IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-PATNA 'e-COURT', KOLKATA
[Hybrid Court Hearing]

Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member

I.T.A. Nos. 356, 357, 358, 359 & 360/PAT/2024
Assessment Years: 2017-2018to 2021-2022

Gandhipati Construction Private Limited,... Appellant
401B, Capital Tower, Block-'B',
Fraser Road, Patna-800001, Bihar
[PAN:AADCM2976R]

-Vs.-
Principal Commissioner of Income Tax,.....Respondent
Central,
Central Revenue Building,
Birchand Patel Path,
Patna-800001, Bihar

Appearances by:
Shri A.K. Rastogi, Sr. Advocate and Shri Rakesh Kumar, Advocate, appeared on behalf of the assessee

Shri Ashwani Kumar, Sr. D.R., appeared on behalf of the Revenue

Date of concluding the hearing : September 11,2024
Date of pronouncing the order : October 16, 2024

O R D E R

Per Bench:-

These appeals are preferred by the assessee against the orders of ld. Principal Commissioner of Income Tax

(Central), Patna, all dated 30th March, 2022 for assessment years2017-18 to 2021-22.

2. The grounds raised by the assessee in all the assessment years are common. Since facts for all the impugned years are identical and as both the sides have agreed to this fact, we, for the purpose of adjudication, take the facts and grounds of appeal raised for A.Y. 2017-18, which read as under:-

> *(1) For that the Ld. Pr.CIT has erred in initiating proceedings u/s 263 in respect of an issue which stands concluded by order u/s 143(3) dated 31/03/2022.*
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> *(2) For that Ld. Pr.CIT has erred in initiating the proceeding under section 263 of the Income Tax Act without existence of the condition precedent for such initiation.*
>
> *(3) For that the Ld. Pr.CIT has erred in recording certain findings which are contrary to the assessment records.*
>
> *(4) For that the Ld. Pr.CIT has traveled beyond the allegations contained in the notice under section 263 while passing the impugned order and thus has exceeded the jurisdiction by not limiting to the allegation in the show cause notice and thereby violating the principles of equity and natural justice.*
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> *(5) For that the Ld. Pr.CIT has erred in invoking powers under section 263 and passing the order holding the order of assessment u/s 143(3) dated 31/03/2022 to be erroneous in so far as prejudicial without pointing out which of the two phraseology used in section 263 is applicable to the Appellant's case.*
>
> *(6) For that the Ld. Pr.CIT has erred in raising issues on the seized material in the SCN which does not pertained/ belonging to the appellant's company.*

(7) For that the Ld. Pr.CIT has erred in not providing copy of appraisal report which was a relied upon document despite specific request made on 27/03/2024 & 28/03/2024.

(8) For that the Ld. Pr.CIT has failed to appreciate the fact that the issue of raised in the SCN were duly examined by the Assessing Officer in course of assessment proceedings u/s 143(3) concluded vide order dated 31/03/2022.

(9) For that the Ld. Pr.CIT has erred in holding that there is nothing on record in form of correspondence, notice u/s 133(6) or correspondence related to third party.

(10) For that the Ld. Pr.CIT has erred in holding that there has been lack of cooperation and deliberate delay in submitting replies and explanation at every stage viz. search, post search and assessment proceeding.

(11) For that the Ld. Pr.CIT has erred in holding that the new incumbent has insufficient time to conduct any meaning independent enquiry without considering the fact that the predecessor in office has issued questionnaire u/s 142(1) dated 20/01/2022 which was duly complied on 14/02/2022, 21/02/2022 (two replies online), 01/03/2022, 15/03/2022, 24/03/2022 pursuant to notice dated 23/03/2022 for compliance on 25/03/2022.

(12) For that the change of incumbency is not a ground for alleging insufficient time to the new incumbent when there is a process of handing over and taking over of charge among officers with specific note on pending assessments.

(13) For that the Ld. Pr.CIT has erred in holding that the inference drawn or conclusion and finding given in the assessment order has not been based on independent enquiry or corroboration of reply submitted by the appellant.

(14) For that the Ld. Pr.CIT has erred in holding that the assessment proceedings have been concluded without any independent enquiry though the assessment record clearly proves that A.O. has made independent enquiry and thereafter, has undertaken remedial action by initiating proceeding u/s 153C.

(15) For that the Ld. Pr.CIT has erred in holding that point wise reply to SCN was perfunctory.

(16) For that the Ld. Pr.CIT has erred in holding that the appellant has conceded that the A.O. did not have time and has not made necessary enquiry or verificationbefore passing the assessment order and thereby rendering the order to be erroneous and prejudicial to the interest of revenue.

(17) For that the Ld. Pr.CIT has erred in holding that the case of the appellant is covered by Clause (a) of Explanation-2 to Section 263.

(18) For that the Ld. Pr.CIT has erred in holding that the assessee has failed to file complete details along with supporting evidence and explanation in response to notice u/s 142(1).

(19) For that the Ld. Pr.CIT has erred in passing the assessment order without raising queries or making enquiries and verification vis-a-vis the seized material.

(20) For that the Ld. Pr.CIT has erred in holding that regular books of accounts were neither found during the course of search action nor properly produced by the assessee in course of post search enquiry.

(21) For that the Ld. Pr.CIT has failed to appreciate that the books of accounts maintained on Tally was found and seized in course of search and are still lying with the department and thus, Explanation-2(a) is not applicable.

(22) For that the Ld. Pr.CIT has erred in relying on some of the judicial precedents without confronting the appellant with the same.

(23) For that the Ld. Pr.CIT has erred in relying on judicial precedents which are distinguishable on facts.

(24) For that the Ld. Pr.CIT has erred in distinguishing the Judgments relied on by the appellant on flimsy ground.

(25) For that the Ld. Pr.CIT has erred in not following the Judgments of the jurisdictional High Court and the Apex Court relied upon by the appellant, an action which amounts to overreaching the binding judicial precedent under Article 227 and 141 of the Constitution of India.

(26) For that the Ld. Pr.CIT has erred in cancelling and setting aside the assessment order dated 31/03/2022.

(27) For that the Ld. Pr.CIT has erred in issuing the following directions to the A.O. while setting aside the assessment order dated 31/03/2022:
(i)Conduct proper enquiries including third party enquiries and investigations into the claim of the assessee company;

(ii) Closely examine the seized material;

(iii) Consider the provisions of Section 142(2A).

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(28) For that the Ld. Pr.CIT has failed to appreciate that re-examination of the issue already concluded vide order u/s 143(3) dated 31/03/2022 would amount to review of the said order which is not permissible in the eyes of law.

(29) For that whole order is bad in fact and the law of the case and is fit to be quashed.

(30) For that other grounds, if any, shall be urged at the time of hearing of the appeal.

3. Brief facts of the case are that the assessee is a Private Limited Company engaged in the business of construction. The assessee is a part of Janardan Prasad Group of cases, which was subjected to search & seizure operation under section 132(1) of the Act conducted on 29th October, 2020. Various documents were seized. Original return of income for A.Y. 2017-18 already stood filed by the assessee on 31.10.2017 declaring income of Rs.2,27,98,640/-. Post-search notice under section 153A of the Act was issued and in compliance, the assessee furnished the return on 24.12.2021 declaring income of

Rs.70,00,000/-. Thereafter serving the assessee with valid notices under sections 143(2) and 142(1) of the Act along with the detailed questionnaire to which the assessee made due compliance. The ld. Assessing Officer has also referred to the appraisal report having some information and seized material placed at page GCPL-21 about unaccounted cash payments, as were not recorded in the regular books. The ld. Assessing Officer also observed that the assessee has claimed deduction under section 80IA of the Act. He declined the claim made by the assessee and concluded the assessment assessing income at Rs.2,97,98,640/-.

4. Thereafter ld. PCIT on examination of the assessment records deemed fit to issue show-cause notice under section 263 of the Act and the same issued on 26.03.2024 (copy placed at pages 97 to 120 of the paper book). Reply was given by the assessee stating that all the details mentioned in the show-cause notice were forming part of the notice issued under section 142(1) of the Act and the same have been duly examined by the ld. Assessing Officer. Ld. PCIT after considering the submissions filed by the assessee on 26.03.2024 and 28.03.2024 noted that they were repetitive in terms of submission of fact and the documents annexed to these replies were same/similar to the one submitted during the course of assessment proceedings. He observed that

there was no explanation or new evidence available with the assessee for the non-cooperation during the search, post-search or assessment proceedings or for the deliberate delay in submission of replies. Ld. PCIT thereafter observed that nothing on record is available, which could show that there was any further correspondence or notice issued under section 133(6) of the Act related to third party verification/ confirmation and that whether any independent inquiry has been conducted by the ld. Assessing Officer.

5. Ld. PCIT also referred to Explanation 2 to section 263 of the Act observing as under:-

> *"12. In the instant case, it is borne out of facts that not only did the assessee fail to file complete details along with supporting evidence and explanation before the Assessing Officer in respect of issues raised in notice[s] u/s 142[1] of the Income Tax Act, 1961, in time, the Assessing Officer, too, has also failed to do the needful and has passed the assessment order without raising such queries or making such inquiries and verification which should have been done in the light of seized material with him and transactions found recorded in the incriminating documents found during the course of search & seizure action dated 29.10.2020 in the case of assessee company. This was all the more necessary in the light of the fact that regular books of accounts were neither found during the course of search action nor properly produced by the assessee company during post-search enquiries. Explanation-2enjoins upon the Assessing Officer to conduct necessary enquiries and verifications before passing an assessment order and the failure to do so, would lead to invocation of the provisions of Section 263 of the Income Tax Act, 1961. The failure of the Assessing Officer to do so has rendered the assessment order passed*

by him deemed to be erroneous in so far as it is prejudicial to the interests of the revenue. Thus, on factual matrix itself, the case of the assessee in these proceedings fails.

13. Even on legal footing, the order passed by the Assessing Officer lacks application of mind, lacking as it is in the conduct of relevant enquiries or verification, which should have been done on the facts and circumstances of the case, rendering the order becoming erroneous in so far as it is prejudicial to the interest of the revenue in terms of Clause (a) of Explanation 2 u/s 263 of the Income Tax Act, 1961.

The assessee has placed reliance on several case laws but the facts and merits of almost all case laws referred to and relied upon, by the assessee are distinguishable. The cases relied upon and the ratio extract of the judgement are discussed in detail".

6. Thereafter ld. PCIT has relied on plethora of judgments and has even discussed the judgment referred to by the ld. Authorized Representative of the assessee distinguishing them on facts observing that the assessee failed to appreciate that the facts of the case relied upon, are different from the case under consideration in the present proceedings. In the case relied upon by the assessee, the Assessing Officer had made specific enquiry on the issue considered during assessment proceedings and nature of expenditure was explained by the assessee to him but in the instant case, the Assessing Officer failed to conduct any enquiry or verification.Finally, after making the detailed discussion as discussed above, ld. PCIT concluded the revisionary proceedings observing that there is no application of mind on the part of the ld. Assessing Officer, inasmuch

as, the necessary verification on facts/inquiries, which should have been made, have not been made, making the order erroneous and prejudicial to the interest of revenue within the meaning of section 263 read with clause (a) of Explanation 2, which provides that the order is passed without making inquiries or verification, which should have been made. Accordingly, assessment orders passed under section 153A read with section 143(3) of the Act for A.Ys. 2017-18 to 2020-21 were set aside with a direction to pass fresh order after conducting proper inquiries including third party inquiries and investigation into the claim of the assessee-company, examination of seized material available with him and if ld. Assessing Officer considers, then he may invoke the provision of section 142(2A) of the Act i.e. special audit, depending upon his opinion and satisfaction considering the facts of the case as well as the material on record. Aggrieved, the assessee is now in appeal before this Tribunal commonly challenging the revisionary order passed under section 263 of the Act by the ld. PCIT for AY 2017-18 to 2021-22.

7. Ld. Counsel for the assessee firstly made reference to the paper book containing 623 pages, which contains the notice under section 142(1) of the Act issued by the ld. Assessing Officer for the impugned assessment years from 2017-18 to 2021-22 under appeals, various replies

given by the assessee to such notices on multiple occasions, copies of assessment orders passed for A.Ys. 2017-18 to 2021-22 in case of other assesses of the group, copies of relevant page of audit report and bifurcation of non-operating income in respect of sale of scrap, copies of vouchers of cheque payments, copies of e-portal on which documents uploaded from time to time during the course of assessment proceedings. Regarding applicability and scope of Explanation (2) u/s.263 of the Act, ld. Counsel for the assessee referred and relied on the decision of the Coordinate Bench, Mumbai in the case of *JRD Tata & Trust -vs.- DCIT (2021) 085 ITR (Trib.) 0431* and also the judgment in the case of *CIT -vs.- Mukul Kumar (2009) 4 PLJR 417.* Reliance also placed on the decision of Coordinate Bench in the case of *Gyan Infrabuild Pvt. Limited [ITA Nos. 175 to 178/PAT/2023 dated 13.05.2024*], where similar type of issue has also been adjudicated by this Tribunal deciding in favour of the assessee.

8. Ld. Counsel for the assessee further submitted that the seized material was available with the ld. Assessing Officer at the time of carrying out the assessment proceedings and questionnaire has been issued referring to each of the seized material to which detailed reply has been filed by the assessee. Since major transactions appearing in the seized documents were already recorded

in the books of account, ld. Assessing Officer after examination of the said seized material, vis-à-vis the books of account maintained by the assessee did not make any addition. However, while computing the assessment, ld. Assessing Officer has made other additions for the unrecorded cash payments and disallowance and deduction under section 80IA of the Act. Therefore, it cannot be said that the assessment has been completed without making proper inquiries or no inquiries. He also submitted that the draft assessment orders were sent to the ld. JCIT for granting approval under section 153D of the Act and the same was granted on 31.03.2022, which itself proves that the detailed inquiry conducted by the ld. Assessing Officer has culminated into an assessment order and that the ld. JCIT, who also keeps a continuous track of the search and seizure assessment cases and after examining the assessment record and the draft order had accorded approval u/s. 153(1) of the Act pursuant to which final assessment order has been passed. He further submitted that ld. PCIT has not revoked the order under section 153D of the Act failing which the revisionary proceeding carried out by the ld. PCIT deserves to be quashed.

9. On the other hand, ld. D.R. apart from supporting the detailed order of ld. PCIT also filed written submission running into 42 pages in support of his

contention that proper inquiries were not conducted by the ld. Assessing Officer and he has not acted as an investigator but has merely accepted the submission made by the assessee without making any further inquiry to verify the veracity of the submissions filed before him. Ld. D.R. further submitted that in the instant case, the Commissioner had reasons to hold that creditworthiness of the alleged lenders was not enquired into. Mere examination of the bank pass book, profit and loss account and balance sheet of the creditors is not enough. When the requisite enquiry was not made, the order is bound to be erroneous and prejudicial to the interest of the revenue. The Tribunal proceeded on the theory that it was not a case of no enquiry; that no doubt is true, but that is not enough. If the relevant enquiry was not made, it may inappropriate cases amount to no enquiry and may also be a case of non-application of mind. The power u/s. 263 can be exercised where the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue. When an order is erroneous, then the order is also deficient and in order to remedy the situation, power under section 263 has been given. Therefore, the view that the power could not have been exercised to allow the Assessing Officer to make up the deficiency is altogether an incorrect impression of the law.

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

10. Reliance placed on following decisions:-

(i) Rajmandir Estates Pvt. Limited -vs.- P_CIT-3, Kolkata [2017] 245 Taxmann 127 (SC);

(ii) Anuj Jayendra Shah -vs.- Pr. CIT [2016] 67 Taxmann.com 38 (Mumbai);

(iii) PCIT, Ludhiana -vs.- venus Woollen Mills [2019] 412 ITR 188 [P&H];

(iv) CIT -vs.- Ballarpur Industries [2017] 85 Taxmann.com 10 (Bombay);

(v) Addl. CIT -vs.- Mukur Corpn. [1978] 111 ITR 312 (Guj);

(vi) Addl. CIT -vs.- Krishna Narayan Nail [1984] 150 ITR 513;

(vii) CIT -vs.- Precision Finance (P) Ltd. [1994] 208 ITR 465;

(viii) Duggal & Co. -vs.- CIT [1996] 220 ITR 456;

(ix) CIT -vs.- Anand Kumar Jain 370 ITR 140 (Allahabad);

(x) Malabar Ind. Co. Ltd. 243 ITR 83 (SC);

(xi) Tara Devi Agarwal -vs.- CIT 88 ITR 323 (SC);

(xii) CIT -vs.- South India Shipping Corporation 233 ITR 546 (Mad.)

11. Further reference was also made to various documents furnished in the paper book running into 426 pages and the following index highlights the documents furnished by the ld. D.R.

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12. When paper book was received by the ld. Counsel for the assessee, in rebuttal a written submission has been filed by the assessee giving comments, wherein each and every point referred in the written submission by the ld. D.R. has been replied and to summarize it was stated that all the points stated by the ld. D.R. in the written

submission do not have any merit as ld. Assessing Officer has already examined the points in detail.

13. We have heard the rival contentions and gone through the material placed before us. In the instant appeal, assessee's grievance is that Ld. Pr. CIT erred in carrying out revisionary proceedings by assuming jurisdiction u/s. 263 of the Act and that the Ld. Pr. CIT erred in holding that the assessment orders framed u/s. 153A r.w.s. 143(3) of the Act is erroneous and prejudicial to the interest of revenue and that the impugned order deserves to be quashed as the approval granted u/s. 153D of the Act has not been revised. As Section 263 of the Act has a direct bearing on the controversy, therefore, it is pertinent to take note of this section. It reads as under:-

> *"263(1) The 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 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) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-*
>
> *(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;*

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(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;

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

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

14. A bare perusal of sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner/PCIT have four compartments. In the first place, the learned Commissioner/PCIT may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner/PCIT was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an

analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the ld. Pr. CIT taken u/s 263.

15. Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC)has laid down following ratio with regard to provisions of section 263 of the Act:

> *"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. 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. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC)".[Emphasis Supplied]*

16. In the light of the provisions of section 263 of the Act and a settled position of law, powers u/s 263 of the Act can be exercised by the Pr. Commissioner/Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and also prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. 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 interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry.

17. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263:

> *"(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.*

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was 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 the requirement of 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 interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard."

18. Apart from above stated broader principles, one more principle needs to be added in view of the judgment of Hon'ble Delhi High Court in the case of ITO vs. D.G. Housing Projects Ltd. [2012] 343 ITR 329 (Delhi) that the ld. CIT has to examine and verify the issue himself and give a finding on merits and form an opinion on merits that the order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Relevant extract is reproduced below:

> *"In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."*

19. In the light of the above details of Hon'ble Apex Court and Hon'ble High Courts, before us, Ld. Counsel for the assessee also mentioned about the recent decision of this Tribunal in the case of *M/s. Gyan Infrabuild Pvt. Ltd. [2024] 162 taxmann.com 664* wherein also verbatim similar issue came up for consideration and Ld. CIT(A) invoked section 263 of the Act by setting aside the assessment orders framed u/s. 153A r.w.s. 143(3) of the Act without revoking the order of granting approval u/s. 153D of the Act. We find that the ratio laid down by this Tribunal in the case of *Gyan Infrabuild Pvt. Ltd. (supra)* has subsequently been followed in

another decision of this Tribunal in the case of *Nalanda Engicon Pvt. Ltd. Vs. DCIT, ITA No. 322 to 326/Pat/2024 dated 02.09.2024* wherein this Tribunal on observing that the AO having conducted sufficient and detailed enquiry about each of the seized documents and proper replies were furnished by the assessee to the satisfaction of the AO and Ld. AO took one of the plausible view provided under the Act, and held that Ld. Pr. CIT erred in assuming jurisdiction for carrying out the revisionary proceeding u/s. 263 of the Act and the same were quashed observing as follows :

> "30. Now, on perusal of all the above details for each of the assessment years it remains an undisputed fact that each of the seized material has been examined by the Ld. AO and the assessee has been asked to reply about each of the transaction appearing in the seized material and the replies given by the assessee are not mere formality but they are exhaustive replies giving explanation about each transaction. The audited financial statement for each of the impugned years along with the books of account were produced before the ld. AO and he after verifying these details has examined the replies filed by the assessee and has completed the assessment proceedings. It has consistently been held that each and every details called for and examined by the Ld. AO cannot form part of the assessment order and only those issues on which ld. AO intends to make the addition appears in the assessment order. The order sheet available in the records gives an insight of the assessment proceeding carried out by the Ld. AO. In the instant case, notice issued u/s. 142(1) of the Act are running into 100s of pages for almost each year and the replies are also running 100s of pages.
>
> 31. Hon'ble Apex Court in the case of *Malabar Industrial Company Ltd. (supra)* has held that every loss of revenue as a consequent of an order of the AO cannot be treated as prejudicial to the interest of revenue unless the AO do not adopt one of the courses permissible in law. In the given set of appeals, we find that the seized materials have been examined by the AO in reference to the detailed replies filed by the assessee and after he being convinced that the transactions indicated in the seized material are duly accounted for in the regular books of account, there was no occasion to make the addition because the transactions were duly explained by the assessee. It is quite

obvious that if the transactions appearing in the seized material are accounted for in the regular books and the profits for the year have been duly offered to tax, it is not open for the AO to make the additions in the hands of the assessee. We find that Ld. AO after carrying out adequate enquiry has completed the assessments which are neither prejudicial to the interest of the revenue nor are they erroneous in nature. The correctness of the assessment order is further supported by the approval granted by ld. JCIT u/s. 153D of the Act which still remains intact as Ld. PCIT has not revised the said order.

32. Now, once adequate enquiry has been conducted and a permissible view has been taken by the AO no room is left for the Ld. Pr. CIT to give direction to re-conduct the enquiry in the manner he deems fit. The revisionary powers cannot be extended to direct the AO to again enquire/examine the issue which have already been examined in detailed and a plausible view has been taken. It is for the Ld. Pr. CIT to carry out independent enquiry to bring certain material on record to prove that Ld. AO has not examined those issues and that the order is erroneous and prejudicial to the interest of revenue. Perusal of the impugned order clearly indicates that no such independent enquiry has been conducted and just for the sake of brief reply filed by the assessee to show cause notice, Ld. Pr. CIT had come to the conclusion of setting aside the assessment order.

33. Though the assessee has referred and relied upon plethora of decisions, we would like to take note of two decisions which are squarely applicable on the facts of the instant case. The first one is the judgment of Hon'ble jurisdictional High Court in the case of CIT Vs. J. P. Goel (2001) 161 Taxmann.com 400 and the brief synopsis of the said judgment and the ratio laid down therein is as under:

"Commissioner noticing order passed by the assessing officer prejudicial to the interests of Revenue since the assessing officer had not fully verified the facts – Commissioner noticing that there being a search at the premises of the assessee certain amount of cash, gold and jewellery seized not enquired by the assessing officer by investigating the fact- Assessee pleading that assessing officer had made proper enquiries and passed the order thereafter only – Held, this being a question of fact and the material being before the assessing officer, the assessing officer made proper enquiries- Order not prejudicial to the interests of the Revenue- CIT not justified in cancelling the order.

34. We also notice that in the recent decision of this tribunal in the case of *Gyan Infrabuild (P) Ltd.*(supra) the facts are almost identical because in the case of *Gyan Infrabuild (P) Ltd.*(supra) also search was carried out and Ld. AO completed the assessment proceeding after making detailed enquiry and also got the approval u/s. 153D of the Act and the assessment order u/s. 153A r.w.s. 143(3) of the Act was the subject matter of the revisionary proceeding and this Tribunal quashed

the revisionary orders firstly on the ground that Ld. Pr. CIT before revising the assessment order should have also revised the approval u/s. 153D of the Act and secondly that when detailed and adequate enquiry has been conducted by the AO in the assessment proceedings for the issues referred in the show cause notice u/s. 263 of the Act and the Ld. AO has adopted one of the courses permissible under the law, ld. Pr. CIT cannot assume jurisdiction u/s. 263 of the Act. Relevant part of the decision of this Tribunal in the case of *Gyan Infrabuild (P) Ltd.*(supra) reads as under:

"11. We have heard rival contentions and perused the material placed before us. Search and seizure action u/s 132 and Survey u/s 153A of the Act on 23/02/2018 was carried out at the business premises of Subhash Prasad Yadav Group which included the assessee. Various documents were seized and statements of various persons who were attached with the assessee company were also recorded and this mainly included the statement of Shri Satyendra Kumar Sharma, who is working as Director of the assessee company, and other employees, mainly, Mrs. Muskan Pandey, Shri Hulas Pandey, Shri Atul Kumar Agarwal etc,. Subsequent to search, notice u/s 153A of the Act were issued to the assessee company to which necessary compliances were made and return was filed. However, the returned income as disclosed in the original return filed on 30/09/2015 was again shown as income in the return filed in compliance to notice u/ s 153A of the Act furnished on 02/12/2019. Thereafter the assessee was served with the statutory notices u/s 143(2) & 142(1) of the Act and various questions were raised in the notice u/s 142(1) of the Act as well as during the course of assessment proceedings. In the assessment order framed u/s 153A of the Act, the ld. Assessing Officer has mentioned that the details were filed along with the submissions as well as copies of returns, computation of 10 I.T.A. No. 175 to 178/Pat/2023 Assessment Year: 2015-16 to 2018-19 Gyan Infrabuild Private Limited income and point-wise reply. Further the assessment was completed after taking necessary approval u/s 153D of the Act from JCIT, Central, Range-1, Patna. Finally, the assessment for all the impugned assessment years for Assessment Year 2015-16 to 2018-19 were completed accepting the returned income filed by the assessee. Now, all the four assessment years evenly dt. 27/12/2019 are the subject matter of the revisionary proceedings invoked by the ld. Pr. CIT u/s 263 of the Act, wherein after referring to the seized material and other discussions, all these four assessments have been held to be erroneous and prejudicial to the interest of the revenue.

12. The assumption of jurisdiction u/s 263 of the Act holding the assessment order as erroneous and prejudicial to the interest of the revenue is in challenge before us. As Section 263 of the Act has a direct bearing on the controversy, therefore, it is pertinent to take note of this section. It reads as under:-

"263(1) The 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 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) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(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;

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

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

13. A bare perusal of sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an

order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the ld. Pr. CIT taken u/s 263.

14. Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC)has laid down following ratio with regard to provisions of section 263 of the Act:

"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. 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. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC)".[Emphasis Supplied]

15. In the light of the provisions of section 263 of the Act and a settled position of law, powers u/s 263 of the Act can be exercised by the Pr. Commissioner/Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and also prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. 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 interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to

exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry.

16. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263:

"(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was 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 the requirement of 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 interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard."

17. Apart from above stated broader principles, one more principle needs to be added in view of the judgment of Hon'ble Delhi High Court in the case of ITO vs. D.G. Housing Projects Ltd. [2012] 343 ITR 329 (Delhi) that the ld. CIT has to examine and verify the issue himself and give a finding on merits and form an opinion on merits that the order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Relevant extract is reproduced below:

"In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

18. In the light of the above, we would like to examine the fact of the instant case. Before us, the first contention made by the ld. Counsel for the assessee is that the impugned revisionary proceedings are not valid in the eyes of law because only the order framed u/s 153A of the Act has been held to be erroneous and prejudicial to the interest of the revenue but the same cannot be held to be justified until and unless the approval given u/s 153D of the Act has also been held to be erroneous and prejudicial to the interest of the revenue. Now, under Chapter 14 of the procedure for assessment, so far as the assessments relating to search cases are concerned, separate procedures have been laid down. Starting from Section 153A for assessments in the case of search or acquisition, Section 153B for time limit for completion of assessment u/s 153A, Section 153C for assessment of income of any other person and Section 153D i.e., prior approval necessary for assessment in case of search or acquisition. So far as Section 153D of the Act is concerned, the same reads as follows:-

*"**153D.** No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of[sub-section (1) of] section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner:]"*

18.1. Now, on perusal of the above Section which states that a prior approval is necessary for assessment in case of assessment search or acquisition, it is specifically mentioned that no order of assessment or re-assessment shall be passed by an Assessing Officer below the rank of JCIT except with the prior approval of the Joint Commissioner. Before us, the ld. Counsel for the assessee stated that for the search assessment cases whatever seized material are found belonging/pertaining to the assessee, a copy of complete set is also kept with the authority who has to provide the approval of the assessment or re-assessment. He also stated that during the course of assessment proceedings, the ld. Assessing Officer has to update about the proceedings to his senior who has to finally grant the approval u/s 153D of the Act. Even after preparation of the draft assessment order, the same is sent to the ld.Joint Commissioner and he/she after thorough examination of the seized materialvis-à-vis the draft assessment order prepared by the ld. Assessing Officer and after being satisfied with the correctness of such draft assessment order or in case required can suggest certain changes in the said assessment order finally grants approval. Only after receiving such approval u/s 153D of the Act, the ld. Assessing Officer passes the final assessment order u/s 153A r.w.s. 143(3) of the Act. In short, the assessment order u/s 153A of the Act is incomplete without the approval u/s 153D of the Act. Now, whether action of the ld. Pr. CIT of assuming jurisdiction u/s 263 of the Act holding only the order u/s 153A of the Act is erroneous so far as prejudicial to the interest of the revenue and not the order u/s 153D of the Act, as erroneous insofar as prejudicial to the interest of the revenue, can be held to be justified.

19. Before us, the ld. Counsel for the assessee, has referred to plethora of decisions whether the revisionary order u/s. 263 of the Act has been quashed, where only the order u/s 153A of the Act is revised without revising order u/s 153D of the Act.

20. Reliance is placed on the following judicial pronouncements:

i. Smt. Abha Bansal v. Principal Commissioner of Income-tax [2021] 132 taxmann.com 231 (Delhi - Trib.) -

*"9.4 It is evident from the plain reading of the *— aforesaid Explanation that an Order passed on or before or after 1 st Day of June, 1988 by the A.O. shall include (/) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A; (if) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner*

or Principal Director General or Director General or Principal Commissioner or ' Commissioner authorised by the Board in this behalf under section 120. It may be noted that Order of assessment passed with the approval of JOT under section 153D of the I.T. Act, 1961 could not be revised under section 263 of the I.T. Act, 1961. The Ld. D.R. has, however, relied upon the Order of ITAT, Panaji Bench, but, has not explained whether the Judgment of Hon'ble Allahabad High Court in the case of Dr. Ashok Kumar (supra) or different Benches of the Tribunal have been considered in this case by the Panaji Bench. It is not decided in this case that assessment order cannot be revised without revising the approval under section 153D of the I.T. Act and Explanation 1 to section 263 of the I.T. Act has also not been considered. Therefore, this decision relied upon by the Ld. D.R. would not apply to this case. Further the Judgment in the case of Param Transport (P.) Ltd. (supra), of Hon'ble Chhattisgarh High Court (supra) is not with regard to approval obtained under section 153D of the I.T. Act because in this case it was held that revisional power under section 263 of the I.T. Act is applicable to assessments under search and seizure. However, it is not explained by the Ld. D.R. whether in this case the approval under section 153D have been revised by the Learned PCIT. It may also be noted that it is well settled Law that if two views are possible, then the view which is in favour of the assessee should be made applicable. We rely upon Judgment of Hon'ble Supreme Court in the case of CITv. Vegetable Products Ltd. R9731 88 ITR 192. It may also be noted here that the Hon'ble Allahabad High Court is one of the jurisdictional High Court of Delhi Bench, therefore, preference shall have to be given to the Judgment of the Hon'ble Allahabad High Court as reproduced above. In the totality of the facts and circumstances of the case and following the decisions referred to above, we are of the view that the Learned PCIT was not having jurisdiction to proceed under section 263 of the I.T. Act, 1961 in the matter in issue and as such the Order passed by the Learned PCIT is nullity and void ab initio. We therefore, decide this issue in favour of the assessee."

ii) Surendra L. Heera Nandani v. Pr.CIT [IT Appeal No.3226/Mum./2017 etc., date. 14-2-2018]

"28. Since in the instant case also the Assessing Officer has passed the order after obtaining necessary approval from Addl. CIT u/s.l53D of the I.T. Act, therefore respectfully following the above-mentioned decisions of the Coordinate Benches o the Tribunal we are of the considered opinion that the CIT has no power to revise the order u/s.263 of the I.T. Act in the instant case since the same has been passed with the approval of the Addl. CIT U/S.153D of the I.T. Act. We respectfully following the decision of ACIT Vs. Dr. Ashok Kumar, ITA 192 of 2000. We find that in the instant case the original approval 25 ITA No3226-3232.M.17 A.Y.2008 09 to 2014-15 was granted by Addl. CIT and this assessment order is cannot b< revise without approval of Add. CIT."

iii) Dhariwal Industries Ltd. v. CIT [IT Appeal Nos. 1108 to 1113 (Pune) of 2014 dated 23-12-2016]

"9. Referring to the decision of the Hyderabad Bench of the Tribunal in the case of M/s. Trinity Infra Ventures Ltd. Vs. DCIT vide ITA Nos. 584 to 589/H/2015 order

dated 04-12- 2015 for A.Yrs. 2005- 06 to 2010-11 he submitted that the Tribunal in the said decision, following various decisions including the decision of Hon'ble Allahabad High Court in the case of CIT Vs. Dr. Ashok Kumar vide Income Tax Appeal No. 192/2000 order dated 06-08-2012, has held that assessment order approved by the Addl.CIT U/S.153D cannot be subjected to revise u/s.263 of the I.T. Act."

12. We have considered the rival arguments made by both the sides, perused the orders of the AO and the Ld.CIT and the paper book filed on behalf of the assessee.

14. We find merit in the above submission of the Ld. Counsel for the assessee. We find the Lucknow Bench of the Tribunal in the case of MehtabAlam Vs. ACIT vide ITA Nos.288 to 294/Lkw/2014 order dated 18-11-2014 while deciding an identical issue has observed as under.

14.1 We find the Hyderabad Bench of the Tribunal in the case of CH. Krishna Murthy Vs. ACIT vide ITA No.766/Hyd/2012 order dated 13-02-2015 following the decision of the Lucknow Bench of the Tribunal in the case of MehtabAlam (Supra) held that CIT is not justified in assuming jurisdiction u/s.263 when the order has been passed in terms of section 153D of the Act.

14.2 We find the Hyderabad Bench of the Tribunal in the case of M/s. Trinity Infra Ventures Ltd. (Supra) had an occasion to decide an identical issue and it held that the assessment order approved by the Addl. CIT U/S.153D cannot be subject to revision u/s.263 of the I.T. Act."

iv. Trinity Infraventures Ltd. v. Dy. CIT [IT Appeal Nos. 584-589 (Hyd.) of 2015, dated 4-12-2015]

"5.4. The Ld. Counsel for the assessee has further submitted that the assessment under section 143(3) read with section 153C was passed after getting approval of Addl. CIT under section 153D of the I.T. Act and therefore such an assessment cannot be revised without revising the directions of the Addl. CIT under section 153D of the I.T. Act. The Ld. Counsel for the assessee, has relied upon the decisions of this Tribunal in the case of Ch. Krishna Murthy vs. ACIT, C.C. 3, Hyderabad in ITA No. 766/Hyd/2012 dated 13.02.2015 and also the decision of Lucknow Bench of ITAT in the case of MehtabAlam 288/Luck/2014 dated 18.11.2014 in support of this contention. He has also placed reliance upon the decision of Hon'ble Allahabad High Court in the case of CIT vs. Dr. Ashok Kumar in I.T. Appeal No. 192 of 2000 wherein it has been held that the assessment order approved by the Addl. CIT under section 153D, cannot be subjected to revision under section 263 of the I.T. Act. In view of the above decision also, we hold that the revision order under section 263 of the I.T. Act is not sustainable.

21. From going through the above decisions, wherein it has been consistently held that without revising the approval u/s 153D of the Act, the ld. Pr. CIT cannot revise the assessment order u/s 153A of the Act. Even in case of Surendra L. Heera

Nandani (supra) it was held that ld. Pr. CIT has no power to revise the order u/s 263 of the Act since the same has been passed with the approval of the Addl. CIT u/s 153D of the Act.

22. Therefore, in the light of the above decisions, so far as the first limb of legal argument of the ld. Sr. Counsel for the assessee is concerned, we find merit that ld. Pr. CIT erred in assuming jurisdiction u/s 263 of the Act by revising order u/s 153A r.w.s. 143(3) of the Act without considering that prior approval already accorded to ld. Assessing Officer u/s 153D of the Act and secondly when orders u/s 153A of the Act has been passed after receiving approval u/s 153D of the Act, Ld. PCIT erred in revising order u/s 153A of the Act without first revising the order u/s 153D of the Act as which means that no defect has been observed by ld. Pr. CIT in approval u/s 153D of the Act. Thus the action of the ld. Pr. CIT assuming jurisdiction u/s 263 of the Act cannot be held to be tenable, the impugned proceedings deserves to be quashed on this grounds itself.

22.1. As regards the second limb of argument is concerned that detailed enquiry has been conducted and one of the view legally permissible has been taken, we, in view of the judgment in the case of Malabar Industrial Co. Ltd. vs. CIT (supra) and of Income-tax Officer v. D.G. Housing Projects Ltd. (supra) note that the assessments in question before us are search assessments. There is a separate procedure for carrying out the assessment for search cases. Though we have referred to the procedure in the preceding paragraphs, we will like to observe that prior to issuing of notice u/s 153A of the Act, complete seized material are available with the ld. Assessing Officer and a copy is also made available to the Senior Officer who has to grant the approval u/s 153D of the Act. Under the search assessment, the assessee has to be confronted with all the seized material belonging to the assessee. In the instant case there were certain documents which were owned by Shri Satyendra Kumar Sharma, in the statement recorded on oath where, he has categorically stated that these documents belong to him and were maintained by him and on the basis of such documents, additions have been made in the hands of Shri Satyendra Kumar Sharma also. Now, reference has been made to the very same set of documents which have been owned by Shri Satyendra Kumar Sharma and the ld. Pr. CIT has observed that the ld. Assessing Officer ought to have conducted enquiry about these documents. We fail to find any merit in such action of the ld. Pr. CIT because the seized materials available with the ld. Assessing Officer which belonged to the assessee company have been examined, queries have been raised by issuing questionnaire. Detailed reply has been received along with necessary documents and after recording all these facts in the assessment order, ld. Assessing Officer has completed the assessment. So, it is not a case of no enquiry. However, it may be a case that intense enquiry as referred by the ld. Pr. CIT in the impugned order might not have been conducted but that cannot give power to the ld. Pr. CIT to revise the assessment order because the ld. Assessing Officer has conducted reasonable enquiry and taken one of the legally permissible view under the Act.

23. Further, the ld. D/R failed to rebut this fact that the ld. Assessing Officer is not the only person who is involved in completing the assessment and along with

him, the ld. JCIT is also part of the assessment proceedings because once the draft assessment order is prepared by the ld. Assessing Officer, he/she has to approach the Joint Commissioner for prior approval, who again examines the seized material with the draft assessment order framed by the ld. Assessing Officer and after being satisfied, either suggests necessary changes or he accords the approval after which, the ld. Assessing Officer passes the final assessment order.

24. We also observe that learned PCIT u/s 263 of the Act before initiating the revisionary proceedings was required to carry out necessary enquiry in support of his assumption that the documents belongs to the assessee or that the ld. Assessing Officer has not enquired. The Hon'ble High Court of Delhi in the case of Income-tax Officer v. D.G. Housing Projects Ltd. reported in [2012] 343 ITR 329 has held that "in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous."Further the Hon'ble Apex Court in its judgment in the case of CIT vs. Electro House reported in 82 ITR 824, had held that "the CIT before reaching his decision and not before commencing his enquiry is to give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary". We note that in the instant case the learned PCIT before reaching his decision that the documents found, belongs to the assessee had made no enquiry whatsoever. Thus learned PCIT failed to appreciate that before he could have considered the assessment order to be erroneous and prejudicial to the interest of the revenue, he ought to have brought material on record to show that the documents belongs to the assessee and not by merely referring to those very documents which already stood examined by the ld. Assessing Officer and considering the statement of Shri Satyendra Kumar Sharma, for coming to the conclusion that the documents cannot be said to be belonging to the assessee.

25. We observe that in the case of Ramji Dayawala & Sons Pvt. Ltd. vs. Invest Import, AIR 1981 SC 2085, the Hon'ble Apex Court has held that if the truth of the facts stated in a document is in issue, mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue. Further reliance is placed on the following judicial pronouncements:

i. Mohammed Yusuf vs. D. &Ors., AIR 1968 (Bom.) 112.

ii. CIT vs. S M Aggarwal, 293 ITR 43 (Del.)

26. Further it is brought to our notice that huge addition has been made in the hands of other assessee, namely, Shri Satyendra Kumar Sharma, who has owned various documents seized during the course of search and has stated to that even

some documents are in his own hand writing. The ld. Assessing Officer of the assessee is also the ld. Assessing Officer of Shri Satyendra Kumar Sharma and has framed the assessments in both the cases and after being satisfied with the documents and replies filed before him, he made the addition in the hands of Shri Satyendra Kumar Sharma. This asserts the fact that the ld. Assessing Officer has taken one of the legally permissible view and made addition in the hands of the person, he was of thebelieve, to be subjected to addition. Therefore, the ld. Counsel for the assessee succeeds on the second plea that ld. Pr. CIT erred in assuming jurisdiction in the given case where enquiry has been conducted and the order of the ld. Assessing Officer is not prejudicial to the interest of the revenueas huge additions have been made in the hands of Shri Satyendra Kumar Sharma, and thus one of the limbs of Section 263 of the Act is not fulfilled andrevision of the assessment order cannot be held to be valid and tenable in the eyes of law and thus the impugned proceedings u/s 263 of the Act, deserves to be quashed.

27. So far as the merits of the case is concerned, we, taking strength of the judgment of the Hon'ble Delhi High Court in the case of Income-tax Officer v. D.G. Housing Projects Ltd. (supra), find that the ld. Pr. CIT has merely referred to the seized material but has not made any further enquiry about the correctness of such documents, as to whether they belong to the assessee, or pertain to the year under consideration.

28. We find that the learned PCIT in his show cause notice has referred to documents which even does not pertains to AY 2014-15 or 2015-16 but had been prepared thereafter and as such, it is evident that the order passed by ld PCIT apparently are without application of mind. The ld. Counsel for the assessee has referred to GIB-11 Page 8 which is in handwriting of Shri. Satyendra Kumar Sharma, is not a document for the AY 2015-16 or even AY 2016-17. Infact, there was no supporting evidence available for such figures and thus had no relevance at all in the eye of law for the assessment year either for AY 2015-16 or for AY 2016-17.

29. We note that the Learned CIT has committed a factual error observing at page 19 of his order, that the LD ACIT has committed an error by not examining the discrepancies pointed out by the DDIT(Inv) in his notice date 18.05.2018 in respect of the transactions with M/s Broadson Commodities Pvt Ltd.

30. However, it is an admitted fact that the Learned ACIT had duly examined each of the allegations stated in the notice under section 263 as is evident from the notice of the Learned ACIT issued under section 142(1) of the Act dated 11-11-2019, a copy thereof is placed at pages24-27 of the PB-I for the assessment year 2015-16. In fact in respect of all the allegation regarding the alleged discrepancy in respect of the transaction with M/s Broadson Commodities Pvt Ltd at item number 19, the AO had called for the assessee' explanation which was in respect of the advances made to M/s Broadson Commodities Pvt. Ltd. The assessee in response to said notice had duly explained the same, vide its response dated 24-12-2019 a copy of which has been placed at page 28 to 364 of the PB-I, wherein at para 18 the alleged discrepancy had duly been explained (at page 76-79). Further, on perusal of

the said response which is running into 337 pages, we note each of the issues had been duly explained. Thus, we note that the Learned CIT while revising the order under section 263 has completely overlooked the assessee's response as also the order sheet entries made by ld. Assessing Officer in the assessment file of the assessee. We note that the Learned CIT has also overlooked that the Learned ACIT had examined Shri Baban Singh, Director, of M/s Broadson Commodities Pvt Ltd under section 133(6)/131 of the Act which is evident from the Order Sheet entry dated 25/12/2019 of the assessment file.

31. We find that the learned PCIT has failed to appreciate that the learned AO in given circumstances had framed the assessment with proper application of mind by making necessary enquiry and examining the seized material which in ld. Assessing Officer's view were belonging to the assessee and thus learned PCIT had acted without jurisdiction in setting aside the order of the ld AO and holding the same as erroneous being prejudicial to the interest of the revenue. We draw support from the following judicial pronouncements:

i. 100 ITD 173 (Mum) Mrs. Khatiza S. Oomerbhoy vs. ITO

ii. 100 ITD 441 (Kol) Al-Haz Amir Hasan Properties Pvt. Ltd. vs. Asst. CIT

iii. 203 ITR 108 (Bom) CIT vs. Gabriel India Ltd

iv. 171 ITR 141 (MP) CIT vs. Ratlam Coal Ash Co

31.1. We also find that learned CIT has erred in holding the assessment order as erroneous, a condition precedent and that the fact for holding the order was erroneous he has not made any enquiry whatsoever but proceeded on the basis of his own opinion. Where more than one view is possible, the order cannot be said to be erroneous as has been held by the Apex Court in the case of Malabar Industrial Co. Ltd. vs. CIT (supra).That same income cannot be taxed twice over, as held in the case of Smt. Tara Devi Aggarwal vs. CIT reported in 88 ITR 323, where an income has not been earned and is not assessable merely because the assessee wants it to be assessed in his or her hands in order to assist someone else who would have been assessed to a larger amount, an assessment so made will be erroneous and prejudicial to the revenue. In the instant case we find that the learned PCIT has not considered the order of assessment made in the case of Shri Satyendra Kumar Sharma, on the ground that the said documents did not belong to him but it belongs to the assessee. But ld. Pr. CIT has taken no action to cancel/revise the said assessments made in the case of Shri Satyendra Kumar Sharma.

32. Thus, in the light of the settled judicial precedents referred supra and on our examination of the facts of the case including the enquiries conducted by the ld. Assessing Officer regarding the transactions carried out during the impugned year as well as examining the seized material, and then getting necessary approval u/s 153D of the Act and also observing that the ld. Pr. CIT did not make any specific enquiry prior to assuming jurisdiction, find the impugned revisionary proceedings as bad in law and deserves to be quashed on account of the following:-

"a) that when there is an approval u/s 153D of the Act, it has been held consistently by the Hon'ble Courts (referred supra) that revisionary power u/s 263 of the Act cannot be exercised.

b) even otherwise, without revising the order u/s 153D of the Act, and finding them to be erroneous and prejudicial to the interest of the revenue, revisionary powers cannot be invoked for the assessment order framed u/s 153A/143(3) of the Act after getting approval u/s 153D of the Act.

c) that when the ld. Assessing Officer has conducted detailed enquiry, examined the seized records, made necessary observations in the assessment order, referred to various statements filed by the assessee and having taken one of the legally permissible view, then in such circumstances, the revisionary powers cannot be exercised just on the ground that adequate enquiry has not been done.

d) that revisionary proceedings cannot be held to be justified unless ld. Pr. CIT had carried out independent enquiry specifically dealing with the details in his possession, for the issues raised in the show cause notice u/s 263 of the Act.

e) that when the Assessing Officer, based on his observations and examination of records had made addition in the hands of another assessee, the ld. Pr. CIT without revising the assessment order of other assessee, which has been framed by the same Assessing Officer cannot revise the assessment order in the case of the assessee and directing to make the additions as the same would tantamount to double addition.

f) that the finding on merit of the ld. Pr. CIT contains various mistakes as the documents referred are not for the assessment year in dispute and some of the documents are not belonging to the assessee."

33. Thus, in view of our discussion(supra)and our examination of the facts, as the order of the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue, there was no scope for the ld. Pr. CIT to revisit the order of the ld. Assessing Officer. Therefore, the impugned order u/s 263 of the Act is quashed and assessment order framed u/s 153A/143(3) of the Act dt. 26/03/2022, is restored. The effective grounds raised by the assessee are hereby allowed for Assessment Year 2015-16. As discussed earlier, our decision for Assessment Year 2015-16 quashing the order u/s 263 of the Act is applicable mutatis mutandis to the appeals of the assessee for Assessment Year 2016-17 to 2018-19."

35. Respectfully following the decisions cited *supra* particularly placing reliance on the recent decision of this Tribunal in the case of *Gyan Infrabuild (P) Ltd.*(supra), we find that Ld. Pr. CIT erred in assuming jurisdiction u/s. 263 of the Act firstly because approval granted u/s. 153D of the Act to the draft assessment order u/s. 153A r.w.s. 143(3) of the Act has not been revised and, therefore, the extensive and adequate conducted by the AO is proved. Secondly, we find that Ld. Pr. CIT erred in holding the assessment order as erroneous and prejudicial to the interest of revenue because adequate and extensive enquiry has been conducted by the AO for each of the assessment years and detailed replies have been

filed by the assessee explaining the transactions appearing in the seized material as well as other transactions appearing in the books of account and since Ld. AO has adopted one of the courses permissible in law under the given facts, the assessment orders cannot be held as erroneous and prejudicial to the interest of Revenue. Even explanation (2) to section 263 of the Act cannot come to rescue the revenue because Ld. Pr. CIT has not carried out any independent enquiry before forming an opinion that the orders of the AO have been passed without making enquiries or verification. Accordingly, the impugned revisionary proceedings u/s. 263 of the Act are hereby quashed and the assessment orders framed u/s. 153A read with section 143(3) of the Act for the impugned assessment years i.e. s 2014-15 to 2021-22 are hereby restored. Common grounds of appeals challenging the impugned proceedings are hereby allowed."

20. Now on going through the judicial precedence referred above and also considering the grounds of appeal raised by the assessee and the contentions of ld. D.R., we find that the facts needs to be examined with regard to the following two issues:-

(i) Firstly, whether the assessment order in question is erroneous and prejudicial to the interest of revenue on account of no inquiry/ adequate inquiry conducted by the ld. Assessing Officer; and

(ii) Secondly, whether the impugned order deserves to be confirmed in the light of Explanation 2 to sub-clause (a) of section 263 of the Income Tax Act, which provides that if the order is passed without making inquiries or verification, which should have been made in the opinion of ld. Principal Chief Commissioner or Chief

Commissioner or Principal Commissioner or Commissioner.

21. Taking up the first issue as to whether ld. Assessing Officer has conducted adequate inquiry or not, we take the facts from A.Y. 2017-18 since similar type of exercise has been carried out by the ld. Assessing Officer for the remaining years. Now when the search was conducted at the assessee's premises on 29.10.2020, various documents were found and seized. Copies of seized material were available with the ld. Assessing Officer as well as the authority competent to grant approval under section 153D of the Act. Now the ld. Assessing Officer after having received the income tax return in compliance to notice under section 153A of the Act has selected the same for scrutiny by issuing and validly serving notice u/s.143(2) and u/s. 142(1) of the Act on 20.01.2022 and has asked the assessee to furnish the reply to various questions mentioned in the questionnaire attached to the notice under section 142(1) of the Act. The copy of the notice under section 142(1) of the Act dated 20.01.2022 is placed at pages no. 1 to 96 of the paper book and perusal of the same indicates that ld. Assessing Officer has asked for various details as well as the explanation to the seized material marked as PKS and GCPL along with the numbers attached to the seized document. The ld. Assessing Officer has also referred to

all the seized material marked JPNM. In all, ld. Assessing Officer has acted upon each and every seized material relevant to the assessment year 2017-18 and asked the assessee to furnish reply thereto. After receiving the said questionnaire, assessee has duly furnished the reply on multiple occasions and the same are forming part of the paper book containing 426 pages. Specific replies are also placed at pages no. 285 to 426 of the paper book. Since the replies dated 15th March, 2022 filed by the assessee are too voluminous. We are not extracting the same in this order but they very well form part of the paper book placed before us.

22. The replies portion in the paper book filed by the assessee clearly indicate that ld. Assessing Officer has raised specific query for each and every seized material to which the assessee had furnished reply with supporting evidence and also giving the explanation as to whether such entry or the amount appearing in the seized material is part of the transaction disclosed in the regular books of account or the seized material having no date and narration are merely rough document for which no explanation can be made.

23. For instance, there is a transaction dated 01.09.2016 of the amount of Rs.3,96,190/- appearing in the seized material no. GCPL 8. It has been explained by

the assessee that this amount is towards the payment made to Ultratech Cement Limited through cheque of Andhra Bank. Similarly, an entry of Rs.7,05,000/- dated 01.09.2016 is explained to be a payment made to Century Textile and Industries for purchase of cement. In this manner, the assessee has given specific replies with supporting documents to the ld. Assessing Officer for the queries raised in the questionnaire for all the years under appeals. Ld. Assessing Officer has gone through these details and after due application of mind has passed the assessment orders after having made certain additions. Like for A.Y. 2017-18, ld. Assessing Officer on observing that assessee has offered Rs.70,00,000/- as income towards unrecorded payments, has examined the said transaction and has initiated the penalty proceedings under section 271AB(1a) of the Act. Ld. Assessing Officer has also disallowed the claim of deduction made under section 80IA of the Act at Rs.2,27,98,640/-. This exercise of the assessee shows that after having carried out the inquiry with reference to each and every seized material, assessment has been completed after making certain addition and, therefore, the view taken by the ld. Assessing Officer is one of the views permissible under the law. We draw support from the judgment of the Hon'ble Apex Court in the case of *Malabar Industrial Co. Ltd. (supra*).

24. We note that Ld. PCIT has observed in the impugned order that ld. Assessing Officer should have further raised the queries after receiving the reply to notice under section 142(1) of the Act. We, however, are of the view that when a detailed query has been raised and a satisfactory reply has been received, ld. Assessing Officer, who is an Officer having quasi-judicial authority, has taken one of the legally permissible views then only in case, he is not satisfied, he could have raised further query. Each and every detailed discussion by the ld. Assessing Officer cannot form part of the assessment order and for this we draw inference from the judgment of Hon'ble Bombay High Court in the case of *CIT Vs. Gabriel India Ltd. 203 ITR 108 (Bom.)*, wherein the Hon'ble Court has held that ITO's order could not be held to be erroneous simply because in his order, he did not make an elaborate discussion. Therefore, placing reliance on the various judgments referred above, we are of the considered view that so far as the first issue is concerned, we find that since it is not a case of no enquiry or inadequate enquiry because the ld. Assessing Officer has conducted adequate inquiry to which adequate and satisfactory reply has been filed by the assessee to the satisfaction of the ld. Assessing Officer, which ld. Assessing Officer has accepted after detailed discussion and with proper application of mind and considering one of the legally permissible views has

framed the assessment after getting approval u/s. 153D of the Act, therefore, the assessment order in question is not erroneous in so far as prejudicial to the interest of revenue and thus, ld. PCIT erred in assuming jurisdiction u/s. 263 of the Act.

25. So far as the applicability of Explanation 2(a) to section 263 of the Act, before proceeding, we would like to take note of the decision dated 28th December, 2020 of the Coordinate Bench, Mumbai in the case of *JRD Tata Trust-vs.- DCIT reported in 85 ITR 431(supra*), which reads as under:-

> *"19. The question that we also need to address is as to what is the nature of scope of the provisions of Explanation 2(a) to Section 263 to the effect that an order is deemed to be "erroneous and prejudicial to the interests of the revenue" when Commissioner is of the view that "the order is passed without making inquiries or verification which should have been made".*
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> *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, Assessment year: 2014-15 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 Assessment year: 2014-15 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 [(1195) 99 ITR 375 (Del)], "it is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. (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 section263. 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 Assessment year: 2014-15 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.

22. Having said that, we may also add that while in a situation in which the necessary inquiries are not conducted or necessary verifications are not done, Commissioner may indeed have the powers to invoke his powers under section 263 but that it

does not necessarily follow that in all such cases the matters can be remitted back to the assessment stage for such inquiries and verifications. There can be three mutually exclusive situations with regard to exercise of powers under section 263, read with Explanation 2(a) thereto, with respect to lack of proper inquiries and verifications.

The first situation could be this. Even if necessary inquiries and verifications are not made, the Commissioner can, based on the material before him, in certain cases straight away come to a conclusion that an addition to income, or disallowance from expenditure or some other adverse inference, is warranted. In such a situation, there will be no point in sending the matter back to the Assessing Officer for fresh inquiries or verification because an adverse inference against the assessee can be legitimately drawn, based on material on record, by the Commissioner. In exercise of his powers under section 263, the Commissioner may as well direct the Assessing Officer that related addition to income or disallowance from expenditure be made, or remedial measures are taken. The second category of cases could be when the Commissioner finds that necessary inquiries are not made or verifications not done, but, based on material on record and in his considered view, even if the necessary inquiries were made or necessary verifications were done, no addition to income or disallowance of expenditure or any other adverse action would have been warranted. Clearly, in such cases, no prejudice is caused to the legitimate interests of the revenue. No interference will be, as such, justified in such a situation. That leaves us with the third possibility, and that is when the Commissioner is satisfied that the necessary inquiries are not made and necessary verifications are not done, and that, in the absence of this exercise by the Assessing Officer, a conclusive finding is not possible one way or the other. That is perhaps the situation in which, in our humble understanding, the Commissioner, in the Assessment year: 2014-15 exercise of his powers under section 263, can set aside an order, for lack of proper inquiry or verification, and ask

the Assessing Officer to conduct such inquiries or verifications afresh.

26. Now going through the above judgment and also taking note of the relevant provision of Explanation 2, sub-clause (a) of section 263 of the Act and also taking note of the judgment of the Hon'ble Delhi High Court in the case of *DG Housing (supra*), we find that ld. PCIT before setting aside the assessment order holding it as erroneous in so far as prejudicial to the interest of revenue, needs to first carry out independent inquiry or verification at his own end. Once the documents establishes that ld. Assessing Officer has conducted the inquiry to the extent what was needed under the given facts and circumstances, then the burden shifts over to the ld. PCIT to make specific reference to certain issues or transactions or seized material and then discussing such issue after giving due opportunity to the assessee should come to a firm conclusion that such transaction which deserved to be added in the hands of assessee had not been done by the ld. Assessing Officer due to lack of carrying out proper inquiry. Merely giving general observation that ld. Assessing Officer has not carried out adequate inquiry will not meet the requirement of law as provided under section 263 of the Act. Perusal of the impugned order indicates that ld. PCIT after having referred to show-cause notice and the reply filed by the assessee has concluded the revisionary proceedings by

referring certain judicial pronouncements without discussing any fact of the case. Under these given facts and circumstances, since ld. PCIT has not carried out any independent inquiry before arriving at to the decision that the order of ld. Assessing Officer is erroneous in so far as prejudicial to the interest of revenue, Explanation 2(a) to sec. 263 of the Act cannot be applied for a valid revisionary proceeding and, therefore, the impugned proceedings are to be held as invalid and without jurisdiction.

27. Before concluding, we also note that the assessment order in question have been passed after getting proper approval under section 153D of the Act by the superior authority to ld. Assessing Officer. However, ld. PCIT has only used his revisionary powers for setting aside the assessment order but has not revised the approval order under section 153D of the Act. In the preceding para, where we have referred to the decision of this Tribunal in the case of *Gyan Infrabuild Ltd. (supra)* wherein reliance has been placed on the decision of Coordinate Bench Delhi in the case of *Smt. Abha Bansal v. Principal Commissioner of Income-tax (supra)*, decision of Mumbai Tribunal in the case of *Surendra L. Heera Nandani v. Pr.CIT (supra)*, decision of ITAT, Pune in the case of *Dhariwal Industries Ltd. v. CIT (supra)* and that of Coordinate Bench Hyderabad in the case of *Trinity Infraventures Ltd. v. Dy. CIT (supra)*, it has

been consistently held that without revising the approval u/s. 153D of the Act, Ld. Pr. CIT cannot revise the assessment order u/s. 153A of the Act. Same is the situation in the present case where the assessments have been framed u/s. 153A read with section 143(3) of the Act after the draft order being accorded the approval u/s. 153D of the Act. Therefore, the ratio laid down by the Coordinate Benches squarely applies on the instant case also and, therefore, on this ground also the assessee succeeds and the impugned orders u/s. 263 of the Act deserves to be quashed.

28. We accordingly allow the effective grounds of appeal challenging the assumption of jurisdiction and validity of orders u/s. 263 of the Act raised by the assessee for AYs 2017-18 to 2021-22 and restore the assessment orders framed for the respective assessment years u/s. 153A read with section 143(3) of the Act evenly dated 30.03.2022.

29. In the result, all the appeals of the assessee bearing ITA Nos. 356,357,358, 359 & 360/PAT/2024 are allowed.

Order pronounced in the open Court on 16.10.2024.

Sd/-	Sd/-
(Rajpal Yadav)	**(Manish Borad)**
Vice-President	**Accountant Member**

Kolkata, the 16th day of October, 2024

S. Laha, Sr.PS/Jd. Sr. PS

Copies to :(1) Gandhipati Construction Private Limited,
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(3) DCIT, Central Circle-1, Patna

(4) The Departmental Representative, Patna

(5) Guard File

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By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata