IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No. 1119/DEL/2022
Assessment Year: 2017-18

M/s Kaur Cookies (P) Ltd., F-38, Ambience Mall, Vasant Kunj, New Delhi-110070. PAN- AACCK8951H	Vs	Principal Commissioner of Income-tax, Delhi-4, New Delhi.
APPELLANT		**RESPONDENT**
Assessee represented by	Sh. Lalit Mohan, CA	
Department represented by	Sh. Mohd. Gayasuddin Ansari, CIT(DR)	
Date of hearing	18.04.2023	
Date of pronouncement	11.05.2023	

O R D E R

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Principal Commissioner of Income-tax (PCIT), Delhi-4, New Delhi, dated 24.03.2022, passed u/s 263 of the Income-tax Act, 1961, hereinafter referred to as the "Act", pertaining to the assessment year 2017-18. The assessee has raised following concise grounds of appeal:

"1 That order dated 24.3.2022 *u/s 263 of the Act by the learned Pr.*

Commissioner of Income Tax, Delhi-4, New Delhi has been made without satisfying the statutory preconditions contained in the Act and is therefore without jurisdiction and thus, deserves to be quashed as such.

2 That the learned Principal Commissioner of Income Tax has also erred both in law and on facts in directing and, holding that "entire amount of Rs. 99,209/- of PF and Rs. 30,841/- of ESIC required addition as these payments are not within permitted time" when as a matter of fact, no such addition was warranted either on fact and in law and therefore unsustainable.

2.1 That even otherwise that conclusion that '"the assessee is not eligible for claim beyond due date prescribed under PF Act & ESIC Act to be disallowed u/s 36 of IT Act" is factually incorrect, legally misconceived and wholly untenable.

2.2 That further finding of the learned Principal Commissioner of Income Tax that the issue regards to details of Entertainment tax, EPF, ESCIC, Service Tax and VAT needs to be enquired thoroughly is not based on correct appreciation of facts and in law, apart from being without jurisdiction.

3 That the finding of the learned Principal Commissioner of Income Tax that "the claim of loss on disposed off assets the assessee was not eligible to claim loss on car wherein the block of assets not ceased to exist. The assessee accepts that due to inadvertent errors on the part of the assessee company the value of assets have been taken at Rs. 11,70,034/- instead f Rs. 13,60,034/-. On the claim of loss detailed enquiry was required to have been made by the Assessing Officer" is factually incorrect, contrary to record and otherwise too perverse and without application of mind and therefore untenable."

2. Facts giving rise to the present appeal are that in this case the assessee filed its return of income declaring loss of Rs. 2,40,88,622/- on 6.11.2017. Thereafter, revised return was filed on 21.06.2018 declaring loss of Rs. 2,40,84,958/-. The

case was selected for scrutiny assessment and the assessment was completed at a loss of Rs. 2,40,67,255/- after making addition of Rs. 17,703/-. Thereafter the learned PCIT after examining the record issued notice u/s 263 of the Act calling upon the assessee as to why the assessment order dated 10.12.2019 be not revised. In response thereto the assessee filed its reply. However, the reply of the assessee was not found acceptable and the learned PCIT held the assessment order dated 10.12.2019 as erroneous in as much as prejudicial to the interest of revenue. He, therefore, directed the assessing Officer to frame the assessment de novo. Aggrieved against this the assessee is in appeal before this Tribunal.

3. Apropos to the grounds of appeal the learned counsel for the assessee reiterated the submissions as made in the written submissions. For the sake of clarity the submissions of the assessee are reproduced as under:

> "*MAY IT PLEASE YOUR HONOURS:*
>
> ***1** The **instant appeal** arises from an order **dated** 24.3.2022framedu/s 263 **of the Act.***
>
> ***2** Issue No. 1*
>
> *2.1 It is submitted that learned Pr. Commissioner of Income Tax in revision order has held that sum of Rs. 3,48,324/- has not been considered for disallowance in return of income by relying upon tax audit report (hereinafter referred to as **"TAR")** furnished by learned Auditor **(para 9.1 - 9.2, page 8 and para 10(1) page 9 of impugned).** Break-up of the aforesaid figure as also submitted to learned PCIT in reply dated 12.3.2022 (pages 77-100 at page 79 of Paper Book) is as under:*

Sr. No.	*Particulars*	*Amount disallowed Column 26(i)(B)(b) of TAR (Page 27 of Paper Book)*	*Amount disallowed in Income Tax return (Page 3 of Paper Book)*	*Difference*	*Remarks*
1	*Entertainment*	*5,44,753*	*5,44,753*	*-*	
2	*EPF*	*83,847*	*83,847*	*-*	
3	*ESIC*	*96,553*	*96,553*	*-*	
4	*Service Tax*	*3,22,901*	*3,22,901*	*-*	
5	*VAT*	*18,51,632*	*15,03,308*	*3,48,324*	*Sum of Rs. 3,48,324 has been duly deposited on* ***1****1.4.2017* ***(page 124 of Paper Book)*** *i.e. before due date of furnishing the return of income, therefore no disallowance is warranted. (Reply dated 12.3.2022 at page* ***80 read with page 124 of Paper Book)***

2.2 It is submitted that in respect of aforesaid issue, the appellant vide reply dated ***12.3.2022*** **(*pages 77-100 at page 79-80 of Paper*** *Book) filed before learned PCIT has submitted that sum of Rs. 3,48,324/- was duly deposited on 11.4.2017* **(*page 124 of Paper*** *Book)i.e. before due date of furnishing the return of income; hence no disallowance is warranted.*

2.3 It is submitted that finding of learned PCIT at page 8, para 9.2 has held that "the assessee vide reply dated 12.3.2022 submitted that it was assessee's mistake by the Auditor and disallowance of Rs. 3,48,324/- was not required" is misconceived. It is submitted that the contention of the appellant was that "That the VAT liability of Rs. 3,48,324/- which was incurred in the year under review was duly deposited on or before the due date offurnishing of return of income u/s 139(1) of the Act." Hence, no disallowance is warranted u/s 43B of the Act. Thus finding of learned PCIT at page 9, para 10(1) of impugned order is not in accordance with law.

2.4 It is thus submitted that in view of undisputed facts of appellant no inference on order of assessment is justified on the issue under consideration.

3. 2nd Issue

3.1 It is submitted that learned PCIT has next alleged ***(para 9.3, page 8 of impugned order)*** *that as per TAR column no. 20(b) of FORM 3CD* ***(page 23-24 of Paper Book),*** *it*

has been reported by the learned Accountant that PF of sum of ***Rs. 87,924/-*** *have* ***not been paid*** *before due date of relevant Act and was required to be disallowed u/s 36(l)(ia) of the Act.*

3.2 It is submitted that aforesaid finding ***of*** *learned PCIT is factually incorrect. It is submitted that as per Column 20(b) of TAR* ***(page 23 of Paper Book)*** *sum of Rs.* ***38,652/- (item 1 to 8 of said table)of*** *PF has not been paid by appellant and detail* ***of*** *same was also explained before learned PCIT in tabular chart as extracted hereunder:* ***(page 81 of Paper Book)***

Name of Liabilities	*Chandigarh Unit*			*Delhi Unit*		
Employee's Contribution to Provident fund	*For the Month*	*Amount*	*Date of Deposit*	*For the Month*	*Amount*	*Date of Deposit*
	Apr-16	*7314*	*15-Jul-16*	*Apr-16*	*7356*	*Not deposited*
	May-16	*6992*	*20-Sep-16*	*May-16*	*6875*	
	Jun-16	*6355*	*23-Nov-16*	*Jun-16*	*5181*	
	Jul-16	*5739*	*01-Dec-16*	*Jul-16*	*5015*	
	Aug-16	*5647*	*27-Aug-16*	*Aug-16*	*4248*	
	Sep-16	*5647*	*27-Aug-16*	*Sep-16*	*5040*	
	Oct-16	*5345*	*11-Feb-17*	*Oct-16*	*2376*	
	Nov-16	*3782*	*31-May-17*	*Nov-16*	*2561*	
	Dec-16	*3974*	*31-May-17*	*Dec-16*	*0*	*Business Closed*
	Jan-17	*3254*	*31-May-17*	*Jan-17*	*0*	
	Feb-17	*3254*	*31-May-17*	*Feb-17*	*0*	
	Mar-17	*3254*	*31-May-17*	*Mar-17*	*0*	
Total		*60,557*			*38,652*	

3.3 It is submitted that the sum of Rs. 38,652/- has already been disallowed by appellant *as part of disallowance of Rs.* ***83,847/- (page 3 read with page 27 and*** *79-80* ***of Paper Book)*** *and was also submitted before learned PCIT as under:*

(pages ***77-100*** *at page* ***80*** *of Paper Book)*

> *"****B. Mismatch in disallowance made by the auditor in column 20b of Tax audit report in form 3CD and disallowance in the Return of Income as per section 36(l)(va) of the Income Tax act.:-***
>
> *The notice u/s 263 states that no independent verification was made by the assessing officer in respect of deposit of Employee's Contribution of PF & ESI received by the assessee Company during the year under review.*
>
> *In this regard, we submit that during the year under review the assesse Company*

had recorded Rs.30,841/- of ESIC's employees share & Rs.99,209/- being PF's employees share. The details ESIC & PF shares is explained as under:- ***a. PF Contribution (Employees share)***

During the year under review the assessee Company was running 2 restaurants out of which Delhi restaurant was closed in Nov 2016. The assesse Company during the year under review had recovered PF contribution Employees share of Rs. 99,209/- out of which the company had deposited Rs.60,557/- for Chandigarh Unit & no amount was deposited for Delhi unit. Details of month wise contribution received from employees & details of deposits are as under:-

Name of Liabilities	*Chandigarh Unit*			*Delhi Unit*		
Employee's Contribution to Provident fund	*For the Month*	*Amount*	*Date of Deposit*	*For the Month*	*Amount*	*Date of Deposit*
	Apr-16	*7314*	*15-Jul-16*	*Apr-16*	*7356*	*Not deposited*
	May-16	*6992*	*20-Sep-16*	*May-16*	*6875*	
	Jun-16	*6355*	*23-Nov-16*	*Jun-16*	*5181*	
	Jul-16	*5739*	*01-Dec-16*	*Jul-16*	*5015*	
	Aug-16	*5647*	*27-Aug-16*	*Aug-16*	*4248*	
	Sep-16	*5647*	*27-Aug-16*	*Sep-16*	*5040*	
	Oct-16	*5345*	*11-Feb-17*	*Oct-16*	*2376*	
	Nov-16	*3782*	*31-May-17*	*Nov-16*	*2561*	
	Dec-16	*3974*	*31-May-17*	*Dec-16*	*0*	*Business Closed*
	Jan-17	*3254*	*31-May-17*	*Jan-17*	*0*	
	Feb-17	*3254*	*31-May-17*	*Feb-17*	*0*	
	Mar-17	*3254*	*31-May-17*	*Mar-17*	*0*	
Total		*60,557*			*38,652*	

The Tax auditor had correctly reported in form 3CD in column 20b that Employees' PF Contribution of Rs. ***38,652/-*** *is not deposited. It is matter of fact that the Employers share of Rs.* ***38652/-*** *alongwith employees share of Rs.* ***45,195/-*** *has been disallowed u/s 43B i.e. Rs.* ***83847/-*** *in form 3CD column 26(i)(B)(b) i.e. clause (a),(b),(c),(d),(e),(f),and (g) of section 43B of the Act, the liabilities for which was incurred in the previous ear and was not aid on or before due date of furnishing the return of income u/s 139(1) and the same was disallowed in the Return of Income as explained in Table A above. However, as per section 43B(b) only employers share is disallowed if the same is not paid before due date of furnishing the return of income u/s 139(1), but the Company had wrongly disallowed the both employer and employees contribution u/s 43 B while filing return of Income instead of disallowing 36(l)(v)."*

3.4 It is submitted that learned PCIT has not disputed the aforesaid contention of appellant but has held that (page 9, para 10(2) of impugned order) "the disallowance in PF and ESIC Employee contribution the plea of the assessee that part of it has been disallowed by the assessee u/s 43B of IT Act is not justified since disallowance was required to be made u/s 36(l)(va) of the Act."

3.5 It is thus submitted that in view of aforesaid fact that disallowance has already been made by appellant; there is noprejudice to revenue and In fact order is also not erroneous. It is further submitted that even the finding that assessee may claim it in next year on the basis of payment during the year is also misconceived.

4 It is next submitted that learned PCIT has also alleged ***(para 9.3, page 8 of impugned order)*** *that as per TAR column no. 20(b) of FORM 3CD* ***(page 23-24 of Paper Book),*** *it has been reported by the learned Accountant that ESI of sum of* ***Rs. 29,115/-*** *have not been paid before due date of relevant Act and was required to be disallowed u/s 36(l)(ia) of the Act.*

4.1 It is submitted that aforesaid finding of learned PCIT is factually incorrect. It issubmitted that as per Column 20(b) of TAR ***(page 23 of Paper Book)*** *only sum of Rs.* ***25,925/- (items9 to 16 and item 32 to 40 of said table)*** *of ESI has not been paid by appellantand detail of same was also explained before learned PCIT in tabular chart as under: (Page 83 of Paper Book)*

Name of Liabilities	*Chandigarh Unit*			*Delhi Unit*		
Employee's Contribution to ESIC	*For the Month*	*Amount*	*Date of Deposit*	*For the Month*	*Amount*	*Date of Deposit*
	Apr-16	*1726*	*03-feb-17*	*Apr-16*	*1552*	*Not deposited*
	May-16	*1664*	*22-Mar-17*	*May-16*	*1419*	
	Jun-16	*1526*	*22-Mar-17*	*Jun-16*	*1020*	
	Jul-16	*1376*	*Not deposited (total of not deposited is Rs. 18,132/-)*	*Jul-16*	*976*	
	Aug-16	*1376*		*Aug-16*	*772*	
	Sep-16	*1376*		*Sep-16*	*982*	
	Oct-16	*1314*		*Oct-16*	*561*	
	Nov-16	*779*		*Nov-16*	*511*	
	Dec-16	*1190*		*Dec-16*	*0*	*Business Closed*
	Jan-17	*3517*		*Jan-17*	*0*	
	Feb-17	*4089*		*Feb-17*	*0*	
	Mar-17	*3115*		*Mar-17*	*0*	
Total		*23048*			*7793*	

*4.2 It is submitted that the sum of **Rs. 25,925/-** has already been disallowed by appellant as part of disallowance of **Rs. 96,553/-** (page 3 read with page 27 and 79-80 of Paper Book) and was also submitted before learned PCIT as under:*

"ESIC Contribution(Employees share)

*During the year under review the assessee Company had received ESIC contribution Employees share of **Rs. 30,841/-** out of which the company had deposited **Rs. 4916/-. Details of month wise contribution received from employees are as under:-***

Name of Liabilities	*Chandigarh Unit*			*Delhi Unit*		
Employee's Contribution to ESIC	*For the Month*	*Amount*	*Date of Deposit*	*For the Month*	*Amount*	*Date of Deposit*
	Apr-16	*1726*	*03-feb-17*	*Apr-16*	*1552*	*Not deposited*
	May-16	*1664*	*22-Mar-17*	*May-16*	*1419*	
	Jun-16	*1526*	*22-Mar-17*	*Jun-16*	*1020*	
	Jul-16	*1376*	*Not deposited (total of not deposited is Rs. 18,132/-)*	*Jul-16*	*976*	
	Aug-16	*1376*		*Aug-16*	*772*	
	Sep-16	*1376*		*Sep-16*	*982*	
	Oct-16	*1314*		*Oct-16*	*561*	
	Nov-16	*779*		*Nov-16*	*511*	
	Dec-16	*1190*		*Dec-16*	*0*	*Business Closed*
	Jan-17	*3517*		*Jan-17*	*0*	
	Feb-17	*4089*		*Feb-17*	*0*	
	Mar-17	*3115*		*Mar-17*	*0*	
Total		*23048*			*7793*	

The Tax auditor had correctly reported in form 3CD in column 20b that Employees' ESIC Contribution of Rs.25,925/- is not deposited. It is matter of fact that the employees share of Rs. 25,925/- along with Employers share of Rs. 70,628/- has been disallowed u/s 43B i.e. Rs. 96,553/- in form 3CD column 26(i)(B)(b) i.e. clause (a), (b),(c),(d),(e),(f),and (g) of section 43B of the Act, the liabilities for which was incurred in the previous year and was not paid on or before due date of furnishing the return of income u/s 139(1) and the same was disallowed in the Return of Income as explained in Table A above. Since the assesse Company had itself disallowed the entire of Employer's and Employees Share u/s 43B(b) instead of disallowing Employees share u/s 36(l)(v), no disallowance is called for since the amount has been disallowed."

4.3 It is submitted that learned PCIT has not disputed the aforesaid contention of appellant but has held that (page 9, para 10(2) of impugned order) "the disallowance in PF and ESIC Employee contribution the plea of the assessee that part of it has been disallowed by the assessee u/s 43B of IT Act is not justified since disallowance was required to be made u/s 36(l)(va) of the Act."

4.4 It is however submitted that in view of aforesaid fact that disallowance has already been made by appellant; there is no prejudice to revenue and infact order is also not erroneous. It is further submitted that even the finding that assessee may claim it in next year on the basis of payment during the year is also misconceived.

5 It is further submitted that finding of learned PCIT ***(page 9, para 10(3) of impunged order)*** *that "In this way entire amount of Rs. 99,209/- of PF (item 1 to 8 and item 17 to 28 of table at page 23-24 of paper book) and Rs. 30,841/- of ESIC (item 9 to 16 and 29 to 40 of table at page 23-24 of paper book) required addition as these payments are not within permitted time. " being employees contribution not deposited by assessee upto due dates of PF Act & ESIC Act in view of applicability of new amendment in section 36 of Act. It is submitted that aforesaid finding are also misconceived in view of judgment of Hon'ble Jurisdictional High Court of Delhi in the case of* ***PCIT vs. Pro Interactive Service (India) Pvt. Ltd. in ITA No. 983/2018.***

5.1 Further reliance is also placed upon following decisions wherein it has been held that amendment brought out by Finance Act, 2021 will take effect from 01st April 2021 and will prospectively apply in relation to the assessment year 2021-22 and subsequent years therefore does not apply to year under consideration i.e. 2017-18

i) *ITA No. 97/D/2022 dated 18.5.22 Dayal Industries (P) Ltd. vs. AO (Batch of cases)*

ii) ITA No. 1051/D/2022 dated 15.6.2022 Pratham Motors (P) Ltd. vs. ACIT (Batch of cases)

6 3rd Issue

6.1 It is submitted that learned Assessing Officer during course of assessment ***proceedings in notice dated*** *27.9.2019 (pages 38-44 at page 43 of Paper Book) u/s 142(1) of the Act*

"22. Details of addition to fixed assets made during the year, with evidence and the assets sold during the year with calculation of profit and loss on sale of fixed assets."

6.2 It is submitted that appellant during the course of assessment proceedings; appellant has submitted as under:

i) *Reply dated 1.12.2019* ***(pages*** *53-58* ***at page*** *58* ***of Paper Book)***

> *"12.* ***Point No. 22.*** *Details of assets purchased during the year review alongwith copy of some of the bills are enclosed for records. Further as stated in above points that decline is sale lead to closure of the Delhi & Gurgaon restaurants in the year under review which lead to sale of some of the fixed assets of the Company. There were assets which are not salable hence, the same were scrapped/disposed off due to which loss increased. Detail of the same is enclosed for records.*

It is submitted that following evidences has been placed on record:

a. Copy of ledger of loss on sale of assets in books of appellant ***(page 114*** *of Paper Book);*

b. Copy of ledger of Plant & Machinery in books of appellant ***(page*** *of Paper 115 of Book);*

c. Copy of ledger of loss on scrapped/disposed off assets in books of appellant ***(page 116 of Paper Book);***

d. details of fixed assets sold and loss details (pages 120-121 of Paper Book)

e. ***Copy of*** *computation of income, return of income and depreciation* ***charts(pages 1,3 and 16 of Paper Book)***

ii) ***Reply dated 30.11.2019*** *(pages 53-58 at page 54 of Paper Book)*

> *"Point No. 6. Comparative details of Total Sales, Gross Profit, Net Profit along with N.P. Ratio, G.P. ratios is explained as under:*
>
> *…. .*
>
> *The main reasons for decline in PBT for the year under review are as follows :-*
>
> *…. .*
>
> *e. Capital loss on dispose off/sale of fixed assets of Rs. 31,53,777/-."*

6.3 It is further submitted that appellant during the course of proceedings u/s 263 of the Act in its reply dated 12.3.2022 (pages 77-100 at page 85 - 89 of Paper Book) has submitted as under:

> *"D. No disallowance of loss of sale of fixed assets of Rs. 24.860/- and loss on sale of scrapped/disposed off assets of Rs. 31.28.117/- has been claimed:-*
>
> *In this regard we respectfully submit here that the assessee Company incurred loss on sale of Fixed Assets of Rs. 24,860/- & loss on sale of scrapped/disposed off assets of Rs. 31,28,117/- and the same has been disallowed in the Computation of Income filed for the year under review. That both the above stated amount were*

disallowed under clause 9e any other allowance under Part A OI-Other Information of ITR form along with bad debts. Details of amount disallowed under clause 9e are as under:-

	Particulars	*Amount*
i	*Loss on sale of Assets*	*Rs. 24,860/-*
ii	*Loss on Scrapped/disposed off assets*	*Rs. 31,23,117/-*
iii	*Bad Debt/Amount written off*	*Rs. 32,93,694/-*
	Total	*Rs. 64,47,471/-*

The extract of the ITR filed showing the above stated disallowance is being produced below:

9	*Amounts debited to the profit and loss account, to the extent disallowance under section 40A*			
	a	*Amounts paid to persons specified in section 40A(2)(b)*	*9a*	*0*
	b	*Amount paid otherwise than by account payee cheque or account payee bank draft under section 40A(3)-100% disallowable*	*9b*	*0*
	c	*Provision for payment of gratuity [40A(7)]*	*9c*	*0*
	d	*Any sum paid by the assessee as an employer for setting up or as contribution to any find, trust, company, AOP, or BOI or society or any other institution [40A(9)]*	*9d*	*0*
	e	*Any other disallowance*	*9e*	*64,47,471/-*
	f	*Total amount disallowance under section 40A*	*9f*	*64,47,471/-*

Our submission on notice u/s 263 relating to loss on assets sale/scrapping

During the course of assessment proceedings in the above case, necessary explanations and information were provided to the Learned Assessing Officer for all the queries raised by way of written submissions as stated above and explanations furnished in person during the proceedings. It is on the basis of all the records and information furnished which were considered by the Learned Assessing officer using his understanding and discretionary powers in framing the assessment order. The order is neither erroneous nor prejudicial to the interest of the revenue and the all the points raised in notice u/s section 263 have been duly taken care of and there is nothing in the assessment order which is prejudicial to the interest of the revenue.

In a bid do elaborate the issue raised, we submit as under:-

	Particulars		*Amount (in Rs.)*
I	*Net Loss as per Audited Profit and loss Account*		*4,03,12,164*
ii	*Add; Expenditure not allowable*		
	Depreciation as per Co's Act	*37,99,001*	
	Donation	*9,000*	
	Expenses Disallowed u/s 40(a)(ia)	*70,32,228*	
	Disallowance u/s 43B	*25,51,362*	
	Penalty	*1,00,000*	
	Loss on sale of Assets	*25,660*	
	Bad Debts/Amount written off	*32.93,694*	
	Loss on Scrapped/Disposed assets	*31,28,117*	*1,99,39,662*
iii	*Less: Expenses Allowed*		
	Bad-debt Allowed	*2,97,763*	
	Depreciation as per I Tax	*34,17,757*	*37,15,520*
	Less 80G Deduction		*4,500*
iv.	*Business Loss*		*2,40,84,120*

Thus it is apparent from the above computation of income that the assessee on its own had reduced the taxable business loss from the Book loss as per audited financials. The items of additions being contemplated in the notice u/s 263 have already been disallowed in the computation of income and the return filed which was duly provided and considered by the Learned Assessing Officer in faming the assessment order. The disclosures are available in the computation and the income tax return filed with certain disclosures under the column "Any Other Disclosure" under Schedule 01.

The contention of notice u/s 263 is that loss on sale of fixed assets of Rs. 24,860/- has been claimed and loss on sale of scrapped/disposed off assets of Rs. 31,28,172/- has been claimed while the balances of these assets still exists in block of assets. We would like to explain this as under:-

Loss on sale of assets and assets disposed of details was submitted in reply to point no. 22 vide para no. 12 of our reply submitted on 1st December, 2019 ***(pages 54*** *of Paper Book). A detailed annexure showing working of loss on sale and asset scrapping was submitted, which is being provided here in under:-*

Sr. No.	*Particulars*	*Sale Value*	*Loss on sale*	*Loss on scrapping*
a.	*Gas Breakign Oven*	*83,000*	*7,667*	*-*
b.	*Kitchen Equipment*	*18,000*	*5,859*	
c.	*Chocolate Modules*	*8,000*	*1,450*	
D	*Microwave Oven*	*10,000*	*1,978*	
e	*Mini Mixed*	*6,500*	*236*	
f	*Mixer Machine*	*11,000*	*3,046*	
g	*Packing Machine*	*8,000*	*4,128*	
h	*Sandwich Griller*	*9,000*	*66*	
i	*Waffel Machine*	*16,500*	*430*	
J	*Plant & Machinery (at costs)*	*10,00,434*	*-*	*-*
K	*Wagon R*	*1,90,000*	*-*	*2,30,922*
L	*Fire Extinguisher*	*0*	*-*	*5466*
M	*Sign Board*	*0*	*-*	*7,99,379*
N	*Terrace Awning*	*0*	*-*	*21,081*
O	*Furniture*	*0*	*-*	*1,25,410*
P	*Design fee Building*	*0*	*0*	*19,45,059*
Q	*Table Tennis Table*	*0*	*-*	*800*
	Total	*13,60,034*	*24,860*	*31,28,117*

Total of Loss on Sale and Loss on scrapping of assets/disposed of comes to Rs. 31,52,977/-. However there has been an inadvertent error on the part of the assessee Company in this case wherein sale value of assets has been considered at Rs.11,70,034/- instead of Rs. 13,60,034/- in the Income Tax Depreciation Chart- ***(page** 16 **of Paper Book)** Difference being the salevalue of Wagon R car of Rs. **190000/-. We are agreeing on this addition** 15% **Depreciation on** 190000/- **i.e. Rs.** 28 00/-. **This is an inadvertent error which is not material in relation to the total loss being of Rs.** 2.41 **cr being claimed by the assessee for the year under review.***

***As regards other assets which have been disposed/ apped off, the assessee** vide para no. 12 of our reply submitted on 1st December, 2019 (pages **53-58** of Paper Book at page **58)** had clearly mentioned that the assessee company had to close down two restaurants (Delhi and Gurgoan) during the period under review. At the time of evicting any rented place, iris obvious that all the assets installed are not in a position of being removed especially the furniture/Fixture, Designing, Interior Decoration embedded in the premises is not possible to be removed. Thus the assessee Company sold off whatever assets could possibly be removed and sold and the balance was left at the time of leaving the premises. It was also mentioned in para 2 (C) of above reply **(pages** 53-58 **of Paper Book at page** 58) that the reasons for decline. In profitability was loss on sale of assets/scrapping of asset. Thus it is evident from the above submission that the company suffered losses on scrapping of assets which were not feasible to be removed from the site — for ex- Designing fee, Signboards, Furniture & Fixture etc. — the loss for the*

above assets of Rs. 31,28,117 has been rightly added in the computation along with the actual loss on assets which were sold. This loss on sale is apparent from the Computation of Income filed and the assessee on its own gave a detailed explanation with working for the losses from sale and scrapping of assets. A detailed working in the form of Annexure was also provided to the Learned Assessing Officer working out the loss on sale and scrapping of asset. ***The actual sale value of all the assets sold came under the 15% Depreciation bracket rate and the sale amount was thus rightly excluded from the Depreciation chart as per Income Tax Act.*** *There was no realisation from other assets i.e. Furniture/Fixture, Building, Designing charges etc. and thus no sale value was rightly shown under the other assets in the Depreciation Chart as per Income Tax Act.*

Thus it is evident that the Learned Assessing. Officer had specifically sought details of the loss which were explained in detail, besides the losses incurred have been added back to the Book Loss in Computation of Income/Income tax return filed makes its absolutely clear that the order has been passed after making proper enquiries and is not prejudicial to the interest of the revenue. It is being submitted again that required additions have been made in the Computation of Income and Income tax return filed which were considered by the Learned Assessing Officer while framing the order. Thus the notice issued u/s 263 stating that loss on sale of fixed assets/scrapping of assets has not been claimed as a revenue loss is devoid of actual facts of the case on record. The Assessee Company had filed requisite details and the Learned Assessing Officer has considered the same before framing the assessment order. The notice u/s 263 does not fulfil the conditions as laid down under explanation 2 of the said section."

6.4 It is submitted that learned PCIT has not denied the contention of appellant that appellant has already disallowed the loss in return of income however has held as under:(page 9 of impugned order)

> *"As regards the claim of loss on disposed off assets the assessee was not eligible to claim loss on car wherein the block of assets not ceased to exist. The assessee accepts that due to inadvertent errors on the part of assessee company the value of assets have been taken at Rs. 11,70,034/- instead of Rs. 13,60,034/-. On the claim of loss detailed enquiry was required to have been made by the Assessing Officer."*

CONENTIONS OF APPELLANT

7 It is submitted that in order to assume jurisdiction u/s 263 of the Act, the pre-requisites are that, order passed by the learned Assessing Officer should be erroneous and it should also be prejudicial to the interests of revenue. In other words the twin conditions have to be satisfied, ***namely, (i) the order of the*** *Assessing Officer sought to be revised should be erroneous (ii) it should be prejudicial to the interests of the revenue.* ***It is submitted that however learned*** *PCIT ignored or rather failed to appreciate that once learned Assessing Officer on examination of facts on record and after making all possible enquiries had accepted the claim of the assessee. then such an order of assessment cannot be alleged as erroneous and prejudicial to the interest of Revenue.*

Further in a case where two views are possible and the learned Assessing Officer has taken a view with which the PCIT does not agree, the said order cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Assessing Officer is unsustainable in law as held by Hon'ble Delhi High Court in the case of ***CIT vs. DLF Ltd. reported in*** *350* ***ITR*** *555whereby Hon'ble Court has held as under:*

> *"11. In this case, the record reveals that the AO had issued notice, and held proceedings on several dates (of hearing) before proceeding to frame the assessment. He added nearly Rs. 2 crores to the income at that time. The Commissioner took the view that the assessment order disclosed an error, in that the deduction under Section 14-A had not been made. Now, while the statutory direction to the Assessing Officer to calculate, proportionately, the expenditure which an assessee may incur to obtain dividend income, for purposes of disallowance, cannot be lost sight of, equally, such a requirement has to be viewed in the context and circumstances of each given case. In the present case, it was repeatedly emphasized that the assessee's dividend income was confined to what it received from investment made in a sister concern, and that only one dividend warrant was received. These facts, in the opinion of this court, were material, and had been given weightage by the Tribunal in its impugned order. There is no dispute that the investment to the sister concern, was not questioned; even the Commissioner has not sought to* ***undermine this aspect. Equally, there is no material to say that apart from that single dividend warrant, any other dividend income was received. Furthermore, there is nothing on record to say that the assessee had to expend effort, or specially allocate resources to keep track of its investments, especially dividend yielding ones.*** *In these circumstances, it can be said that whether the deduction under Section 14-A was warranted, was a debatable fact. In any event, even if it were not debatable, the error by the AO is not "unsustainable". Possibly he could have taken another view; vet, that he did not do so, would not render his opinion an unsustainable one, warranting exercise of Section 263.*

7.1 Reliance in support of the above submission is placed on decision of ***Hon'ble Kolkata Tribunal in the case*** *of Garg Brothers (P) Ltd. vs. DCIT in* ***ITA No. 2519/D/2017*** *dated 18.4.2018, whereby Hon'ble Tribunal held as under:*

> *65. In any event, we note that the Assessing Officer has adopted one of the courses permissible in law and even if it has resulted in loss to the revenue, the said decision of the Assessing Officer cannot be treated as erroneous and prejudicial to the interest of the revenue as held by Hon'ble Supreme Court in Malabar Industries Ltd. vs. CIT (supra). Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of the revenue, in the facts and circumstances narrated above, the usurpation of jurisdiction exercising revisional jurisdiction by the Principal CIT is ''null" in the eves of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the Principal CIT. Therefore, we quash all the*

orders of the Principal CIT dated 15.03.2017 being ab initio void

7.2 It is further submitted that from the perusal of the show cause notice issued during the assessment proceedings and also show cause notice u/s 263 of the Act, it is seen that there are no new fact that have emerged after assessment order or any fact that have been skipped by the learned Assessing Officer. All the facts and report of the investigation wing were available with the learned Assessing Officer ***at the time of assessment proceedings. Therefore, it is evident that the learned officer had conducted proper enquiries before framing the assessment. Infact, the learned Assessing Officer had made all necessary enquiries provided in law and thereafter alone had accepted claims of the assessee. Hence, by no justification, it could be alleged that, the order of assessment framed by the learned officer is erroneous within the meaning of Section 263 of the Act and as such, notice is without jurisdiction. Reliance is also placed on the following judicial pronouncements:***

i) 295 ITR 282 (SC) CIT v. Max India Ltd. *the Hon'ble Apex Court in the above case applied the ratio in the case of* ***Malabar Industrial Co. Ltd. v. CIT reported in 243 ITR 83*** *wherein it has been held as under:*

> *"A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suomoto under it, is that the order of the Income Tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the Income Tax Officer is eiToneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not conferred to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an eiToneous order of the Income Tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the assessing officer. Every loss of revenue as a consequence of an order of assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue: or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it*

cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income Tax Officer is unsustainable in law.

It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi ***Saraogi*** *v. C/T [1968] 67ITR 84 (SC) and in* ***Smt. Tara Devi Aggarwal*** *v. C/T [1973] 88 ITR 323 (SC)."*

i) 437 IR 285 (Del) Pr. CIT v. Brahma Centre Development (P) Ltd.
ii) 171 ITR 698 (All) CIT v. Goyal Private Family Specific Trust
iii) 170 ITR 28 (All) CIT v. KashniNath& Company
iv) 171 ITR 141 (MP) CIT v. Ratlam Coal Asn. & Co.
v) 430 ITR 55 (Kar) CIT vs. Cyber Park Development & Construction Ltd.
vi) ITA No. 2519/Kol/2017 dated 18.4.2018 Garg Brothers (P) Ltd. vs. DCIT
vi) ITA Nos. 3281-3284/D/2015 dated 11.10.2019 Smt. ShumanaSen vs. DCIT
vii) ITA No. 5239/D/2019 dated 21.2.2020 M/s Sunrays Cotspin (P) Ltd. vs. PCIT
viii) ITA No. 3207/Ahd/2009 Gujarat Laxmi Majur Kamgar Sahkari Mandi Ltd. vs. CIT
ix) ITA No. 499/Chd/2016 dated 9.11.2016 Sh. Paramjit Singh vs. PCIT

7.3 Moreover, it is submitted, in any case, it is not a case where conditions for exercise of power u/s 263 of the Act stand satisfied since at best it is a case, where two view are possible (one view of the learned Assessing Officer and other of the learned PCIT who issued the notice and passed order u/s 263 of the Act). It is submitted that order of assessment ***dated*** *10.12.2019is not erroneous in as much as prejudicial to interest of revenue since it is not based on;*

- Either incorrect application of law; or
- Incorrect application of fact; or
- Non-application of mind
- There is nothing to show that the income assessed is not in accordance with law. The learned Commissioner of Income Tax has not even specified what is settled position of law, the findings and, therefore untenable.

8 THAT LEARNED ASSESSING OFFICER HAS PASSED ORDER AFTER MAKING ALL POSSIBLE ENQUIRIES AND IS NOT A CASE OF "LACK OF ENQUIRY" OR "LACK OF INVESTIGATION" WHEREIN COMMISSIONER IS EMPOWERED TO EXERCISE HIS REVISIONAL POWERS BY CALLING FOR AND EXAMINING THE RECORDS OF ANY PROCEEDINGS UNDER THE ACT AND PASSING ORDERS THEREON.

8.1 It is submitted that perusal of the order read with show cause notice would show that the learned Principal Commissioner of Income Tax has proceeded on fundamental factual misconception. It is submitted that the learned Assessing Officer had considered the issue at the time of assessment proceedings, as is now raised by learned Principal

Commissioner of Income Tax.

8.2 The Hon'ble Delhi High Court in the case ***of CIT vs. Vikas Polymers reported in*** *341****ITR*** *537has held as under:*

> ***13. It is also trite that there is a fine though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in cases of "lack of inquiry" that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon***.
> *In Gabriel India Ltd. (supra), it was expressly observed:- "The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity [see Parashuram Pottery Works Co. Ltd. vs. ITO, (1977) 106 ITR 1 (SC)]."*

8.3 The Hon'ble Delhi high Court in the case of ***CIT*** *vs.* ***Sunbeam Auto Ltd. reported in 332 ITR*** *16it has held as under:*

> ***"Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open."***
>
> *[Emphasis supplied]*

8.4 Further in the case of *ITO vs. D.G. Housing Projects Ltd. reported in 343* ***ITR*** *329to has held that in cases of* ***wrong opinion*** *or* ***wrongfinding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed****. It* ***was held as under:***

> *"19. In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing*

Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. ***As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding*** *recorded is erroneous and which is also prejudicial to the interest of the Revenue.* ***In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue****.* ***In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not." [Emphasis supplied]***

8.5 Infact Hon'ble Delhi High Court in case of *PCIT vs. Delhi Airport Metro Express (P) Ltd. reported* ***in*** *398 ITR 8 (Del), wherein Hon'ble Court has held as under:*

"10. For the purposes of exercising jurisdiction under Section 263 of the Act, the conclusion that the order of the AO is erroneous and prejudicial to the interests of the Revenue has to be preceded by some minimal inquiry. In fact, if the PCIT is of the view that the AO did not undertake any inquiry, it becomes incumbent on the PCIT to conduct such inquiry. All that PCIT has done in the impugned order is to refer to the Circular of the CBDT and conclude that "in the case of the Assessee company, the AO was duty bound to calculate and allow depreciation on the BOT in conformity of the CBDT Circular 9/2014 but the AO failed to do so. Therefore, the order of the AO is erroneous insofar as prejudicial to the interest of revenue". 11. In the considered view of the Court, this can hardly constitute the reasons required to be given by the PCIT to justify the exercise of jurisdiction under Section 263 of the Act. In the context of the present case if, as urged by the Revenue, the Assessee has wrongly claimed depreciation on assets like land and building, it was incumbent upon the PCIT to undertake an inquiry as regards which of the assets were purchased and installed by the Assessee out of its own funds during the AY in question and, which were those assets that were handed over to it by the DMRC. That basic exercise of determining to what extent the depreciation was claimed in excess has not been undertaken by the PCIT.

13. Therefore, the Court is of the view that the ITAT was not in error in setting aside the impugned order of the PCIT under Section 263 of the Act. No substantial question of law arises." [Emphasis supplied]

9 THAT SECTION 263 OF THE ACT CANNOT BE INVOKED TO MAKE ***DEEPER ENQUIRY:*** *It is submitted that Hon'ble High Court of Delhi in the case of* ***CIT vs. Leisure Wear Exports Ltd.*** *reported in 341* ***ITR 166*** *has held that where the assessment order has been passed by the Assessing Officer after taking into account the assessee's submissions and documents furnished by him and no material whatsoever has been brought on record by the Commissioner which showed that there was any discrepancy or falsity in evidences furnished by the assessee, the order of the Assessing*

Officer cannot be set aside for making deep inquiry only on the presumption and assumption that something new may come out.

***9.1 In the case of** DIT **vs.** Jyoti Foundation reported in **357** ITR **388** (Del) it was held as under:*

> *"4. Revisionary power under Section 263 of the Act is conferred by the Act on the Commissioner/Director of Income-tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue. but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because the revisionary authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken.*
>
> 16. *Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.*
>
> *17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration*

on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. Shree Manjunathesware Packing Products. IT 9981 231 ITR 53 tSCVI (pages 119-125 of JPB). Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.'

5. In the present case, inquiries were certainly conducted by the Assessing Officer. It is not a case of no inquiry. The order under Section 263 itself records that the Director felt that the inquiries were not sufficient and further inquiries or details should have been called. However, in such cases, as observed in the case of DG Housing Projects Limited {supra), the inquiry should have been conducted by the Commissioner or Director himself to record the finding that the assessment order was erroneous. He should not have set aside the order and directed the Assessing Officer to conduct the said inquiry."

9.2 Reliance is also placed on the following judgments:

Delhi High Court

i) 332 ITR 167 (Del) CIT vs. Sunbeam Auto Ltd.

ii) 341 ITR 537 (Del) CIT vs. Vikas Polymers

Income Tax Appellate Tribunal

i) ITA No. 7265/D/2017 dated 27.1.2020 M/s Klaxon Trading (P)Ltd. vs. PCIT

ii) ITA No. 1781/D/2016 dated 24.4.2019 Sanjeev Singh vs. PCIT

10 THAT FOR HOLDING THAT THE ASSESSMENT ORDER PASSED BY LEARNED ASSESSING OFFICER IS NOT ONLY PREJUDICIAL TO THE INTEREST OF REVENUE BUT IS ALSO ERRONEOUS LEARNED PCIT HAS TO BE PRECEDED BY SOME MINIMAL INQUIRY.

10.1 The burden is on the learned Commissioner of Income Tax to establish that there is an 'error' in the order of assessment and in absence of an 'error' invocation of section 263 of the Act is not in accordance with law. Reliance is placed on the judgment of Hon'ble Delhi High Court in the case of ***PCIT vs. Delhi Airport Metro Express (P) Ltd. reported in 398 ITR 8*** *wherein it has been held as under:*

"10. For the purposes of exercising jurisdiction under Section 263 of the Act, the conclusion that the order of the AO is erroneous and prejudicial to the interests of the Revenue has to be preceded by some minimal inquiry. In fact, if the PCIT is of the view that the AO did not undertake any inquiry, it becomes incumbent on the PCIT to conduct such inquiry. All that PCIT has done in the impugned order is to refer to the Circular of the CBDT and conclude that "in the case of the Assessee company, the AO was duty bound to calculate and allow depreciation on the BOT in conformity of the CBDT Circular 9/2014 but the AO failed to do so. Therefore, the order of the AO is erroneous insofar as prejudicial to the interest of revenue". 11. In the considered view of the Court, this can hardly constitute the reasons required to be given by the PCIT to justify the exercise of jurisdiction under Section 263 of the Act. In the context of the present case if, as urged by the Revenue, the Assessee has wrongly claimed depreciation on assets like land and building, it was incumbent upon the PCIT to undertake an inquiry as regards which of the assets were purchased and installed by the Assessee out of its own funds during the AY in question and, which were those assets that were handed over to it by the DMRC. That basic exercise of determining to what extent the depreciation was claimed in excess has not been undertaken by the PCIT.

13. Therefore, the Court is of the view that the ITAT was not in error in setting aside the impugned order of the PCIT under Section 263 of the Act. No substantial question of law arises." [Emphasis supplied]

10.2 Reliance is also placed on the following judgments

i) ITA No. 771/CHD/2017 Shri Abhimanyu Gupta Vs. PCIT
ii) 70 taxmann.com 227 (Mum) Narayan TatuRane vs. ITO
iii) ITA No. 3391 /D/2018 dated 8.1.2019 Arun Kumar Garg HUF vs. PCIT
iv) ITA No. 2799/D/2018 dated 21.6.2019 Champ Info Software vs. PCIT
v) ITA No. 3097/D/2014 dated 1.7.2019 Dwarkadhis Buildwell (P) ltd. vs. CIT

10.3 Reliance is placed on** CIT vs. NiravModi reported in 390 ITR 292 (Bom) further SLP has been dismissed against the aforesaid order in SLP No. (C) 22149/2016 reported in 244 Taxman 194 (SC) **where in it has been held as under:

"12. In the present facts, the Assessing Officer was satisfied, consequent to making an enquiry and examining the evidence produced by the Assessing Officer, establishing the identity and creditworthiness of the donor as also the genuineness of the gift. The CIT in his order of Revision, does not indicate any doubts in respect of the genuineness of the evidence produced by the Assessee. The satisfaction of the Assessing Officer on the basis of the documents produced is not shown to be erroneous in the absence of making a further enquiry. It is made clear that our above observations should not be inferred to mean that it is open to the Assessing Officer to enquire into the source of source for the purpose of the

present facts. This is a case where a view has been taken by the Assessing Officer on enquiry. Even if this view, in the opinion of the CIT is not correct, it would not permit him to exercise power under Section 263 of the Act. In fact, the Apex Court in Amitabh Bachchan {supra) *has observed that there can be no doubt that where the view taken by the Assessing Officer is a possible view, interference under Section 263 of the Act, is not permissible.*

10.4 Reliance is also placed on the following judgments

i) ITA No. 3205/Del/2017 M/s Amira Pure Foods (P) Ltd. v. PCIT

ii) ITA no. 574/Del/2018 dated 19.06.2018 M/s VidyaPrakashanMandir (P) Ltd. vsPr CIT

iii) ITA No. 2539/Del/2018 dated 29.08.2018 Durgesh Autofin P Ltd vsPr CIT

11. EXPLANATION 2 TO SECTION 263 OF THE ACT DOES NOT AUTHORISE OR GIVE UNFETTERED POWER TO COMMISSIONER TO REVISE EACH AND EVERY ORDER AND, IS NOT A SUBSTITUTE TO THE PRECONDITION U/S 263(1) OF THE ACT.

11.1 The Hon'ble Mumbai Tribunal in the case ***of Narayan TatuRane*** *vs.* ***ITO reported in*** *70* ***taxmann.com*** *227has also held that in a case where learned PCIT has not brought any material on record by making enquiries or verifications to substantiate his inference, the learned PCIT is not justified in holding that the impugned assessment order was erroneous. The relevant extract is as under:*

"21. In the instant case, as noticed earlier, the AO has accepted the explanations of the assessee, since there is no fool proof evidence to link the assessee with the document and M/s RNS Infrastructure Ltd, from whose hands it was seized, also did not implicate the assessee. Thus, the assessee has been expected to prove a negative fact, which is humanely not possible. No other corroborative material was available with the department to show that the explanations given by the assessee were wrong or incorrect. Under these set of facts, the AO appears to have been satisfied with the explanations given by the assessee and did not make any addition. We have noticed that the Hon'ble Supreme Court has held in the case of Central Bureau of Investigation {supra) *that the entries in the books of account by themselves are not sufficient to charge any person with liability. Hence, in our view, it cannot be held that the assessing officer did not carry out enquiry or verification which should have been done, since the facts and circumstances of the case and the incriminating document was not considered to be strong by the AO to implicate the assessee. Thus, we are of the view that the assessing officer has taken a plausible view in the facts and circumstances of the case. Even though the Ld Pr. CIT has drawn certain adverse inferences from the document, yet it can seen that they are debatable in nature. Further, as noticed earlier, the Ld Pr. CIT has not brought any material on record by making*

enquiries or verifications to substantiate his inferences. He has also not shown that the view taken by him is not sustainable in law. Thus, we are of the view that the Ld Pr. CIT has passed the impugned revision orders only to carry out fishing and roving enquiries with the objective of substituting his views with that of the AO. Hence we are of the view that the Ld Pr. CIT was not justified was not correct in law in holding that the impugned assessment orders were erroneous."

11.2 Reliance is also placed on the following judgments:

SUPREME COURT

i) 390 ITR 292 (Bom) CIT v. NiravModi affirmed by Apex Court in the case of CIT vs. NiravModi reported in 244 Taxman 194 (SC) ***(pages 137-146 of JPB)***

Income Tax Appellate Tribunal

i) 51 CCH 0473 dated 29.11.2017 M/s Amira Pure Foods (P) Ltd. v. PCIT

ii) 169 DTR 153 (Del) M/s VidyaPrakashanMandir Pvt. Ltd. vs. PCIT

iii) ITA No. 3391/D/2018 Arun KumarGarg HUF vs. PCIT

iv) ITA No. 2742/D/2017 dated 08.04.2019 Cotton Textiles Mills (P) Ltd. v. Pr. CIT

v) ITA no. 3125/Mum/2017 dated 19.01.2018 M/s Indus Best Hospitality & Realtors Pvt Ltd vsPr CIT.

vi) ITA No. 3498/ Mum/2017 dated 02.01.2018, Shri Anil L. Todarwal.

vii) ITA No. 1007/D/2019 dated 25.9.2019 Rekha Gupta v. Pr. CIT

viii) ITA No. 456/D/2021 dated 4.4.2022 NarendraAggarwal vs. PCIT

"25. As far as the invocation of Explanation 2 to Section 263 by PCIT in the present case is concerned, we are of the view that only in a very gross case of inadequacy in inquiry or where inquiry is per se mandated on the basis of record available before the AO and such inquiry was not conducted, the revisional power so conferred can be exercised to invalidate the action of AO.

12 APART THEREOF APPELLANT SEEKS TO RELY UPON FOLLOWING ***PROPOSITION IN RESPECT OF SECTION 263 OF THE ACT***

12.1 It is thus submitted that, without bringing any evidence to the contrary, the Learned PCIT, erred in holding the order to be erroneous and directing the Assessing Officer ***to re-examine the issue.*** *The proposition relied upon by the Appellant are as under:*

PROPOSITION I: THAT IT IS NECESSARY FOR COMMISISONER OF INCOME TAX TO POINT OUT THE MATERIAL ON RECORD AS TO HOW THE ORDER OF AO IS PREJUDICIAL TO THE INTEREST OF REVENUE

i) 142 ITR 778 (Pat) CIT vs. Shanti LalAggarwala

ii) 96 ITR 310 (All) CIT vs. Late Sunder Lai

iii) 111 ITR 326 (All) J.P. Srivastava& Sons v. CIT

iv) 170 ITR 28 (All) CIT vs. KashiNath& Co.

v) 394 ITR 758 (Del) PCIT v. Vinita Chaurasia

PROPOSITION II; THAT COMMISSIONER OF INCOME TAX CANNOT SIMPLY ASK THE ASSESSING OFFICER TO RE-EXAMINE THE MATTER. HE CAN DO SO ONLY AFTER FINDING ORDER OF ASSESSMENT IS ERRONEOUS AND PREJUDICIAL TO INTERST OF REVENUE

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

ii) 341 ITR 240 (Del) CIT vs. Software Consultants

PROPOSITION III: ERROR SHOULD BE ONE WHICH DEPENDED ON FACT OR LAW AND NOT MERE POSSIBLITY OR GUESS WORK

i) 167 ITR 129 (Jaipur) CIT vs. Trustees Anupam Charitable Trust

PROPOSITION IV: ORDER OF COMMISSIONER OF INCOME TAX MERELY SETTING ASIDE THE ORDER OF ASSESSMENT WITHOUT GIVING REASONS IS A VITIATED ORDER

ii) 96 ITR 310 (All) CIT vs. Sunder Lai

iii) 111 ITR 326 (All) J. P. Srivastava& Sons Ltd. vs. CIT

iv) 170 ITR 28 (All) CIT vs. KashiNath& Co.

PROPOSITION V: REVISION ORDER CANNOT BE PASSED U/S 263. UNLESS THERE IS TOTAL NON APPLICATION OF MIND BASED ON COGENT MATERIAL

i) 100 ITD 173 (Mum) Mrs. Khatiza S. Oomerbhoy vs. ITO
ii) 100 ITD 441 (Kol) Al-Haz Amir Hasan Properties Pvt. Ltd. vs. Asst. CIT
iii) 203 ITR 108 (Bom) CIT vs. Gabriel India Ltd.
iv) 171 ITR 141 (MP) CIT vs. Ratlam Coal Ash Co.

PROPOSITION VI: ALL PARTICULARS ARE FURNISHED BEFORE THE LEARNED ASSESSING OFFICER AND HE HAS APPLIED HIS MIND THEN REVISION IS NOT VALID U/S 263 OF THE ACT

i) 130 TTJ 669 (Del) Regency Park Property Management Services Pvt. Ltd. vs. CIT
ii) 125 TTJ 428 (Del) Rajiv Agnihotri vs. CIT
iii) 131 ITD 58 (Jai) Rajiv Arora vs. CIT
iv) 137 TTJ 67 (Pat) Ramakant Singh vs. CIT

***PROPOSITION** VII: THAT PROCEEDINGS U/S 263 HAVE TO BE CONFINED TO FINDINGS RECORDED BY LEARNED ASSESSING OFFICER AND NOT BEYOND*

i) 140 ITR 490 (P&H) Jagadhri Electric and Supply Co. vs. CIT
ii) 192 ITR 547 (Kar) CIT vs. L.F.D. Silva
iii) 192 ITR 50 (Mad) CIT vs. Late T.S. Srinivasalyer
iv) 60 ITD 295 (Del) Jagjit Industries Ltd vs. ACIT
v) 61 ITD 307 (Ahd) SatishbhaiJayantilal Shah vs. ACIT
vi) 125 Taxation 188 (AP) CIT vs. G.K. Kabra Cooperative Ind. Estate
vii) 61 ITD 317 (Mad) Sanco Trans Ltd. vs. ACIT

*13. It is thus submitted that the conditions or the factors enabling the learned PCIT to invoke his jurisdiction u/s 263 have not been satisfied. It is submitted that there must be positive material for the Commissioner to consider objectively and not subjectively that the order of the Assessing Officer was erroneous, in so far as it was prejudicial to the interest of revenue. The Hon'ble Bombay High Court in the case of **CIT vs. Gabriel India Ltd., reported in 203 ITR 108** has held that there must be some prima facie material on record to show that the tax which was lawfully eligible has not been imposed or that by application of the relevant statute on an incorrect or an incomplete interpretation, a lesser tax than what was just, has been imposed. It is submitted on an application of the aforesaid rule, it will be seen that the order made u/s 263 of the Act was entirely without any jurisdiction as there was absolutely no material to justify such an assumption nor has any material been brought on record or the materials which are on record have been disputed justifying such an assumption that the tax lawfully eligible has not been imposed.*
14. It is therefore prayed that, impugned order made under section 263 of the Act dated 24.3.2022 be held to be without jurisdiction and, therefore be quashed and appeal of the appellant be allowed."

4. On the other hand, learned Sr. DR opposed the submissions and submitted that the assessee itself has accepted the fact that there were certain mistakes. He submitted that there is no infirmity into the impugned order, same deserves to be sustained.

5. We have heard the rival submissions and perused the material available on record. Undisputedly, by way of the impugned order the learned Pr.CIT revised the assessment order on the basis that on perusal of tax audit report of the year under consideration it was found that the Auditor in column no. 26(i)(B)(b) of form no. 3CD related sum referred to clause (a), (b), (c), (d), (e), (f) and (g) of Section 43B of the Act, the liabilities for which was incurred in the previous year and was not paid on or before due date of furnishing the return of income u/s 139(1) of the Act was Rs. 29,99,686/- (Entertainment tax = Rs. 5,44,753/-; EPF Rs. 83,847/-; ESIC Rs. 96553/-; Service tax Rs. 3,22,901/-; and VAT Rs. 18,51,632/-). However, while computing income, disallowance of Rs. 25,51,362/- was made u/s 43B of the Act. Hence, an amount of Rs. 3,48,324/- was not considered for disallowance u/s 43B of the Act by the assessee. The AO failed to make any inquiry on this score. After giving notice to the assessee and considering the reply, the learned Pr. CIT set aside the assessment order dated 10.12.2019, considering the same being erroneous inasmuch as prejudicial to the interest of the Revenue and directed the AO to make the assessment afresh.

6. During the course of hearing, the learned counsel for the assessee submitted that the finding of the learned Pr. CIT is contrary to the record and misconceived.

It is submitted that the VAT liability of Rs. 3,48,324/- was incurred during the year under consideration and was duly deposited before the due date of furnishing of return of income u/s 139(1) of the Act, hence no disallowance was warranted u/s 43B of the Act. It was further stated that EPF of sum of Rs. 83,847/- was not paid before the relevant date and, therefore, was required to be disallowed. It was pointed out that the finding of learned Pr. CIT was factually incorrect. As per column no. 20b of tax audit report, a sum of Rs. 38,652/- was not paid by the assessee and this sum was already disallowed by the assessee itself. This was the part of disallowance of Rs. 83,850/-. Hence, he contended that the Ld. Pr. CIT did not verify the facts from records and he failed to appreciate the same in right perspective.

7. The law is well settled. The powers u/s 263 can be exercised if the order sought to be revised is erroneous inasmuch as prejudicial to the interests of the Revenue. Hence twin conditions are required to be satisfied – one being that order should be erroneous and second, such order should be prejudicial to the interests of the Revenue. The basis of exercising the power by the learned Pr. CIT is that the AO failed to verify the correctness of the disallowance made in the tax audit report. However, during the course of hearing the learned counsel for the assessee ha

pointed that the learned Pr. CIT failed to consider the fact that no disallowance could be made in the case of VAT as the amount was duly deposited before the due date of filing of the return of income. Further, in respect of EPF contribution, it was pointed out that the assessee itself had made disallowance, hence no prejudice was caused to the Revenue.

8. The learned DR could not rebut the submissions of the assessee regarding VAT, paid in the government account before the due date of filing of the return of income u/s 139(1) of the Act and also the disallowance made by the assessee itself in respect of EPF. Therefore, looking to the facts of the present case, we are of the considered view that it was not a fit case for exercising powers u/s 263 of the Act, as the learned Pr. CIT did not verify the correct facts from the records before embarking upon the issuance of notice u/s 263 of the Act and initiating the proceedings. There is no dispute with regard to the fact that the learned Pr. CIT is empowered by law to initiate such proceedings, but the exercise of power u/s 263 envisages satisfaction of aforesaid twin conditions. In the present case, in our considered view both the conditions are not satisfied, which is sine qua non for revising the concluded assessment. We, therefore, set aside the impugned order

and restore the original assessment order passed by the AO. The grounds raised in this appeal are allowed.

9. Appeal of the assessee is allowed.

Order pronounced in open court on 11th May, 2023.

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MP
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI