IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCHES, CHANDIGARH

BEFORE SHRI H.L.KARWA, HON'BLE VICE PRESIDENT &
MS. ANNAPURNA MEHROTRA, ACCOUNTANT MEMBER

ITA No. 573/Chd/2015
Assessment Year: 2010-11

M/s Ved Parkash Contractors, Patiala	Vs.	The CIT, Patiala

PAN No. AAAFV7011Q

(Appellant) (Respondent)

Appellant By	:	Sh. Ashwani Kumar
Respondent By	:	Sh. S.K.Mittal
Date of hearing	:	14.09.2015
Date of Pronouncement	:	03.11.2015

ORDER

PER H.L.KARWA, VP

This appeal filed by the assessee is directed against the order of CIT, Patiala dated 27.3.2015 passed u/s 263 of the Income-tax Act, 1961 (in short 'the Act') for assessment year 2010-11.

2. In this appeal, the assessee has raised the following grounds:-

1. *That order passed u/s 263(1) by the Ld. CIT Patiala is against law and facts on the file in as much as he was not justified to arbitrarily hold that the assessment order dated 28.1.2013 passed by the Ld. Asst. CIT,*

Circle-Patiala is erroneous in as much as prejudicial to the interest of Revenue.

2. *That he was not justified to set aside the assessment order dated 28.1.2013 by giving the following directions*

   a) *To make an addition of Rs. 5,95,970/- on account of understatement of closing stock.*

   b) *Disallowance of interest us/ 36(1)(iii) in respect of investment in land and mixing plant.*

   c) *Disallowance of depreciation in respect of the mixing plant*

   d) *Disallowance of deduction on account of interest and salary paid to the partners.*

3. Briefly stated the facts of the case are than on an examination of the assessment record of the assessee for the assessment year under consideration, the CIT observed that the assessment order dated 20.01.2013 passed in this case u/s 143(3) of the Act was erroneous and in as much as it was prejudicial to the interest of Revenue. The Ld. Commissioner issued a notice to the assessee u/s 263 of the Act listing eight issues in respect to which it was found that the assessment order was erroneous and prejudicial to the interest of Revenue. In response to the aforesaid notice, the assessee contended that all the queries raised in the show cause notice had been looked into by the Assessing officer while framing the assessment order and the Assessing officer was fully satisfied with the record produced before him and the contention put forth before him by the assessee with regard to the points raised by the Ld. Commissioner. The next contention of the assessee was that it is the prerogative of the Assessing officer to make entries in the noting sheet of the record he verified and it is also his preoperative to write the wording of the assessment order as per his choice, but this does not mean that the Assessing

officer did not verify the points raised in the show cause notice. The assessee also relied on the decision of Hon'ble Jurisdictional High Court in the case of Hari Iron and Trading Co. v CIT (2003) 131 Taxman 535 (P&H) and the decision of ITAT, Kolkata Bench in Zamirun Bibi Vs. CIT in ITA No. 661/Kolkata/2011 dated 1.9.2011 for the proposition that merely because the order of the Assessing officer was cryptic would not be a sufficient reason to brand the assessment order as erroneous and prejudicial to the interest of Revenue.

4. The Ld. CIT observed that on some of the issues raised in the show cause notice u/s 263(1) of the Act, the Assessing officer had also raised queries and reply / explanation was filed by the assessee to those queries. He has also stated that the Assessing officer had noted that on 24.1.2013, the assessee had produced books of account, bills and vouchers which were verified and certain discrepancies were noted and certain disallowance were made on account of the same. However, in respect of some of the issues, the Ld. CIT was of the view that the Assessing officer has neither examined the issue nor applied his mind to the issue and has taken a decision contrary to law and, therefore, the assessment order was erroneous and also prejudicial to the interest of Revenue. The Ld. CIT set aside the assessment order with the direction to the Assessing officer to pass a fresh assessment order after making an addition of Rs. 5,95,970/- on account of understatement of closing stock, disallowance of interest u/s 36(1)(iii) in respect of investments in land and mixing plant and depreciation in respect of mixing plant and disallowance of deduction on account of interest and salary paid to the partners.

5. We have heard the rival submissions. It is observed that Commissioner has directed the Assessing officer to make an addition of Rs. 5,95,970/- on account of understatement of closing stock. According to Ld. CIT, out of the purchases from M/s Jay Building Material Supplier and Rakesh Yadav aggregating to Rs. 6,95,970/- on 31.3.2015, the assessee had shown material worth Rs. 1 lakh in his closing stock. He further stated that since the material was purchased on the last date but could not have become part of the work-in-progress of the assessee as that would have been physically impossible. The Ld. CIT observed that no query was raised by the Assessing officer about the purchases made on the last day of the year figuring in the closing stock of the assessee. The Ld. CIT held that the assessee has understated its closing stock on account of payments to M/s Jay Building Material Supplier and Rakesh Yadav to the extent of Rs. 5,95,970/- (Rs. 6,95,970/- - Rs. 1,00,000 shown). The Ld. Commissioner took the view that the order of the Assessing officer is erroneous since he did not examine the value of the closing stock with reference to the purchases made at the end of the year and is prejudicial to the interest of Revenue because non verification has led to understatement of the closing stock as well as income to the extent of Rs. 5,95,970/-. In this regard, the reply of the assessee dated 16.2.2015 was as under:-

> *“4.1 In response to the aforesaid query, the Ld. Counsel has submitted its reply dated 16.03.2015, which is reproduced as under:-*
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> > *"Our suppliers of Diesel, Dust, Rori, Bricks & Reta/Sand etc. raised the bills fortnightly. They supply the goods to us on various dates and after 15 days they raised the bill against us. So, the bills of Diesel, Dust, Rori, Bricks & Reta/Sand etc. debited in our accounts on 31.03.2010 does not means that goods supplied to us on 31.03.2010 only.*

These goods were supplied to us from 16.03.2010 to 31.03.2010 tentatively. As a matter of proof we are hereby producing before you the bills of the above said material of the suppliers for your reference. Copy of Mitti purchased account also enclosed for your reference. So,. Valuation of closing stock given by us is very much correct, The goods supplied to us from 16.03.2010 to 31.03.2010 minus closing stock of that goods included in work done figure of Rs. 22,00,000/-."

6. From the above reply it is clear that the goods have been supplied to the assessee on various dates and after 15 days the said party raised the bills against the assessee. It was also contended by the assessee that the bills of Diesel, Dust, Rori, Bricks & Reta / Sand etc. debited in its account on 31.3.2010 did not mean that the goods were supplied to the assessee from 16.3.2010 to 31.3.2010. It appears that Ld. Commissioner has not properly appreciated the explanation of the assessee. Shri Ashwani Kumar, Ld. Counsel for the assessee vehemently argued that the points / query raised by the Ld. Commissioner have been duly looked into by the Assessing officer during the assessment proceedings. The Assessing officer was satisfied with the record produced before him and explanation given to him with regard to the above point. Shri Ashwani Kumar, Ld. Counsel for the assessee invited our attention to the queries raised by the Assessing officer vide his letter dated 18.11.2012 (copy placed at page 19 of the paper book), which reads as under:-

"3. The perusal of the balance sheet reveals that you had shown:-

i) Work in progress : Rs. 30,20,830/-

In this connection, you are required to file the basis of calculation of the closing stock of each item along with the stock inventory prepared."

Similarly, the Assessing officer vide his questionnaire dated 10.12.2010 asked the assessee to furnish details regarding valuation of opening and closing stock. In response to the above query, the assessee submitted his reply on 17.12.2012 and the relevant para of the reply is reproduced herein below:-

Reply to Point No. 7 of your questionnaire:

There was Opening Stock of Rs. 10 Lacs as on 1.4.2009. This Opening Stock mainly consists of Material lying at sites, Work done but not certified by the concern department.

Detail of Closing Stock /Work- In - Progress as on 31.3.2010 was as follows:

1) Cement	*2714 Bags*	*Rs. 5,86,224.00*
(Bill dt. 30.3.2010 of Adiya Cement, Chittorgargh enclosed for your record)		
2) Rori / Dust / Reta		*Rs. 1,00,000.00*
3) Work done but not yet certified by the department as on 31.3.2010		*Rs. 22,00,000.00*
4) Other Material (Inc. Misc. Items)		*Rs. 1,34,606.00*
Total		***Rs. 30,20,830.00***

7. It is also observed that the Assessing officer vide his questionnaire dated 8.11.2012 (para 5) required the assessee to furnish the details of month wise purchase and sales of each item separately. The Assessing officer also required the assessee to submit the list of the purchaser / seller exceeding to Rs. 20,000/- alongwith complete postal address. The assessee along with its reply dated 3.12.2012 submitted the copy of the account of all purchases made

during the assessment year 2010-11. In our opinion, the Ld. Commissioner has wrongly presumed that the Assessing officer had not properly examined the issue. The order of the Assessing officer may be brief and cryptic but that by itself does not sufficient reason to brand the assessment order as erroneous and prejudicial to the interest of Revenue. It is well settled law that writing an order in details may be a legal requirement but the order not fulfilling this requirements cannot be said to be erroneous and prejudicial to the interest of Revenue. It is apparent from the records that the assessee submitted it reply and also furnished the requisite information or details to substantiate its claim during the assessment proceedings. The Assessing officer having considered all these issues on which the assessment order is revised u/s 263, the exercise of powers u/s 263 is bad in law. It is also true that if an enquiry is made by the Assessing officer and then objection of the CIT is that such inquiry is not adequate, the CIT would have no jurisdiction u/s 263 of the Act to revise the order of the Assessing officer. In our considered view the Assessing officer has made proper and desired enquires before passing the assessment order. Therefore, the view taken by the Ld. CIT cannot be held justifiable. While taking such a view we are forfeited by the decision of Hon'ble Bombay High Court in the case of CIT Vs. Gabrial India Ltd (1992) 203 ITR 108 (Bombay) wherein it has been held that ITO had made enquires in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. The Hon'ble High Court further observed that the claim was allowed by the Assessing officer on being satisfied with the explanation of the assessee. The Hon'ble High Court opined that such decision of the ITO cannot be held to be ‘erroneous’ simply because in his order he did not make any elaborate discussion in that regard. In the instant case also, the assessee had furnished detailed explanation with regard to the closing stock of Rori /

Dust / Reta and other material shown by the assessee by a reply in writing. All these are part of the record of the case. After examining the records and the details submitted by the assessee, the claim was allowed by the Assessing officer on being satisfied with the explanation of the assessee. Therefore, the order of the Assessing officer cannot be held to be erroneous and prejudicial to the interest of Revenue simply because in his order he did not make any elaborate discussion in that regard. In the case of CIT v Sunbeam Auto Ltd. (2011) 332 ITR 167(Delhi), the Hon'ble High Court held that where the Assessing officer allowed the claim on being satisfied with the explanation of the assessee, such decision of the Assessing officer could not be held to be erroneous simply because in his orders he did not make an elaborate discussion in that regard.

8. The Ld. CIT also directed the Assessing officer to pass a fresh assessment order after making disallowance of interest u/s 36(1)(iii) in respect of land and mixing plant and also depreciation on mixing plant. The Ld. Commissioner observed that assessee purchased land of Rs. 66 lakhs and machinery of Rs. 20 lakhs during the relevant previous year. According to him, the purchase of land by the assessee was not shown to be for business purpose and proportionate interest expenditure should have been considered for disallowance. The Ld. CIT also observed that alternatively since the asset was not used for business purpose during the year, interest expenditure should have been disallowed. He further observed that the same was the position in respect to the bills bearing Nos. 1 & 2 dated 10.04.2009 for purchase of mixing plant. The Ld. CIT pointed out that machinery was purchased from Ahmadabad. However, no transportation charges had been debited and / or capitalized. In this regard, it was submitted that the assessee is doing the business of

government contractor and required storage space for the storage of construction material, so assessee purchased the land measuring 2 acres 3 kanals and 20 marlas on Gurgaon to Badli Road, Village Budheda in the month of June 2009 for amounting to Rs. 66.71 lakhs. Later on, the assessee installed Mixing Batching Plant at the site. Accordingly, it was contended by the assessee that the above land was very much used for business purpose during the year under consideration. As regards the purchase of the machinery for Rs. 20 lakhs from M/s Bhawani Engineers, Ahmedabad it was contended that these plants have been purchased F.o.R at Gurgaon work site, so no transport charges etc. were paid by the assessee. It was also stated that plant runs on diesel and diesel expenses amounting to Rs. 56.83 lakhs were incurred during the year under consideration. The Ld. Commissioner observed that the details of the purchase of land must have been submitted during the course of assessment proceedings, however, no query was either raised by the Assessing officer nor put forth by the assessee to show that the land was used for the purpose of assessee's business. The Ld. CIT opined that in the absence of above information and because land is not raw material in the assessee's business and is not a normal fixed asset also the Assessing officer should have disallowed the interest in respect of money invested in purchase of these non business asset which he has not done. On the other hand, the assessee has incurred substantial interest expenditure on account of loan taken from bank and others and also paid to partners. According to Ld. CIT, the Assessing officer did not raise any query in this regard nor examined the issue, he did not apply the provisions of section 36(1)(iii) of the Act or the proviso to section 36(1)(iii) of the Act. Accordingly, the Ld. Commissioner has directed the Assessing officer to disallow interest u/s 36(i)(iii) in respect of land and mixing plant and depreciation in respect of mixing plant.

9. Shri Ashwani Kumar, Ld. Counsel for the assessee submitted that the above points / queries raised by Ld. CIT have been duly looked into by the Assessing officer during the assessment proceedings. He reiterated that the Assessing officer was very much satisfied with the record produced before him and the explanation given to him by the assessee with regard to the above said points. The Assessing officer issued questionnaire dated 8.11.2012 and 10.12.2012. Vide Para 4 of the questionnaire dated 8.11.2012, the Assessing officer asked the assessee to file the details of list of items mentioned under the head fixed assets alongwith the source of investment in acquisition of the same. Similarly, vide para 9 of the questionnaire dated 10.12.2012, the Assessing officer required the assessee to furnish copies of the bills with respect to the addition to fixed assets. In response to the said query, the assessee submitted a detailed reply on 3.12.2012 and 17.12.2012 along with copy of the accounts of fixed assets supported by vouchers / evidence of addition in the fixed assets during the assessment year 2010-11. From the records, it is clear that the Assessing officer has made the requisite enquiries before framing the assessment order for the year under consideration. In our considered opinion the Assessing officer was satisfied with the record produced before him and explanation given to him by the assessee with regard to the aforesaid points / queries. In the instant case, the Ld. Commissioner initiated the proceedings by pointing out what he saw as glaring illegalities in the assessment order which was subjected to revision proceedings, but what he concluded was that the such assessment order was passed without making proper inquires. The Commissioner finally revised the order for want of proper and desired inquires then shifted the stand, which is not permissible under the provisions of law. As we have already observed hereinabove that the order of

the Assessing officer may brief and cryptic but that by itself is not a sufficient reason to brand the assessment order as erroneous and prejudicial to the interest of Revenue. Accordingly, we hold that the Commissioner was not justified in directing the Assessing officer to disallow interest u/s 36(1)(iii) in respect of land and mixing plant and depreciation in respect of mixing plant. In view of the detailed findings given in respect of point No.1, ground No.2 (a), the assessment order cannot be held erroneous and prejudicial to the interest of Revenue in respect of issues mentioned in ground No. 2(b) and (c) of the appeal.

10. In the impugned order, the Ld. Commissioner has also directed the Assessing officer to disallow deduction on account of interest, salary etc. paid to the partners. The Ld. Commissioner observed that during ghe year under consideration, there was a change in the partnership deed. The Ld. CIT observed that the assessee submitted a copy of the partnership deed before the Assessing officer, which was attested by the assessee's C.A. However, as per the provisions of section 184(2) of the Act, it should have been certified by all the partners in writing. According to him, the Assessing officer without examining this aspect allowed salary and interest paid to the partners to the tune of Rs. 15,00,000/- and Rs. 15,95,955/- respectively which was not allowable as per the provisions of the Act. In this regard the explanation of the assessee was that the partnership deed was re-written on 1.4.2009 and the copy of the same was produced before the Assessing officer during the course of assessment proceedings. The original copy of the deed at the time of filing of photocopy of the deed was shown to the Assessing officer. Accordingly, it was submitted that the assessee has fully complied with terms and conditions of furnishing the partnership deed dated 1.4.2009. Interest & salary paid to

the partners as per the clause of the partnership deed. The Assessing officer vide questionnaire dated 10.12.2012 (para 13) required the assessee to furnish the copy of the partnership deed duly certified by the partners. In response to the said query, the assessee submitted its reply on 17.12.2012 together with copy of the partnership deed. Shri Ashwani Kumar, Ld. Counsel for the assessee submitted that the Assessing officer was satisfied with the copy of the partnership deed dated 1.4.2009 produced before him. It was also contended that original partnership deed dated 1.4.2009 was shown to the Assessing officer. The Assessing officer was satisfied with the documents produced before him and he has allowed interest and salary paid to the partners as per the clause of the partnership deed dated 1.4.2009. Similarly, profits have also been distributed amongst the partners as per the profit sharing ratio written in the aforesaid partnership deed. In our opinion, the conclusion drawn by the CIT on this issue is erroneous. Therefore, the CIT was not justified in stating that assessment order is erroneous in as much as prejudicial to the interest of this Revenue. Recently, the Hon'ble Calcutta Hon'ble High Court in the case of CIT Vs. S.R. Batliboi & Associates in ITA No. 190 of 2009 vide its order dated 24.2.2015 held that Section 185 read with Section 184, although worded in emphatic terms, is not intended to be a mandatory provisions. The question before the Hon'ble High Court was as under:-

> *"Whether the Income Tax Appellate Tribunal was justified in upholding the deletion of the disallowance amounting to a sum of Rs.4,49,60,000/- on account of remuneration of the partners under section 185 of the Income Tax Act when the instrument of change in partnership was not filed along with the return?*

11. In the above case, the Tribunal has made the following observations:-

"We observe that there was a change in partnership deed with effect from 1st August, 2004 and the assessee was required to file a certified copy of the partnership deed along with the return as per section 184 (4) of the Act. Section 185 of the Act provides that if a firm does not comply with the provisions of Section 184 for any assessment year, firm shall be so assessed that no deduction by way of any payment of interest, salary, bonus, commission or remuneration, by whatever name called made by such firm to any partner of such firm shall be allowed in computing the income chargeable under the head "profit and gains of business or profession".

There is no dispute to the fact that the assessee filed the certified copy of the deed during the course of assessment proceedings. The question arises as to whether non filing of the copy of the changes in partnership deed along with the return is a violation of substantive provision and make the return invalid or it is only a procedural default and is an irregularity in filing the return. We are of the considered view that non-filing of the copy of the changes in partnership deed along with the return is only an omission and does not make the return filed by the assessee as invalid so as to disallow the claim of the assessee. Section 292B of the Act provides that merely by reason of any mistake, defect or omission in such return of income, assessment, etc. shall not be invalid or shall not be deemed to be invalid. The Hon'ble Kerala High Court has held in the case of CIT -vs- Masoneilan (India) Ltd. [242 ITR 569] that section 292B provides that no return of income shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income if it is in substance and effect in conformity with or according to the intent and purpose of the Act. It is further observed that section 139 also throws some light on the question, if there is any defect, the A.O. is required to give an opportunity to the assessee to rectify

the defect within a stipulated time. We are of the considered view that the purpose of filing the copy of the changes in the partnership deed before the A.O. is to enable the A.O. to examine as to whether there is a genuine partnership in existence and the remuneration being paid to the partners is properly distributed and paid in accordance with the partnership deed. Furnishing of certified copy of the revised instrument of partnership deed as per section 184(4) of the Act is procedural in nature though the word "shall" is stated but the filing of the instrument of partnership deed is required by the A.O. as mentioned hereinabove to ascertain the genuineness of the existence of the partnership and to ascertain the share of each of the partner as to whether the remuneration being paid is in accordance with the deed of partnership deed and is also in accordance with the limit prescribed under section 40 (b) of the Act. The defect in not filing the copy of the change in instrument of partnership deed along with the return is a curable defect only through section 184(4) provides that the same should be furnished along with the return of income."

12. In the above case, the Tribunal observed that furnishing of certified copy of the revised instrument of partnership deed as per seciton184(4) of the Act is procedural in nature, though the word 'shall' is stated but the filing of the instrument of partnership deed is required by the Assessing officer to ascertain the genuineness of the existence of the partnership and to ascertain the share of each of the partner as to whether the remuneration being paid is in accordance with the limit prescribed u/s 40(b) of the Act. In this case the Tribunal observed that the filing of the revised/changed instrument of partnership deed along with the return is directory in nature and it can be filed at any time before completion of the assessment by the A.O. The Tribunal

further observed that we do not agree with the contention of the Revenue that after amendment by the Finance Act 2003, non filing of instrument of partnership deed along with return will make the claim of assessee illegal so as to deny the claim of the assessee though the requisite details and the evidence is made available to the Assessing officer before he completes the assessment. The Revenue challenged the order of the Tribunal dated 13.2.2009 by way of appeal before the Hon'ble Calcutta High Court and the Hon'ble High Court vide its order dated 24.2.2015, confirmed the order of the Tribunal observing as under:-

> *"Mrs Das De, learned advocate appearing for the appellant reiterated the submissions advanced before the learned Tribunal that section 185 is emphatic and also starts with a non-obstante clause. Therefore, omission on part of the assessee to comply with the requirement of sub-section 4 of section 184 precludes the assessee from claiming any deduction by way of salary paid to the partners. She contended that the learned Tribunal erred in taking a view which is plainly contrary to the section namely Section 185. We have not been impressed by such submission.*
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> *We are of the opinion that the view taken by the learned Tribunal is the correct view. We may add further reasons why the view taken by the learned Tribunal is unimpeachable. The assessee is required to file return under sub- section 1 of Section 139 within the time prescribed therein. What is the time prescribed has been dealt with in Explanation 2 appended to sub-section 1 of section 139. This requirement of law has to be held subject to the provision of sub-section 4 which permits an assessee to file a return at any time before the expiry of one year from the end of relevant assessment year or even before the completion of the assessment whichever is earlier.*

The Apex Court in the case of CIT, Punjab v. Kulu Valley Transport Co.P.Ltd., reported in 77 ITR 518 held that sub-section 3 of section 22 is to be read as a proviso to sub-section 1 of section 22. Sub-section 1 of section 22 is in pari materia with sub-section 1 of section 139.

The relevant portion of the said judgement reads as follows :

> *"It can well be said that section 22(3) is merely a proviso to section 22(1). Thus, a return submitted at any time before assessment is made is a valid return. In considering whether a return made is within time sub-section (1) of section 22 must be read along with sub-section (3) of that section. A return whether it is a return of income, profits or gains or of loss must be considered as having been made within the time prescribed if it is made within the time specified in section 22(3). In other words if section 22(3) is complied with section 22(1) must also be held to have been complied with. If compliance has been made with the latter provision the requirements of section 22(2A) would stand satisfied."*

Mrs.Das De has not disputed before us that the assessee could have filed his return along with the certified copy of the instrument of change within the period prescribed by sub-section 4 of section 139. In that case, the return would have been perfectly valid and there would have been no violation of sub-section 4 of section 184. But because the assessee filed the instrument of change before the day on which the assessee could have filed under sub-section 4 of section 139, the return is to be treated as invalid, is a submission which we are in a position to accept.

The records reveal that a prayer was made before the assessing officer on behalf of the assessee to treat the return as a defective return because the instrument of change in the

partnership deed was not annexed to the return. In that case, the assessee would be entitled to an opportunity to cure the defect. The assessing officer refused to treat the return as a defective return. Once herefused to treat the return as a defective one he could not have also held that the return was in derogation of sub-section 4 of section 184 of the Act nor could he in that case have refused to allow the deductions. If, on the contrary, he had held that the return was defective, then under sub-section 9 of section 139 the assessee would get a chance to cure the defect. In either case, the result is that section 185 read with section 184, although worded in emphatic terms, is not intended to be a mandatory provisions.

For the aforesaid reasons, the question is answered in the affirmative and in favour of the assessee."

13. In the instant case, Ld. Commissioner has observed that as per the requirement of seciton 184(2) and 184(4), the assessee is required to submit a certified copy of the partnership deed. According to him, the assessee has not complied with the provisions of section 184(2) and 184(4) of the Act and therefore, assessment order was erroneous in as much as prejudicial to the interest of Revenue. The Ld. CIT presumed that the above provisions of the Act are mandatory. This observation of the Ld. CIT is contrary to the decision of the Hon'ble Calcutta Hon'ble High Court (supra), wherein the Hon'ble High Court has categorically held that Section 185 read with Section 184, although worded in emphatic terms, is not intended to be a mandatory provisions.

14. In the instant case the Revenue has accepted the return filed by the assessee as perfectly valid and, therefore, there is no occasion to held that the

return was in derogation to sub section (4) of section 184 of the Act. In view of the decision of Hon'ble Calcutta High Court referred to above, we find that order of the CIT on this issue is not tenable and accordingly we hold that the assessment order cannot be held erroneous in as much as prejudicial to the interest of Revenue on this issue.

15. In view of the above discussion, we set aside the order of the CIT in toto and hold that the assessment order dated 28.01.2013 passed u/s 143(3) of the Act cannot be held erroneous in as such as prejudicial to the interest of the Revenue.

16. At his stage, we may also mention yet another aspect of the matter. The Ld. CIT has finally held as under:-

> *"7. In light of the discussion above, the assessment order dated 28.01.2013 passed by the AO is, therefore; set aside to the AO on the aforesaid issues with the direction to the AO to pass a fresh assessment order after making an addition of Rs.5,95,970/- on account of understatement of closing stock, disallowance of interest u/s 36(l)(iii) in respect of land and mixing plant and of depreciation in respect of mixing plant, and disallowance of deduction on account of interest, salary etc. paid to the partners. Opportunity of being heard shall be provided to the assessee before passing the fresh assessment order."*

17. From the above, it is abundantly clear that CIT has exceeded its jurisdiction in virtually reassessing the case. It is true that the revisional

authority itself has wide power to examine the case whether the decision has been erroneous and prejudicial to the interest of Revenue and in exercise of these power modifications are permissible, and furthermore that if the Commissioner comes to this conclusion that the assessment is required to be redone, that such direction can still be issued to the Assessing officer . However, it is trite law that it is not permissible for the CIT being a revisional authority to step into the shoes of the Assessing officer and to redo the assessment and pass fresh assessment order. In the instant case, the Commissioner has set aside the order of the Assessing officer on the aforesaid issues with a direction to the Assessing officer to pass a fresh assessment order. At the same time, the Ld. Commissioner has directed the Assessing officer to make the addition of Rs. 5,95,970/- on account of understatement of closing stock, disallow interest u/s / 36(1)(iii) in respect of mixing plant and depreciation in respect of mixing pant and disallow of deduction on account of interest, salary etc. paid to the partners. In our considered view, remanding the matter to the Assessing officer is of no consequence, particularly when the CIT himself has reframed the assessment. In the facts and circumstances of the present case the CIT has not left any scope for the Assessing officer to redo the assessment or pass a fresh assessment order. It is also observed that Ld. CIT has directed the Assessing officer to give an opportunity of being heard to the assessee before passing the fresh assessment order. In our view, giving opportunity of being heard to the assessee by the Assessing officer is also meaningless, particularly when the Ld. CIT himself has reframed the assessment order. The directions given by the Ld. CIT in para 7 of the impugned order are also contrary to the settled position of law. When the Ld. CIT directs the Assessing officer to pass a fresh assessment order, the only proper course for the Commissioner was not to express any final opinion as regards to the controversial points. While taking such a view, we are fortified

by the decision of Hon'ble Gujrat Hon'ble High Court in the case of Addl. CIT v Mukur Corporation (1978) 111 ITR 312 (Gujarat). It is also observed that in the concluding part of the order of the Commissioner he has issued a direction to the Assessing officer to pass a fresh assessment order then he was not required to express any final verdict as regards the controversial points. In this case, the Commissioner has directed the Assessing officer to make the specific additions / disallowances, as mentioned in the impugned order. Therefore, the directions given to the Assessing officer to frame a fresh assessment order is bad in law as this is clearly a case in which the Ld. CIT has exceeded his jurisdiction in reassessing the case. Even the direction given by the CIT to the Assessing officer to provide an opportunity of being heard to the assessee is also of no consequence.

18. It is relevant to observe here that while deciding the appeal on merits we have concluded that the assessment order passed by the Assessing officer cannot be held to be erroneous and prejudicial to the interest of Revenue, therefore, the order passed u/s 263 of the Act is not maintainable. At the same time, we have also concluded that the impugned order is not tenable on the ground that the Ld. Commissioner has exceeded his jurisdiction in virtually reassessing the case instead of remanding the matter to the Assessing officer for fresh assessment order without recording his final conclusion on the points of issues involved. We also agree with this submission of the Ld. Counsel of the assessee that when a fresh assessment is done, there could always be grounds on which one of the parties is aggrieved and the law prescribes a corrective remedy by way of appeal, revision etc. If the CIT who is a highly placed authority of the Revenue, is to exercise the powers of which doing a fresh assessment, then the right of appeal, revision etc. is totally annihilated

and this could never be the intention of the Legislature. We fully endorse the above submissions made by Shri Ashwani Kumar, Ld. Counsel for the assessee.

19. Viewed from any angle, the impugned order deserves to be quashed and we order accordingly.

20. In the result, the appeal is allowed.

Order pronounced in the Open Court on 03.11.2015

Sd/- Sd/-

(ANNAPURNA MEHROTRA) **(H.L.KARWA)**
ACCOUNTANT MEMBER **VICE PRESIDENT**
Dated : 3rd Nov., 2015
Rkk
Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT*
4. *The CIT(A)*
5. *The DR*