

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

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 204/JP/2022  
निर्धारण वर्ष/Assessment Years : 2017-18

Om Prakash Agarwal 256, Chhoti Chaupar, Jaipur-302003.	बनाम Vs.	Principal Commissioner of Income Tax, Jaipur-1, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABWPA 2846 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Praveen Saraswat (C.A.)  
राजस्व की ओर से / Revenue by : Shri Sanjay Dhariwal (CIT)

सुनवाई की तारीख / Date of Hearing : 27/06/2022  
उदघोषणा की तारीख / Date of Pronouncement: 29/08/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This is an appeal filed by the assessee against the order of Learned Principal Commissioner of Income Tax)-1, Jaipur (hereinafter referred to as (Ld. Pr. CIT)] dated 26.03.2022 for the assessment year 2017-18 which in turns arise from the order of the assessment passed by the Income Tax Officer, Ward 1(4), Jaipur on 03.07.2019.

2. Aggrieved from the above order of the Id. Pr. CIT the assessee has marched this appeal before us. In this appeal the assessee has raised the following grounds of appeal:-

- “1. a) On the facts and circumstances of the case, the order passed by Ld. PCIT u/s 263 of the Income Tax Act is unsustainable as power to revise can be invoked in the case of lack of enquiry, not in the case of inadequate enquiry. Ld. PCIT has held that the AO failed to enquire the 'cash deposited in bank' thoroughly, while all the aspects related to 'Cash deposited during the year including demonetization period', were enquired by the AO in the assessment proceedings and Section 131 proceedings.
- b) On the facts and circumstances of the case, the Ld. PCIT has erred both on facts and in law in ignoring the fact that the issue raised by her in notice u/s 263 was before the AO and as such the jurisdiction on this issue under section 263 cannot be assumed by her.
- c) On the facts and circumstances of the case, the Ld. PCIT has erred both on facts and in law assuming jurisdiction u/s 263 in the absence of twin conditions of the order passed by the A.O. being erroneous as well as prejudicial to the interest of the Revenue, being satisfied.
- d) On the facts and circumstances of the case, the Ld. PCIT has erred both on facts and in law in ignoring the fact that the proceedings u/s 263 cannot be used for sustaining opinion of the A.O. by that of the PCIT.
- e) On the facts and circumstances of the case, the Ld. PCIT has erred both on facts and in law in setting aside the matter to the file of the AO without giving a finding as to the error and prejudice caused to the revenue by the assessment order, and as such the order passed is bad in law and liable to be quashed.
2. That the appellant craves leave to reserve to itself the right to add, alter, amend, substitute, withdraw and/or any ground(s) of appeal at or before the time of hearing”

3. The assessee has raised the following additional ground vide application dated 22.06.2022 which is reproduced as under:-

“That the Learned Pr. Commissioner of Income Tax, Jaipur-1 invoked revision proceedings u/s 263 exclusively based on the proposal/suggestion made by the Assessing Officer & thereby failed to apply her mind independently, which causes the entire revision proceedings illegal/illegitimate and needs to be quashed.”

4. Brief facts of the case are that the assessee earned income from trading in Ghee, Vansapati Oil and Edible oil. The return declaring total income at Rs. 8,90,270/- was e-filed on 31.10.2017, which was processed u/s 143(1) of the Income Tax Act, 1961[ here in after referred to as Act]. The case was selected for scrutiny under CASS. Notice U/s 143(2) was issued on 29.09.2018, which was duly served upon the assessee. Thereafter, notice u/s 142(1) was issued on 05.02.2019 and 03.05.2019 requiring certain details from the assessee. It is seen that in the year under reference cash of Rs. 1,47,45,000/- has been deposited in the two bank accounts of the assessee. The Id. Pr. CIT, exercising her revisionary powers under section 263, issued a SCN dated 16.02.2022 for clarifying the assessee as to why the assessment should not be held erroneous in so far as it is prejudicial to the interest of Revenue. Assessee submitted a

detail reply to the SCN on 28.02.2022, which did not find favour with the Ld. Pr. CIT and an order under section 263 of the Act was passed on 26.03.2022.

5. The Id. AR of the assessee prayed that the additional ground, being pure legal ground, it is raised for the first time as the assessee got the information late under Right to Information and came to know about the legal issue and therefore, raised the same now in this appeal as additional ground.

5.1 On the other hand revenue objected for the additional ground raised by the assessee and submitted that the information relied upon is merely department internal communication cannot be considered and thus, he submitted not to accept the additional ground at this stage.

5.2 We have heard rival contentions and perused the material brought on record in the prayer petition filed by the assessee for raising the additional ground before us. The bench of the view that since, the additional ground being technical and legal ground be admitted in the interest of justice and

the same is thus admitted as it does not involve any factual issue for this additional ground.

6. Since, the additional ground raised by the assessee is purely on the legal issue challenging the jurisdiction of the Id. Pr. CIT and as the controversy goes to the root of the case we are inclined to entertain this ground first. The foremost controversy raised by the Assessee relates to initiation of proceeding based on the report of the AO is validly initiated proceeding u/s. 263 of the Act, or not?

7. On this legal ground the Id. AR for assessee submitted a detailed written submissions which is reiterated here in below :-

“2.1 Section 263 reads as follows:

*263. (1) The Principal Chief Commissioner or Chief Commissioner or Principal 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. (Emphasis supplied).*

2.1.1 The provisions of section 263 require the PCIT to himself call for and examine the records of any proceedings under the Act. He is, as per the provisions in the Section, neither empowered nor expected to assign the task of

reviewing the proceedings/order passed under the Act to any subordinate officer viz the AO or the Additional CIT.

2.1.2 Revision proceedings under appeal, are bad in law as the Pr. Commissioner of Income Tax without applying her independent mind initiated the proceedings u/s 263 on the proposal initiated by the Assessing Officer.

2.1.3 Appellant takes the liberty to draw the valued attention of the bench towards the following extracts in the letter addressed by the AO to Ld. PCIT vide Letter No. ITO/W-1(4)/JPR/2020-21/124 dated 10/06/2020:

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Paragraph 1 of the Page No.1 of the letter (*Please see attachment No. 3*)

“The case was reviewed by the Additional CIT and following comments have been made-.....”

Paragraph No. 2 of the page No. 4 of the letter (Please see attachment No. 6)

“The assessment record was examined and comments given by the Addl. CIT was gone through with reference to issues raised in the review, are agreed. “

Paragraph No. 3 of the page No. 4 of the letter (Please see attachment No. 6)

“Perusal of the observations/comments given by the Addl. CIT as mentioned above and on examination of assessment record it reveals that assessment order is erroneous and prejudicial to the interest of revenue therefore, proposal u/s 263 of the Income Tax Act, 19671 is being submitted to you for revision of the assessment order passed by the AO u/s 143(3) taking under consideration of all the points raised in the review. Time limitation is getting barred on 31/03/2022 for initiating of the action u/s 263 of the I. T. Act, 1961”

Yours faithfully

(PK Kalyania)      Income Tax Officer, Ward 1(4),Jaipur

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Above letter from AO to Ld. PCIT clearly brings out that AO, who completed the assessment proceedings and passed an order u/s 143(3) is revealing to Ld. PCIT that his order is erroneous and prejudicial to the interest of revenue.

2.1.4 Office of the Ld. PCIT-1, Jaipur has reverted back to the Addl. CIT with the following reply vide letter No. 22 dated 24/06/2020 (Please see attachment No. 3)

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No. : Pr. CIT-1/ITO(T&J)/JPR/2020-21/122 Dated 24/06/2020

The Addl. Commissioner of Income Tax,

Range-1,

Jaipur

Sir,

Subject: Approval for taking remedial action in the case of Om Prakash Agarwal-ABWPA2846D AY 2017-18 reg

Kindly refer to your proposal for approval for taking remedial action u/s 263 of the IT Act vide letter No. 324 dated 11/06/2020

In this regard, I am directed to convey that after due consideration, the PCIT has prima facie agreed to take remedial action u/s 263 of the IT Act, 1961 in this case. You are therefore, required to submit detailed proposal for the same at the earliest. The assessment record is being returned back herewith.

Yours faithfully

(P K JOSHI)

Income Tax Officer (T&J)

For Pr. Commissioner of Income Tax, Jaipur-1, Jaipur

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Above letter from Ld. PCIT to Addl. CIT conclusively proves that no independent application of mind was made by the Ld. PCIT and lower authorities were in de facto exercising the powers u/s 263 of PCIT.

2.1.5 It is a well-settled law that for invoking the provisions of section 263 the Commissioner of Income Tax has to apply his independent mind after examining the records and has to form his independent opinion that the order passed by the Assessing Officer is erroneous and prejudicial to the revenue. The provisions of section 263 cannot be invoked merely on asking of Assessing Officer or proposals initiated by the Assessing Officer to substitute his original opinion. In the instant case, it is found that the Assessing Officer initiated the proposal for invoking the provisions of section 263 merely under the pressure of the Addl. CIT. The proposal of the AO is solely based on the views/opinion of his superior i.e. Addl. CIT. The provisions of section 263 cannot be allowed to be misused by the Assessing Officer to super-impose his opinion different from the one taken at the time of assessment proceedings.

2.1.6 As is evident from the documents on the record being submitted as Annexures 1 to 6 to this submission, the provisions of section 263 of the Act have been invoked in blatant abuse for revisional jurisdiction.

In the present situation, the revision was initiated on the basis of AO sending a proposal to the PCIT and not on the PCIT suo motu calling for and examining the record of the assessment proceedings and thereafter considering the assessment order erroneous and prejudicial to the interest of the revenue. AO and Addl. CIT recommending a revision to the PCIT has no statutory sanction and is a course of action unknown to the law. AO can not usurp the power of PCIT and recommend a revision.

2.1.7 Appellant places reliance on the following judgements

i) Span Overseas Ltd. Vs. Commissioner of Income Tax in ITA No. 1223/PN/2013 for assessment year 2008-09 decided on 21-12- 2015;

ii) Alfa Laval AB Vs. CIT(IT/TP), Pune by ITAT, Bench C ITA No. 1287/PUN/2017 AY 2012-13 pronounced on 02/11/2021

(Please see attachment No. 7 to 12)

(iii) Rajesh Chandrakant Shah (HUF) Vs. PCIT-6, Pune AY 2011-12 ITA No. 1028/PUN/2016 pronounced on 06/02/2019

(iv) Hindustan Lever Ltd. Vs. CIT, Kol-II, High court of Calcutta ITA No. 193 of 2002 judgement on 04/02/2011

(Please see attachment No. 13 to 16)

2.1.8 The fact remains that a notice such as the one issued in the above case is ultra vires the provisions of the Income-tax Act 1961, and also does violence to the mandate of the Supreme Court in the case of Bhavnagar University v. Palitana Sugar Mill (P.) Ltd. [Appeal (Civil) 8003 of 2002, dated 3-12-2002]. "....It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creatures of statute. They must act within the four corners thereof." In other words, statutory power can only be exercised by the authority on whom it is conferred and by no one else.

2.1.9 It is fairly settled that the substantive power enshrined in the Act cannot be held hostage to procedural requirements, yet it bears a recall that the procedure delineated in section 263 is a substantive provision and meets the mandate of principles of natural justice, an abiding characteristic of any administrative or quasi-judicial action. It is more particularly so when revision unsettles a settled assessment. Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative.

2.1.10 If the AO were permitted by the Income-tax Act 1961, to "review" his own orders, for enabling him to send a proposal on an order being found erroneous, the AO shall be found bestowed with the power of the constitutional courts - that of reviewing their own orders; which power is not available even to the Hon'ble Tribunal benches, let alone the authorities under the Act.

As the revision proceedings, in this case, have triggered with the AO sending a proposal to the Ld. PCIT and then the later passing the order u/s 263 of the Act on the basis of such a proposal, it becomes a case of jurisdictional deficit resulting in vitiating the impugned order."

8. In addition to the above written submission on legal ground the Id. AR of the assessee drawn our attention page 3 of his paper book where in the assessing officer has forwarded a proposal u/s. 263. Thus, the Id. AR submitted the AO cannot exercise such power of review thought the proceeding under section 263 of the Act. Section 263 nowhere provide that

AO will assist to the PCIT in the proceeding it is the PCIT review the orders and invoke the provision of section 263 of the Act. For driving home to this contention, the Id. AR of the assessee relied upon the judgement of Honourable Calcutta High Court in the case of Hindustan Lever Ltd. Vs. CIT-Kol-II and decision of the co-ordinate bench of Pune ITAT in the case of Alfa Laval Lund AB Vs. CIT – Pune. The relied upon part of Calcutta High Court judgement is extracted here in below for the sake of brevity :

*“We, therefore, find that there was no justification of invoking Section 263 of the Income Tax Act for reopening of the assessment on the basis of a proposal given by the assessing officer himself after passing of the order of the assessment on the basis of the precedent of Gauhati High Court which has not been approved by a Division Bench of our High Court.*

*We, therefore, set aside the order passed by the Commissioner of Income Tax under section 263 of the Act which has been affirmed by the Tribunal below and direct the assessing officer to act accordingly. The appeal is, thus, allowed.”*

9. Per contra, the Id. DR relied on the orders of the lower authorities and submitted that review of the case was done by JCIT and not AO. Based on the JCIT review the AO send a proposal as this is administrative process to review the work done by the subordinate officer. The finding is of the JCIT and AO has followed the direction given by the higher officer and he has not his own done the review. Merely based on the proposal the proceeding u/s. 263 is not completed. The proposal received by him is duly considered

and the Pr. CIT as per provision of the section 263 of the evaluate the order of the lower authorities and after that the Pr. CIT issues the show cause notice to the assessee. Based on the reply of the show cause notice the Pr. CIT decide the case. To initiate the proceeding u/s. 263 source is not material and in this case the proposal has been moved at the instance of JCIT. The Id. DR explained the difference between the proceeding u/s. 263 & 264. In section 264 the application can be moved by the assessee or own its own motion the proceeding can be initiated. This own motion is missing in the 263 section and thus, the proceeding validly initiated. The Id. DR also read the meaning of record given in the 263 section which include the records of the review of the JCIT and thus the proposal is already part of the record. The Id. DR further argued that if the view is so adopted then the provision of section 263 become redundant and therefore, the additional ground raised by the assessee shall be rejected. The decision relied upon by the Id. AR of the assessee are on different in facts and in law. The Id. DR has relied upon the following decision:

- [1998] 65 ITD 263 (Delhi) Apollo Tyres Ltd. vs. Assistant Commissioner of Income-tax
- [2016] 67 taxman.com 41 (Kolkata – Trib.) Stewarts & Lloyds of India Ltd. vs. Commissioner of Income-tax, Circle-1, Kolkata.

9.1 The Id. DR from the above decision drawn our attention to para 3.3, 3.6, 4.1, 4.2, 4.3 & 4.9 of the decision of Delhi ITAT in the case of Apollo Tyres Ltd. Vs. ACIT reported at 61 TTJ 365. The relevant extract of these paras are as under :

“3.3 The learned Sr. D.R. submitted that the CIT could validly act on the basis of the facts reported to him by the Assessing officer vide his letter dated 23<sup>rd</sup> June, 1995. It is not necessary for the CIT that he should suo motu call for the records and examine it with a view to find out whether the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue. The CIT is entitled to initiate proceedings under section 263 either suo motu or on the basis of information as may be given to him by the Departmental Authorities or by the Internal Auditor or Audit Officer of the CAG Department or on the basis of information received from any other sources. To the extent the CIT receives information from any of these sources, it is purely an administrative action. The quasi-judicial function of the CIT under section 263 starts from the stage when he makes up his mind and issues a show-cause notice to the assessee under section 263. Thereafter, the CIT is required to give an opportunity of hearing to the assessee before arriving at a conclusion that an order passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue. In the present case, the CIT has given adequate and reasonable opportunity to the assessee and has also given convincing reasons in the order passed by him which fully support the order of the CIT.

3.6 The learned Sr. DR also submitted that the Explanation b inserted below section 263, which defines ‘records’ include all records relating to any proceedings under the Act available at the time of examination by the Commissioner. The proposal sent by the ACIT vide letter dated 23<sup>rd</sup> June, 1995 to the CIT was a part of ‘record’ and the CIT could take into consideration the said proposal at the time of initiating action under section 263.

4. We have carefully considered the submissions made by the learned representatives of the parties and have gone through the order of the learned CIT as well as all other documents to which our attention was drawn during the course of hearing. We have also carefully gone through all the judgments which were cited by the learned representatives of both sides.

4.1 The provision of section 263 (1) and the relevant Explanation (b) are reproduced hereunder :

"263. (1) The Commissioner may call for and examine the record of any proceedings under this Act, and if he considers that any order passed therein by the Assessing officer 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 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. For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a)\*\*\*\*\*

b) 'record' shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner."

A plain reading of the aforesaid section clearly indicates that the Commissioner may call for and/ examine the records of any proceedings under the Act. For this purpose, he is not required to show as to what reasons prompted him to call for and examine the record of any proceeding under this Act. The provisions also do not prescribe any limitation that the CIT should suo motu call for and examine the record and he cannot take into consideration or rely upon any report or information which may be supplied to him by the other officers of his Department or on the basis of any information which he may obtain from any other sources. The Authority of the CIT to call for and examine the record on the basis of any information from any source or suo motu is purely an administrative matter. Thereafter, the CIT has to consider as to whether any order passed under the Act by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue. This consideration, having regard to the language of section 263, is a consideration which he exercises by calling for and examining the records. If after calling for and examining the records, the Commissioner considers that the order of the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the revenue, then subsequent proceeding acquires quasi-judicial character. Thereafter, he has to give the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, he may pass such orders 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. It will be worthwhile to compare the language of section 263 with the language used in section 264 of the Act. In section 264, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the records of any proceeding under this Act. However, in section 263 the expression "on his own motion" is absent. It is nowhere provided as to under what circumstances and on the basis of what type of information and source, the CIT may call for and examine the record of any proceedings for the purposes of section 263. In the absence of any express provision in section 263, providing that CIT can act under section 263 only on his own motion or suo motu and also in view of the fact that there is no restrictions or limitations on the power of the Commissioner to call for and examine the record of any proceeding pursuant to the report given by the Assessing Officer or by other Departmental officer, we are of the view that the CIT could validly call for and examine the record of the assessee for the relevant year under consideration pursuant to a letter received from the Assessing Officer containing a proposal under section 263 of the Act. We, therefore, do not find any merit in the contention of the learned counsel for the assessee that the CIT could not assume jurisdiction under section 263 on the basis of the letter sent by the ACIT containing the proposal under section 263. After receiving the report from the ACIT, the Commissioner decided to call for and examine the relevant records and proceeded to consider whether the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue. After such consideration, the CIT gave a show-cause notice under section 263 to the assessee and afforded a proper and reasonable opportunity before passing the Impugned order. The order of the CIT cannot, therefore, be cancelled or treated as invalid simply because the CIT called for and examined the records pursuant to a letter sent by the ACIT for this purpose.

4.2 We will now consider an important question of law argued by the learned Counsel for the assessee, namely, that the CIT cannot exercise revisionary jurisdiction in relation to items of income which escaped levy of tax in the original assessment for which the Assessing officer could take action under section 147 of the Act. The learned Counsel vehemently contended that a new source of income, which had escaped assessment in the original assessment cannot be brought to tax by exercising revisional jurisdiction under section 263 because the CIT can only revise an assessment but cannot reassess an income which had altogether escaped taxation. The escapement of income is covered by section 147 and not by section 263.

4.3 The learned counsel had placed heavy reliance on the following observations made by the Hon'ble Supreme Court in the case of K.M. Cheria Abdulla & Co. (supra) at pages 886-887 :

".....It would not invest the revising authority with power to launch upon enquiries at large so as either to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ignore the limitations inherent in the exercise of those powers. For instance, the power to reassess escaped turnover is primarily vested by rule 17 in the Assessing Officer and is to be exercised subject to certain limitations, and the revising authority will not be competent to make an enquiry for reassessing a taxpayer. Similarly, the power to make a best judgment assessment is vested by section 9(2) (b) in the assessing authority and has to be exercised in the manner provided. It would not be open to the revising authority to assume that power. The revisional power has to be exercised for ascertaining whether the order passed is illegal or improper or the proceeding recorded is irregular and it is in aid of that power that such orders may be passed as the authority may think fit....."

4.9 The Hon'ble Gujarat High Court in the case of Orient Trading Co. v. CIT [1985] 152 ITR 26, 20 Taxman 330 at page 35 has also held as under :

"However till a reassessment order is made by the ITO, it is open to the Commissioner to revise the assessment order. In the present case, admittedly, no reassessment was made by the ITO in pursuance of the proceedings initiated under sections 147 and 148 of the Act when the Commissioner in exercise of his revisional power under section 263 set aside the original assessment order. Therefore, as held by the Delhi High Court, it was open to the Commissioner to revise the assessment order under section 263 of the Act. To this extent, we are in agreement with the Delhi High Court. However, with respect, we do not agree with the view of the Delhi High Court that if reassessment is made by the ITO in pursuance of a proceeding initiated under section 147 and/or section 148, then on reassessment, the entire original assessment is set aside and ceases to exist with the result that the original order of assessment which the Commissioner was seeking to revise becomes non set."

9.2 The Id. DR also drawn our attention to para 13 of the second decision of kolkotta HC relied upon. The same is also extracted here in below:

“13. We have heard the submissions of the learned counsel for the Assessee and the learned DR. The first argument of the learned counsel for the Assessee was that u/s. 263 of the Act it is only the CIT who can suo motu initiate proceedings and in this case the AO has mooted the proposal for revision u/s. 263 of the Act and therefore the order u/s. 263 of the Act has to be held to be invalid, illegal. We are of the view that this argument is liable to be rejected. It is no doubt true that the CIT in the show cause notice u/s. 263 of the Act has set out the proposal of the AO that his order suffered from an error and by reason of such error his order was prejudicial to the interest of the revenue. In para 3 of the show cause notice the CIT has clearly set out that he has perused the proposal and the assessment record and has also expressed satisfaction that the AO has failed to make proper verification and that there was an error in his order which was prejudicial to the interest of the revenue. There is no prohibition u/s. 263 of the Act for the CIT to act on the basis of proposal by the AO and that the CIT has to initiate action u/s. 263 of the Act only suo motu. So long as there is application of mind on errors brought to his notice and the other conditions u/s. 263 of the Act are satisfied, there can be no grievance whatsoever to the Assessee. We therefore reject this argument made on behalf of the Assessee.”

10. In the rejoinder the Id. AR of the assessee that the judgment relied upon by the Id. DR old one where as the decision of the ITAT he has relied upon are recent one. Not only that he has submitted that in the decision relied upon there may be mistake where in this case it is purely a change of opinion of the AO/JCIT/PCIT on the very same issue that has already been examined and the law does not give power to review the order already passed. Moreover, the AO cannot exercise the route of 263 when he has specific power of 154 or 147 in the present case. The Id. AR also submitted that when two views are possible the view that is favourable to the assessee be taken considering the Apex Court decision in the Vegetable

Products and based on the decision relied upon the view which is favorable be taken.

11. We have gone through the rival submission placed on record, contentions raised before us during the hearing and the decisions relied upon by both the parties. As it is evident from the forwarding letter of the assessing officer, he has in detailed mentioned the review on the assessment records and after that he has written as under which is important in this case and thus the same is extracted from the letter of the AO dated 10.06.2020

2. The assessment record was examined and comments given by the Addl. CIT was gone through with reference to issues **raised in the review, are agreed.**

11.1 From the fact, we noticed that in the case of the assessee verification of "Cash Deposits during demonitisation" was conducted by the AO by way of examination of all evidences including books of account, in pursuance to the proceeding u/s. 131 on 22.03.2017 to 23.03.2017. Subsequently, the ITR of the assessee for the AY 2017-18 was selected for scrutiny u/s 143(2) on 29/09/2018 by the AO (Mr. Trilok Chand, ITO, Ward 1(4), Jaipur). Notices u/s 142(1) were issued on 05/02/2019 and 03/05/2019 seeking a number of details related to assessment year 2017-18 and preceding

assessment year 2016 17. Assessee submitted the details alongwith all required documentary evidences. Assessee was also required to produce the books of accounts including cash books for the two financial years i.e. FY 2015-16(AY 2016-17) and 2016-17(AY 2017-18), along with vouchers/bills for detailed examination by the AO. Besides the other issues, main focus of the assessment proceedings was to verify the Cash Deposits during demonetisation'. After detailed examinations of facts, records and evidence, AO accepted the returned income vide assessment order dated 03/07/2019. Thus, the assessee was subjected to detailed inquiry of Cash deposit by two different in two different periods and both found the cash deposit transactions in order.

11.2 Even on merits we have perused the submission made by the assessee and the same is extracted here in below for the sake of brevity of the cash.

"1.1 Inquiry for cash deposit began with the summon u/s 131 dated 20/03/2017 issued by the AO (ITO, Ward 1(4), Jaipur), which required following records to be produced on 22/03/2017 alongwith the personal appearance of the assessee(**Please See PB No. for 19 summon**):

1. **दिनांक 09.11.2016 से 30.12 .2016 के दौरान बैंको में नकद जमा कराइगयी राशि से संबंधित बैंक खातों की प्रति एवं इस जमा के स्रोत के दस्तावेजी साक्ष्य**  
(Copy of bank statements from 9/11/2016 to 30/12/16 and its evidence for the sources of deposit)
- 2 **चालू वित्तीय वर्ष के समस्त बही खाते स्टॉक रजिस्टर सहित**

(Books of accounts of current year alongwith stock register)

Note : English translation has been made by A/R for convenience only. Assessee's son Shri Sanjay Agarwal appeared on 22/03/2017 before the assessing Officer and produced the required details. A detailed reply with various enclosures was also submitted (**Please See PB No. 20-21 for reply to summon**) :

AO further asked for following additional details during the discussions for submission on 23/03/2017:

1. Day to day cash summary from 1.4.2015 to 31.3.2016 for comparison of cash summary of current year
2. Sale Register from 1.4.2016 to 31.12.2016
3. Cash Book from 1.10.2016 to 31.12.2016
4. Extract of audited Balance Sheet as on 31.03.2016 for pending balance Rs. 4513263.39

The said details were also submitted on 23/03/2017.

1.2 In depth inquiry was conducted by the AO also during the scrutiny proceedings u/s 143(3) as revealed from the notices issued u/s 142(2) from time to time:

**First Notice u/s 142(1)**

No: ITBA/AST/F/142(1)/2018-19/1014983216(1) Dtd 05/02/2019

**(Please See PB No. 22-23)**

- 1) Please furnish a brief note regarding business/income earning activities.
- 2) Please furnish copy of Audit Report u/s 44AB of the IT Act, 1961 along with its enclosures for the relevant period.
- 3) Please furnish computation of total income for the relevant period.
- 4) Please furnish copy of bank statement of all bank accounts maintained by you during the year under consideration with reconciliation statement.
- 5) Please furnish a comparative chart showing total sales/turnover/GP/GPrate/NP/NP rate of the relevant assessment year and previous two years giving justification for difference if any.
- 6) Please furnish complete details of cash deposited during demonetization period with supporting evidences and source of the cash deposits.**
- 7) Regarding new cash credits/squared up a/c's, please furnish the following,
  - . Copy of account(s) duly confirmed by the concerned person(s) alongwith their complete postal address (es) & PAN(s).

In case the person is not assessed to tax, furnish source of deposit with supporting evidence.

**Assessee submitted the reply to said queries vide letter dated 14/02/2019 (Please see PB No. 24-26)**

**Second Notice u/s 142(1)**

No : ITBA/AST/F/142(1)/2019-20/1015887475(1) Dtd 3/05/2019

**(Please See PB No. 27-28)**

- 1) Produce books of accounts, Cash Book, Sales Book, Purchase Book, Ledger for the F.Y. 2015-16 and F.Y. 2016-17 along with all the vouchers.
- 2) Detailed explanation in respect of increase of sundry creditors along with a list of sundry creditors added during the relevant F.Y. 2016-17

**Assessee submitted the reply to said queries vide letter dated 03/05/2019 (Please see PB No.29 )**

1.3. Issues raised in the Show Cause notice **(Please see PB No. 30-32 for SCN)** issued in pursuance to Section 263 proceedings stood examined by the AO. The following tabular analysis compares the issues raised in the SCN/Order u/s 263 by Ld. PCIT and coverage thereof by the AO during the assessment proceedings:

<b>S. No.</b>	<b>Discrepancies pointed out by Ld. PCIT in her SCN/order u/s 263</b>	<b>Whether alleged discrepancy examined by AO during scrutiny proceedings u/s 143(3) ?</b>
i)	It was failure, while completing the original assessment, to examine the genuineness of opening cash balance of Rs. 45.13 Lacs as on 01/04/2016 (related to preceding AY 2016-17). On 01/03/2016 cash was Rs. 15.65 Lacs which increased to Rs. 45.13 Lacs on 31/03/2016.	<b>Yes</b> , AO examined the books of accounts of FY 2015-16 and 2016-17 along with complete bills/ vouchers (as mentioned in his assessment order also). If there was any doubt for the opening balance as on 01/4/2016, then the Assessment Year 2016-17 should have also been reopened/reviewed and there can not be any point of investigating AY 2017-18 for verifying the Cash Balance as on 01/04/2016. Further the demonetisation was declared on 08/11/2016, while the

		<i>ITR and audit report for AY 2016-17 were already filed on 13/10/2016, which rules out the possibility of manipulation, if any, in opening balance.</i>
ii)	<i>Average Cash balance was higher than earlier years</i>	<b>Yes</b> ,AO thoroughly examined the cash book and receipts/payment entries of earlier year and assessment year i.e. 2015-16 and 2016-17 and tallied the cash deposited during the assessment year.
iii)	<i>New loans were taken while cash was available on the date of loan</i>	<b>Yes</b> , examined. Taking or repaying business loans is a matter of prudence of businessmen. All loan transactions have taken place thru bank and duly signed confirmations of lenders along with address, PAN etc. were submitted to AO. TDS was deducted on Interest payment.
iv)	<i>On 08/11/2016, assessee had withdrawn Rs. 1.50 Lacs from ICICI Bank and Rs. 1.10 Lacs from SBBJ. If the assessee really had cash of Rs. 1.27 Crore, he would have not required to to withdraw money</i>	<b>Yes</b> , examined. There were heavy receipts from cash sale and corresponding deposit of cash in the bank account. As on 31/12/2016, cash balance was just Rs. 3.81 Lacs, thereby, clearing all doubts about the existence of actual cash balance.
v)	<i>Assessee had bank loan of Rs.1.64 Crore from ICICI Bank and Unsecured Loan of Rs. 62.60 Lacs. No prudent person would borrow such heavy loans and would pay such heavy interest</i>	<i>Borrowing/repaying is dependent on a number of short-term and long-term factors and these are the business judgements of the assessee. Entire cash balance stood deposited in bank as on 31/12/2016, therefore the issue of</i>

	<p><i>out of his hard earned money if he really had daily average cash balance of above Rs. One crore during the year as shown in cash book. If one really had such cash balance, he would repay existing loans and not borrow new loans</i></p>	<p><i>availability/existence of cash balance does not survive. Further there is no correlation of the loans and cash balance which is clear from the following balances as on 31/12/2106:</i></p> <table border="1" data-bbox="802 595 1383 869"> <thead> <tr> <th><i>Balance Sheet Items</i></th> <th><i>Amount in Lacs</i></th> </tr> </thead> <tbody> <tr> <td><i>Cash in Hand</i></td> <td><i>3.81</i></td> </tr> <tr> <td><i>ICICI Bank Loan</i></td> <td><i>168</i></td> </tr> <tr> <td><i>Unsecured Loans</i></td> <td><i>71</i></td> </tr> </tbody> </table> <p><i>Thus, even after depositing most of the cash balance in bank, the level of loans at ICICI Bank and Unsecured Loans has not come down. Therefore, the assumption of PCIT is without understanding the intricacies of the business of the assessee, whose annual turnover is Rs. 33 Crore.</i></p>	<i>Balance Sheet Items</i>	<i>Amount in Lacs</i>	<i>Cash in Hand</i>	<i>3.81</i>	<i>ICICI Bank Loan</i>	<i>168</i>	<i>Unsecured Loans</i>	<i>71</i>
<i>Balance Sheet Items</i>	<i>Amount in Lacs</i>									
<i>Cash in Hand</i>	<i>3.81</i>									
<i>ICICI Bank Loan</i>	<i>168</i>									
<i>Unsecured Loans</i>	<i>71</i>									
vi)	<p><i>Sundry Creditors of assessee increased from Rs. 69.47 Lacs as on 31/03/2016 to Rs. 1.30 Crore as on 31/03/2017</i></p>	<p><b>Fully examined.</b> <i>This issue was thoroughly examined by the AO by issuing notice u/s 142(1) dated 03/05/2019. Assessee has submitted the PAN, Address and Balance of each Sundry Creditors as on 31/3/2016 and 31/03/2017</i></p>								
vii)	<p><i>Assessee had two bank accounts having average utilisation of Rs.1.50 Crore . He has paid heavy interest. No prudent person would pay heavy interest</i></p>	<p><i>These business decisions are made as per the prevailing situation, knowledge and intelligence of the assessee. Assessee deals in edible oil/ghee commodity which undergoes frequent</i></p>								

	<i>of keeping debit balance in Current Account if he had</i>	<i>fluctuations in prices, influenced by the national and international factors.</i>
<i>viii)</i>	<i>Assessee had shown receipt of 10 New loans of Rs.21.99 Lacs during the year. Out of 10 Loans, 8 loans have not claimed interest.</i>	<i>AO has examined the genuineness of the loans. Confirmations from all lenders were submitted. Most of the loans were from relatives and friends.</i>
<i>ix)</i>	<i>GP rate was 1.40 % as against the 1.63% in preceding year.</i>	<b>Yes, examined.</b> <i>GP /NP rates of AY 2015-16, 2016-17 and 2017-18 were examined by the AO</i>
<i>x)</i>	<i>Drawings of the assessee were only Rs. 268897/-</i>	<i>AO had examined the Books of accounts including capital account, showing the drawings.</i>

1.4 Assessee submitted a detailed reply on 28/02/2022 (Please See PB No. 33-41). However, the Ld. PCIT had mentioned in her order on page No. 4 that :

*"...in view of the above discrepancies, the A. O. failed to examine properly the cash deposited during the demonetisation period and thus, the order passed by the AO appeared to be erroneous and prejudicial to the interest of the revenue"*

*Ld. PCIT reiterates in the para (vii) on the page No. 6 of her order:*

*"(vii) In view of the above mentioned discrepancies the AO failed to examine thoroughly the cash deposited during the demonetisation period during the assessment proceedings"*

*The above conclusion proves that AO had examined the so called discrepancies but in the opinion of Ld. PCIT, such examination was not 'thorough'. In other words, the inquiry was made but the same was not 'adequate' in the opinion of Ld. PCIT. Such views of the Ld. PCIT renders the revisionary proceedings u/s 263 unsustainable.*

*Merely because from a perfectionist point of view, it is felt that some more enquiries and verifications could have been made by the AO, assessment order cannot be declared to be erroneous and prejudicial to the interests of revenue [Delhi Tribunal Special Bench in the case of Salora International Ltd. v. Addl. CIT [2005] 2 SOT 705 (Delhi) (Trib.)]*

1.5 *Whether the AO has applied his mind or not need not necessarily be determined from what has been stated in the assessment order alone. It has to be examined as to whether any inquiry was at all conducted by the AO. There exists a difference between 'lack of enquiry' and 'inadequate enquiry'. If there were any enquiry, even inadequate, that would not give an occasion to exercise jurisdiction under section 263 to Ld. PCIT. In the case of assessee, inquiry of 'cash deposit' was conducted by two different AOs i.e. Mr. M L Pareek, ITO , Ward 1(4), Jaipur conducted in-depth inquiry in 2017 u/s 131 and, thereafter his successor Mr. Trilok Chand, ITO , Ward 1(4), Jaipur conducted the 143(2) proceedings in 2019. **Therefore, here is a case where inquiry was more than adequate but Ld. PCIT still felt the need for further inquiry u/s 263 proceedings. It is a settled law that assessment order, in any case, cannot be revised on the ground that the deeper enquiry ought to have been made or proper exercise was not done while making assessment.***

1.6 *It is humbly submitted that every business has its own requirements of cash and bank balance and how anyone can say that how much is sufficient or surplus. The business expediency and prudence is to be judged by the assessee only. It is further submitted that the Ld. PCIT cannot sit in the armchair of businessman and decide what the assessee has to do to maximize his profits. It is for the assessee to run the show and he is the best judge to manage the affairs of the business. Moreover, there are no guidelines in any business regarding levels of cash and bank balance, loans, inventory, Debtors/Creditors etc. to be maintained by such business. It is to be worked out individually and it keeps on changing as per the business requirement. 1.7 Ld.*

*PCIT had relied upon following case laws to support the invocation of Section 263 (as mentioned on page No. 7 of the order dated 26/03/2022)*

	<b>Citation of the Case</b>	<b>Factual Matrix and whether applicable upon the facts of the appellant</b>
1	<i>Gee Vee Enterprises 99 ITR 375(Delhi HC) 1975</i>	<p><i>Some of directors and shareholders of assessee-company formed partnership firm – ITO granted registration to said firm and made very first assessment on that basis apparently without ascertaining truth of facts on which registration was granted and returns were made – Subsequently, Commissioner acting under section 263 cancelled assessment and directed ITO to make fresh assessment – Petitioner had not filed any appeal against such order of Commissioner nor it had given any explanation as to why he did not file appeal against order under section 263 nor any exceptional circumstances were shown to persuade High Court to depart from normal rule that writ petition complaining against order of Commissioner would not be entertained in absence of such adequate explanation by petitioner – Whether on facts, writ petition was to be dismissed in limine - Held, yes</i></p> <p><i>Case law is not remotely applicable upon the facts of the assessee</i></p>
2.	<i>Jagdish Kumar Gulati 269 ITR 71 (Allahabad)</i>	<i>Whether where Assessing Officer completed assessment proceedings under section 143(3)</i>

	2004		<p><i>and admitted that he could not make proper enquiries as assessment was becoming time-barred, there was valid assumption of jurisdiction under section 263 by Commissioner, and Tribunal, in such a situation, did not commit any error in law in confirming order of Commissioner in setting aside assessment and directing Assessing Officer to make a fresh assessment - Held, yes</i></p> <p><i>Case law is not applicable upon the facts of the assessee as the detailed inquiries were made by AO</i></p>
3.	K RamaswamiChettiar 220 ITR 657 (Madras)	A	<p><b>Assessment years 1974-75 and 1975-76 - Whether Explanation to section 263(1), which was introduced by Finance Act, 1988 with effect from 1-6-1988 would be applicable even prior to 1-6-1988 - Held, yes</b></p> <p><i>Case law is not applicable upon the facts of the assessee</i></p>

1.8 Appellant relies upon the following landmark judgements by Hon'ble Supreme Court which have laid the law/clarified the law of Section 263:

**1.8.1 Malabar Industrial Co. Ltd. v. CIT [243 ITR 83 (SC)] (2000)**

Held at Para No. 10

".. Every loss of revenue as a consequence of an order of assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the

*Income Tax Officer 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 Income Tax Officer is unsustainable in law”*

### **1.8.2 CIT v. Max India Limited [2007] 295 ITR 282 ) (SC)**

*Held at para No. 1:*

*“Suffice it to state that in this particular case when the order of the Commissioner was passed under section 263 of the Income-tax Act two views on the said word 'profits' existed. In our view the matter is squarely covered by the judgment of this Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 as also by the judgment of the Calcutta High Court in the case of Russell Properties (P.) Ltd. v. A. Chowdhury, Addl. CIT [1977] 109 ITR 229”*

### **1.8.3 Greenworld Corporation – [2009] 181 Taxman 111 , 314 ITR 81 (SC)**

*Held at para No. 29:*

*“The scope of provisions of section 263 of the Act is no longer res integra. The power to exercise of suo motu of revision in terms of section 263(1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein, viz., (1) the order is erroneous; (2) by virtue of the order being erroneous prejudice has been caused to the interest of the revenue, exist.”*

### **1.8.4 PCIT v. V. Dhana Reddy & Co. –[2018] 100 taxmann.com 58(SC)**

*SLP of the revenue dismissed against the judgement in the case of by [2018] 100 taxmann.com 357 (Andhra Pradesh & Telangana) PCIT-I v. V. Dhanna Reddy & Co.*

*Hon'ble High Court held at para 5 of the judgement:*

*“ In our opinion, as the AO had opined that renting of the godowns is integral in the business of the assessee and as the decision arrived at by the Tribunal being on appreciation of facts and the reason for invocation of Section 263 being that there is a possibility for estimating the income at a higher rate, without there being a finding of error in the Assessment Order, a resort to Section 263 of the Act cannot be made . In the absence of any other material placed before this Court, in the facts of the present case, question No.1 is required to be answered in favour of the assessee and against the Revenue”*

#### **1.8.5 CIT, Central-III v.Nirav Modi [2017] 77 taxmann.com 78 (SC)**

*SLP of revenue dismissed against the judgement in the case of [2016] 71 taxmann.com 272 (Bombay) **CIT, Central-III v Nirav Modi***

*Hon'ble High Court held at para 6 of the judgement:*

*“....Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no occasion to exercise powers of the revision can arise. Nor can revisional power be exercised for directing a fuller inquiry to find out if the view taken is erroneous when a view has already been taken after inquiry. This power of revision can be exercised only where no inquiry as required under the law is done. It is not open to enquire in cases of inadequate inquiry”*

#### **1.8.6 PCIT-2 v.Shree Gayatri Associates [javascript:void\(0\);](#)[2019] 106 taxmann.com 31 (SC)**

*SLP of revenue dismissed against the judgement in the case of [2019] 106 taxmann.com 30 (Guj.) **PCIT -2 v. Shree Gayatri Associates**[javascript:void\(0\);](#)*

*Hon'ble High Court held at para 2 of the judgement:*

*“PCIT, therefore, exercised power of revision flowing from Section 263 of the Act. Under such revision order, he held and observed that the Assessing*

*Officer had failed to carry out proper inquiries with respect to assessee's on-money receipts. The assessee carried the issue before the Tribunal. The Tribunal, by the impugned judgment, reversed the order of the Commissioner. In such judgment, the Tribunal observed that in the order of assessment, the Assessing Officer had raised multiple queries calling upon the assessee's response. The Tribunal was of the opinion that the Assessing Officer had carried out detailed inquiries. The Commissioner was incorrect in holding that no inquiries were carried out. The revisional powers, therefore, could not have been exercised”*

**1.8.7 PCIT v. Sumatichand Tolamal Gouti–[2019]111taxmann.com 287 (SC)** SLP filed against decision of High Court was dismissed by Hon’ble Supreme Court in the case of PCITv. Sumatichand Tolamal [2019] 111 taxmann.com 286 (Bombay)

*Hon’ble High Court held at para 2 of the judgement:*

*“The Commissioner took the order of the assessment in revision under Section 263 of the Income Tax Act, 1961 ("the Act" for short) on the ground that the Assessing Officer had not carried out any enquiries as to the nature of expenditure being capital or not. The assessee carried the matter in Appeal before the Tribunal. The Tribunal, by the impugned judgment allowed the assessee's Appeal holding that the Assessing Officer had carried out detailed enquiries and taken a view which was a plausible view The Tribunal, therefore held that the Commissioner erroneously exercised the revision powers”*

**1.8.8 PCIT v. Shreeji Prints (P.) Ltd. (2021) 282 Taxman 464 (SC)**

*SLP filed against decision of High Court was dismissed by Hon’ble Supreme Court in the case of PCIT v. Shreeji Prints (P) Ltd. (2021) 130 taxmann.com 293 (Guj.)(HC)*

*Hon’ble High Court held at para 6 of the judgement:*

*“Thus, the Tribunal has considered in detail the aspect of revisional power to be exercised by the PCIT in the facts of the case and has given a finding of facts that the Assessing Officer has made inquiries in detail and after applying mind, accepted the genuineness of loans received by the respondent assessee from the aforesaid two companies and such view of the Assessing Officer is a plausible view, and therefore, the same cannot be said to be erroneous or prejudicial to the interest of the Revenue”*

**1.8.9 CIT, Gujarat-II v. Kwality Steel Suppliers Complex [2017] 84 taxmann.com 234 (SC).**

*Hon’ble Supreme court in Para 9 Held :*

*"Where two views are possible and the Assessing Officer 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 Assessing Officer, in such circumstances the assessment order cannot be treated as an order erroneous or prejudicial to the interest of the Revenue, 'Reason is simple. While exercising the revisionary jurisdiction, the CIT is not sitting in appeal."*

*Hence, the appeal of the assessee deserves to be allowed.*

11.3 The bench notes that the prerequisite exercise of jurisdiction by the learned Principal CIT under section 263 of the Act is that the order of the AO is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The Principal CIT has to be satisfied of twin conditions, namely (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e., if the assessment order is not erroneous but it is prejudicial to the

Revenue, provision of section 263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous as also prejudicial to Revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interest of the Revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. It is pertinent to mention that if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the Pr. CIT does not agree, it cannot be treated as an erroneous order and it is prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. In this process even the AO has no power to review his own order taking the route of proceeding under section 263 of the Act. In this regard, we draw strength from the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1: (2000) 243 ITR 83 (SC). We also draw strength from the decision of the Hon'ble Supreme Court in the case of CIT

vs. Max India Ltd. (2007) 213 CTR (SC) 266: (2007) 295 ITR 282 (SC)

wherein it was held that:

"The phrase 'prejudicial to the interests of the Revenue' in s. 263 of the IT Act, 1961, has to be read in conjunction with the expression 'erroneous' order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. For example, when the AO adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law."

11.4 Thus, based on this decision it is also noteworthy to mention that one of the pre-requisite before invoking S. 263 and the allegation of the Ld. Pr. CIT is that there has been incorrect assumption of fact and law by the Assessing Officer. However, despite our deep and careful consideration of the material on record including the finding recorded in the subjected Assessment order dated 03.07.2019 and in the findings recorded in the order under challenge, we do not find any incorrectness and incompleteness in the appreciation of facts made by the AO. In the light of these observations, we do not agree on this aspect to this extent with Ld. Pr. CIT. However, we now proceed to consider whether the AO has also incorrectly appreciated and assumed the law while making the subjected assessment to be termed, as erroneous and prejudicial to the interest of the

revenue. The facts are not disputed that the assessee has submitted the books of accounts and documents related there upon and has been verified by the AO. The AO has recorded his satisfaction in the assessment order that he has verified the books of account and other records produced before him and the same is verified in the light of the reasons for selection of the case under CASS. This itself shows that the AO has applied his mind on the reasons and has verified the records produced before him by the assessee and the assessee has filed a detailed submission in this proceeding that the AO has verified each and every aspect of the issue on hand and looking the facts of the case on hand the exercise of the power under section 263 via AO is nothing but a change of opinion which is not permitted in the eyes of the law. We have precisely gone through the para of the judgement relied upon by the Id. DR that the AO has power to refer the matter to PCIT where he establishes that there is an error apparent on record where in this case merely the AO has agreed to review the order in his proposal which is not permitted under the law and therefore, the facts relied upon by the Id. DR are factually different and with the fact of this case and thus, based on our detailed observations and relying on the decision of co ordinate bench of Pune ITAT in the case of Alfa Laval Lund AB in ITA no. 1287/PUN/2017 where in the bench in para 5 observed as under:-

*“5. It is trite that a power which vests exclusively in one authority, can’t be invoked or cause to be invoked by another, either directly or indirectly. Section 263 of the Act confers power on the CIT to revise an assessment order, subject to certain conditions. Instantly, we are confronted with a situation in which the revision was initiated on the basis of the AO sending a proposal to the CIT and not on the CIT suo motu calling for and examining the record of the assessment proceedings and thereafter considering the assessment order erroneous and prejudicial to the interests of the revenue. The AO recommending a revision to the CIT has no statutory sanction and is a course of action unknown to the law. If AO, after passing an assessment order, finds something amiss in it to the detriment of the Revenue, he has ample power to either reassess the earlier assessment in terms of section 147 or carry out rectification u/s 154 of the Act. He can’t usurp the power of the CIT and recommend a revision. No overlapping of powers of the authorities under the Act can be permitted. As the revision proceedings in this case have triggered with the AO sending a proposal to the Id. CIT and then the latter passing the order u/s 263 of the Act on the basis of such a proposal, we hold that it became a case of jurisdiction deficit resulting into vitiating the impugned order. Without going into the merits of the case, we quash the impugned order on this legal issue itself.  
6. In the result, the appeal is allowed.”*

11.5 Being consistent with the finding given by a co ordinate bench and the detailed finding given by us we allow the additional ground raised by the assessee. Since we have allowed the appeal of the assessee on technical ground the other grounds need not to be adjudicated upon.

In the result, the appeal of the assessee allowed.

Order pronounced in the open court on 29/08/2022.

Sd/-

( डा० एस. सीतालक्ष्मी )  
(Dr. S. Seethalakshmi)  
न्यायिक सदस्य / Judicial Member  
जयपुर / Jaipur

Sd/-

( राठोड कमलेश जयन्तभाई )  
(Rathod Kamlesh Jayantbhai)  
लेखा सदस्य / Accountant Member

दिनांक / Dated:- 29/08/2022

**\*Ganesh Kumar**

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

1. The Appellant- Om Prakash Agarwal, Jaipur.
2. प्रत्यर्थी / The Respondent- Pr.CIT, Jaipur-1, Jaipur.
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 204/JP/2022)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar