आयकर अपीलीय अधिकरण, **'सी' न्यायपीठ, चेन्नई।**
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI

श्री महावीर सिंह, माननीय उपाध्यक्ष, एवं
श्री **जी. मंजूनाथा, , माननीय** लेखा सदस्य **के समक्ष**
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.1340/Chny/2019**
निर्धारण वर्ष **/Assessment Year: 2014-15**

M/s.Trivitron Healthcare Pvt. Ltd., "Sapthagiri Bhavan", New No.15, Old No.25, Trivitron Sapthagiri Bhawan, 4th Street, Abhiramapuram, Chennai. [**PAN:** AAACT 9378 H]	**v.**	The Dy. Commissioner- of Income Tax, Corporate Circle-3(1), Chennai.
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr.S.Sridhar, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Mr.M.Rajan, CIT
सुनवाई की तारीख/Date of Hearing	:	15.09.2022
घोषणा की तारीख /Date of Pronouncement	:	12.10.2022

आदेश / O R D E R

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the Principal Commissioner of Income Tax-3, Chennai, dated 22.03.2019 passed u/s.263 of the Income Tax Act, 1961, and pertains to assessment year 2014-15.

2. The assessee has raised the following grounds of appeal:

The order passed by the Principal Commissioner of Income Tax - 3, Chennai is erroneous considering the facts and circumstances of the case.

The Appellant wish to submit as under:

As per provisions of section 263 of the IT Act, a commissioner can issue notice only if he / she comes to the conclusion that the order passed by the AO is considered as erroneous and prejudicial to the interest of revenue, where AO passed order:-.

1) without making any inquiries/verification which he/she is required to make.

2) without making inquiry into a claim which is claimed by assessee and allowed such claim.

3) which is not in accordance with any order/direction/instruction (i.e. circulars) issued by CBDT u/s 119 of Income Tax Act, 1961.

4) which is not in accordance with any decision of jurisdictional High Court or Supreme Court which is prejudicial to the assessee or any other person. In other words, where jurisdictional High Court or Supreme Court's decision is against the assessee or any other personal and AO passed their order without considering such judgment then such order shall be considered as erroneous and prejudicial to the interest of revenue.

The Appellant respectfully submit that AO had called for all the records and documents in connection with the assessment under section 143 (3) and took several months to pass the order on 29/12/2016. The assessee submitted voluminous records and documents in respect of their claim including Court order relating to amalgamation, provision for warranty and disallowance of Rule 8D. The AO had made roving enquiries on claims made by the company and only after that passed the order under section 143 (3). Accordingly, the AO must have considered all aspects of the claim and have passed the order only after considering the validity of such claim. In view of the above, clause 1 and clause 2 of the Proviso to section 263 cannot be a ground for issue of show cause notice under section 263.

Merely because the AOs order is silent on a particular point, does not mean that there is lack of application of mind on the part of AO. The order must be erroneous and prejudicial to the revenue, that is both conditions have to be concurrently satisfied in order to invoke section 263 (CIT Vs Seshasayee Paper Boards Ltd (2000 242 ITR 490, 500 -Madras).

The CIT Appeals has set aside all the 3 issues namely Depreciation on goodwill, Provision for warranty and Disallowance under 14A read with Rule 8D to the Assessing Officer for verification.

The Appellant submits:

a) There is no ground to revise the order passed earlier under section 143(3) by the AO under section 263 of the IT Act;

b) The order passed by the AO is not erroneous and not prejudicial to the interest of the Company.

The Appellant prays that the order passed under section 263 be squashed.

The Appellant may be permitted to furnish additional grounds if any at the time of hearing.

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing of diagnostic equipment, filed its return of income for the AY 2014-15 on 28.11.2015 declaring total income of Rs.10,52,92,870/-. The case has been selected for scrutiny and the assessment has been completed u/s.143(3) of the Act, on 22.12.2016 and determined total income of Rs.10,53,20,918/- by disallowing belated remittances of PF & ESI amounting to Rs.28,048/- u/s.36(1)(va) of the Act. The case has been, subsequently taken up for revision proceedings by the Principal CIT, Chennai-3, and issued show cause notice u/s.263 of the Income Tax Act, 1961 dated 07.02.2019 and called upon the assessee to explain as to why assessment order passed by the Assessing Officer shall not be revised. The Principal CIT, in the said show cause notice observed that assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of Revenue, because the Assessing Officer has allowed depreciation on goodwill, even though 5th proviso to section 32(1) of the Act, very clearly restricts claim of depreciation to successor company on amalgamation, as if such succession has not taken place. However, the Assessing Officer has allowed claim of depreciation on goodwill without considering necessary provisions in right perspective of law which rendered assessment order passed by the Assessing Officer as erroneous, in so far as it is prejudicial to the interests of Revenue and thus, called upon the assessee to file its objections, if any, to the proposed revision.

4. The PCIT further observed that a sum of Rs.2,25,71,530/- has been debited as provision for warranty for the AY 2014-15 as against Rs.50 lakhs debited for the AY 2013-14. This amount was not added back in the statement of taxable income nor disallowed by the AO in the assessment order, although, the assessee has not explained rational behind substantial increase in provision for warranty expenses. The PCIT further observed that the assessee has earned dividend income of Rs.1,04,39,190/- and claimed the same as exemption u/s.10(34) of the Act. However, made suo moto disallowance of Rs.16,13,602/- u/s.14A of the Act, has been made, even though, the Auditor in Form No.3CD for amalgamation company has quantified disallowance u/s.14A of the IT Act, at Rs.68,94,556/-. The AO without verifying the relevant facts has completed assessment order. Therefore, issued a show cause notice and called upon the assessee to explain, as to why, the assessment order passed by the AO, shall not be revised in terms of provisions of Sec.263 of the Act.

5. In response to the show cause notice, the assessee has filed detailed written submissions on the issue which has been reproduced at para 5 to 5.11 on page 2 to 5 of the learned PCIT order. The sum & substance of arguments of the assessee before the PCIT are that the assessment order passed by the Assessing Officer is neither erroneous nor prejudicial to the interests of Revenue, because the Assessing Officer has considered issue of depreciation claimed on goodwill arising out of amalgamation and after considering necessary facts with reference to provisions of section 32(1) of

the Act, has allowed depreciation. Therefore, view taken by the Assessing Officer is one of the possible view and thus, PCIT cannot hold that order passed by the Assessing Officer is erroneous, in so far as, it is prejudicial to the interests of Revenue, unless view taken by the Assessing Officer is unsustainable in law. The assessee had also argued the issue in light of certain judicial precedents and submitted that 5th proviso to section 32(1) of the Act, has no application to the facts of the present case, because as per said provisions aggregate depreciation claimed by the amalgamating and amalgamated company in the case of amalgamation should not exceed in any previous year deduction calculated at the prescribed rate as if succession or amalgamation or demerger, as the case may be, had not taken place and such deduction shall be apportioned between predecessor and successor in ratio of number of days for which the assets were used by them. In other words, if an assessee acquires certain assets on amalgamation and claimed higher depreciation, then as per 5th proviso, such depreciation should be restricted in proportionate to number of days both predecessor and successor utilized the asset, as if, said amalgamation or succession has not been taken place. In this case, the assessee has not acquired any goodwill from amalgamating company. Further, goodwill in the present case arose out of amalgamation, because the assessee has paid consideration for acquisition of asset over and above net asset of amalgamating company, therefore, submitted that proposed revision on the issue of depreciation on goodwill is incorrect.

6. The assessee further submitted that provision for warranty expenses has been thoroughly examined by the AO, where, the assessee has filed detailed reply in response to show cause notice issued by the AO and thus, merely because, the assessment order does not find place on the issue, it cannot be said that the AO has not verified the issue. Further, provision for warranty expenses is estimated on the basis of past history and scientific method, based on previous financial years' experience, because, the assessee is engaged in the business of manufacturing of diagnostic equipments and further provides warranty to its customer, in case any defects in the machines. Therefore, such provision is in accordance with ratio laid down by the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd., v. CIT [314 ITR 62] (SC). The assessee had also explained why the AO has accepted disallowance computed u/s.14A r.w.r.8D of IT Rules, 1962.

7. The learned PCIT, after considering relevant submissions of the assessee and also taken note of various decisions including decision of the ITAT., Bangalore bench in the case of DCIT Vs United Breweries Ltd. (TS-553-ITAT 2016-Bang) opined that the assessment order passed by the Assessing Officer is erroneous, in so far as it is prejudicial to the interests of Revenue, because the assessment order passed by the Assessing Officer is silent on the issue. The PCIT further observed that order of the Assessing Officer becomes erroneous, if it has been passed without making inquiries or verification which the Assessing Officer should have been made. The

order is also erroneous, if it is prejudicial to the interest of the Revenue, and if the assessment is on wrong assumption of facts or incorrect application of law. Although, the assessee claimed depreciation on goodwill arising out amalgamation, the Assessing Officer has allowed such depreciation contrary to 5th proviso to section 32(1) of the Income Tax Act, 1961. The PCIT further noted that the Tribunal in the case of DCIT v. United Breweries Ltd (supra) had considered an identical issue and held that claiming depreciation on enhanced cost of goodwill, in case of succession or amalgamation, contrary to 5th proviso to section 32(1) of the Act, which restricts claim in the cases specified thereunder is not permissible. Therefore, the PCIT rejected arguments of the assessee and also case laws cited in support of its arguments and set aside order passed by the Assessing Officer u/s.143(3) of the Act, and direct the Assessing Officer to examine applicability of 5th proviso to section 32(1) of the Act.

8. Further, the PCIT observed that the AO has failed to carry out necessary enquiries with regard to provision for warranty and thus, the issue requires proper verification on the basis of submissions made by the assessee and also in light of the decision of the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd. (supra). The PCIT had also opined that the AO has not carried out required enquiries in so far as disallowance of expenditure u/s.14A of the Act, even though, the Tax Auditor of amalgamation company, has been quantified higher disallowance u/s.14A of the Act. Therefore, the PCIT opined that the assessment order passed

by the AO u/s.143(3) of the Act, is erroneous in so far as it is prejudicial to the interest of the Revenue and thus, set aside the assessment order passed by the AO and directed the AO to examine the issues taken up in 263 proceedings and re-do the assessment in accordance with law. The relevant findings of the PCIT are as under:

> *4. The arguments oi the assessee have been considered- The assessee was asked to show cause why depreciation as good will on amalgamation of Kiran Medical Systems should not be disallowed in view of the proviso u/s.32(1) of the Income Tax Act, which states as tinder;*
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> > *"Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets' or know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the ease may he, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may he, in the ratio of the number of days for which the assets were used by them. "*
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> *4.1 The assessee has stated that merely because the AO has been silent on the issue, it does not mean that the issue has not been examined. It has been contended that voluminous material was placed before AO who considered all of this before allowing the claim of depreciation on goodwill.*
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> *4.2 An order of the AO is erroneous if it has been passed without making inquiries or verification which should have been made. An order is also erroneous in so far as it is prejudicial to the interests of the revenue if the assessment is made on (i) wrong assumption of facts, (ii) Incorrect application of law or (iii) without due application of mind (CIT Vs Jawahar Bhattacharya (341 ITR 434)). It was also held by Rajasthan High Court in the case of CIT Vs Energy Shoe Manufacturing Co (213 ITR 343) held that failure to apply the correct provisions of law may Inapplicable to the facts of the case would result in an erroneous order.*
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> *4.3 In this case, the provisions of the Income Tax Act have not been correctly applied by the AO. The proviso under section 32(1) clearly prescribes that in the case of an amalgamation, the aggregate deduction in respect of depreciation of tangible and intangible assets shall not exceed in any previous year, the deduction calculated at the prescribed rates, as if the amalgamation had not taken place.*

4.4 The Supreme Court in the case of M/s.Smifs Securities has only held that goodwill is an intangible asset, but has not gone in to the question of whether depreciation on good will is available to the amalgamated company. The Hon'ble Supreme Court has also recorded its decision in the context of the proviso to Section 32(1) of the Act.

4.5 In the case of United Breweries., the Bangalore Bench of the ITAT has considered the issue of depreciation on goodwill. In that case the assessee has submitted that '"when the assets are introduced in the books of the assessee being the balancing figure of excess consideration over the value of the tangible assets then 5th proviso to Section 32(1) is not applicable. He has further submitted that in all the cases before the Hon'ble Supreme Court as well as Hon'ble High Courts, the revenue has not raised this objection of restricting the claim of depreciation by applying 5th proviso to Section 32(1) of the Act. Therefore, the revenue cannot raise this objection when it was not raised in the other cases before the Hon'ble Supreme and Hon'ble High Courts".

4.6 The ITAT after considering the issue held that "there is another aspect involved in this issue of claiming depreciation on the enhanced cost of goodwill in cases of succession / IT A Nos.722, 801, 1065 & 1066/Bang/2014 amalgamation as it is restricted, in the hand of successor or amalgamated company only to the extent as apportioned between the amalgamating and amalgamated company in the ratio of number of days for which the assets used by them. Further, the deduction shall be calculated at the prescribed rate as if the amalgamation has not taken place".

4.7 Placing reliance on the Proviso u/s.32(1) the ITAT held "This proviso provides that depreciation allowable in the case of succession, amalgamation or merger, demerger should not exceed the depreciation allowable had the succession not taken place. In other words, the allowance of depreciation to the successor / amalgamated company in the year of amalgamation would be on the written down value of the assets in the books of the amalgamating company and not on the cost as recorded, in the books of amalgamated company. The case of amalgamation is not regarded as transfer for the purpose of capital gain as provided under Section 47 (vi) of the Act and therefore, such cases are exempted from, capital gain which is Otherwise chargeable to tax on transfer of assets. In the case on hand the business of the subsidiary was transferred to the assessee by way of amalgamation therefore it would not be regarded as transfer of asset for the purpose of capital gain. Hence, the claim of depreciation on the assets acquired under the scheme of amalgamation is restricted only to the extent if such amalgamation has not taken place. The Assessing Officer made a reference to 5th proviso to Section 32 in para as under:

> *As highlighted above, the company paid Rs.180.52 Crores in the preceding year as consideration for acquiring shares of KBDL from original owners and thereby KBDL became a subsidiary last year. Thus, the consideration paid is for shares hut not for individual assets.*
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> *It is not the case of the assessee that the subsidiary has claimed any depreciation of goodwill. Therefore, by virtue of 5th proviso to Section 32(1), the depreciation on the hands of the assessee is allowable only to the extent if such succession has not taken place. Therefore, the assessee being amalgamated company cannot claim or he allowed depreciation on the assets acquired in the scheme of amalgamation more than the depreciation is allowable to the amalgamating company. As regards the decision of Hon'ble Supreme Court in the case of CIT Vs. Smiff Securities Ltd. (2012)*

348 ITR 302, the said ruling of the Hon'ble Supreme Court is only on the point whether the goodwill falls in the category of intangible assets or any other business or commercial rights of similar nature as per the provisions of section 32(1) of the Act. Therefore, there is no quarrel on the issue that goodwill is eligible for depreciation. However, the said ITA Nos.722, 801, 1065 & l066/Bang/2014 judgment would not over-ride the provisions of 5th proviso to Section 32(1) of the Act which restricts the claim in the cases specified there under. The consideration paid by the assessee for acquiring the shareholding of the subsidiary in the earlier years is not relevant for the issue of depreciation on the assets taken under amalgamation and for the purpose of 5th proviso to Section 32(1) of the Act. Accordingly, in view of the above facts and circumstances of the case as well as the above discussion, we hold that the claim of depreciation in the hands of the assessee is subjected to the 5th proviso to Section 32(1) of the Act. Accordingly, this issue is decided against the assessee".

4.8 In view of the above discussions, the issue is set aside to the AO. The AO is directed to examine the applicability of the 5th Proviso to Sec.32(1) of the Act. The assessee has further sought to distinguish the facts of this case from the facts in the case of M/s United Breweries where the decision of Bangalore Bench of the ITAT has held that depreciation on goodwill cannot be claimed by the company on amalgamation. The AO is directed to consider the contentions of the assessee examine the facts of the case and decide the issue after giving the assessee an opportunity to be heard.

5. Issue-2: A sum of Rs.2,25,71,530/- has been debited as provision for warranty for the AY 14 -15 as against Rs.50,00,000/- debited for the A.Y. 13-14. The Assessing Officer has failed to notice that no evidence was filed to establish that the conditions necessary to allow such provision were satisfied. Further the Assessing Officer has also failed to examine the reasons on account of which the provision for warranty has increased by 5 times over the earlier years.

5.1 The assessee had stated that the said issue has been examined in detail during the course of Assessment and we have made a detailed submissions with regard to warranty liability, vide letter dated 30.11.2016. The AO has examined these submissions and based on such submissions only he had accepted the claim and therefore reopening under section 263 was objected by the assessee.

5.2 The assessee has further stated that there is no ground lo withdraw the deduction on following facts:

a) The company had created the liability towards warranty commitment in terms of mandatory Accounting Standards and on sound scientific basis only and it is submitted that the same is not made on an adhoc basis,

h) Though the term used in the Accounts is "Provision for warranty ", in reality it is a liability which the company had undertaken based on Industry norms.

c) The amount of provision varies depending on the number of instruments sold, nature of instruments sold, customer requirements, tender norms etc..... Certain customers may be given 1-year warranty and others 3 years depending upon the negotiation carried out at the time of finalization of sales and it cannot be expected that the amount of warranty has to be same year after year.

d) Similarly, certain warranties may include only the service and others may require Pads replacement as well as service. Again this may vary year to year and hence it is submitted that warranty liability need not be consistent year after year,

e) It is industry norms that anything between 2% to 5% would be the liability towards warranty commitment and hence 1.68%, is quite normal for a company of this nature particularly when the company is dealing with medical and electronic equipment with very heavy obsolescence, wear and tear and where the break down instances are many and common.

f) The Company in the subsequent year (Financial Year 2014-15) had utilized a sum of Rs.1,98,09,774/- from the provision made in FY 2013-14, which justifies the provision of Rs.2,25,71,530/- made in the FY 2013-14.

g) In view of the above it is submitted that the Provision for warranty is made on scientific and systematic basis and there has been significant utilization of such warranty in the subsequent year and as such it is an allowable deduction

h) Warranty becomes an integral part of the sale price of the product. In other words, warranty stood attached to the sale price of the product- As stated above, obligations arising from past events have to be recognized as provisions. These past events ae known as obligating events. In the present case, therefore, warranty provision needs to be recognized because the appellant is an enterprise having a present obligation as a result of past events resulting in an outflow of resources. Lastly, a reliable estimate can be made of the amount of the obligation.

i) The assessee relied on the decision of Rotork Controls Vs CIT (Supreme Court) 314 1TR 62 civil Appeal No.3506-3510 of 2009 arising out of SLP NO. 14178-14182 OF 2007 wherein it was held that Provision for Warranty is an ascertained Liability and hence allowable as a genuine business expenditure.

j) High court of Punjab & Haryana at Chandigarh Income Tax Appeal No, 434 of 2014df 19.05.2015 held in the case of the CIT vs. M/s Carrier Air-Conditioning and Refrigeration that provision for warranty made on based on experience and past trends is an allowable expenditure.

k) Hence it is submitted that the same has to be fully allowed and there cannot be any disallowance.

6. The submissions of the assessee and the materials on records have been considered. The issue requires proper verification of the submissions made by the assessee. The assessee has now contended that the increase in provision for warranty is justified taken into account the actual payments in the subsequent year. The AO is directed to examine the provision with reference to the decision of the Hon'ble Supreme Court in Rotork Controls v. CIT, which has been relied upon by the assessee also. Therefore, the issue is reverted back to the AO for fresh consideration and decision.

7. Issue-3: Dividend Income of Rs.1,04,39,190/- has been claimed as exempt u/s 10. In the statement of total income, Rs.16,13,602/- was disallowed u/s 14A. The details required u/r.8D(2)(ii) have been given but not quantified. Hence

considering only, the third leg, disallowance of Rs.16,13,602/- has been made. Further, in the form 3CD for the amalgamation company, i.e Trivitron Healthcare P. Ltd., certified by a qualified Auditor, disallowance u/s.14A shown as Rs.68,94,556/- which was not considered by the Assessing Officer.

7.1 The assessee had stated that the said issue has been examined in detail during the course of Assessment and they have made detailed submissions with, regard to 14A disallowance vide letter dated 30.11.2016 and therefore we object to the issue of Notice Under section 263 of IT Act with regard 14A disallowance.

7.2 The assessee has further stated the following facts in support of his claim;

a) It is submitted that dividend income from company pertains to the dividend declared by Kiran Medical Systems Private Ltd, which was merged with the Company with effect from 01/04/2013 vide court order dated 19/03/2015.

b) As the merger scheme was approved only on 10/03/2015, the dividend declared by Kiran Medical Systems Private Ltd in the year was disclosed in the audited accounts of the assesse, which was adopted in the Board Meeting held on 29.09.2014 much before the court order which was received only on 19/03/2015.

c) Consequent to the merger effective from 01/04/2013, when both asseesee's financials and Kiran Medical Systems accounts are merged, the dividend earlier received from the amalgamating company loses it nature of dividend as no company can declare a dividend for itself and accordingly the same cannot be treated as dividend for the purpose of section I4A.

d) Accordingly, dividend received from Kiran Medical systems Private Ltd., becomes only a profit and loss surplus and cannot be called as dividend.

e) Besides, the Tax audit report of Trivitron Healthcare Private Ltd was filed before the merger was approved by the Court and the disallowance may be relevant at that time. Once the merger order is received and approved with retrospective effect, the accounts of both entities are consolidated. On consolidation, the dividend income loses its nature and the disallowance and quantification will not be relevant for the purpose of assessment.

f) When the individual lax audit report of the assessee company was compiled by the Tax Auditors and signed on 29.11.2014, they have included investment made by the Company in Kiran Medical Systems Private Ltd in the calculation of 14A disallowance. As effective from 1st April 2013 Kiran Medical Systems Pvt. Ltd has been merged with the assesse company vide court order dated 19/03/2015, the total investments as on 01/04/2013 and 31/03/2014 have to be reworked by excluding investments in Kiran Medical Systems Private Ltd. Also there are certain investments made outside the country such as Star Trivitron FZLLC (Dubai), Trivitron Navakrama Medical systems Private Ltd (Srilanka) and Lab Systems OY (Finland) have to be excluded from opening as well as closing investments in order to arrive at the average investments. All these have been carried out and based on such revised calculations, the assessee themselves

offered Rs.16,13,602/- as per calculation attached. In the above circumstances, based on the argument that the 'Lax auditors have in the Form 3CD have quantified a sum of Rs.66,94,556/- as disallowance under section 14A is not a valid ground for invoking section 263. I! is once again reiterated that Tax Audit report was filed on 29.11.2014 and the court order approving merger of Kiran Medical systems Private Ltd was received on 19/03/2015 and hence the Tax auditors couldn't have considered the elimination of cross investments relating to Kiran Medical Systems Private Ltd, while calculating 14 A disallowance.

g) Also none of the investments were made out of borrowed funds and entire investment has been made only out of Equity contribution and internal generations.

h) Based on the above working assessee has voluntarily disallowed a sum of Rs.16,13,302/- under the third leg and hence no further disallowance is needed.

8. The submissions of the assessee and the materials on records have been considered. The issue requires proper verification of the submissions made by the assessee. Therefore, the issue is reverted back to the AO for fresh consideration with particular reference to the observations made by the Auditor in the Tax Audit Report. The AO is directed to verify the facts regarding, the contentions reproduced in Para(1) in page 13 of this order. The assessee's contentions regarding cross investments relating to Kiran Medical Systems P. Ltd is also to be verified by the AO.

9. From the above discussions, it is evident that the AO has tailed to apply his mind before passing the order, lie has failed to properly enquire the issues with reference to the submissions made by the assessee. There-tore., the assessment u/s 143(3) is rendered erroneous in so far as it is prejudicial to the interest of the revenue. The assessment is therefore set aside on the issues discussed in the above paras. The AO is directed to examine these issues, with reference to the submissions made by the assessee on each issue, after giving an opportunity of hearing to the assessee. The assessment is set aside to be redone with the above directions.

9. The Ld.AR for the assessee submitted that the PCIT has taken up three issues in revision proceedings u/s.263 of the Act. The first and foremost issue taken up by the PCIT is depreciation on goodwill arise out of amalgamation. The assessee has claimed depreciation u/s.32(1) of the Act, on goodwill which has been arisen to the assessee on amalgamation of assessee company with M/s.Kiran Medical Systems w.e.f.01.04.2013 in a scheme amalgamation approved by the Hon'ble Madras High Court vide order dated 28.04.2015. The very same issue has been subject matter of

263 proceedings by the PCIT for the AY 2015-16, where the PCIT has directed the AO to verify depreciation claimed on goodwill in light of 5th proviso to section 32(1) of the Act. The assessee has challenged 263 order passed by the PCIT before ITAT. The Tribunal in ITA No.97/Chny/2021 dated 24.06.2022, has considered very same issue and held that the assessee is entitled for depreciation on goodwill and 5th proviso to Sec.32(1) of the Act, has no application to the facts of present case. Therefore, he submitted that the issue is squarely covered by the decision of ITAT in the assessee's own case for the AY 2015-16 and thus, assumption of jurisdiction by the PCIT on this issue is fails.

10. The Ld.AR further referring to various documents submitted in Paper Book filed by the assessee argued that the AO has examined the issue of provision for warranty expenses in light of reply filed by the assessee vide letter dated 30.11.2016, in response to a specific question raised by the AO during the course of assessment proceedings. The AO after considering the relevant facts has rightly allowed the claim of the assessee. Further, provision for warranty expenses is estimated on the basis of past history and scientific method based on expenses incurred for earlier years and such provision is in accordance with ratio laid down by the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd. (supra). He further submitted that the AO had also examined disallowances of expenditure u/s.14A of the Act, in light of dividend income earned by the assessee and after considering relevant submissions of the assessee dated 30.11.2016,

has accepted suo moto disallowance made by the assessee. Further, on merits, the assessee has earned dividend income from M/s.Kiran Medical Systems, which was later merged with the assessee company w.e.f. 01.04.2013 and thus, dividend declared by merged company and received by amalgamated company losses its nature of dividend as no company declared a dividend for itself and accordingly, the same cannot be treated as dividend for the purpose of s.14A of the Act. The AO after considering relevant facts allowed the claim of the assessee and thus, the PCIT erred in revision of assessment order on this issue.

11. The learned DR, on the other hand, supporting order of the learned CIT(A) submitted that the assessment order passed by the Assessing Officer is erroneous, in so far as it is prejudicial to the interests of Revenue, because assessment order passed by the Assessing Officer, is silent on the issue of depreciation claim on goodwill arising out of amalgamation and thus, it cannot be argued that the Assessing Officer has considered issue and has taken one possible view. The learned DR further submitted that by insertion of Explanation 2 to section 263 of the Income Tax Act, 1961, revisionary powers of the PCIT has been enlarged and an order passed by the Assessing Officer shall be deemed to be erroneous, insofar as it is prejudicial to the interests of Revenue, if in the opinion of the PCIT, the order is passed without making inquiries or verification which should have been made and further, the order is passed allowing any relief without inquiring into claim. In this case, the Assessing Officer has allowed claim

of depreciation on goodwill without making any inquiry or verification contrary to 5th proviso to section 32(1) of the Act, and thus, the PCIT has rightly invoked jurisdiction u/s.263 of the Act and set aside the assessment order.

12. The Ld.DR further submitted that the PCIT has rightly exercised his powers conferred u/s.263 of the Act, on the issue of provision for warranty expenses, because, the AO has not carried out required enquiries, he ought to have been carried out. Similarly, on the issue of 14A disallowance also, the powers exercised by the PCIT in accordance with law. Therefore, he submitted that the order of the PCIT should be upheld.

13. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The PCIT has set aside assessment order passed by the AO in exercise of powers u/s.263 of the Act, on three issues – i) depreciation claimed on goodwill arise out of amalgamation, ii) provision for warranty expenses & iii) disallowance u/s.14A r.w.r.8D of Income Tax Rules, 1962. As regards, the first issue of depreciation on goodwill arise out of amalgamation, we find that similar issue had been considered by the Tribunal in the assessee's own case for the AY 2015-16 in ITA No.97/Chny/2021 dated 24.06.2022, where on identical set of facts and on identical reasons, the PCIT has revised assessment order passed by the AO u/s.263 of the Act, on the issue of depreciation on goodwill in light of 5th proviso to sec.32(1) of the Act. The

Tribunal after considering relevant facts and also applicability of 5th proviso to sec.32(1) of the Act, held that depreciation claimed on goodwill arose out of amalgamation, is not hit by 5th proviso to sec.32(1) of the Act and thus, set aside the order of the PCIT u/s.263 of the Act, on this issue. The relevant findings of the Tribunal are as under:

> *10. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The learned PCIT has set aside assessment order u/s.263 of the Income Tax Act, 1961, on the issue of depreciation claimed on goodwill arose out of amalgamation. The sole basis for the PCIT to assume jurisdiction u/s.263 of the Act is applicability of 5th proviso to section 32(1) of the Act and restriction of depreciation in a scheme of amalgamation. According to the PCIT, in a scheme of amalgamation, claim of depreciation should be in accordance with 5th proviso to section 32(1) of the Act. Therefore, it is necessary to refer to 5th proviso to section 32(1) of the Act and relevant proviso reads as under:-*
>
> > *"Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.*
> >
> > *Explanation 1. -Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.*
> >
> > *Explanation 2. -For the purposes of this sub-section "written down value of the block of assets" shall have the same meaning as in clause* (c) of sub-section (6) of section 43.*

Explanation 3.- For the purposes of this sub-section, the expression "assets" shall mean-

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature."

11. The 5th proviso to section 32(1) of the Act, has been inserted by the Finance Act, 1996, to restrict claim of aggregate deduction which is evident from memorandum of Finance Bill of 1996, as per which, in case of succession in business and amalgamation of companies, predecessor of business and successor of amalgamating company and amalgamated company, as the case may be, are entitled to depreciation allowance on same assets which in aggregate cannot exceed depreciation allowance in any previous year at prescribed rates. Therefore, it is proposed to restrict aggregate deduction in a year depreciation at the prescribed rate and apportion the same allowance in ratio of number of days for which said assets were used by them. From the memorandum explaining Finance Bill, and purpose of introduction of 5th proviso to section 32(1) of the Act, it is very clear, as per which predecessor and successor in a scheme of amalgamation should not claim depreciation over and above normal depreciation allowable on a particular asset. In other words, in a scheme of amalgamation where existing assets of amalgamating company are acquired by amalgamated company, then while claiming depreciation after amalgamation, amalgamated company can claim depreciation only on the basis of number of days a particular asset were used by them. Therefore, in our considered view, said proviso only determines amount of depreciation to be claimed in the hands of predecessor / amalgamating company and in hands of the successor or amalgamated company only in the year of amalgamation based on the date of such amalgamation. However, it does not in any way restrict claim of depreciation on assets acquired after amalgamation or during the course of amalgamation. Therefore, it is very clear from 5th proviso to section 32(1) of the Act, that once any asset, including intangible asset, more particularly, goodwill is added to the respective block of asset of the amalgamated company, in the context of claim of depreciation in the hands of amalgamated company and such addition to the block of assets would not fall within the purview of the 5th proviso to section 32(1) of the Act. Effectively, scope of the said proviso is narrow as could be culled out for the purpose for which said proviso was inserted in the statute as reflected in the Memorandum to the Finance Bill. To further clarify, 5th proviso to section 32(1) of the Act, with regard to depreciation on goodwill is restricted to assets which belongs to amalgamating company and its application cannot be extended to the assets which arise in the course of amalgamation to the amalgamated company. The intention of law was to extend benefit available to the amalgamated company on succession and not to restrict depreciation on assets which generated in the course of succession. It is very clear from the proviso that it refers to depreciation allowable to the predecessor and successor in the case of succession and this should be understood as reference to the assets that belong both to the predecessor and successor and which can only once belonged to the predecessor company and it does not apply to the assets which were generated in the hands of amalgamated company for the first time, as a result of amalgamation as approved by the High Court. In our considered view, 5th proviso applies only to those assets which commonly exist between predecessor and successor, however, it does not apply to asset which has been created or acquired after amalgamation. The creation of new asset by virtue of amalgamation like goodwill

completely go out of reckoning of said proviso and thus, in our considered view, basis of the PCIT to invoke his jurisdiction u/s.263 of the Act is incorrect.

12. Having said so, let us come back to the issue on hand. In the present case, there is no dispute with regard to the fact that goodwill is not existing in the books of account of the amalgamating company. Further, depreciation on goodwill claimed by the assessee was first time recognized in the books of account of amalgamated company in a scheme of amalgamation approved by the Hon'ble High Court of Madras. As per said scheme of amalgamation, accounting treatment in the books of transferee company has been specified as per which transferee company shall account for merger in its books of account as per 'purchase method' of accounting prescribed under Accounting Standard-14 issued by Institute of Chartered Accountants of India. As per AS-14 issued by the ICAI, all assets and liabilities recorded in the books of account of transferor company shall stand transferred and vested in the transferee company pursuant to scheme and shall be recorded by the transferee company at their book value. The excess of or deficit in net asset value of the transferee company, after reducing aggregate face value of shares issued by the transferee company to the members of the transferor company, pursuant to the scheme and cost of investment in the books of the transferee company for the shares of transferor company held by it on the effective date be either credited to the capital reserve or debited to the goodwill account, as the case may be in the books of transferee company. Such resultant goodwill, if any shall be amortized in the books of transferee company as per principles laid down in Accounting Standard-14. Therefore, from scheme of amalgamation and Accounting Standard-14 issued by the ICAI, it is very clear that once amalgamation is in the nature of 'purchase method', then excess consideration paid over and above net asset value of transferor company shall be treated as goodwill and can be amortized in the books of account of the transferee company. In this case, net asset value of the transferor company (amalgamating company) was at Rs.42,66,49,594/-. Further, value of investments of transferee company i.e., in the present case, the assessee in the shares of transferor company (in the present case amalgamating company) was at Rs.114,30,11,323/-. The value of investments held by the assessee company in the shares of amalgamating company extinguishes after amalgamation and consequently difference between net asset value of amalgamating company and value of investment held by amalgamated company would become goodwill in the books of account of transferee company. In the present case, difference between net value of assets of amalgamating company and value of investments held by amalgamated company is at Rs.71,63,61,739/- and same would become goodwill in the books of account of amalgamated company. Therefore, in our considered view, accounting of goodwill and consequent depreciation claim on such goodwill in the books of account of the assessee company is nothing but purchase of goodwill and thus, the assessee has rightly claimed depreciation on said goodwill in terms of section 32(1) of the Income Tax Act, 1961. This legal principle is supported by the decision of Hon'ble Supreme Court in the case of M/s. Smifs Securities Ltd. (2012) 348 ITR 302. This principle is also supported by the decision of the ITAT., Mumbai in the case of M/s. Kewa Fragrances P.Ltd in ITA No.334/Mum/2020 and also decision of the ITAT., Hyderabad Benches in the case of M/s. Mylan Laboratories in ITA No. 2335/Hyd/2018 . The sum and substance of ratios laid down by the Hon'ble Supreme Court and the Tribunals are that goodwill arising on amalgamation is entitled for depreciation u/s.32(1) of the Income Tax Act, 1961. Insofar as case law relied on by the PCIT in the case of DCIT Vs United Breweries Ltd. (supra) of ITAT., Bangalore Bench, we are of the considered view that facts of the case of DCIT Vs United Breweries Ltd.(supra) are distinguishable from facts of the present case, because in the case of DCIT Vs United Breweries Ltd.(supra), before

amalgamation there was a goodwill in the books of account of amalgamating company. Further, in a scheme of amalgamation, goodwill has been revalued and shown higher value. The amalgamated company on succession has claimed higher depreciation on goodwill arose out of amalgamation. Under those facts, the Tribunal came to the conclusion that in terms of 5th proviso to section 32(1) of the Act, predecessor and successor company can claim depreciation on proportionate basis for number of days assets used by them, however, they cannot claim depreciation over and above normal depreciation allowable on a particular asset.

13. In this case, there was no goodwill in the books of account of the amalgamating company and further, goodwill has been acquired by amalgamated company by paying consideration over and above net value of assets at amalgamating company. Therefore, in our considered view, case of the assessee squarely comes under ratio laid down by the Hon'ble Supreme Court in the case of M/s.Smifs Securities Ltd.(supra). In any way, in a subsequent decision, ITAT ., Bangalore Bench in the case of M/s. Altimetrik India Pvt.Ltd, Vs. DCIT (2022) 137 taxmann.com 9 had considered an identical issue and after considering decision of the United Breweries Ltd. (supra) held that consideration paid by the amalgamated company over and above net assets of amalgamating company should be considered as goodwill arising on amalgamation and such goodwill is a capital asset eligible for depreciation. Therefore, from the above facts, it is very clear that in the given facts & circumstances of the case, the 5th proviso to section 32(1) has no application and further, in absence of any other possible view, view taken by the Assessing Officer while allowing depreciation on goodwill in the assessment proceedings, cannot be held to be erroneous or unsustainable under the law. Since, foundation for assuming jurisdiction u/s.263 of the Act, is completely erroneous on account of wrong assumption of applicability of 5th proviso to section 32(1) of the Income Tax Act, 1961, to the facts of the present case, assessment order passed by the Assessing Officer needs no revision, as there is no error committed by the Assessing Officer in claim of depreciation on purchase of goodwill. It is well settled principle of law by decisions of various Courts, including decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co.Vs. CIT 243 ITR 83 (SC), where it has been clearly held that the PCIT cannot assume jurisdiction to revise assessment order, unless the PCIT satisfies that assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the Revenue. In this case, on the issue of depreciation on goodwill, the Assessing Officer has taken one possible view with which the PCIT does not agree, however, it cannot be treated as erroneous & prejudicial to the interests of the Revenue, unless view taken by the Assessing Officer is erroneous and unsustainable in law. This legal principle is also laid down by the Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. 295 ITR 282. In our considered view, view taken by the Assessing Officer on the issue of depreciation on goodwill is a possible view, because when 5th proviso to section 32(1) of the Act, has no application to the given facts and circumstances of the case, the Assessing Officer cannot take any view, which is contrary to provisions of section 32(1) of the Act. Since, the Assessing Officer has taken one of the possible view for which the PCIT may not agree, however, this may not be a reason for the PCIT to assume jurisdiction to revise assessment order passed by the Assessing Officer.

14. In this view of the matter, and considering facts & circumstances of the case, we are of the considered view that the assessment order passed by the Assessing Officer u/s.143(3) of the Act dated 29.12.2017, is neither erroneous nor prejudicial to the interest of the Revenue. The PCIT has assumed jurisdiction u/s.263 of the Act on the sole basis of application of 5th proviso to section 32(1) of the Act, towards depreciation on goodwill. In view of the factual matrix as stated

in preceding paragraphs and non-applicability of 5th proviso to section 32(1) of the Income Tax Act, 1961, to the facts of the present case, there cannot be error in relation to the view taken by the Assessing Officer while framing the original assessment. Therefore, in absence of any such error in the assessment order, assumption of jurisdiction u/s.263 of the Act, by the learned PCIT should be reckoned as invalid. Hence, we quash impugned order passed by the learned PCIT u/s.263 of the Income Tax Act, 1961.

14. In this view of the matter and by following the decision of the ITAT, in the assessee's own case for the AY 2015-16, we are of the considered view that the assessee has rightly claimed depreciation on goodwill arise out of amalgamation, because, 5th proviso to sec.32(1) of the Act, has no application to the facts of the present case. Therefore, we are of the considered view that assumption of jurisdiction by the PCIT on this issue is fails.

15. Coming back to the second issue questioned by the PCIT in revision proceedings. The PCIT has questioned provision for warranty expenses amounting to Rs.2,25,71,530/-. According to the PCIT, there is a five times increase in provision for warranty expenses for the AY 2014-15 when compare to AY 2013-14. Although, the assessee has not explained rational behind substantial increase in expenses, the AO has allowed the claim without carrying out required enquiries, he ought to have been carried out. Therefore, the PCIT opined that the assessment order passed by the AO on this issue is erroneous in so far as it is prejudicial to the interest of the Revenue. We find that the assessee is in the business of manufacturing diagnostic equipments is required to provide warranty on goods manufactured and sold to customers. The assessee is making provision for

warranty expenses on the basis of past history and such provision has been made on scientific basis considering the facts including past history and experience and warranty provided to customers. In our considered view, provision for warranty expenses provided by the assessee in the books of accounts is on the basis of past history and further, such provision has been made on scientific basis. Further, it is in accordance with the decision of the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd.(supra), wherein, it was held that provision for warranty expenses is ascertained liability and hence, allowable as business expenditure. As regards, the allegation of the PCIT on the powers of the AO in not examining the issue in right perspective of law, we find that during the course of assessment proceedings, the AO has issued a specific show cause notice on the issue and the assessee vide letter dated 30.11.2016 filed a detailed reply and explained how provision for warranty is allowable expenses. The AO after considering the relevant facts has rightly allowed the claim of the assessee. No doubt, there is no specific discussion on the issue in the body of the assessment order, however, just because there is no specific discussion on the issue in the assessment order, it does not mean that the AO has not carried out necessary enquiries. In this case, on the basis of details furnished by the assessee, what we noted that the issue has been thoroughly examined by the AO and has allowed the claim of the assessee. Therefore, we are of the considered view that assumption of jurisdiction by the PCIT on this issue also fails.

16. Coming back to the third issue taken up by the PCIT for revision proceedings. The PCIT has set aside the assessment order passed by the AO on the issue of disallowance u/s.14A r.w.r.8D of IT Rules. According to the PCIT, although, the Tax Auditor of amalgamation company i.e. the assessee has quantified the disallowance u/s.14A of the Act, at Rs.68,94,556/-, but the assessee has made disallowance of Rs.16,13,602/- in the statement of total income. The AO without verifying the relevant facts has simply allowed the claim of the assessee which rendered the assessment order passed by the AO to be erroneous in so far as it is prejudicial to the interest of the Revenue. We do not find any merits in the findings of the PCIT on the issue of disallowance u/s.14A of the Act. First of all, the issue has been thoroughly examined by the AO during original assessment proceedings, which is evident from the fact that the AO had issued a specific questionnaire on disallowance of expenditure u/s.14A r.w.r.8D of IT Rules, for which, the assessee vide letter dated 30.11.2016 has filed a detailed Written Submissions and explained how disallowance computed u/s.14A of the Act, in accordance with law. Therefore, we are of the considered view that once the issue on which the PCIT wants to assumption of jurisdiction u/s.263 of the Act, has been examined by the AO, during the course of assessment proceedings, then, there is no scope for the PCIT to revise assessment order on the said issue. Further, on merits also computation of disallowance of expenditure u/s.14A r.w.r.8D of IT Rules, is in accordance with law for two reasons. The first reason is that

dividend income of Rs.1,04,39,190/- received during the year, has been received from M/s.Kiran Medical Systems, the amalgamated company. As we have already noted in the first issue on goodwill, M/s.Kiran Medical Systems, has been amalgamated with the assessee company w.e.f.01.04.2013 vide the Hon'ble High Court order dated 19.03.2015. Consequent to the merger effective from 01.04.2013, when both the assessee's financials and M/s.Kiran Medical Systems's financials are consolidated, the dividend income earlier received from amalgamating company losses its nature of dividend as no company can declare a dividend for itself and accordingly, the same cannot be treated as dividend for the purpose of s.14A of the Act. Further, the Tax Auditor has quantified higher disallowance u/s.14 of the Act, in the case of the assessee, but such quantification has been made by taking into account dividend income received by the assessee and relevant expenditure incurred for the assessment year. However, once after amalgamation dividend income becomes 'nil', and the question of disallowance expenditure relatable to dividend income does not arise. Therefore, in our considered view the AO has rightly accepted the claim of the assessee on the issue of disallowance u/s.14A of the Act and thus, we are of the considered view that assumption of jurisdiction by the PCIT on this issue also fails.

17. In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that assessment order passed by the AO u/s.143(3) of the Act dated 22.12.2016 is neither

erroneous nor prejudicial to the interest of the Revenue. The PCIT without appreciating the facts simply set aside the assessment order passed by the AO u/s.263 of the Act, on three issues. Therefore, we quashed the order of the PCIT u/s.263 of the Act.

18. In the result, the appeal filed by the assessee is allowed.

Order pronounced on the 12th day of October, 2022, in Chennai.

Sd/-	***Sd/-***
(महावीर सिंह)	**(जी. मंजूनाथा)**
(MAHAVIR SINGH)	**(G. MANJUNATHA)**
उपाध्यक्ष /VICE PRESIDENT	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 12th October, 2022.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF