आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR

श्री एन.के.सैनी, उपाध्यक्ष एवं श्री संदीप गोसाईं, न्यायिक सदस्य के समक्ष
BEFORE: SHRI N.K. SAINI, VICE PRESIDENT & SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No. 20/JP/2021
Assessment Year: 2016-17

Shri Ashutosh Bhargava, B-801, C-22, Trimurty Dave Apartment, Jai Singh Highway, Banipark, Jaipur (Raj)-302016.	बनाम Vs.	Pr.CIT-2, Jaipur.
PAN No.: AAPPB 4152 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Shravan Kr. Gupta (Adv)
राजस्व की ओर से / Revenue by : Shri B.K. Gupta (Pr.CIT-DR)

सुनवाई की तारीख / Date of Hearing : 01/12/2021
उदघोषणा की तारीख / Date of Pronouncement : 06/01/2022

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

The present appeal has been filed by the assessee against the order of the ld. Pr.CIT-2, Jaipur dated 31/03/2021 passed U/s 263 of the Income Tax Act, 1961 (in short, the Act) for the A.Y. 2016-17. The assessee has raised following grounds of appeal:

"1. That the Impugned order u/s 263 of the Act dated 31.03.2021 and notice u/s 263 are bad in law and on facts of the case and hence the same may kindly be quashed.

2.1 That the Id. Pr.CIT-2 Jaipur is grossly erred in law as well as on the facts of the case in invoking S. u/s 263 of the Act. The same is being purely contrary to the provisions of law, therefore the

impugned order u/s 263 as well as notice u/s 263 of the Act may kindly be quashed.

3. *That the Id. Pr. CIT-2 Jaipur is grossly erred in law as well as on the facts of the case in passing the order u/s 263 of the Act, without providing the adequate opportunity of being heard and without considering the material, evidences and laws, in gross breach of law and principal of natural justice. Thus the same may kindly be quashed.*

4. *That the Id. Pr. CIT-2 Jaipur is grossly erred in law as well as on the facts of the case in taking the action u/s 263 of the Act on the allegations that:*

(a). *That Deduction of Rs. 50,00,000/- has been claimed u/s 54EC on investment in National Highway authority of India, however no documentary evidence is brought on record to establish the genuineness of the deduction.*

(b) *That Expenditure of Rs.7,24,429/- has been claimed as repairing and improvement expenditure after indexation. However no documentary evidence is brought on record to establish the genuineness of the said expenditure.*

(c) *That Payment of brokerage charges of Rs. 6,21,000/- has been claimed. However no documentary evidence is brought on record to establish the genuineness of the said expenditure.*

(d) *That Investment of Rs.71,10,000/-in Destiomoney Securities is not verifiable.*

(e) *That Share derivative transactions of Rs. 3,32,29,00,597.22/- was made during the year under consideration. Further, it was mandatory for audit u/s 44AB of the IT Act 1961, as the transactions in derivatives were more than the threshold limit. Penalty u/s 271B of the IT Act 1961 for not carrying out audit u/s 44AB. was not initiated.*

Which are contrary to the facts and such a finding being perverse, the impugned action is bad in law without jurisdiction

and being void ab initio, the impugned order u/s 263 may kindly be quashed.

5. The appellant prays your honors indulgence to add, amend or alter all or any of the grounds of the appeal on or before the date of hearing."

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. The brief facts of the case are that the assessee derives income from Capital Gain, income from other sources, business or profession. For the year under consideration, the assessee filed his return of income declaring the total income of Rs.3,53,22,645/- and paid tax of Rs.81,76,330/-. Later on, the case of the assessee was selected for **"limited Scrutiny**" on the issue *"large value sale of futures (derivative) in a recognized stock exchange reported in securities Transaction Tax Return (STT* Code 5 and *Turnover in* Part A- *P&L Account of 1TR), sales consideration of property in ITR is less than sale consideration* reported *in form* 26QB and *to* examine *whether* capital *gain has been correctly shown in the return of income."* The A.O. passed assessment order on 26/11/2018 U/s 143(3) of the Act. Later on, the ld. Pr.CIT called the records of this case for examination and found that the order passed by the A.O. U/s 143(3) of the Act is erroneous in so far as prejudicial to the interests of the Revenue as

according to the ld. Pr.CIT, the said order was passed in a routine and perfunctory manner. Thus, while invoking the provisions of revision under clause (a), (b) and (c) of Explantion-2 to Section 263 of the Act, set aside the order of assessment passed by the A.O.

4. Being aggrieved by the order of the ld. Pr.CIT, the assessee has preferred the present appeal before the ITAT on the grounds mentioned hereinabove.

5. All the grounds raised by the assessee are interrelated and interconnected and relates to challenging the order of the ld. Pr.CIT passed by invoking provisions of Section 263 of the Act, therefore, we deem it fit to dispose off all these grounds through the present consolidated order.

6. The ld. AR while appearing before us challenging the order passed by the ld. Pr.CIT U/s 263 of the Act and also supported the order passed by the A.O. U/s 143(3) of the Act. The ld AR also relied upon the detailed written submissions filed by him before the Bench which contains all the legal propositions and the factual submissions. The said written submissions filed by the assessee are reproduced herein below:

1.1 Action of the Pr. CIT is invalid and without jurisdiction: It is submitted the action and direction of the ld. Pr. CIT is without jurisdiction and invalid on the facts and legal position because the ld. Pr. CIT has no right or jurisdiction of revision u/s 263 only when the order of the AO (i) is erroneous in so far as (ii) it is prejudicial to the interests of the revenue. S. 263 provides as under

"263. (1) The Pr. Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

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

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]

2.1 On perusal of the order of the ld. AO as well as the order of the ld. Pr. CIT itself it is very clearly proved that the order of the AO has neither erroneous nor prejudicial to the interests of the revenue. Because as we would like to draw kind attention of the honble bench that in the above matter the case of the assessee has been selected for limited scrutiny u/s 143(2) of the Act on the reason that" "large value sale of futures (derivative) in a recognized stock exchange reported in securities Transaction Tax Return (STT Code 5 and Turnover in Part A- P&L Account of ITR), sales consideration of property in ITR is less than sale consideration reported in form 26QB and to examine whether capital gain has been shown correctly shown in the return of income." Vide copy of notice u/s 143(2) (PB2) and page one of the assessment order.

1.3 Thereafter the ld. AO has issued the detailed query letter to the assessee u/s 142(1) and asked to the assessee to produce the details and evidences for verification. In response thereto the assessee has furnished all the details admittedly vide replies to AO with the details(PB7-45). Also vide page 1-3 of the assessment order wherein he has stated that " A/R of the assessee submitted electronic response through e-filling portal/ITBA from time to time and necessary details on various queries were submitted. The ld. AO considered the reply and details and thereafter he stated that the assessee submitted the requisite details and documents related to the limited scrutiny issue which were examined and after considering the submission and supporting details filed by the assessee on the limited issue the returned income is accepted. Thus the AO did examine all these details, record and discussion with the assessee, after that the ld. AO had taken a possible view being a quasi judicial authority. That is why the ld. AO has noted same in the assessment order that at page 1-4. Thereafter he completed assessment at Rs.3,53,22,650/- vide assessment order u/s 143(3) dt. 26.11.2018 by taking a reasonable and possible view.

Here we want to say that if the ld. AO has not examined the issues and claim he could have not made the assessment. When the assessee has filed reply on the issues (PB7-45) with all the bank details and income and verified the same, when the case was selected for the limited scrutiny and how it can be possible that the issues on which the case was selected would not have examined.

1.4 On these preposition kindly refer the recent decision of the Honble ITAT Jodhpur bench in the case of
Lodha Offset Ltd. vs. Pr. CIT ITA No. 155/Jodh/2018 19th March, 2020
Prateek Metals Pvt. Ltd. vs. Pr. CIT ITA No. 156/Jodh/2018 19th March, 2020
Nokha Agro Sevices vs. Pr. CIT ITA No. 171/Jodh/2018 20th March, 2020

1.5 Further the ld. Pr. CIT has not gone in to the merit of the assessee's case or argument or contentions available on assessment record, if so than how it can be said or found out whether any prejudice in fact has been caused to revenue or not by lack of inquiry on the part of the AO. If no loss of revenue is caused and the result remains the same even after conduct the inquiry. It is very settled principal and legal position by various courts or judgments that it will be wrong to say that merely because proper enquiry was not conduct, the assessment would become prejudicial also. It was incumbent upon the Pr. CIT to have shown as to how the order was prejudicial to the interest of the Revenue. In the present case the appellant had furnished a detailed reply with the other replies to the AO(PB7-45)with the details which were available in the record by making the reference to

the facts of the case. Despite that the Pr. CIT did not prove or bring any material or circumstantial evidence on record in support of his contention.

1.6 Thus he has not looked into the merit of the case in their true perspective and sense and not applied his mind on the same despite available before him. He was only of the view that the AO has not made proper & detailed i.e deep inquiry on the issue. He has only stated that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Hence the conclusion of the Pr. CIT that the order is prejudicial to the interest of the Revenue is not a matter of subjective satisfaction of the Pr. CIT. He, therefore ought to have found out this on the basis of Objective material after assessing the contention raised by the assessee in its reply. He, however failed to do so and reached a conclusion that the order was prejudicial with a view that the present AO shall undertake that exercise after the assessment has been setaside for his consideration. Such a view or action is not well founded in the law or by various Hon'ble courts. Kindly refer direct decisions in case of Smt. Leela Choudhary v/s PR. CIT 289 ITR 226(Gau.) also refer, Saw Pipes Ltd v/s Add. PR. CIT 94 TTJ 1036(Del) Also refer Malabar Industrial Co. Ltd. v/s PR. CIT 159 CTR(1)(SC), PR. CIT v/s Rayn Silk Mills 221 ITR 155(Guj.)

Same view has been expressed in the case of Kamal Kumar Gupta v/s Pr. CIT 142 TTJ 9(Jp) wherein it has been held that "assessee was asked by the AO to file the details of trade creditors which are shown in the name of agriculturalist. In the reply, assessee filed written submission enclosing the list of creditors. Thus, the AO made the inquiry and it is not a case of lack of inquiry but can be case of insufficient enquiry. Pr. CIT was not justified in passing the order u/s 263." In the present case also is the same position. And also followed in the case of Sh. Gyan Chand Jain v/s Pr. CIT 50 TW 109(Jp).

1.7 Further the ld. AO at page first of the impugned order as well as in the notice u/s 263 at page second (PB47) has stated that the assessee has filed the return of income declaring the total income of Rs.(-)3,53,22,650/- i.e in loss while the assessee has filed his ROI of income of at Rs.3,53,22,650/- and paid the tax of Rs.80,91,960/- (PB9-12). Thus the ld. Pr. CIT himself has narrated and proceeded on the wrong facts, hence also liable to be quashed.

2. Case reopened u/s 143(2) for limited issue: Further when the very basis of scrutiny the case was on account of limited issues which have been replied by the assessee and considered by the ld. AO, then how it can be said that the AO has failed to make the inquiry, where the scope of inquiry is limited only to the extent of that issue. And till date the position is same there is no change. It was not a complete assessment it was a

scrutiny for the limited purpose or issue and on perusal of the entire record or detailed it cannot be said that the ld. AO has not made inquiries. In this preposition we would like to draw your kind attention to the latest decision of this Honble Bench in the In the case of Mahendra Singh Dhankhar HUF vs. ACIT ITA No. 265/JP/2020 Jun 30, 2021 (2021) 62 CCH 0271 JaipurTrib where It has been held that

"Revision—Ordering revision where case is selected for limited scrutiny—Assessee firm is a real estate firm engaged in colonizing and developing residential projects—Case of assessee was selected for limited scrutiny through CASS on account of mismatch of AIR and CIB data, and mismatch in sale turnover reported in audit report and ITR—An addition for wrong calculation of LTCG was made by A.O. which was not challenged by assessee—Subsequently, on basis of certain audit objections, PCIT issued notice u/s 263—Assessee submitted that it is a case outside jurisdiction of Commissioner of Income tax to raise objections outside scope of limited scrutiny—PCIT ordered for 'Denovo' assessment without considering reply filed by assessee—Held, there is no dispute that scope of enquiry in case of limited scrutiny is only to extent of issues for which case was selected for scrutiny under CASS—CBDT has issued instructions from time to time in this respect and has specifically instructed taxing authorities that scope of enquiry should be limited to verification of all particulars for which limited scrutiny was taken up under CASS—However, in case during assessment proceeding if AO is of view that substantial verification of other issue is also required then case may be taken up for comprehensive scrutiny with approval of Pr.CIT/DIT concerned—It is also instructed that such an approval shall be accorded by Pr.CIT/DIT in writing after being satisfied about merits of issue(s) necessitating wider and detailed scrutiny in case—AO is duty bound to follow instructions in case limited scrutiny assessment proceeding are proposed to be converted into complete scrutiny and without following said procedure and necessary approval of competent authority conducting an enquiry on issue which is outside limited scrutiny would be beyond jurisdiction of AO—As a necessary corollary, Pr. CIT u/s 263 cannot be permitted to traverse beyond jurisdiction that was vested with A.O while framing assessment as what cannot be done directly cannot be done indirectly—Therefore, where matter was selected for limited scrutiny, revisional jurisdiction cannot be exercised for broadening scope of jurisdiction that was originally vested with A.O while framing assessment—As per PCIT, reason for which matter was selected for limited scrutiny i.e, mis-match of sales turnover vis-à-vis ITR, CIB & AIR has a direct bearing on opening and closing stock of cost of construction and W.I.P and in turn, on taxable income, therefore, AO was duty bound to examine these issues and AO having failed to examine these issues, AO has effectively failed to examine issues for which matter was selected

for limited scrutiny—As far as matters for which case was selected for limited scrutiny in terms of mis-match of sales turnover, same has been duly examined by AO and even PCIT has not recorded any adverse findings in terms of lack of enquiry or inadequate enquiry on part of AO—Order passed by PCIT u/s 263 is set aside—Assessee's appeal allowed."

In the case of Paul Bharwaj vs. Pr.CIT in ITA No. 463/Chd/2019 May 13, 2021 (2021) 62 CCH 0120 Chd Trib Revision—Order erroneous or prejudicial to revenue—Over exercise of power—Assessee an individual filed his return declaring income and agricultural income—Case was selected for limited scrutiny for reason that there was a substantial increase in capital during year relevant to assessment year under consideration—AO accepted return filed by assessee—Pr. CIT issued notice to assessee u/s 263 and directed AO to make assessment afresh on issues mentioned in notice—Held, Tribunal in case of M/s Su-Raj Diamond Dealers Pvt. Ltd. CIT ITA No 3098/ Mum has quashed order passed u/s 263 in case of limited scrutiny assessment, holding that Pr. CIT under garb of section 263, cannot exceed his jurisdiction holding that when case of assessee was selected for limited scrutiny for reasons viz. (i) Large other expenses claimed in P&L A/c; and (ii) Low income in comparison to High Loans/advance /Investment in shares, therefore, no infirmity could be attributed to assessment framed by A.O on ground that he had failed to deal with other issues which though did not fall within realm of limited reasons for which case was selected for scrutiny assessment—In other words, Pr. CIT in garb of his revisional jurisdiction u/s 263 cannot be permitted to traverse beyond jurisdiction that was vested with A.O while framing assessment—As A.O had aptly confined himself to issues for which case of assessee was selected for limited scrutiny, therefore, no infirmity can be attributed to his order, for reason, that he had failed to dwell upon certain other issues which did not form part of reasons for which case was selected for limited scrutiny under CASS—Case of assessee was selected for limited scrutiny under CASS for reason that there is substantial increase in capital in relevant year and AO passed assessment order and accepted return filed by assessee after examining issue regarding increase in capital account as assessee had credited his capital account with agricultural income and capital gain from sale of flat—Assessee has reflected that same in its capital account—Further in response to letter issued by AO during assessment proceedings, assessee submitted his reply explaining reason for increase in capital—However, Pr. CIT exercising jurisdiction under section 263, directed AO to make fresh assessment on issues which were not subject matter of limited scrutiny—Since, issue raised by assessee in this case has already been decided in favour of assessee Pr. CIT(A) has exceeded jurisdiction u/s 263 by directing AO to make fresh assessment on issues

which were not subject matter of assessment framed on basis of limited scrutiny—Assessee's appeal allowed.

Thus in the present case the position are same and the principal of the above judgments are also applicable in the present case.

Thus in the light of the facts and position the Pr. CIT cannot be said to be justified in holding that assessment order was passed without making inquiry or verification when firstly the case of reopened for the limited purpose secondary despite the same assessee has produced all the details which examined and deduction allowed.

3. Breach of natural justice: In the present case the ld. Pr.CIT has not provided an opportunity of being heard to the assessee. As the Pr. CIT has issued the notice u/s 263 on dt18.03.2021 for the hearing on dt. 24.03.2021 and the time is being so short and the assessee has to engaged the counsel and to collect the papers from the earlier counsel and also required the time to prepare the matter with the counsel. Hence on the date the assessee has filed an adjournment request online on dt.24.03.2021, copy is enclosed. However the ld. Pr.CIT has not gone through the same or without considering the same has alleged at page 3 in para No.5 stated that no compliance has been made and decided the matter, without giving the opportunity of being heard. And passed the order on 31.03.2021. It is the violation of the principal of natural justice

Recently in the case of Jaidurga Minerals v/s Pr. CIT 200 DTR 205(Ctk)(Trb.) in ITA No. 276/Ctk/2015 dt. 10.08.2020 it has been held that " right to fair hearing is a guaranteed right to an assessee and granting of effective opportunity is a sine qua non in Sec. 263 for unsetting a statutory order. It was the duty of the Pr. CIT to provide the assessee an effective opportunity to enable it to substantiate its claim. In any case, it is one of the fundamental principal of natural justice that no person can be condemned unheard i.e audi alteram partem, the impugned order was thus passed in violation of the principal of natural justice in absence of any effective/reasonable opportunity of hearing provided to the assessee. It is mandatory to apply the principal of natural justice irrespective of the act as to whether there is any statutory provision or not . In the present case, the assessee was not afforded opportunity much less sufficient opportunity to give the reply to the show cause notice. Therefore it is clear that the pr. CIT in a hurriedly manner without affording opportunity of hearing to the assessee had passed impugned order by violating principal of audi alteram partem. In view of above factual position the Pr. CIT has committed a gross error in not

providing the any effective/reasonable opportunity of being herd to the assessee before passing the order. Accordingly the revisional proceedings framed u/s 263 by the Pr. CIT are quashed. – Jagnnath Prasad Bhargva vs Lal Nathimal AIR 1943 All 17 Applied.

Here is exact same position and the present order is also liable to be quashed.

4.1 No fix formula or limit or extent of Inquiry: Thus, here it is not the case of the Pr. CIT that no inquiry or examine has been made by the AO on these issues. The AO has made the inquiry on the above issues although the very base of the scrutiny of the case was limited issue. On perusal of the assessment order our reply and query of the ld. AO shall revel that the details bank a/c and all the other transaction has been shown there and explained and the AO made inquiry and assessee filed all the details related thereto. No one (AO) can read the mind of other person (Pr. CIT) while doing the work on its sprite and cannot guess the expectation or manner of his superior authority. Here the meaning is that non making of an enquiry may render the subject assessment erroneous, however the process of making enquiries may be endless. For someone, some enquiries may be sufficient (here AO), however, the same may be insufficient for the other (here Pr. CIT). There is no straight jacket formula or parameter to make inquiry in the assessment proceedings. What is required is that the AO should frame the assessment in accordance with the provisions of the Act, as interpreted and in the light of the relevant judicial pronouncements, as available on the date of framing the assessment or material available before him. The AO being a quasi-judicial authority can also take support from one set of the decisions, if there, in case is a diversions of opinion. He can't be directed to make an assessment in a particular manner, as specifically prohibited by S. 119.

Kindly refer recent judgment of Jodhpur Bench in the case of Ritesh Suhalka V/s Pr. CIT Udaipur in ITA No. 383/Jodh/2019 dt. 21.12.2020. On same plea

4.2. We also would like to draw on the observation and finding In the case of Dorabji Tata Trust vs. DCIT (EXEMPTION) ITA No. 3909/Mum/2019 28th December, 2020 (2021) 209 TTJ 0409 (Mumbai) delivered by the honble President and vice president as under:

"20. Undoubtedly, the expression used in Explanation 2 to Section 263 is "when Commissioner is of the view," but that does not mean that the view so formed by the Commissioner is not subject to any judicial scrutiny or that such a view being formed is at the unfettered discretion

of the Commissioner. The formation of his view has to be in a reasonable manner, it must stand the test of judicial scrutiny, and it must have, at its foundation, the inquiries, and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant- that an Assessing Officer is expected to be. If we are to proceed on the basis, as is being urged by the learned Departmental Representative and as is canvassed in the impugned order, that once Commissioner records his view that the order is passed without making inquiries or verifications which should have been made, we cannot question such a view and we must uphold the validity of revision order, for the recording of that view alone, it would result in a situation that the Commissioner can de facto exercise unfettered powers to subject any order to revision proceedings. To exercise such a revision power, if that proposition is to be upheld, will mean that virtually any order can be subjected to revision proceedings; all that will be necessary is the recording of the Commissioner's view that "the order is passed without making inquiries or verification which should have been made". Such an approach will be clearly incongruous. The legal position is fairly well settled that when a public authority has the power to do something in aid of enforcement of a right of a citizen, it is imperative upon him to exercise such powers when circumstances so justify or warrant. Even if the words used in the statute are prima facie enabling, the courts will readily infer a duty to exercise a power which is invested in aid of enforcement of a right—public or private—of a citizen. [L Hirday Naran Vs Income Tax Officer [(1970) 78 ITR 26 (SC)]. As a corollary to this legal position, when a public authority has the powers to do something against any person, such an authority cannot exercise that power unless it is demonstrated that the circumstances so justify or warrant. In a democratic welfare state, all the powers vested in the public authorities are for the good of society. A fortiorari, neither can a public authority decline to exercise the powers, to help anyone, when circumstances so justify or warrant, nor can a public authority exercise the powers, to the detriment of anyone, unless circumstances so justify or warrant. What essentially follows is that unless the Assessing Officer does not conduct, at the stage of passing the order which is subjected to revision proceedings, inquiries and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant- that an Assessing Officer is expected to be, Commissioner cannot legitimately form the view that "the order is passed without making inquiries or verification which should have been made". The true test for finding out whether Explanation 2(a) has been rightly invoked or not is, therefore, not simply existence of the view, as professed by the Commissioner, about the lack of necessary inquiries and verifications, but an objective finding that the Assessing Officer has not conducted, at the stage of passing the order which is subjected to revision proceedings,

inquiries and verifications expected, in the ordinary course of performance of duties, of a prudent, judicious and responsible public servant that the Assessing Officer is expected to be.

21. That brings us to our next question, and that is what a prudent, judicious, and responsible Assessing Officer is to do in the course of his assessment proceedings. Is he to doubt or test every proposition put forward by the assessee and investigate all the claims made in the income tax return as deep as he can? The answer has to be emphatically in negative because, if he is to do so, the line of demarcation between scrutiny and investigation will get blurred, and, on a more practical note, it will be practically impossible to complete all the assessments allotted to him within no matter how liberal a time limit is framed. In scrutiny assessment proceedings, all that is required to be done is to examine the income tax return and claims made therein as to whether these are prima facie in accordance with the law and where one has any reasons to doubt the correctness of a claim made in the income tax return, probe into the matter deeper in detail. He need not look at everything with suspicion and investigate each and every claim made in the income tax return; a reasonable prima facie scrutiny of all the claims will be in order, and then take a call, in the light of his expert knowledge and experience, which areas, if at all any, required to be critically examined by a thorough probe. While it is true that an Assessing Officer is not only an adjudicator but also an investigator and he cannot remain passive in the face of a return which is apparently in order but calls for further inquiry but, as observed by Hon'ble Delhi High Court in the case of Gee Vee Enterprises Vs ACIT [(1995) 99 ITR 375 (Del)], "it is his duty to ascertain the truth of the facts stated in the return <u>when the circumstances of the case are such as to provoke an inquiry</u>. (Emphasis, by underlining, supplied by us). It is, therefore, obvious that when the circumstances are not such as to provoke an inquiry, he need not put every proposition to the test and probe everything stated in the income tax return. In a way, his role in the scrutiny assessment proceedings is somewhat akin to a conventional statutory auditor in real-life situations. What Justice Lopes said, in the case of Re Kingston Cotton Mills [(1896) 2 Ch 279, 288)], in respect of the role of an auditor, would equally apply in respect of the role of the Assessing Officer as well. His Lordship had said that an auditor (read Assessing Officer in the present context) "is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a bloodhound.". Of course, an Assessing Officer cannot remain passive on the facts which, in his fair opinion, need to be probed further, but then an Assessing Officer, unless he has specific reasons to do so after a look at the details, is not required to prove to the hilt everything coming to his notice in the course of the assessment

proceedings. When the facts as emerging out of the scrutiny are apparently in order, and no further inquiry is warranted in his bonafide opinion, he need not conduct further inquiries just because it is lawful to make further inquiries in the matter. A degree of reasonable faith in the assessee and not doubting everything coming to the Assessing Officer's notice in the assessment proceedings cannot be said to be lacking bonafide, and as long as the path adopted by the Assessing Officer is taken bonafide and he has adopted a course permissible in law, he cannot be faulted- which is a sine qua non for invoking the powers under section 263. In the case of Malabar Industrial Co Ltd Vs CIT [(2000) 243 ITR 83 (SC)], Hon'ble Supreme Court has held that "Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law." The test for what is the least expected of a prudent, judicious and responsible Assessing Officer in the normal course of his assessment work, or what constitutes a permissible course of action for the Assessing Officer, is not what he should have done in the ideal circumstances, but what an Assessing Officer, in the course of his performance of his duties as an Assessing Officer should, as a prudent, judicious or reasonable public servant, reasonably do bonafide in a real-life situation. It is also important to bear in mind the fact that lack of bonafides or unreasonableness in conduct cannot be inferred on mere suspicion; there have to be some strong indicators in direction, or there has to be a specific failure in doing what a prudent, judicious and responsible officer would have done in the normal course of his work in the similar circumstances. On a similar note, a coordinate bench of the Tribunal, in the case of Narayan T Rane vs ITO [(2016) 70 taxmann.com 227 (Mum)] has observed as follows:

20. Clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. 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 shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-a-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have claimed

out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made.

The above are also applicable in the present case.

In case of Chorma Business Ltd v/s DPR. CIT 82 TTJ 540(Cal) it has been held that "AO before making the assessment, having called for details and having discussed the matter with the A/R of the assessee, such an order cannot be called erroneous and prejudicial to the interest of the Revenue only because the AO made a brief assessment order without discussing such details therein. Further, the Pr. CIT also did not give any finding as to whether the share transaction loss claimed by the assessee was bogus or not genuine but merely stated that the transaction could have been verified by the contract notes from the brokers, challan etc. Revision order of the PR. CIT Set Aside. Also refer Subrata Kumar Nag v/s PR. CIT 127 TTJ 238(Kol), Rajiv Arora v/s PR. CIT (Supra).

We would like to refer the case of Kartik Financial Services Ltd V/s CIT 55 CCH170 (Mum. Tribunal)(2019). The principal of the case is also applicable here in the present case.

In the case of Nalco Company vs CIT 200 DTR 275(Pune-C) ITA No.1217/Kol/2017 dt. 05.02.2021 it has been held that if the AO makes inquiry, examines the issue which is born out from the record of the assessment proceedings, then reaches a conclusion in favour of the assessee which is legally possible, the assessment order cannot be characterized as erroneous and prejudicial to the interest of the Revenue. Since none of the four clauses of the Expln. 2 to s. 263(1) applies to the case under consideration, revisionary power, even under the enlarged scope of the Expl. 2, was not legally exercisable.

5. No requirement of deep investigation: Thus, on the perusal of the order of the Pr. CIT it is very clear that he was of the view that the AO must have made deep investigation and in the case of Arvind Bhartiya Vidhyalaya Samiti v/s ITO 94 TTJ 614(Jp). Where in held that Deep investigation is outside of the preview of assessment procedure". And also held there is no case laws which say for deep investigations Because there is no limit of deep investigation. Also refer Gaberial India Ltd. 203 ITR 108 (Bom). That is why Hon'ble SC held in Malabar Fisheries Industries Ltd. 243 ITR 82 (SC) that in each and every type of mistake/ error cannot be made a basis to invoke Sec.263. The case laws available on the subject on this aspect, are distinguishable in as much as those were the cases where no inquiries at all (or very minor reflecting from a short assessment order),

which is not at all a case here. Also refer Gyan Chand Gupta V/s PR. CIT 135 TTJ 01(Jp), M/s. Om Rudra Priya Holiday Resort Pvt. Ltd. vs. Pr. CIT (2018) 54 CCH 0597 JaipurTrib

In CIT v/s Jain Construction 257 CTR 336(Raj.) It has been held that Revision u/s 263—Order erroneous and prejudicial to interest of revenue—CIT issued a notice u/s 263 to assessee on ground that assessment order of AO passed u/s 143 (3) was an order erroneous and prejudicial to interest of revenue—Tribunal allowed appeal of assessee—Held, safeguard provided to assessee in section 263 is that mere erroneous orders are not revisable but revisional authority has to further establish with material on record that such erroneous order is also prejudicial to interest of revenue—Twin conditions of assessment order being erroneous and it also being prejudicial to interest of revenue, keeps initial burden on Commissioner, who invokes such jurisdiction—Premise for invoking revisional jurisdiction on the ground that the Assessing Authority made insufficient enquiry or improper enquiry and failed to verify closing stocks in record of assessee, before passing assessment order, falls flat by a bare perusal of assessment order itself—Thus, Tribunal was justified in holding that Commissioner was in error in invoking revisional jurisdiction u/s 263—Mere alleged insufficiency of enquiry in opinion of Commissioner by Assessing Authority, could not permit him to invoke revisional jurisdiction u/s 263—Therefore, essential twin conditions for invoking revisional jurisdiction, were not satisfied.

In the case of V.B. Construction (P) Ltd. vs. CIT (2009) 28 CCH 0434 KolTrib held that Revision—Erroneous and prejudicial order—Lack of proper enquiry—There was a time of two years for investigation, the AO had issued questionnaire, the assessee had produced books of account, bills, etc. and replied to various issues raised by AO—Thus, it could not be said that order was passed in haste without making any inquiry on the issues—AO had taken one view where two views are plausible and such view cannot make the order erroneous and prejudicial to the interest of the Revenue—CIT's view cannot be invoked to substitute the view of the AO—Assessment also does not become erroneous where queries raised during the assessment proceedings are not recorded in the final assessment order.

6.1. On perusal of the order in the present case the ld. CIT has taken action u/s 263 only on the assumption and presumption that the no inquiry has been made by the AO on the issues and not verified. Kindly refer CIT v/s Paras Cotton Co. 288 ITR 211(Raj.) where held that CIT could not have acted on mere assumption. Mere suspicion cannot take place of proof and the order of CIT u/s 263 cannot be sustained.

6.1 In C IT V/s Girdhari Lal 258 ITR 331(Raj.) it has been held,"When the Assessing Officer after going through the material on record and after considering the explanation of the assessee, made some additions and rejected the books of accounts, it could not be said that he had not applied his mind. It is not always necessary that every assessee in the line of business should have the same rate of profit. The tribunal was correct in cancelling the order under sec 263 of Income Tax Act."

When the assessing officer had considered all the relevant material on record, it was basically a question of facts and it could not be interfered with unless the finding of the Tribunal was found perverse. Considering the material on record, it could be said that finding of the Tribunal was perverse. Therefore, the Tribunal was correct in cancelling the order under section 263."

6.2 Also refer CIT v/s Ganpat Ram Bishnoi 296 ITR 292(Raj.) The record of proceedings clearly shows that the AO has framed his assessment after due application of mind and holding enquiries into all areas, which, according to the CIT have not been at all enquired into and the AO has acted merely on furnishing evidence on one single date. The Tribunal noticed that as per the record of the proceedings, the AO required the assessee to produce documents or material in relation to 10 different items, which included the details of capital contributed by partners, details of purchases made in excess of Rs. 20,000 with evidence, confirmation of unsecured loans, amongst other matters, which the AO desired to enquire into. The assessee has produced desired information. The AO studied the sundry creditors, unsecured loans and desired to furnish affidavits of unsecured loans and details of interest paid. The AO again required the assessee to furnish the details of partners capital accounts and also to produce voucher for expenses and the matter was adjourned. After that, assessment was completed by passing assessment order. These matters clearly indicate that the AO particularly made reference to the matters, which the CIT has opined were not inquired. Thus, according to the Tribunal, the foundation to exercise power under s. 263 was not existing. In the aforesaid circumstances on the finding reached by the AO, no question of law really arises for consideration in this appeal. From the record of the proceedings, no presumption can be drawn that the AO had not applied its mind to the various aspects of the matter. In such circumstances, without even prima facie laying foundation for holding that assessment order is erroneous and prejudicial to interest in any matter merely on spacious ground that the AO was required to make an enquiry, cannot be held to satisfy the test of existing necessary condition for invoking jurisdiction under s. 263. When enquiry in fact has been conducted and the AO has reached a particular

conclusion, though reference to such enquiries has not been made in the order of the assessment, but the same is apparent from the record of the proceedings the invocation of jurisdiction by the CIT was unsustainable. As the exercise of jurisdiction by the PR. CIT is founded on no material, it was liable to be set aside. Jurisdiction under 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. The finding of the Tribunal that the ITO had passed assessment order after relevant enquiries and considering the aspects of the matter required by the CIT to be considered by him is a finding of fact.

Although in the present case the ld. AO has made the detailed inquiry on the very same issue being the reason of reopening the case u/s 148.

6.3 In the case of CIT V/s Anil Kumar Sharma 335 ITR 83(Del), held that " Revision- Erroneous and Prejudicial order- lack of proper enquiry- Pr. CIT came to the conclusion that the issue relating to taxability of compensation received by the assessee was not examined by the AO and held that the order of AO is erroneous and prejudicial to the interest of the revenue- Tribunal has arrived at a conclusive finding that through the assessment order does not patently indicate that issue of the taxability of the compensation has been considered by the AO, the record shows that the AO has applied his mind-Thus, it is not a case of lack of enquiry even if the enquiry was inadequate and the CIT was not justified in passing the order under section 263- findings of the Tribunal quashing the order of the PR. CIT passed under Section 263 do not warrant any inference- CIT V/s Sunbeam Auto Ltd. (2009) 227 CTR (Del) 133: (2009) 31 DTR (Del) 1 followed".

7. In the case of The Lake Palace Hotels & Motels Pvt Ltd v/s The PR. CIT Udaipur 48 TW 181(Jd). It has been concluded that :

The fundamental principles which emerge from the catena of judicial pronouncements may be summarized as under :

(i) The PR. CIT must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue. Both the conditions must be fulfilled:
(ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it is only when an order is erroneous, that the section will be attracted.
(iii) An incorrect assumption of facts or an incorrect application of law will suffice for the requirement or order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.
(v) Every loss of revenue cannot be treated as prejudicial to the interest of the revenue and if the Assessing Officer has adopted one of the courses permissible under law or where two views are possible and the Assessing Officer has taken one view under with which the PR. CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the Assessing Officer is unsustainable under the law.
(vi) If while making the assessment, the Assessing Officer examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the PR. CIT, while exercising his power under section 263, is not permitted to substitute his estimate of income in place of the income estimated by the Assessing Officer.
(vii) The Assessing Officer exercise quasi-judicial power vested in him and if he exercise such power in accordance with law and arrives as a conclusion, such conclusion cannot be termed to be erroneous simply because the PR. CIT does not feel satisfied with the conclusion.
(viii) The PR. CIT, before exercising his jurisdiction under section 263 , must have material on record to arrive at a satisfaction. (ix) If the Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation be a letter in writing and Assessing Officer allowed the claim on being satisfied with the explanation of the assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

8. It is submitted that when all the details submitted by assessee and AO framed the Assessment order thereon, reliance is placed on a case of High Court of Gujarat 21 Taxman. Comm. 64 (Guj) CIT V/s Amit Corporation it has been held " When during course of framing of assessment, Assessing Officer had access to all records of assessee and after perusing said records, he framed assessment, said assessment could not be re -opened in exercise of revision power under section 263 for making further inquires ."
Reference has been made to the decision of Hon'ble Allahabad High Court in the case of Anil Bulk Carriers (P) Ltd. vs. PR. CIT (2005) 194 CTR (All.) 226 : (2005) 276 ITR 625 (All.).

It is submitted that department can assume jurisdiction under section 263 of Income tax Act if twin conditions of the order being erroneous and prejudicial to the interest of the revenue are satisfied. If the view

taken by the A.O. is one of the possible views then learned CIT cannot assume jurisdiction. For this purpose reliance has been placed on the followings decisions:

1. *Malabar Industrial Co. Ltd. v. PR. CIT [2000] 243 ITR 83 (SC)*
2. *PR. CIT VS MAX INDIA LTD.(2007)213 CTR 266(SC)*

It is further submitted that proceedings under s. 263 cannot be taken on the ground that the AO has not made sufficient enquiry. The learned PR. CIT can assume jurisdiction if there has been lack of enquiry. In the instant case, the enquiry has been made, though the enquiry may not be sufficient in the opinion of the learned PR. CIT. The reliance is placed upon the decision of Hon'ble Delhi High Court in the case of CIT v. Hindustan Marketing & Advertising Co. Ltd. [2010] 46 DTR (Del.) 109. The attention is drawn towards the decision of Hon'ble jurisdictional High Court in the case of PR. CIT v. Trustees Anupam Charitable Trust [1987] 65 CTR (Raj.) 30 : [1987] 167 ITR 129 (Raj.)

Thus it is clear that Assessing Officer has made enquiry but sufficiency of enquiry can be depend upon from person to person. The AO cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is the duty of the AO to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an enquiry. The word 'erroneous' includes the failure to make enquiry. It is submitted that the AO made the enquiry and it is not a case of lack of enquiry. The Hon'ble Delhi High Court in the case of CIT v. Vikas Polymers [2010] 236 CTR (Del.) 476 had an occasion to consider the passing of order under s. 263 of the Act by the learned CIT when the AO made an enquiry and the assessee filed the reply. The Hon'ble Delhi High Court held that assumption of jurisdiction under s. 263 of the Act by learned CIT is not warranted. It will be useful to reproduce the head note from this decision:

"Provisions of s. 263 when read as a composite whole make it incumbent upon the PR. CIT before exercising revisional powers to : (i) call for and examine the record, and (ii) give the assessee and opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfillment of these twin conditions that the PR. CIT may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the PR. CIT may call for the records and if he prima facie considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interest of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. The twin requirements of the section are manifestly for a purpose. Merely because the PR. CIT considers on examination of the

record that the order has been erroneously passed so as to prejudice the interest of the Revenue will not suffice. The assessee must be called, his explanation sought for and examined by the CIT and thereafter if the CIT still feels that the order is erroneous and prejudicial to the interest of the Revenue, the CIT may pass revisional orders. If, on the other hand, the CIT is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to the interest of the Revenue, he may choose not to exercise his power of revision. This is for the reason that if a query is raised during the course of scrutiny by the AO, which was answered to the satisfaction of the AO, but neither the query nor the answer was reflected in the assessment order, this would not by itself lead to the conclusion that the order of the AO called for interference and revision. In the instant case, for example, the CIT has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment, assuming it to be so, this does not justify the conclusion arrived at by the CIT that the AO had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the CIT was duly reflected in the respective assessments of the partners who were income-tax assessee and the unsecured loan taken from SC (P) Ltd. was duly reflected in the assessment order of the said chit fund which was also an assessee. Merely on the basis that the AO has not examined the cash credits of the partners or deposits from SC (P) Ltd., PR. CIT was not justified in invoking his suomotu powers, especially where the assessee had explained that the capital investment made by the partners, which had been called into question by the PR. CIT was duly reflected in the respective assessments of the partners and the unsecured loan taken from the SC (P) Ltd. was duly reflected in the assessment order of the said person."

The reliance is also placed in the order of the Hon'ble High Court of Bombay in the case of PR. CIT v. Gabrial India Ltd. [1993] 71 TAXMAN 585 (BOM.). It will be useful to reproduce the held portion of the case:

Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1973-74 - Assessee claimed a sum of Rs. 99,326 described 'as plant relay out expenses' as revenue expenditure and ITO, after making enquiries in regard to nature of said expenditure and considering explanation furnished by assessee in that regard, allowed assessee's claim- Subsequently, Commissioner, exercising powers under section 263, cancelled order of the ITO observing that order of ITO did not contain discussion in regard to allow ability of claim for deduction which indicated non-application of mind and that claim of assessee required examination as to whether expenditure in

question was a revenue or capital expenditure and directed ITO to make a fresh assessment on lines indicated by him - Whether under section 263 substitution of the judgment of the Commissioner for that of the ITO is permissible - Held, no - Whether ITO's conclusion can be termed as erroneous simply because Commissioner does not agree with his conclusion - Held, no - Whether ITO's order could be held to be 'erroneous' simply because in his order he did not make an elaborate discussion - Held, no - Whether provisions of section 263 were applicable to instant case and Commissioner was justified in setting aside assessment order - Held, no

In the case of CIT vs. Deepak Real Estate Developers (I)(P) Ltd. (2014) 367 ITR 0377 (Raj) It has been held that Revision—Revision by commissioner of orders prejudicial to revenue—AO observed that return submitted by Assessee was duly supported by necessary evidence and accepted Assessee's return—CIT in exercise of his power u/s 263, issued notice to Assessee being of opinion that assessment of AO was erroneous and prejudicial to interest of Revenue—ITAT viewed that CIT could not have formed any opinion that assessment order was erroneous and no reasons had been recorded to demonstrate that assessment order was prejudicial to interest of revenue—Held, perusal of Order of ITAT would testify that AO had consciously examined all relevant records in accepting return submitted by Assessee—CIT did not find fault with any findings of AO, culminating in ultimate conclusion that return of Assessee was acceptable—Decision of CIT authenticates that Assessee furnished all relevant records and documents in support of its return accepted by AO—CIT did not reject documents to be irrelevant—CIT only remanded matter to AO observing that documents ought to have been laid before him and examined at time of assessment—Revisional jurisdiction available to Commissioner u/s 263 subject to condition that Order of AO was erroneous and prejudicial to interest of Revenue—Any exercise of revisional jurisdiction, bereft of such satisfaction was impermissible rendering resultant order void—No interference with impugned order of ITAT was warranted—Appeal dismissed

In the case of Baberwad Shiksha Samiti v/s PR. CIT 134 DTR 65(Jp) It has been held that the AO accepted the returned income of the assessee. AO issued the query letter on both the issue which was replied by the assessee. Thus the AO made detailed enquiry and no adverse inference has been drawn by him. Hence the order u/s 263 is not sustainable.

In the case of Shree Salasar Overseas (P) Ltd. vs. PR. CIT (2012) 144 TTJ 0041 (UO) held Revision—Erroneous and prejudicial order—Lack of proper enquiry— CIT set aside the assessment order on the ground that the AO has not verified as to whether the provision for development

expenses claimed as deduction by the assessee-developer was made on scientific basis having regard to the accrued liability incurred by the assessee—Not justified—Assessee had filed relevant details before the AO in a letter stating that such deductions was also allowed in earlier years—Hence, this is not a case where there was no enquiry—Action under s. 263 cannot be taken on account of inadequate enquiry—Therefore, CIT was not justified in setting aside the assessment order by exercising power under s. 263—Swapan Sakar Insurance Consultant & Marketing Services (P) Ltd. (ITA No. 117/JP/2010, dt. 6th Jan., 2011) followed.

In the cae of CIT vs. Ashish Rajpal 320 ITR 0674 (Del) it has been held that Revision—Erroneous and prejudicial order—Lack of proper enquiry—After issue of notice under s. 143(2), several communications were addressed by the assessee to the AO whereby the information, details and documents sought for were adverted to and filed—If upon a perusal of the record filed by the assessee with the AO the Tribunal formed a view that there had been an enquiry which had not been conducted with 'undue haste' surely one would be slow to hold otherwise—While the supervisory power of CIT is wide, it cannot be invoked to substitute the view of the AO—Fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee.

9. Neither loss return nor assessed income was in loss: Further it is submitted that it may be big reason that to issue the notice u/s 263 by the ld. Pr. CIT because he stated the return income and assessed income of loss of Rs.3,53,22,650/- while there was neither loss returned income nor loss assessed income the same were positive income of Rs.3,53,22,650/-. Hence the finding and facts of the ld. Pr. CIT itself was wrong.

10. On Merit our submissions are as under:

10.1 In this regard we have to object to the said notice because on all the above issues have already been raised and discussed and the assessee has also submitted the supporting evidences related to the above issues. And when the case was selected on the limited issue, then it is not open for the Assessing Officer to go beyond those issues.

3. Now without prejudice to the above we are submitting our point-wise reply:

3. (i) and (ii) As your honor has stated that deduction of Rs. 50,00,000/- has been claimed u/s 54EC on investment in NHAI, which was subsequently allowed by the Assessing Officer however no documentary evidence is placed on record to establish the genuineness of the fact. Further, no evidence of the investment so made in these bonds have been filed.

(ii). Expenditure of Rs. 7,24,429/- has been claimed as repairing and improvement expenditure after indexation which was subsequently allowed by the Assessing Officer however no documentary evidence is placed on record to establish the genuineness of the fact.

(iii). Payment of brokerage charges of Rs. 6,21,000/- has been claimed which was subsequently allowed by the Assessing Officer however no documentary evidence is placed on record to establish the genuineness of the facts.

: In this regard it is submitted that

In this regard it is submitted during the year the assessee has sold a immovable property as land and building situated at Sudershanpura Industrial area which was given on rent in earlier years by the assessee in support we have filed copy of rent deed and last computation in which rent received(PB39-40) was shown to the AO during the course of assessment proceedings. This property was sold in total for consideration of Rs 5,18,05,000/- to Prem Motors Pvt Ltd. The assessee has also paid Rs. 6,21,000/- as commission brokerage to Deepak Gupta Rs 2,60,000/-, Arihant Sharma Rs. 2,60,000/- and Rs 1,01,000/- Bihari Lal Bhargava. In support we have filed the copy of PAN card of Deepak Gupta and Arihant Sharma to the ld. AO and are also enclosed herewith(PB41-42) and the payment have been made through the account payee check vide bank statements dt.06.10.2015(PB13).

And it is not possible to sale this high value price property without brokerage and it is not higher on the sale transaction of Rs.5.18 crore and this brokerage is only 1.2% about and there is the normal rate of 1 to 2% in this line.

Out of net gain assessee has invested Rs 50,00,000/- u/s 54EC in capital gain bonds of NHAI in demat form copy of relevant part of demat account in HDFC bank was filed before the ld. AO(PB43) and Also vide bank statements entries dt.06.10.2015(PB33,19) is also enclosed herewith. Hence it cannot be said that that no documentary evidence is filed. Also acknowledgement of our reply enclosed(PB18)

Regarding the expenditure of Rs.7,24,429/- we have incurred Rs.2,68,700/- (Rs.7,24,429/- is after indexation) as repair and improvement/maintenance in various years and we have filed year wise details of these expenses. And on such size of property as land and building and to maintain, it is very nominal expenses also vide our reply filed to AO enclosed herewith(PB 24-25).

3. (iv). Regarding investment of Rs. 71,10,000/- in Destiomoney Securities it is submitted that Destiomoney Securities is brokerage house. The assessee is dealing in shares/mutual funds investment or trading. For that he had opened a Trading account with Destiomoney Securities and assessee has given Rs.71,10,000/- to Destiomoney Securities for such purpose during the entire year on various dates. The assessee has given this amount from the amount received on sale consideration of property as above on which the assessee had paid th LTCG tax. All these transactions are through the bank statements. In support we had filed the copy of bank statements and ledger account of Destiomoney Securities on perusal of the same all the transaction are clear. The same are also enclosed herewith(PB34-38). Thus the sources as well the transaction are established.

3.(v.) Regarding Share derivative transactions amounting to Rs. 3,32,29,00,597.22/- made by assessee for the year under consideration and liabilities of audit u/s 44AB of the IT Act 1961, and initiation of penalty u/s 271B of the IT Act 1961 for not carrying out audit u/s 44AB. In this regard it is submitted that the assessee was not liable to get its account audited u/s 44AB. Because the assessee deals in derivative transaction in A.Y. 2016-17 total amount of total turnover in derivatives was Rs 42,75,579/- (Loss Rs 40,24,946.82 and profit Rs 250632.41 total Rs 42,75,579.23) which is less than one crore (the limit of tax audit) so tax audit is not required in the present case, which has not been seen by the ld. Pr. CIT. As in the derivatives (F&O) the turnover is calculating by taking the total of profit in the year and total of loss in the year. Not the whole value of the lot sale/purchase. And as per thus the turnover of the assessee was only of Rs.42,75,549/- which is below the threshold limit. In support we are enclosing herewith copy of Tax Audit Guide books for the same. Annexure-A.

Thus as per this or the assessee was not liable to get audit u/s 44AB of the IT Act 1961

No power u/s 263 for initiation of penalty: Further in 263 jurisdiction the Pr. CIT cannot have jurisdiction to direct the AO to initiate any penalty.

In this regard kindly refer a direct decision of SUNILA ASASTHI vs. Pr. CIT IN ITA No. 496/Del/2021 DT. Jul 7, 2021 (2021) 62 CCH 0295 DelTrib wherein it has been held that Revision—Scope of power of CIT—Assessee is an Advocate by profession and derives professional income—Assessee filed her return of income—This return was revised—Case of assessee was selected for limited scrutiny—Assessing Officer accepted revised return and assessed total income—AO did not initiate penalty proceedings—Pr. CIT noted that order passed by AO is erroneous and prejudicial to interest of Revenue—Assessee has revised return only when assessee was asked to reconcile mis-match between receipts shown in Income Tax return and 26AS—Pr. CIT directed Assessing Officer to initiate penalty proceedings under Section 271(1) (Order under Section 263 was passed—Held, issue is squarely covered in favour of assessee by decision of jurisdictional High Court holding that assessment proceeding is a separate proceedings from penalty proceedings—When principal Commissioner of income tax is assuming jurisdiction u/s 263 she does not have any right to direct assessing officer to initiate penalty proceedings u/s 271(1)(c)—Delhi High Court in Addl. CIT vs. J.K.D.'Costa (1981) 25 CTR (Del) 224 : (1982) 133 ITR 7 (Del) has held that CIT cannot pass an order under s. 263 pertaining to imposition of penalty where assessment order under s. 143(3) is silent in that respect—It is not case where AO has initiated penalty proceedings and dropped it later on—AO did not initiate proceedings at first instance and PCIT has invoked his jurisdiction u/s 263—Satisfaction of assessing officer is always part of order of assessment—Therefore, initiation of penalty proceedings is always part of order of assessment—Non-initiation of penalty proceedings by assessing officer makes order of assessing officer erroneous—Respectfully following decision of Delhi High Court there is no reason to sustain order passed by principal Commissioner of income tax u/s 263—Order passed by principal Commissioner of income tax u/s 263 is not sustainable in law—Assessee's appeal allowed.

4. Hence looking to the above facts legal position of law and circumstances of the case and material available on record. it cannot be said that the order of the ld. AO is erroneous in so far as it is prejudicial to the interest of the Revenue. And out of the preview of the Sec. 263. Hence the Proceedings so initiated may kindly be dropped and oblige.

7. On the other hand, the ld. CIT-DR has vehemently supported the order passed by the ld. Pr.CIT and argued that the ld. Pr.CIT had rightly moved provisions of Section 263 of the Act after analyzing and

examining the records of assessment and the order of assessment passed by the A.O. U/s 143(3) of the Act. It was submitted by the ld. CIT-DR that before passing the order U/s 263 of the Act, the ld. Pr.CIT had issued show cause notice dated 18/03/2021 on the following issues:

> (i) Deduction of Rs. 50,00,000/- has been claimed u/s 54EC on investment in National Highway authority of India, which was subsequently allowed by the Assessing Officer however no documentary evidence is placed on record to establish the genuineness of the fact. Further, no evidence of the investment so made in these bonds have been filed.
>
> (ii). Expenditure of Rs. 7,24,429/- has been claimed as repairing and improvement expenditure after indexation which was subsequently allowed by the Assessing Officer however no documentary evidence is placed on record to establish the genuineness of the fact.
>
> (iii). Payment of brokerage charges of Rs. 6,21,000/- has been claimed which was subsequently allowed by the Assessing Officer however no documentary evidence is placed on record to establish the genuineness of the facts.
>
> (iv). Investment of Rs. 71,10,000/- in Destiomoney Securities is not verifiable in absence of any document on record which is liable for disallowance under section 68/69 of the IT Act 1961.
>
> (v.) Share derivative transactions amounting to Rs. 3,32,29,00,597.22/- was made by you for the year under consideration. Further, it was mandatory for audit u/s 44AB of the IT Act 1961, as the transactions in derivatives were more than the threshold limit. However, Assessing Officer not initiated penalty u/s 271B of the IT Act 1961 for not carrying out audit u/s 44AB.

It was submitted that since the A.O. had not verified the above issues and had completed the assessment in a routine and perfunctory manner, therefore, provisions of Section 263 of the Act were rightly invoked by the ld. Pr.CIT. It was further submitted that as far as the claim of assessee with regard to deduction of Rs. 50.00 lacs claimed U/s 54EC of the Act is concerned, in this respect, no documentary evidence was placed on record by the assessee to establish the genuineness of the fact of claiming deduction U/s 54EC of the Act. It was also submitted that, although during the assessment proceedings, the assessee had claimed expenditure on repairing and improvement after indexation. However, in this regard also, no documentary evidences were placed on record to establish the genuineness of the said fact. It was further submitted that the assessee had also claimed payment of brokerage charges but no documentary evidences have been placed on record by the assessee to establish the genuineness of the said claim of making of payment of brokerage charges. It was further submitted by the ld. CIT-DR that according to assessee, he had made investment of Rs. 71.10 lacs in Destiomoney Securities, however, the said investment was not verifiable in absence of any document on record and thus, the same was liable for disallowance U/s 68/69 of the Act. Lastly, it was also

submitted that, according to the assessee, he had made transactions of share derivatives for the year under consideration and thus, it was mandatory for audit U/s 44AB of the Act as the transactions in the derivatives were more than the threshold limit but the A.O. had not initiated penalty proceedings U/s 271B of the Act for not carrying out audit U/s 44AB of the Act. Thus, in this way, the ld. CIT-DR supported the order passed by ld. Pr.CIT. The ld. CIT-DR further submitted that all the above facts goes to show that the A.O. had not applied his mind to the issue in any manner. Further, no query has been raised by the A.O. to examine the issues discussed above. It was further submitted by the ld. CIT-DR that even the assessee had not filed any document wherefrom it could be inferred that the claim made in the return of income were genuine. Thus, under these circumstances when once the A.O. failed to carry necessary enquiries then failed to apply his mind to the information available on record and thus, the order passed U/s 143(3) of the Act was rightly considered and treated as erroneous in so far as it is prejudicial to the interests of the Revenue. Thus, the ld. Pr.CIT had rightly set aside the assessment to be made afresh. In support of his arguments, the ld. CIT-DR has relied upon the decision of the Hon’ble

Apex Court in the case of Deniel Merchants P. ltd. & Anr. Vs ITO & Anr in Special Leave Petition No. 23976/2017 dated 29/11/2017.

8. We have heard the ld. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well as cited before us and we have also gone through the orders passed by the revenue authorities. From the record, we noticed that the ld. Pr.CIT has right or jurisdiction of revision U/s 263 of the Act only when the order passed by the A.O. is erroneous in so far as it is prejudicial to the interests of the Revenue as is provided U/s 263 of the Act and the same is reproduced below:

> *"263. (1) The Pr. Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."*
>
> *[Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—*
>
> *(a) the order is passed without making inquiries or verification which should have been made;*
>
> *(b) the order is passed allowing any relief without inquiring into the claim;*
>
> *(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]

9. Before we decide the merits of the present case, it is necessary and imperative for us to evaluate the order of assessment passed U/s 143(3) of the Act vis a vis the paper book containing documents filed by the assessee. In this regard, we noticed that the assessee had placed on record paper book containing page Nos. 1 to 49 which contains copies of notices U/s 143(2) dated 21/06/2017, notice U/s 142(1) dated 14/09/2018 and 01/11/2018 which are at page No. 1-6 of the paper book. Our attention was also drawn to the detailed reply which was filed by the assessee before the A.O. which are page Nos. 7-8 of the paper book, copy of computation of total income, which are at page No. 9-12 of the paper book, copy of bank statement and details of share transaction, which are at pave Nos. 13-15 of the paper book, copy of notice U/s 133(6) by DDIT (Inv.) dated 21/06/2018 and their reply which are at page Nos. 16-20 of the paper book, copy of notice U/s 142(1) dated 13/06/2018 which at page Nos. 21-23 of the paper book, copy of replies to A.O. which are at page Nos. 24-45 of the paper book, copy of show cause notice dated 18/03/2021 which are page Nos. 46-48 of the paper book and the copy of compliance to Pr.CIT dated 24/03/2021 which is at page No. 49 of the paper book. All these documents, notices and replies

coupled with documents goes to show that the A.O. during the course of assessment had raised queries/enquiries and sought information from the assessee on the issues and the assessee had also replied to the said queries and filed supportive documents.

10. Even otherwise, as per the facts of the present case, the case of the assessee was selected for "limited Scrutiny" u/s 143(2) of the Act on the reason that *"large value sale of futures (derivative) in a recognized stock exchange reported in securities Transaction Tax Return (STT Code 5 and Turnover in Part A- P&L Account of ITR), sales consideration of property in ITR is less than sale consideration reported in form 26QB and to examine whether capital gain has been shown correctly shown in the return of income."* After selecting the case of the assessee for limited scrutiny, the A.O. issued detailed query letter to the assessee and asked to produce the details and evidences for verification and in response thereof, the assessee had furnished all the details vide reply to the AO which are at page Nos. 7-45 of the paper book. Even otherwise, on perusal of the assessment order, the A.O. himself has clearly admitted in the said order that the assessee through his representative had submitted electronic response through e-filling portal/ITBA and necessary details on various queries were also submitted by the ld. AR and after examining the said details, the A.O. had categorically mentioned that during the course

of assessment proceedings, the assessee had submitted reasonable details and documents related to the limited scrutiny issue which were examined by the A.O. and after considering the submission and supporting details filed by the assessee on the limited issue, the A.O. had accepted the returned income. Thereafter he completed the assessment at Rs.3,53,22,650/- vide assessment order u/s 143(3) of the Act dated 26.11.2018 by taking a reasonable and possible view. However, the ld. Pr.CIT while passing the order of assessment, had categorically mentioned that no compliance has been made to the show cause notice dated 18/03/2021 and had decided the matter on the basis of information available on record which goes to show that the ld. Pr.CIT has not looked into merits of the case in the true perspective and sense and not applied his mind on the same despite available before him. Although, it is an admitted case by the ld. Pr.CIT that he had called for the record and gone through and examined the assessment records of the preset case which was selected for 'limited scrutiny' through CASS but he was of the view that the AO has not made proper & detailed i.e deep inquiry on the issue. The ld. Pr.CIT has not looked into details called for by the A.O. and the replies submitted by the assessee to the A.O. during the assessment proceedings. However, the ld. Pr.CIT has only stated that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Hence the

conclusion of the ld. Pr. CIT that the order is prejudicial to the interest of the Revenue is not a matter of subjective satisfaction of the ld. Pr. CIT. He, therefore, ought to have found out this on the basis of objective material after assessing the contention raised by the assessee. He, however, failed to do so and reached a conclusion that the order was prejudicial with a view that the present AO shall undertake that exercise after the assessment has been set aside for his consideration. Thus, according to us, such a view or action is not well founded in the law as has already been held by the various Hon'ble High courts. In this regard, we draw strength from the decisions in the case of **Smt. Leela Choudhary v/s Pr. CIT 289 ITR 226(Gau.), Saw Pipes Ltd v/s Add. PR. CIT 94 TTJ 1036(Del), Malabar Industrial Co. Ltd. v/s PR. CIT 159 CTR(1)(SC) and PR. CIT v/s Rayn Silk Mills 221 ITR 155(Guj.).** The same view has also been expressed by the Coordinate Bench of this Tribunal in the case of **Kamal Kumar Gupta v/s Pr. CIT 142 TTJ 9(JP)** wherein it has been held that "*assessee was asked by the AO to file the details of trade creditors which are shown in the name of agriculturalist. In the reply, assessee filed written submission enclosing the list of creditors. Thus, the AO made the inquiry and it is not a case of lack of inquiry but can be case of insufficient enquiry. Pr. CIT was not justified in passing the order u/s*

263." In the present case also is the same position and also followed in the case of **Sh. Gyan Chand Jain v/s Pr. CIT 50 TW 109(JP)**.

11. It was also submitted by the ld. AR that the ld. Pr.CIT in its order has stated that the assessee has filed return of income declaring the total income of Rs.(-)3,53,22,650/- i.e in loss while the assessee has filed his return of income at Rs.3,53,22,650/- and had also paid tax of Rs.80,91,960/-. Thus, according to the ld. AR, the ld. Pr. CIT himself has narrated and proceeded on the wrong facts. However, on perusal of the order of ld. Pr.CIT U/s 263 of the Act, we found that there was a typographical error in the order passed by the ld. Pr.CIT which itself is not sufficient to quash the order passed by the ld.Pr.CIT, thus we are not in agreement with the arguments of the ld. AR on this aspect. Although, the ld. AR has challenged the order of ld. Pr.CIT by raising different arguments which are mentioned in the written submissions but one of the main argument of the ld. AR is that there was complete breach of principles of natural justice on the part of the ld. Pr.CIT while passing the order U/s 263 of the Act. In this regard, it was submitted that the ld. Pr.CIT has not provided reasonable opportunity of being heard to the assessee as the ld. Pr.CIT had issued show cause notice on 18/03/2021 for hearing on 24/03/2021 and since the time was so short and the assessee had to engaged the counsel and to collect the papers from the

earlier counsel. Thus the assessee required some time to prepare the matter, therefore, the assessee made request for adjournment online on24.03.2021. However, the ld. Pr.CIT had not gone through the same and without considering the same had wrongly stated that no compliance has been made and had decided the matter without giving proper opportunity of being heard to the assessee while passing the order on 31.03.2021 in violation of the principles of natural justice. In this regard, the ld. AR has drawn our attention to the decision of Coordinate Bench of Cuttak Bench in the case of **Jaidurga Minerals v/s Pr. CIT 200 DTR 205(Ctk)(Trb.) in ITA No. 276/Ctk/2015 dated 10.08.2020.** Whereas on the contrary, the ld. CIT-DR has submitted that proper opportunity of hearing was granted to the assessee and the assessee have sufficient time to file reply but he has not opted to file reply or the documents before the ld. PRCIT.

12. After hearing the parties on this issue, we have perused the notice of hearing which is at page No. 46 of the paper book and according to the said notice of hearing which was issued by the office of the Pr.CIT to the assessee. The said notice is dated 18/03/2021 wherein the matter for final hearing was fixed on 24/03/2021 at 6.04 PM. However, on 24/03/2021, the assessee requested for seeking some more time for engaging and for submitting documents. However, the ld. Pr.CIT, did not

consider the request of the assessee and passed order on 31/3/2021 itself. Thus, considering the said facts, we are of the view that right to fair hearing is guaranteed right to an assessee and thus granting of effective opportunity is sine qua non in Section 263 of the Act for setting aside a statutory order. Thus, in our view, it was the duty of the ld. Pr.CIT to provide the assessee an effective and reasonable opportunity of hearing so as to enable him to substantiate its claim. In any case, it is one of the fundamental principles of natural justice that no person can be condemned unheard i.e audi alteram partem, the impugned order was thus passed in violation of the principles of natural justice in absence of any effective/reasonable opportunity of hearing provided to the assessee. Although, the ld. CIT-DR has relied upon the decision in the case of **Deniel Merchants P. ltd. & Anr. Vs ITO & Anr in Special Leave Petition No. 23976/2017 dated 29/11/2017,** however, the facts of the present case are altogether different from the facts of case as relied by the ld. CIT-DR as in that case, the issue was receipt of share application money whereas the facts of the present case are altogether different. The said case, as relied by the ld. CIT-DR, is not found application in the facts of the case under consideration. In our view, it is mandatory to apply the principles of natural justice irrespective of the fact as to whether there is any statutory provision or not. As per

facts of the present case, the assessee was not afforded opportunity much less sufficient opportunity to give the reply to the show cause notice. Therefore it is clear that the ld. Pr. CIT in a hurriedly manner without affording opportunity of hearing to the assessee, had passed impugned order by violating principles of audi alteram partem. Thus, keeping in view the principles laid down by the Coordinate Bench of Cuttak ITAT in the case of **Jaidurga Minerals v/s Pr. CIT (supra)** and in the case of **Jagnnath Prasad Bhargva vs Lal Nathimal AIR 1943 All 17** and in view of the above factual position, the ld. Pr.CIT has committed a gross error in not providing effective/reasonable opportunity of being heard to the assessee before passing the order. Accordingly, the revisional proceedings framed U/s 263 of the Act by the ld. Pr.CIT stands quashed.

13. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 06th January, 2022.

Sd/-	Sd/-
(एन.के.सैनी)	(संदीप गोसाईं)
(N.K. SAINI)	(SANDEEP GOSAIN)
उपाध्यक्ष / Vice President	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 06/01/2022
*Ranjan

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

1. अपीलार्थी/The Appellant- Shri Ashutosh Bhargava, Jaipur.
2. प्रत्यर्थी/ The Respondent- The Pr.CIT-2, Jaipur.
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. 20/JP/2021)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar