR 209 (SC)**. Hence the contention of the DR is untenable.

Submission by DR Ground No. 7: Allowability of Pre-operative expenses

9.0 The DR contends that the AO has allowed the claim of preoperative expenses without examining the basis of allocation of expenses under different heads. Further, though the AO has raised query relating to allowability of such pre-operative expenses u/s 35D of the Act but neither assessee has furnished any reply with reference to section 35D nor the AO has sought any further clarification. The Ld. AR had relied upon the judgement of Hon'ble High Court of Delhi in the case of Relaxo Footwear Ltd, against which SLP filed by the department has been dismissed without a speaking order and thus, no law has been declared by the Hon'ble Apex Court therein. **(Para 7.1.1 and 7.1.3 of the submission)**

9.1 The DR further contends that assessee in its Notes forming part of computation of taxable income has stated that pre-operative expenses have been debited to the fixed assets/CWIP as the case may be. However, the AO has not required such bifurcation. Further, pre-operative expenses in respect of Unit-X was claimed at Rs. 10.81 Crore, whereas the total addition to the fixed assets in the said Unit-X was to the tune of Rs. 4.29 Crore only which is quite strange and should have forced AO to examine the details of closing CWIP of Rs. 801 Crore to find out, whether the same is appearing thereon or not and the share of the said Unit-X in the closing CWIP. **(Para 7.2 of the Submission)**

Our Submission

9.2 On the issue of Pre-operative expenses, break up & details of the expenses (Pg 46 of PB), justification of Allowability of the same as per settled laid down judicial precedence (Pg 43 to 45 of PB), Unit wise breakup of the same (Pg 63 & 99 of PB), date of commencement of new units (Pg 100-104 of PB) all were filed before the AO against multiple queries were raised by the AO during assessment proceedings. Therefore, it could not be alleged that the claim was allowed without examination. Further the DR erred as Pre-operative expenses were not allocated but actual expenses were incurred under respective head.

9.3 That the appellant has duly furnished the justification for claim of preoperative expenditure as revenue in nature relying on the decision of Hon'ble Delhi High Court in the case of **CIT -vs.- Relaxo Footwears Ltd. (2007) 293 ITR 231 (Del)**. Since the SLP filed against the said decision has been dismissed by Supreme Court vide

SLP No. CC 12361/2007 dated 03-01-2008 with note that "UPON hearing counsel the Court made the following ORDER". Therefore DR has wrongly stated that SLP of the department has been dismissed without a speaking order. Even otherwise, the binding nature of the order cannot be denied.

9.4 Further provisions of Sec 35D are not applicable in the present case since there was no expenditure incurred by the appellant for new business. The said fact was duly submitted before the PCIT vide our submission dated 05-01-2021 and also accepted by the PCIT.

9.5 Further DR has erroneously compared the addition in Fixed Assets for AY 2014-15 in Unit-X (Rs 4.29 Crs) with preoperative expenditure (Rs 10.81 Crs lying in CWIP in respect to aforesaid unit. It is humbly submitted that Unit-X has commenced its operation in AY 2015-16 and hence an amount of Rs. 336 Crs has been capitalised in the year of its commencement. The fact that the Unit-X has commence in AY 2015-16 has been duly intimated to the AO & PCIT by furnishing the declaration of commencement. Hence, it would not be correct to state that claim of pre-operative expenditure of Unit-X is more than the amount capitalised as Fixed Assets. Further, pre-operative expenditure is claimed in the year in which it is incurred and not in the year when fixed assets are put to use (capitalised in books). Furthermore, entire pre-operative expenditure which was claimed as revenue expenditure in AY 2014-15 was excluded from block of assets while computing depreciation as per provisions of Act, hence the issue is not prejudicial to revenue.

Submission by DR Ground No.9: Allowability of penalty u/s 37(1)

10.0 The DR contends that the AO has accepted the legal submission of the assessee without verifying the documentary evidence. Neither any documentary evidence was sought by AO nor was any document submitted by the assessee. **(Para 9.1 of the submission)**

Our Submission

10.1 In this regard it is humbly submitted that fact that the above penalty is compensatory in nature i.e. not for any violation of law, was also certified by the tax auditor in his tax audit report by reporting the said amount under the head "Expenditure by way of any other penalty or fine not covered above" and not reporting under the head "Expenditure by way of penalty or fine for violation of any law for the time being in force".

10.2 Further, AO has raised multiple queries with respect to claim of penalty against which proper justification was also submitted before the AO. Also, Ld. PCIT has nowhere pointed out any error or discrepancy in the submission of the assessee.

Submission by DR on Ground No. 10: Cash Deposit in Bank

11.0 The DR contends that AO has simply accepted the contentions of the assessee without verifying the same from the cash book, ledger account of the assessee, as the same were not produced before the AO, as stated earlier. Further, volume and value of the cash deposits is miniscule as compared to the overall size and strength of the appellant could not be the reason for non-verification of cash deposit in the bank

*account of the assessee as in income tax, there is no concept of materiality. **[Para 10.1 and Para 10.2 of the Submission]***

11.1 *Also, it is difficult to believe that such a large company sold its scrap in cash to scrap dealers. Further, the sale bills and cash receipts have not been brought before the AO or Ld. PCIT. **[Para 10.2 of the Submission]***

Our Submission

11.2 *As mentioned in Para 4.1 & 4.2, all the books of accounts were duly produced before the AO. Also, it has never been contended that details of cash deposit should not be verified since it is minuscule as compared to the size of the company. In fact the source of cash deposit has been duly verified by the AO along with details of TCS on scrap sales which were furnished before the AO during the course of assessment proceedings (Reply filed on 19th Jan'2016 – Pg. 25 to 33 of PB. Hence, it could not be alleged that the issue was not examined by him.*

11.3 *Further even before PCIT, the source of cash deposit, along with details of cash withdrawal from banks was submitted in the format as desired by PCIT. A perusal of the same makes it clear that the submissions as made before AO during assessment proceeding stands vindicated. Even otherwise the reply shows the factual position that cash deposit in bank was Rs. 7.86 cr against the cash withdrawal from bank of Rs. 13.60 cr in the relevant period.*

11.4 *Further the reason given by Ld PCIT doubting submissions of assessee is merely a surmise.*

Submission by DR on Ground No. 11: Non verification of ITNS details

12.0 *Against the contention of the Ld. AR that majority of the ITNS transactions were duly verified by the AO, the DR contends that each and every transaction as appearing therein is to be verified by the AO in scrutiny assessment. It may be mentioned that the said transactions were running into number of pages, all of them were not verified by the AO. **(Para 11.1 of the Submission)***

Our Submission

12.1 *In this regard it is humbly that all the issues as specified in the ITNS details were duly enquired by the AO against which proper reply was submitted by the appellant during the course of assessment proceedings.*

Summary of all the details as referred to in ITNS is also submitted before Ld. PCIT (Pg. 16 of the PB). Ld. PCIT has not pointed out any error in submission of the assessee filed during the course of revisionary proceedings and has remanded back the matter on the basis of roving queries without pointing out any specific entry in the ITNS which has not been verified by the AO.

Further even in the notice invoking 263 provisions, there was gross factual error by stating that there was sale of immovable property which AO failed to examine. However, no sale of immovable property has been pointed out in show cause notice

and not in order of PCIT, which itself shows the prejudicial mind set of PCIT in asking AO to make repeated enquiries which are roving in nature.

Submission by DR

13.0 The DR at Para 13 in respect to claim of 'interest on bond' and 'preoperative expenditure' has argued that the principle of res judicata is not applicable to income tax proceedings and every year is an independent year. **(Para 13 of the submission)**

Our Submission

13.1 That it is humbly submitted that both of the aforesaid issues are already covered in favour of the appellant by the decisions of Apex Court & High Court and hence the issues cannot be termed as erroneous to the interest of the revenue.

13.2 It is humbly submitted that although the principle of res judicata is not applicable to Income Tax proceedings and each assessment year is an independent assessment year but the principle of consistency is duly applicable when there is no change in facts / law so as to deviate from consistent stand taken in earlier years. Reliance in this regard can be placed on the decision of Supreme court in case of Radhasoami Satsang vs CIT, 193 ITR 321 (SC) and jurisdictional Rajasthan High court in case of CIT vs Rajasthan State Mines and Mineral Ltd (ITA 131 of 2004) . The aforesaid claim of "interest on bonds" and "preoperative expenditure" has been allowed in all the preceding assessment years after verification. Since, there was no change in facts of the case therefore the same was rightly allowed in the year under consideration by following rule of consistency.

14.0 The DR vide Para 14 of his submissions has also argued that all the judicial pronouncements relied upon by the appellant during the course of hearing held before this bench are distinguishable on facts. However, the DR has failed to point out any reasons as to how such case laws are distinguishable from the present case of the appellant. It is humbly submitted that facts of all the cases as relied by the appellant are similar to the facts of the present case of the appellant and all the principles pronounced in the aforesaid decisions are duly applicable in the case of the appellant.

15.0 Apart from above, DR has also relied on various judicial pronouncements vide Para 12 & Para 13.1 of his submissions & other case laws submitted during the course of hearing held on 01-04-2021. Our counter arguments against the same is enclosed as **Exhibit-1**.

Exhibit - 1

SI No	Decision	Our Submission
1	<i>Gee Vee Enterprises -vs- ACIT (1975) 99 ITR 375 (Delhi)</i>	<p>– This decision is on the applicability of writ against order u/s 263 and thus dealing with the ground of alternate remedy. This order is not relevant for case at hand as no alternate remedy is involved.</p> <p>– No appeal was filed against 263 order before the tribunal</p>

Sl No	Decision	Our Submission
		<p>for which petitioner have given absolutely no explanation and directly writ was filed before the High Court which was rightly rejected by HC as not maintainable.</p> <ul style="list-style-type: none"> - Further in this case, Hon'ble HC did observe that if AO simply accepts the return as it is and there is failure to make any enquiry, CIT can exercise his powers to invoke revision u/s 263 on the ground of failure to make enquiry, which itself is an error. - With due respect, this decision is not applicable in the appellants case due to the following reasons: <ul style="list-style-type: none"> - (a) In case of SCL, return was not accepted as such and huge additions were made by AO after extensive enquiries covering a period of more than 30 months. (b) In the referred case there was no enquiry. In case of SCL there were enormous enquiry on each and every point and in fact even follow up enquiries, followed by personal hearing and also verification of books and records, before passing of the order. However CIT in the present case have held that in his opinion, AO should have made further enquiries. The observation by HC in the referred judgement does not support the said scenario to justify proceedings u/s 263. (c) Further the question of law before the HC was clearly if the writ challenging the validity of an order should be entertained when the said order is appealable and the assessee has not availed of the said right. This is the only point the HC has decided (Pl refer pg 3, 5 & 8 of the DRPB) and while deciding the said question, have made observations, which are peculiar to & relevant for the facts of the said case only and not connected to the present case.
2	<p><i>Malabar Industrial Co. Ltd -vs- CIT (2000) 243 ITR 83 (SC)</i></p>	<ul style="list-style-type: none"> - Pl refer to para 2 for the facts and para 6, 7 & 10 for the principles laid down. - There was a finding of fact by the tribunal and the High Court that the ITO passed the order without application of mind and without any enquiry as the income was considered by AO erroneously under the wrong head of income as 'agricultural income' instead of 'income from other sources'. However, no such error has been pointed out by PCIT in the present case.

Sl No	Decision	Our Submission
		<ul style="list-style-type: none"> – It has been held that only an incorrect assumption of fact or an incorrect application of law will satisfy the requirement of the order being erroneous. Neither of the above situation is applicable in the present case. – Further, in the said case the AO had accepted the accounting entry without supporting documents and without making any inquiry. However, in the present case all the relevant material is available on record and proper inquiries have been made.
3	Virbhadra Singh (HUF) -vs.- PCIT (2018) 400 ITR 530 (HP)	<ul style="list-style-type: none"> – The High Court observed that the case is of no inquiry and not of inadequate enquiry as the assessment was carried out without conducting essential enquiry, which is not the case of the appellant. – The question before the Hon'ble Court was on admission of additional document before the ITAT which is not the present case – There were various loopholes pertaining to errors of facts and law committed by AO pointed out by CIT in the order of AO which is not there in present case.
4	CIT -vs.- Ballarpur Industries Ltd (2017) 85 taxmann.com 10 (Bom)	<ul style="list-style-type: none"> – In the aforesaid case, it was held by the court that merely because the issue is debatable, it does not absolve the AO from examining the issue. – A view has to be preceded by an examination, however in the said case the court has observed that there was an error of law wherein the claim u/s 80HHC was allowed without examining the provisions of the Act. – The case was of no inquiry as the assessee failed to prove that any inquiry has been conducted. However, in the present case the order has been passed after detailed verification and thorough examination.
5	CIT vs Bhawal Synthetics (2017) 297 CTR 104 (Raj.)	<ul style="list-style-type: none"> – Decision already referred by Ld. CIT in its order u/s 263 which is distinguished in the Key Submission filed by the appellant (Pg. 23). – Further it is well established principle that mere non mentioning of the issue does not render the order to be erroneous as held by Apex Court in <u>CIT -vs.- Reliance Communication Ltd. (2016) 76 taxmann.com 226 (SC)</u>

Sl No	Decision	Our Submission
6	<i>Jeevan Investment and Finance (P.) Ltd. -vs.- CIT (2017) 88 taxmann.com 552 (Bombay)</i>	<ul style="list-style-type: none"> - <i>The facts of the case shows that buy and sell of unlisted shares was carried out on the same day to book losses and set it off against the gains.</i> - <i>Based on above facts the CIT alleged that it was a sham transactions.</i> - <i>However, in case of SCL there were detailed enquiry on each and every point and even follow up enquiries, followed by personal hearing and verification of books and records, before passing of the order. Hence, the AO has not only pursued a line of enquiry but has reached a logical conclusion on the basis of the replies submitted by the Assessee and after proper application of mind.</i> <p><i>Further, there is no such allegation of sham transactions in the present case.</i></p>
7	<i>Shoreline Hotels (P.) Ltd. -vs.- CIT (2018) 259 Taxman 49 (Bom)</i>	<ul style="list-style-type: none"> - <i>The case relates to bogus purchase which the assessee admitted before the AO. Still AO disallowed only 15% and not entire purchase.</i> - <i>Based on above facts the CIT alleged that the order was erroneous. There is no such allegation either by the AO or by the CIT of any bogus transaction in present case.</i>
8	<i>Hunumesh Realtors (P.) Ltd. -vs.- PCIT (2017) 88 taxman.com 185 (Mum)</i>	<ul style="list-style-type: none"> - <i>There was a finding of fact by the tribunal (Pg 84) that there were multiple unanswered questions (to be precise 13) details of which were not filed before AO and no proper enquiry/investigation was conducted by the AO.</i> - <i>Further, the AO has reached a particular conclusion without sufficient material which is not the present case.</i> - <i>Based on above findings ITAT concluded (Pg 86) that there was complete lack of application of mind by AO. However, in the present case, detailed multiple enquires & further enquiries were raised, before reaching any final conclusions by the AO.</i>
9	<i>CIT Maithan International (2015) 375 ITR 123 (Cal)</i>	<ul style="list-style-type: none"> - <i>Factual finding of fact that creditworthiness of the parties who gave huge sum as loan was ignored by AO (Pg 89). Therefore, AO has failed to apply his mind which is self-evident.</i> - <i>High Court had objection on proposition of law laid down by ITAT that power cannot be exercised u/s 263 to allow the AO to makeup the deficiency of his case. (para 15, Pg 103)</i> - <i>However, in the instant case, all relevant enquiry which was required to be done was undertaken by the AO.</i>

SI No	Decision	Our Submission
		<ul style="list-style-type: none"> – This decision in fact supports the appellant's case since it has been held by the Court that inadequacy of enquiry by itself is not a ground for revision. Only if it can be shown that the inadequate enquiry led the AO to assumption of incorrect facts that would make the order erroneous and prejudicial to the interest of revenue. (Para 17, Pg 103)
10	Kerala State Elec Board -vs- DCIT (2019) 111 taxmann. com 353 (Coch -Trib)	<ul style="list-style-type: none"> – ITAT came to the conclusion that issue raised in 263 that the disallowance u/s 40(a)(iib) which was statutorily to be disallowed has not been done by the AO. The AO should have made proper further enquiries before accepting the wrong claims made by the assessee. Hence, the order of the AO was erroneous. – There is no such issue of wrong allowance of any claim raised by CIT in the present case. Further, AO has verified both the factual and legal aspect to verify the genuineness of all the claims before allowing it.
11	PCIT -vs.- Venus Woollen Mills (2019) 412 ITR 188 (P&H)	<ul style="list-style-type: none"> – Decision already referred by Ld. CIT in its order u/s 263 which is distinguished in the Key Submission filed by the appellant (Pg. 24)
12	CIT -vs.- Amitabh Bachchan (2016) 384 ITR 200 (SC)	<ul style="list-style-type: none"> – Issue raised before the Apex Court was whether it was mandatory to issue notice before passing order u/s 263. Further whether order u/s 263 can be passed on the issues not mentioned in the notice. Further, in the said case, the assessment was hurriedly passed to avoid any bar of limitation. – However, no such issue is involved in the present case.
13	Brolly Dealcom LLP -vs.- PCIT (2018) 406 ITR 542 (Cal)	<ul style="list-style-type: none"> – In the said case the issue before the High Court was on account of denial of natural justice to the appellant. In the present case there is no such allegation and hence this decision is not relevant at all.
14	Daniel Merchants P Ltd. -vs.- ITO [SLP No. 23976 of 2017 dated 29-	<ul style="list-style-type: none"> – This bunches of appeals wherein Supreme Court has dismissed the SLP filed by the assessee was in the context of share application money. In all these cases, there was allegation of sham transaction which is not there in the present case.

SI No	Decision	Our Submission
	11-2017]	
15	<i>Rajmandir Estates (P) Ltd. – vs.- PCIT (2017) 245 Taxman 127 (SC)</i>	<ul style="list-style-type: none"> – Again, the issue before the Hon’ble Apex Court was on bogus share capital and money laundering. – There are no such allegation in the present case. – The said decision has already been considered and distinguished in decision of Hon’ble Mum. Tribunal in the case of <u>Indus Best Hospitality –vs.- PCIT [ITA No. 3125/Mum/2017 dated 19-01-2018]</u>
16	<i>Nagal Garments Industries (P) Ltd. –vs.- CIT (2020) 113 Taxmann.com 4 (MP)</i>	<ul style="list-style-type: none"> – In the said case the AO has simply accepted the details furnished by the assessee without making a proper enquiry and without applying his own mind. – Further in that case, there was one more finding of fact by both CIT and ITAT that AO recorded in order sheet that the reply filed was not satisfactory and did not explain all facts. Despite this, no addition was made by the AO in the order. Hence, it was held by the High court that the order of the AO be construed as erroneous & prejudicial to revenue. (Para 9) – However, in the present case AO has accepted the reply of the assessee after further query and proper examination. Also, there is no such allegation or discrepancy pointed out by the Ld. CIT in the present case.
17	<i>Kirtidevi S Tejwani. –vs.- PCIT (2020) 116 Taxmann.com 965</i>	<ul style="list-style-type: none"> – There was finding of the fact by ITAT that there was no material whatsoever to indicate, leave aside establish, the AO had examined the application of Sec. 56(2)(viib) at all. Since no exercise was carried out to even examine this aspect makes the order erroneous. – There is no such allegation that applicability of particular provision was not verified by AO in this case. Hence, the aforesaid case is distinguishable.
18	<i>L G Electronics India (P) Ltd. – vs.- CIT (ITA No. 3307 of 2017 dated 09-12-2020)(Del.)</i>	<ul style="list-style-type: none"> – Again in this decision there is a clear finding of fact by both CIT and ITAT that there was no enquiry by the AO on the allowability of provision for service warranty at the time of assessment proceedings and no explanation was asked by the AO/TPO to verify the actual claim. – Hence, it was a case of no enquiry which is not the present

Sl No	Decision	Our Submission
		<p>case of the appellant. Also, in the present case the AO has examined all the claims even though the same were allowed in earlier years.</p>
19	<p>CIT -vs.- Assam Tea House (2012) 25 taxmann.com 93 (P&H)</p>	<p>– In this case, there was a finding of the fact which appellant could not counter that AO had recorded a finality that no books of accounts were produced whereas in order he stated that books of accounts were produced & test checked. This contrary statement made by AO in assessment records made the order erroneous. However, in the instant case AO vide notice u/s 143(2) dated 18-08-2016 has duly required the assessee to furnish books of accounts.</p> <p>– Tribunal set aside 263 order only on basis of legal assumption that CIT did not give final conclusion on taxability. Nowhere tribunal verified the above contrary statement of the AO. Hence, HC set aside ITAT order.</p> <p>Further, the aforesaid issue has also been discussed by Hon'ble Jammu & Kashmir High Court in <u>CIT -vs.- Green Field Commercials (2015) 57 Taxmann.com 64 (J&K)</u> wherein it was held that CIT obviously, has to spell out reasons that prompt and persuade him to hold the order to be erroneous. Similar principle was rendered by Punjab & Haryana HC in <u>CIT -vs.- Superman Knitters (P) Ltd. (2016) 69 Taxmann.com 181 (P&H).</u></p>
19a	<p>ACIT -vs.- Mukur Corporation (1978) 111 ITR 312 (Guj)</p>	<p>– High Court has arrived on this conclusion after clearly stating the facts of the relevant case multiple times. Hence, it cannot be concluded that in all cases above principle would be applicable.</p> <p>– ITAT set aside the order only on the ground that CIT did not give any firm conclusion which is not the present case.</p> <p>– Further, since, in the said case, CIT has completely set aside the order of AO for fresh assessment, hence CIT was not obliged to give his finding.</p> <p>– Further, HC has also laid down the principle that it is the consideration of CIT which is relevant for initiating the action, of course this consideration cannot be mala fide or arbitrary. In the present case on perusal of the notice and order of CIT it is clear that there was arbitrary consideration by CIT.</p>

SI No	Decision	Our Submission
20	<i>Rampyari Devi Saraogi -vs.- CIT (1968) 67 ITR 84 (SC)</i>	<ul style="list-style-type: none"> - Clear finding of fact recorded that there was no enquiry by AO - Clear finding of fact that assessee did not maintain bank account or any books of account & they were not produced before the AO. - Appellant challenged the writ on the ground of natural justice which is not the present case.
21	<i>M/s. Darjeeling Organic Tea Estates Pvt. Ltd. -vs.- DCIT (ITA No. 748 of 2019 dated 20-11-2020)(Kol.)</i>	<ul style="list-style-type: none"> - This judgement is actually in favour of appellant. (Refer Pg 179) wherein 263 proceedings has been held as bad in law as issues on which section 263 was initiated was covered by ITAT decision in appellant's own case. - On one issue where 263 was held as valid, there was clear finding of fact on record (Para 10) that no evidence was placed on record by assessee that AO had, at the stage of assessment, called for details and examined the issue.
22	<i>Vedanta Ltd. -vs.- CIT (2021) 124 taxmann.com 435 (Bom.)</i>	<ul style="list-style-type: none"> - Again issue before the High Court was in relation to the report of SFIO and under invoicing based on which CIT initiated the 263 proceedings. There is no such allegation or any fraud in the present case.
23	<i>CIT -vs.- Eastern Medikit Ltd. (2011) 12 taxmann.com 427 (Del)</i>	<ul style="list-style-type: none"> - Again this decision actually supports the appellant's case. The principle as decided is only in a situation where the issue was not examined by the A.O. which is not there in case at hand. (Refer Para 15)
24	<i>Sesa Starlite Limited -vs.- CIT (TA No.27/2015 & 28/2015 dated 02-11-2020) [Bom HC]</i>	<ul style="list-style-type: none"> - Court has held that in the assessment order there is no reference of allowance of deduction u/s 10B. Such finding of HC is erroneous since the matter is covered by SC decision in the case of <u>CIT -vs.- Reliance Communication Limited (2016) 76 taxmann.com 226 (SC)</u> where it has been held that every finding is not required to be recorded in order. - Further, there is a finding of fact that A.O. merely sought information and has never applied his mind. However, this is not the case here since AO has not only applied his mind but has raised further queries on the issues.

SI No	Decision	Our Submission
25	<i>M/s Arsh Vision – vs.- DCIT (ITA No. 592 of 2019 dated 12-10-2020) (Jai. Trib)</i>	<ul style="list-style-type: none"> – There is a factual finding by ITAT that even basic investigation was not carried out by AO. Hence, it was a case of lack of enquiry. (Para 14, 15, 16, 17) which is not the present case since detailed enquiry by AO was carried out.
26	<i>Anuj Jayendra Shah –vs.- PCIT (2016) 67 taxmann.com 38 (Mum-Trb)</i>	<ul style="list-style-type: none"> – Issue was in relation to unexplained cash credit for which there is established principle to be verified by AO. Since AO did not verified details in relation to such established principle, order was held as erroneous. There is no such allegation of unexplained credit in case of appellant. – It was further held that explanation 2 to Sec. 263 is declaratory in nature and was inserted to provide clarity on the issue. – The said decision has already been considered and distinguished in decision of Hon’ble Mum. Tribunal in the case of <u>Indus Best Hospitality –vs.- PCIT (Supra)</u> wherein it has been held that explanation 2 to Sec. 263 is prospective in nature.
27	<i>Crompton Greaves Ltd. –vs.- CIT (2016) 46 ITR(T) 465 (Mum-Trib)</i>	<ul style="list-style-type: none"> – Clear finding of fact recorded by ITAT that AO had not done any enquiry. Hence, this decision is not applicable in the present case. – Held that explanation 2 to Sec. 263 is declaratory and therefore retrospective in nature. – Further, the said decision has already been considered and distinguished in decision of Hon’ble Mum. Tribunal in the case of <u>Indus Best Hospitality –vs.- PCIT (supra)</u>
28	<i>Lally Motors India (P.) Ltd. - vs.-PCIT (2018) 93 taxmann.com 39 (Amritsar - Trib.)</i>	<ul style="list-style-type: none"> – Finding of fact that verification of disallowance u/s 14A was not carried out by AO in terms of Board Circular & Apex Court decision which is not present case. – It was further held that explanation 2 to Sec. 263 is declaratory and therefore retrospective in nature. – Further, the said decision has already been considered and distinguished in decision of Hon’ble Mum. Tribunal in the case of <u>Indus Best Hospitality –vs.- PCIT (supra)</u>

8. We have heard the Ld. counsels for both the parties and have also considered the material placed on record, order passed by the Ld. PCIT as well as various judgements relied upon by both the parties. The Ld. PCIT has raised eight issues while exercising jurisdiction u/s 263 of the Act and stated that the A.O. has failed to make proper enquire on these issues, and accordingly the powers under section 263 were invoked. We examine these issues as under:

9. The first issue pertains to fall in the GP ratio for A.Y. 2014-15 to 18.59% as compared to GP ratio of 27.29% in the preceding year. The PCIT, in his order, has stated that the fall in GP has not been examined by the A.O. by considering all the reasons for fall in GP. The AO during the assessment proceedings had raised specific query in relation to decline in GP ratio vide his notice dated 04.01.2016 to which reply was also submitted by the assessee on 19.1.2016 and 10.11.2017. However, the Ld. PCIT further stated that the A.O. was not correct in accepting the submission of the assessee and hence has not applied his mind. All details of expenses were also enquired by A.O. and filed before the A.O. and the same were duly submitted to the PCIT. We also find that during assessment various queries were also sought by the A.O. seeking details of opening & closing stock, purchases, production, other expenses, verification of sales from Sales tax returns with sales tax authorities, VAT

audit etc. As regards claim of depreciation also we find that the details pertaining to depreciation i.e. purchase cost, copy of invoices, sale of assets, computation of depreciation, details of higher depreciation, list of assets, place of installation etc. were duly produced and verified by the A.O during the course of assessment proceedings which are also placed in the paper book pages 64 to 98 and pages 171 to 256 and 290 to 318 of the paper book. The production of books of accounts is also stated by the AO in his assessment order, which in our opinion is not so material as the various details and abstracts of books were also submitted in the assessment proceedings. The contention of the PCIT that books were not produced is of therefore little significance as the examination of the same is not in dispute. It is true that Gross Profit over the period cannot remain stagnant and the best guide can be the past history and other comparable cases in the same line of business. The difference in Gross Profit in different years and in particular industry may be on account of various reasons. This cannot be the sole basis for any addition or rejection of books, unless there are other significant defects, which in our opinion has not been pointed out in the present case. Assessment of various years even earlier had been completed and results of past years had been accepted. We respectfully follow the decision of jurisdictional Rajasthan High Court in the case of **CWT –vs.- Girdhari Lal (2002) 258 ITR 331**

(Raj.) wherein the Court has held that *merely because low profit was shown by the assessee, that in itself did not render the order as erroneous for invoking Jurisdiction u/s 263 of the Act. The reason for increase in expenses was also provided by the assessee which led to the fall in GP, to which neither the AO nor the PCIT had raised any objection. Without specifying any flaw in the nature of expenses, merely recommending to disallow GP by the Ld. PCIT to the A.O. is totally unjustifiable and hence proceedings initiated by the Ld. PCIT u/s 263 is factually not tenable on this issue has been fully enquired by the A.O. in 143(3) proceedings.*

10. The second issue pertains to claim of Interest on bonds accrued but not due during the year. The assessee has recorded notional interest income on certain government Bonds in its P&L A/c, though the right to receive shall arise on the due date of the receipt of interest. The person who holds the bond on the record date who has the right to receive the interest. The assessee has excluded the said interest in the computation of income for the AY 2014-15 and the said interest income has duly been offered in the year in which right to receive accrued and in AY 2015-16 the said was offered in income. This is being consistently followed and never disputed by the department, and such a view has also been upheld by the Hon'ble Bombay High Court in the case of **DIT -vs.- Credit Suisse First Boston Ltd. (2013) 351 ITR 323 (Bom) & Karnataka High Court in**

CIT –vs.- Karnataka Bank Ltd (2014) 49 taxmann.com 246 (Karnataka H.C.) and therefore we see no error in the order on this issue also and the same also cannot be said to be prejudicial to the interest of revenue. On this issue also we find that query was made by the AO during assessment vide his notice dated 4.1.2016 to which reply was filed vide letter dated 26.9.2016 which is also placed in the paper book at page 47. On examination further query was also made by the AO vide his letter dated 2.11.2017 to include the same into book profits to which the reply was again submitted vide letter dated 10.11.2017. We therefore observe that the issue had been duly examined and adequate factual material was examined which is there on record. Therefore, it can be clearly emphasized that the A.O. has applied his mind to the said issue of interest on bonds and having satisfied with the correctness of claim made by the assessee allowed the same by placing reliance on judicial pronouncement relied by the assessee during course of assessment proceedings and such a view cannot be said to be erroneous or prejudicial to the interest of revenue on this issue also.

11. The next issue which was raised in the show cause notice u/s 263 relates to various subsidies in the form of excise incentive, prepayment waiver of deferred sales tax, electricity duty exemption and sales tax subsidy. We find from the documents place before us that the A.O. vide

notice dated 04.01.2016 sought details of subsidy claimed as capital receipts to which reply was filed by the assessee vide letter dated 26.09.2016. Further query was also made on 2.11.2017 by the AO as to why these receipts which were treated as capital receipts be not treated as revenue receipts. After considering the reply of the assessee filed on 10.11.2017, the AO treated sales tax subsidy and electricity duty exemption as revenue receipts while allowing the claim of the assessee with regard to excise incentive & prepayment waiver of deferred sales tax as capital receipt. The submission of the assessee on excise incentive & prepayment waiver of deferred sales tax also forms part of the order u/s 143(3). This claim was also allowed to the assessee since A.Y. 2011-12 by the A.O. in the course of assessment proceedings. The AO has accepted one possible view which cannot be said to be accepted without application of mind, making the order erroneous. The excise incentive was first granted in AY 2011-12 when the same was duly allowed by the A.O. in the order u/s 143(3) itself after examining the copy of the scheme and other documents which was placed on record. The excise incentive has been allowed year on year and hence the scheme was already available in the file of the A.O., and the details of the notification and scheme under which the incentive and prepayment waiver of deferred sales tax incentive was granted was duly furnished before the A.O. There are certain judicial

decisions also in which such excise incentive & prepayment waiver of deferred sales tax had been treated as capital receipt and having accepted one probable view, cannot render the order to be erroneous or prejudicial to the interest of revenue once the decision has been taken after due consideration of the matter.

12. The next issue pertains to claim of pre-operative expenditure. It was submitted that various revenue expenditure were incurred with respect to setting up of the integrated cement plant and cement grinding unit. Setting up such units has merely resulted in expansion of the existing business of the assessee. No new business was commenced during the year under consideration by setting up of such unit. Hence, revenue expenditure incurred on expansion of existing business, being in the nature of pre-operative expenditure, is allowable as deduction. This issue was also examined on various occasions by the AO. A query letter dated 2.11.2017 was issued in this issue was raised to which reply was submitted on 10.11.2017 during the assessment proceedings. Again further details in this regard was asked to which reply was submitted on 17.11.2017 and unit wise break up of details of said expenses was submitted during the assessment proceedings as required. We have carefully gone through the aforesaid submissions of both the parties and find that on this issue also due examination was made and various details

like dates on which commercial production of various cement & clinker units was started was also examined. Hence, the contention of the Ld. PCIT that the issue when the commercial production has started has not been verified by A.O. is not correct. Further, the details submitted by the assessee also specifically pointed out that the assessee has set up various cement & clinker units in different states of India, which also indicates that such units were mere expansion of the existing business of the assessee i.e manufacturing & sale of cement & clinker. Hence no new business has been commenced by the assessee. It has also been brought to our notice that the claim of preoperative expenditure was allowed by the in earlier years. Since there is no change in facts, therefore the claim is rightly allowed by the A.O. following the rule of consistency. The Ld. PCIT without pointing out any error either in the factual submission or legal submission, merely remanded the matter back to AO for proper enquiry & verification of the said issue. We are of the view that such approach of the Ld. PCIT is totally unjustifiable. Provisions of Sec 263 cannot be invoked by Ld. PCIT in respect to the aforesaid issue as the order of the A.O. on the said issue is not erroneous or prejudicial.

13. The next issue was that the assessee has sold investments which led to profit of Rs. 83,31,72,239/- and assets which led to profit of Rs. 44,93,014/- which was claimed as deduction while computing book profit.

The said issue of claim of profit on sale of Investment & Assets was first enquired by the A.O. vide query No. 26 of notice dated 04-01-2016 to which reply was filed by the assessee on 29.8.2016. Again further query was made on 25.11.2016, to which again reply was submitted by the assessee on 10.11.2017. After duly considering the reply of the assessee, the aforesaid claim was eventually disallowed by the A.O. in his assessment order u/s 143(3) while computing book profits u/s 115JB. The PCIT has alleged that the A.O. was required to enquire and verify the ITS details to find out other sales transactions of the assets and investments etc. The Ld. PCIT directed the AO to verify whether capital gain/ profit has not been disclosed on sale of any other assets, property, mutual fund, shares, units etc. by properly examining the ITS details and by obtaining the details and documents from the assessee.

14. It was submitted by the assessee that all transactions with respect to sale of investments has duly been offered by the assessee in the computation of capital gain which has been offered to tax in the computation of total income. Also, sale of asset has been reduced from the block of fixed assets thereby reducing the amount of depreciation claimed in the computation of total income. Apart from above there was no sale of any other investment or immovable properties. The ITS details does not reflect any transaction relating to sale of property or Investment other

than already disclosed. No error has been pointed out either by the A.O. or by Ld. PCIT in the aforesaid submissions of the assessee.

15. We are of the opinion that Ld. PCIT has not specifically pointed out as to which transactions in ITS details relating to sale of property was not offered to tax or was not explained by the assessee. Ld. PCIT was unable to point out any single error in the submissions of the assessee and has merely directed the A.O. to verify all the transactions in ITS details which has already been verified during the course of assessment by the A.O. Such approach of PCIT is not acceptable. Further, considering that the aforesaid claim of the assessee has already been disallowed by the A.O during assessment proceedings, the said issue cannot be said to be erroneous or prejudicial to interest of revenue.

16. The said issue pertains to allowability of penalty amounting to Rs. 25,000/- which has been levied under rule 15(1) of Cenvat Credit Rules, 2004. The A.O. enquired into this vide letter dated 04.01.2016 and reply to the same was given by the assessee vide reply dated 18.10.2016 wherein it was submitted that the said penalty is an allowable expenditure as it is not paid for violation of any law but such penalty was paid on account of wrong calculation of CENVAT credit which is compensatory in nature. Further, the fact that the above penalty is compensatory in nature i.e. not

for any violation of law, was also certified by the tax auditor in his tax audit report. After verification of the same the claim was allowed and the order of the A.O. on the said issue does not seem to be erroneous as sufficient enquiry has been made by the A.O. during the course of assessment proceedings.

17. The said issue pertains to non-examination of source of cash deposits in the bank account of the assessee as alleged by Ld. PCIT in his order u/s 263. The AO vide notice dated 4.12.2015 had specifically asked about source of cash deposit in the bank account to which reply was again submitted on 18.10.2016. It was submitted by the AR that the source of cash deposit in the bank account is collection from scrap buyers and deposit out of unutilized cash withdrawals. The Ld. PCIT has stated that A.O. has not verified applicability of TCS on scrap sales and the issue has been closed without verification, which also we find that in the reply dated 19.01.2016 the details of TCS collected on the scrap sales was also submitted during the course of assessment proceedings. Source of cash deposit was explained to A.O. during assessment proceedings and that the A.O. closed the issue without investigations is not incorrect. Hence, in absence of any such findings by the Ld. PCIT, the order of the A.O. cannot be considered as erroneous to the interest of revenue.

18. The next issue pertains to non-verification of various ITNS details as alleged by the Ld. PCIT in his order u/s 263. It was submitted by the AR that all the issues as specified in the ITNS details were duly enquired by the A.O. against which proper reply was submitted by the assessee during the course of assessment proceedings. Reliance in this regard was placed on Pg No. 16 of the PB. Further Ld. PCIT has not specifically pointed out as to which transactions in ITNS details has not been examined by the A.O. and has merely directed A.O. to find out whether any transactions have not been disclosed by the assessee in the return of income for the year under consideration which have bearing on its taxable income. Such approach of Ld. PCIT is totally unacceptable. Ld. PCIT is obliged to give finding that how the said issue has resulted the order of A.O. to be erroneous & prejudicial to revenue.

19. Hence, to summarise, the issues raised by the Ld. PCIT in his order u/s 263 has been examined by the A.O. on various occasions. Voluminous details were not only submitted by the assessee but the same have been examined by the A.O. as well as on the basis of such documents, further queries has been raised by the A.O. during the course of assessment proceedings. In spite of the specific queries raised by the A.O. on each of the issues, it would not be justifiable to state that the A.O. has not applied his mind to the impugned issues. We therefore find that the A.O. has duly

examined the matter under consideration and has carried out requisite enquiry and investigation which was reasonably expected from him and was satisfied after application of mind that there was no basis to make any addition on the impugned issues.

20. In such a situation, where enquiries have already been made by the A.O. and all material is on record, the Ld. PCIT should come with a definite finding for wrong allowance of claim instead of remanding the matter to the A.O. for fresh adjudication. In this regard, we are in concurrence with the decision of the Coordinate Bench in case of **M/s Dangayach Hotels (P) Ltd vs Pr. PCIT (ITA No. 290/JP/2017 dated 4.09.2017)** wherein the relevant findings read as under:-

*"We would like to state that once necessities enquiries are conducted and the claim of assessee is found in accordance with law and also not in violation of Board Circulars/ instructions and the AO adopted a plausible view permissible in law then such view cannot be overruled by taking recourse of section 263 of the Act. **The ld. Pr.CIT should have shown that the view taken by the AO is unsustainable in law. Simply expressing the view that the AO should have conducted enquiries in a particular manner as desired by him then such course of action of ld. Pr. CIT is not in accordance with mandate of provision of Section 263 of the Act. The ld. Pr. CIT has taken the support of newly inserted Explanation 2(a) to Section 263 of the Act. Even though there is a doubt as to whether the said explanation, which was inserted by the Finance Act, 2015 w.e.f. 1-06-2015 would be applicable to the assessment order passed prior to the effectiveness of the amendment yet we are of the view that explanation cannot be said to have override the law interpreted by the Hon'ble Delhi High Court in the***

case of Nagesh Knitwears Pvt. Ltd. (2012) 345 ITR 135 wherein the Hon'ble Delhi High Court has elucidated and explained the scope of provision of 263 of the Act and the same has been extracted by Hon'ble Delhi High Court in the case of CIT vs Goetze (India) Ltd., 361 ITR 505 which reads as under:-

"Thus, in cases of wrong opinion or finding on merits, the Commissioner of Income tax has to come to conclusion and himself decided that the order is erroneous by conducting necessary enquiry. If required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order is not sustainable in law and the said finding must be recorded. The Commissioner of Income Tax cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the Commissioner of Income Tax must give and record a finding that the order/ enquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Commissioner of Income Tax and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in law. In some cases possibly though rarely, the Commissioner of Income Tax can also show and establish that the facts on record or inference drawn from facts on record as per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries whether a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263 of the Act. In such matters, to remand the matter/ issue to the Assessing Officer would imply and mean the Commissioner of Income Tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question."

We would also like to state that this explanation cannot override the interpretation provided by the Hon'ble Delhi High Court and if that be the case then the Id. Pr. CIT can find fault with each and every assessment

without conducting any enquiries or verification in order to establish that the assessment order is not sustainable in law and order for revision. We would also like to state that if the Id. Pr. CIT can force the AO to conduct the enquiries in the manner preferred by him then it will be prejudiced to the independent application of mind by the AO and definitely that could not be intention of the legislature in inserting Explanation 2 to section 263 of the Act. Such interpretation would lead to unending litigations and there would not be any point of finality in the legal proceedings. The Hon'ble Supreme Court in the case of Parshuram Pottery Works Co. Ltd vs ITO (1977) 106 ITR 1 held that there must be a point of finality in all legal proceedings. In our considered view, this provision shall apply if the order has been passed without making enquiries or verification which a reasonable and prudent officer should have carried out in such cases. Under these facts and ratio decided by the Hon'ble Courts in case of CIT Vs. Green World Corporation 314 ITR 81 (SC), CIT v. Kelvinator of India Ltd. 332 ITR 231 (Delhi), CIT-8, Bombay v. Fine Jewellery (India) Ltd. 372 ITR 303 (Bombay) and CIT v. Reliance Communication Ltd (2017) 396 ITR 217, we are of the considered view that it is not a fit case of invoking the provisions of section 263 of the Act. Therefore, we set aside the order of the Id. Pr. CIT and restore the assessment order on this issue in the light of the above deliberations. Thus Ground No. 1, 2 and 3 (a) of the assessee are allowed"

21. The issue has also been decided by decision in case of **Ganpat Ram Bishnoi** (supra) by the Hon'ble jurisdictional Rajasthan High Court wherein it has been stated that:-

"Undoubtedly, the jurisdiction under section 263 is wide and is meant to ensure that due revenue ought to reach the public treasury and if it does not reach on account of some mistake of law or fact committed by the Assessing Officer, the Commissioner can cancel that order and require the concerned Assessing Officer to pass a fresh order in accordance with law after holding a detailed enquiry. But when enquiry in fact had been conducted and the Assessing Officer had reached a particular conclusion, though reference to

such enquiries had not been made in the order of the assessment, but the same was apparent from the record of the proceedings, in the instant case, without anything to say how and why the enquiry conducted by the Assessing Officer was not in accordance with law, the invocation of jurisdiction by the Commissioner was unsustainable. As the exercise of jurisdiction by the Commissioner was founded on no material, it was liable to be set aside. Jurisdiction under section 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something.”

22. Further, Hon'ble Rajasthan High Court in **Smt. Nirmala Devi Chordia** (Supra) has held that powers of Sec. 263 cannot be exercised for want of enquiry in a particular manner. If the proper enquiry has been made by the A.O., powers of revision cannot be exercised. Further the coordinate Bench in **Om Prakash Badya** (Supra) has stated that :-

“We find that the coordinate Bench of this Tribunal in the case of ITO vs. Shri Narayan Tatu Rane(supra), M/s. Arun Kumar Garg, HUF, vs. Pr. CIT(supra) have ruled that the Pr. CIT can not pass the order u/s 263 of the Act on the ground that thorough enquiry should have been made by the Assessing Officer. In the present case the assessing officer had given a specific notice regarding the disputed transactions and the assessee also gave specific reply to the show cause notice issued by the assessing officer. Therefore, it is not a case where the assessing officer has not made any enquiry regarding impugned transactions but the Ld. Pr. CIT invoked the provisions of section 263 of the Act on the ground that the enquiry was not made in the manner, it ought to have been done. In the light of the ratio laid down in the judgment of the Hon'ble Delhi High Court in the case ITO vs. Dg Housing Projects Ltd.(supra) and other decisions of the Coordinate Benches of this Tribunal i.e. ITO vs. Shri Narayan Tatu Rane(supra), M/s. Arun Kumar Garg, HUF, vs. Pr. CIT(supra). In our considered view Ld. Pr. CIT himself ought to

have made some enquiry regarding the impugned transactions before setting aside to the file of the assessing officer. Hence, the action of the Ld. Pr. CIT is contrary to the ratio laid down by the binding precedence. We, therefore, hold accordingly, impugned order is quashed. Grounds raised in this appeal are allowed.”

23. The Coordinate Bench of Ahmedabad Tribunal in the case of **Torrent Pharmaceuticals** (supra) has stated that :-

“Therefore, expecting an AO to examine each and every item of income and expenditure and other transactions to the hilt is fraught with serious constraints and does not appear feasible. Noticeably, the assessee is a listed company and accounts are subjected to multiple audits by expert professionals. The assessment is also carried out on year-to-year basis. In such a scenario, where the AO has rejected substantial amount from the claim of expenditure after reasonably verifying bills and vouchers, the allegation of the Pr.CIT appears misconceived. Ordinarily, it is only in a very gross case of inadequacy in inquiry and lack of application of mind that the order of AO is open to attack as erroneous. In the context of a turnover and scale of operation of this magnitude, the expenditure incurred on business advancement of such amount do not indicate any visible abnormality. This apart, the AO did take cognizance of the issue and made substantial disallowance. Thus, it cannot be out rightly alleged that the AO has omitted to apply its mind to the issue. The allegation thus appears unintelligible. The AO, in our view, has not committed any error in not chasing will of the wisp in the absence of any brazen circumstances.”

24. In the light of the present facts where the A.O. has duly examined all the issues during the course of assessment, initiation of revisionary proceedings by the Ld. PCIT on the same grounds and remanding back the matter to the file of AO for re-verification is not justifiable.

25. Although the AR has also challenged that the Explanation 2 to Sec. 263, which considers order passed without making any enquiry as deemed to be erroneous, inserted by Finance Act, 2015 w.e.f. 01.06.2015 is prospective in nature and would not be applicable for A.Y. 2014-15 in view of various decisions cited above, the said issue is not being adjudicated

since this is not a case of lack of enquiry and the order u/s 143(3) has been passed after making proper enquiries.

26. Besides above, the DR has also relied on various judicial pronouncements during the course of hearing. We have gone through all such decisions and counter submissions of the assessee against the same. It was noted that all the decisions as mentioned by the DR are either related to the case (i) where no enquiry or examination was carried out by the A.O. or (ii) where gross specific error has been pointed out that claims has been erroneously allowed by the A.O. without considering either the Income Tax provisions or Judicial pronouncements or binding circulars/notifications of the department, or (iii) where some tax evasion has been pointed out requiring detailed investigations on aforesaid issues or (iv) issues on maintainability of writ filed against the notice u/s 263. Further various subsequent decisions has also been pointed out by the AR wherein the decisions relied upon by the DR has also been distinguished by the courts. Hence, the decisions relied by the Ld. DR are distinguishable on facts and cannot be applied in the case of the assessee.

27. In light of aforesaid discussion, we find that the A.O. has duly examined the impugned issues and has taken a considered view and the Ld. PCIT was not correct in exercising jurisdiction under Section 263 of the

Act in remanding the matter for fresh adjudication. In the entirety of facts and circumstances of the case and in light of the aforesaid discussion, we are of the considered view that the Ld. PCIT was not correct in exercising jurisdiction under section 263 of the Act and the order passed by the Ld. PCIT u/s 263 is accordingly set-aside and the order passed by the A.O. u/s 143(3) is sustained.

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

Order pronounced in the open court on 23rd June, 2021.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 23/06/2021
*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shree Cement Limited, Beawar.
2. प्रत्यर्थी / The Respondent- The Pr.CIT, Udaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 04/JP/2021)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar