

## Cited Here

***NKB INFRASTRUCTURE (P) LTD. vs. PRINCIPAL COMMISSIONER OF INCOME TAX & ANR.***

*IN THE ITAT DELHI BENCH 'E'*

*KUL BHARAT, JM & O. P. KANT, AM.*

*ITA No. 450/Del/2021*

*Jul 27, 2021*

*(2021) 62 CCH 0376 DelTrib*

Legislation Referred to

*Section 139(5), 143(3), 263*

Case pertains to

*Asst. Year 2015-16*

Decision in favour of:

*Assessee*

***Revision—Order erroneous or prejudicial to revenue— Assessee company was engaged in business of manufacturing of Grit, Stone dust and GSB, carries supply of road construction work etc —A assessee filed return of income declaring loss — Subsequently, assessee revised its return reducing loss assessment order under section 143(3) was passed by Assessing Officer after making an addition — PCIT called for records and found that assessment order was erroneous insofar as it is prejudicial to interest of Revenue and, therefore, he set aside order of Assessing Officer and directed for making fresh assessment — Held, it is prerequisite for PCIT to carry out minimal inquiries on issues on which he has proposed to set aside order of Assessing Officer and thereafter demonstrate how order of Assessing Officer is erroneous — Simply, observing by PCIT that Assessing Officer has not made any enquiry on issue is not sufficient and he is required to demonstrate error in order of Assessing Officer after going through reply of assessee or after carrying out inquiries which are deemed fit — Assessee has already filed revised audit report, which in itself is self-explanatory as how loss claimed by assessee has been reduced due to reduction in claim of depreciation — Revised return assessee has reduced loss as***

**compared to original return and hence there was no occasion of any suspicion of excess claim, which warrant comparison of figures with original return — Before PCIT, assessee has produced all details of original return and revised return along with enclosures, but PCIT has not pointed out any error in said explanation of assessee but has merely directed Assessing Officer to obtain all details and take necessary action — This action of PCIT is not justified — On issue of unsecured loans, assessee filed all confirmations of unsecured loans before PCIT and detailed in respect of addition to loan during year under consideration — Though PCIT has mentioned that no bank statement or Copy of IT return has been filed in respect of lenders and therefore directed Assessing Officer to verify and take appropriate action — PCIT has not pointed out as which loans have been accepted erroneously by Assessing Officer — Similarly, on issue of sundry creditors, it was submitted by assessee before PCIT that once trading results are accepted by Assessing Officer, no addition can be made for sundry creditors under section 68 — PCIT, though mentioned in his order that no address or PAN of sundry creditors were provided to him, however, he himself did not verify as to which creditor was prime facie not genuine — Information in respect of claim of depreciation, unsecured loans and sundry creditors in prescribed perform were duly filed by assessee — Assessee has complied direction of AO and even justified reasons for increase in interest on unsecured loan — When AO has accepted trading results, it is deemed that he has verified sundry creditors/debtors — Thus, to alleged that no enquiry was done by AO as regard to sundry creditor is not correct — Moreover, addition cannot be made for sundry creditor, without disallowing purchase — It cannot be said that no inquiry has been done by AO, which should have been done in case — PCIT has failed to point out any specific error in order of Assessing Officer and in absence of which twin conditions of section 263 are not satisfied and therefore finding of PCIT are set aside — Assessee appeal allowed.**

### Held

*It is prerequisite for the PCIT to carry out minimal inquiries on the issues on which he has proposed to set aside the order of the Assessing Officer and thereafter demonstrate how the order of the Assessing Officer is erroneous. Simply, observing by the PCIT that the Assessing Officer has not made any enquiry on the issue is not sufficient and he is required to demonstrate error in the order of the Assessing Officer after going through reply of the assessee or after carrying out inquiries which are deemed fit.*

(para 6.2)

*Assessee has already filed revised audit report, which in itself is self-explanatory as how the loss claimed by the assessee has been reduced due to the reduction in claim of the depreciation. Revised return the assessee has reduced the loss as compared to the original return and hence there was no occasion of any suspicion of excess claim, which warrant comparison of the figures with the original return. Before PCIT, the assessee has produced all the details of the original return and revised return along with enclosures, but PCIT has not pointed out any error in the said explanation of the assessee. He has merely directed the Assessing Officer to obtain all the details and take necessary action. This action of the PCIT is not justified in view of the precedents discussed above.*

(para 6.6)

*On the issue of the unsecured loans, the assessee filed all the confirmations of unsecured loans before the PCIT and detailed in respect of addition to loan during the year under consideration. Though PCIT has mentioned that no bank statement or Copy of IT return has been filed in respect of the lenders and therefore directed the Assessing Officer to verify and take appropriate action. PCIT has not pointed out as which loans have been accepted erroneously by the Assessing Officer. Similarly, on the issue of sundry creditors, it was submitted by the assessee before PCIT that once trading results are accepted by the Assessing Officer, no addition can be made for sundry creditors under section 68. It has been submitted by the Counsel of the assessee that entire audited books of accounts were produced before the Assessing Officer. PCIT, though mentioned in his order that no address or PAN of sundry creditors were provided to him, however, he himself did not verify as to which creditor was prime facie not genuine.*

(para 6.7)

*Information in respect of claim of the depreciation, unsecured loans and sundry creditors in prescribed form were duly filed by the assessee. Assessee has complied the direction of the AO and even justified reasons for increase in interest on unsecured loan. All these persons are either director or relative of director and assessed under the same Assessing Officer, and thus all information in respect of these parties were already available with the AO and he was not required to call for such information from the Assessing Officer. Similarly, for verification of ledger accounts of sundry creditors, books of accounts alongwith vouchers were produced before the Assessing Officer. Assessing Officer has accepted the trading results of the assessee and PCIT has also not pointed out any error. When the AO has accepted the trading results, it is deemed that he has verified the sundry creditors/debtors. Thus, to alleged that no enquiry was done by the AO as regard to sundry creditor is not correct. Moreover, the addition cannot be made for sundry creditor, without disallowing purchase. It cannot be said that no inquiry has been done by the AO, which should have been done in the case.*

(para 6.8)

*PCIT has failed to point out any specific error in the order of the Assessing Officer and in absence of which twin conditions of section 263 are not satisfied and therefore finding of the PCIT is set aside. Assessee appeal allowed.*

(para 6.9)

### Conclusion

*PCIT has failed to point out any specific error in the order of the Assessing Officer and in absence of which twin conditions of section 263 are not satisfied and therefore finding of the PCIT is set aside.*

In favour of

Assessee

## Cases Referred to

*CIT Vs Ritu Anurag Agarwal ITA No. 325/2008(del)*  
*CIT Vs PanchamDass Jain 205 CTR 444 (all)*  
*CIT Vs Vijay Kumar Koganti, 275 Taxman 394 (Mad.)*  
*PCIT Vs Delhi Airport Metro Express P Ltd 398 ITR 8 (Delhi)*  
*ITO Vs DG Housing Projects Ltd 343 ITR 329 (Delhi)*  
*PCIT Vs Vinita Chaurasia 394 ITR 758 (Delhi)*  
*Malabar Industrial Co. Ltd. v. CIT (2000) 109 Taxman 66/243 ITR 83*  
*CIT v. GK Kabra, Co-operative Industrial Estate [1994] 75 Taxman 503 (AP)*

## Counsel appeared:

*Gautam Jain, Adv. Lalit Mohan, CA for the Appellant.: Pramita M. Biswas for the Respondent*

## **O. P. KANT, AM.**

1. This appeal has been preferred by the assessee against the order dated 16/03/2021 passed by the Learned Principal Commissioner of Income-tax, Faridabad [in short 'the Learned PCIT'] under section 263 of the Income-tax Act 1961 (in short 'the Act') for assessment year 2015-16, raising following grounds:

*1. That order dated 16.3.2021 u/s 263 of the Act by learned Principal Commissioner of Income Tax:, Faridabad 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.*

*1. 1 That the learned Pr. Commissioner of Income Tax has failed to appreciate that once the learned Assessing Officer on examination of the facts on record and after making all possible enquiries had accepted claim of the appellant then such an order of assessment could not be regarded as erroneous in as much as prejudicial to the interest of revenue merely because the learned Commissioner of Income Tax had a different opinion and that too, without; having established in any manner that, view adopted by the learned Assessing Officer was an impossible view.*

*1.2 That the learned Principal Commissioner of Income Tax has failed to appreciate that action u/s 263 of the Act is otherwise too inapplicable on the factual matrix of the facts of the instant case since admittedly, undisputedly and undeniably not a case of "lack of enquiry" or "lack of investigation" and perusal of the show cause notice itself would show that it has not been denied or disputed that all relevant information including books of accounts have been furnished/obtained in the course of assessment proceeding and therefore in absence of any enquiries by the learned Principal Commissioner of Income Tax the invocation u/s 263 of the Act is not in accordance with law.*

*1.3 That the learned Pr. Commissioner of Income Tax has also failed to appreciate that, u/s 263 of the Act, an order of assessment cannot be set- aside to simply to make further enquiries and thereafter pass fresh order of assessment and as such, impugned order is contrary to law and hence, unsustainable.*

*1.4 That various adverse findings recorded in the notice u/s 263 of the Act and, also in impugned order are factually incorrect, vague, legally misconceived and untenable.*

2. Briefly stated facts of the case are that during the year under consideration, the assessee company was engaged in the business of manufacturing of Grit, Stone dust and GSB, carries supply of road

construction work etc. The assessee filed return of income on 31/10/2015, declaring loss of Rs. 2,83,67,943/-. Subsequently, the assessee revised its return of income on 23/06/2016 reducing the loss to Rs. 1,59,41,161/-. The assessment order under section 143(3) of the Act was passed by the Assessing Officer on 27/12/2017 at income of Rs.(-) 1,56,41,161/- after making an addition of Rs. 3 lakh to the returned income. The Learned PCIT called for records and found that the assessment order was erroneous insofar as it is prejudicial to the interest of the Revenue and, therefore, he set aside the order of the Assessing Officer and directed for making fresh assessment. Aggrieved with the said direction of Learned PCIT, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. Before us, the parties appeared through Video Conferencing facility. The assessee filed a paper-book containing pages 1 to 276.

4. The learned Counsel of the assessee submitted that the Learned PCIT has held the order of the Assessing Officer erroneous insofar as prejudicial to the interest of the Revenue on three counts. Firstly, the discrepancy in the revised and original audit report; Secondly, no enquiry in case of unsecured loans; and Thirdly, no enquiry in case of sundry creditors and debtors. 4.1 The learned Counsel of the assessee referred to page-3 of paper-book filed by the assessee and submitted that in the original return of income loss of Rs.2,83,67,943/- was claimed for carry forward and this loss was due to depreciation loss of Rs.8,36,54,720/-. He referred to list of fixed assets on which said depreciation was claimed available on page 4 of the paper-book. He further submitted that assessee revised its loss to Rs. 1,59,41,161/- due to reduction in claim of the depreciation to Rs. 2,07,12,27,938/-, asset-wise detail of which is available on page 47 of the paper-book.

4.2 The Learned Counsel further submitted that in the revised return, rather than increase which could have become a cause of enquiry, there is a fall in claim of loss. He submitted that Learned PCIT has made no specific finding as how the assessment order is erroneous insofar as the issue of claim of reduced loss in revised return. The learned Counsel further submitted that revised return has been filed validly in terms of section 139(5) of the Act and once valid revised return is filed, it substitutes the original return of income and, therefore, the only return that has to be assessed is the revised return and thus, the basis adopted by the Learned PCIT is not sustainable. In support of the contention that if a revised return is filed under section 139(5) of the Act, the assessment can be completed only on the basis of the revised return and not otherwise, the Learned Counsel relied on the decision of the Hon'ble Odisha High Court in the case of Orissa Rural Housing Development Corporation Ltd. Vs. ACIT reported in 343 ITR 316.

4.3 As far as the issues of unsecured loans and sundry creditors and debtors is concerned, the learned Counsel of the assessee submitted that the Assessing Officer had made inquiries and received replies from the assessee and, therefore, there was no valid justification for Learned PCIT to allege, assume and conclude that the order of assessment was erroneous and insofar as prejudicial to the interest of the Revenue. The learned Counsel referred to questionnaire issued by the Assessing Officer on 10/08/2017 (available on page 112 of the paper-book), reply dated 24/08/2017 (available on page 113 to 115 of the paper- book), questionnaire dated 17/10/2017 (available on page 116 of the paper-book), reply dated 08/11/2017 (available on page 117 to 118 of the paper-book) and reply dated 23/11/2017 (available on page 119 to 120 of the paper-book).

4.4 The learned Counsel submitted that in such circumstances the observation of the Learned PCIT that the assessee did not furnish complete details before the Assessing Officer, is completely misconceived, misplaced and untenable. The learned Counsel submitted that as far as unsecured loan is concerned, during the year there is increase of Rs. 2,94,79,167/- for parties which are mainly directors of the company and all those cases were assessed with the same Assessing Officer only. The confirmation in respect of all these persons were duly filed before the Assessing Officer as well as before the Learned PCIT and no adverse inference has been drawn by the Learned PCIT.

4.5 The Learned Counsel further submitted that entire trading results are based on audited books of account of which complete details were furnished during the course of assessment proceeding. He submitted that once the trading results are accepted, any adverse observation on sundry debtors/creditors is fundamentally misconceived and misplaced. According to him, the books of account stand accepted, no addition can be made out of sundry creditors under section 68 of the Act particularly when the trading results are accepted by the learned Assessing Officer as well as by the Learned PCIT. In support, he relied on following decisions:

1. ITA No. 325/2008(del) CIT Vs Ritu Anurag Agarwal
2. 205 CTR 444 (all) CIT Vs PanchamDass Jain

4.6 The learned Counsel referred to the submissions made before the Learned PCIT. Regarding the discrepancy in audit report, he submitted before the Learned PCIT that return of income was revised due to change in depreciation and some figures in original balance-sheet were mentioned erroneously under wrong heads, which were later on observed and rectified as the auditor has rectified the figure while furnishing revised audit report. Regarding unsecured loan, the Learned Counsel submitted that confirmation in respect of all the unsecured loan were furnished before the Learned PCIT. Regarding sundry creditor, the learned Counsel submitted that all evidence to the effect that information were filed before the Assessing Officer, were produced before the Learned PCIT.

4.7 It was submitted by the assessee before the Learned PCIT that proper inquiries were made by the Assessing Officer and, therefore, the assessment order is not erroneous and prejudicial. The learned Counsel further relying on the decision of the Hon'ble Delhi High Court in the case of ETT Ltd Vs CIT reported in 112 taxmann.com 321 (Del), submitted that Learned PCIT has not given any finding as how the assessment order is erroneous and prejudicial to the interest of the Revenue and thus it is liable to be quashed. In support of his contention he also relied on following decisions:

1. CIT Vs Vijay Kumar Koganti, 275 Taxman 394 (Mad.)
2. Abdul Hamid Vs ITO , 117 taxmann.com 986 (Gauhati)

4.8 The learned Counsel submitted that in absence of an 'error' invocation of section 263 of the Act is not in accordance with law.

In support of above ratio, the learned Counsel relied on the following decisions:

1. PCIT Vs Delhi Airport Metro Express P Ltd 398 ITR 8 (Delhi)
2. ITO Vs DG Housing Projects Ltd 343 ITR 329 (Delhi)
3. PCIT Vs Vinita Chaurasia 394 ITR 758 (Delhi)
4. ITA No. 771/ CHD /2017 Shri Abhimanyu Gupta Vs PCIT
5. Narayan Tatu Rane Vs ITO, 70 taxmann.com 227

5. On the contrary, the learned DR referred to Explanation-2(i) below the section 263 of the Act. She submitted that in view of the Explanation which has been inserted by the Finance Act, 2015 with effect from 01/06/2015, the assessment order would be deemed to be erroneous, if the same is passed without making inquiries or verification which ought to have been made. Relying on the Explanation, she submitted that no enquiry has been conducted by the Assessing Officer on the issue of difference in amount between the revised return and original return of income, unsecured loans and sundry creditors

and debtors and therefore the Learned PCIT is justified in setting aside the assessment order holding the same to be erroneous insofar as prejudicial to the interest of the Revenue.

6. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute before us is whether the assessment order passed by the Assessing Officer satisfies the twin conditions of section 263 of the Act. Those two Conditions are that, the order should be erroneous as well as prejudicial to the interest of the Revenue and if these two conditions are satisfied, the Learned PCIT is justified in setting aside the order of the Assessing Officer. 6.1 The Hon'ble Delhi High Court in the case of ETT Ltd. Vs CIT (supra) that Learned CIT or PCIT must conduct prima-facie inquiries and come to a conclusion that assessment order is erroneous. Without concluding enquiries to hold that the order is erroneous, such action of the Learned CIT/PCIT is not justified. The relevant finding of the Hon'ble High Court is reproduced as under:

*"35. The revisionary jurisdiction u/s. 263 cannot be exercised simply to make roving and fishing enquiry. It is a well settled law decided by the various Courts in the judgments relied upon by the Ld. Counsel that, the revisionary authority first of all should give a finding as to how the assessment order is erroneous and prejudicial to the interest of the revenue. If such an authority is of the view that the Assessing Officer did not make any enquiry, then it is incumbent upon CIT to specify as to what kind of inquiry or verification has not been done and even Ld. CIT can also conduct some prima-facie enquiry himself or through AO to reach to a conclusion or inference that the assessment order passed by the Assessing Officer is erroneous in so far as prejudicial to the interest of the revenue. Such an enquiry or exercise by the Ld. CIT is completely lacking in the present case. If the Assessing Officer has carried out detailed enquiry and has examined all the records called upon by him after raising queries, then Ld.. CIT without pointing out as to how such an enquiry is inadequate or not proper cannot set aside the assessment. Even the fiction created by Explanation 2 to section 263 wherein it is deemed that assessment order is erroneous and prejudicial to the interest of revenue if the order passed by the Assessing Officer is without making enquiries or verification which should have been done. Here in this case, we have already found that Assessing Officer has made proper enquiries and verification after calling for all the records and after applying his mind has allowed the deduction in accordance with law. The Ld. CIT now cannot sit on the judgment of the Assessing Officer without pointing out any legal or factual infirmity or without carrying out his own enquiry. He simply cannot set aside the order of the Assessing Officer stating that no proper enquiry has been done. Accordingly, in view of our discussion and finding given above, we set aside the impugned order of Ld. CIT passed u/s. 263 and uphold the assessment order dated 11.08.2015. The impugned order thus, stands quashed.*

39. It is not clear from perusal of records as to what was the cause of action for initiation of proceedings u/s. 263 of IT Act; such as, whether there was any audit objection, or whether any other new information from outside the assessment records were received by the Ld. CIT. Be that as it may, numerous hearings were fixed by the Ld. CIT, including on 07.11.2017, 29.11.2017, 11.12.2017, 10.01.2018, 08.02.2018 and 23.02.2018. Eventually the aforesaid impugned order dated 31.03.2018 was passed by the Ld. CIT on 31.03.2018. Thus, it is seen that although the revision proceedings u/s. 263 of IT Act prolonged for a few months, the impugned order was passed by the Ld. CIT on the last day of limitation period, i.e. on 31.03.2018. A perusal of the aforesaid impugned revision order dt. 31.03.2018 passed u/s. 263 of IT Act shows that although submissions made by the assessee vide aforesaid written submissions dated 08.02.2018 and 23.02.2018 have been mentioned; the contents of these submissions have not at all been discussed by the Ld. CIT. Even as far as aforesaid written submissions dated 11.12.2017 is concerned, only a small portion of it has found mention in aforesaid impugned revision order dated 31.03.2018 passed by Ld. CIT u/s. 263 of IT Act. Thus, it is obvious that the material brought by the assessee for the consideration of Ld. CIT have not been fully factored in by the Ld. CIT; and the Ld. CIT has not fully dealt with the

entire force of assessee's submissions before making an adverse decision against the assessee. Moreover, the Ld.. CIT has observed in a cryptic, summary and nonspeaking manner in aforesaid order dated 31.03.2018, that the AO had not conducted requisite enquiry/investigation on exempt income earned by the assessee and applicability of the Provision of Section 14A of the IT Act, read with Rule 8D of IT. Rules, 1962; without dealing with submissions made and materials placed by the assessee before the Ld. CIT vide aforesaid Letters dated 11.12.2017 and 23.02.2018, as per foregoing paragraphs (38.1.1) and (38.1.1.2) of this order. It is also found, in view of foregoing paragraph (37.2) (i) of this order, that the allegations of the Ld. CIT against the AO, narrated by him in paragraph 4 of the aforesaid order dated 31.03.2018, fluctuate in severity and description. From these features of the aforesaid order dated 31.03.2015 of Ld. CIT; it can be concluded that the order has been passed by Ld. CIT in a hasty manner, without due applications of mind, without fully taking into consideration the submissions made and materials placed by the assessee before Ld. CIT, and without dealing with the full force of assessee's submissions and contentions: and part of the order is also cryptic, summary and non-speaking in nature. An order such as this, is liable to be Quashed."

*(Emphasis supplied externally)*

6.1.1 Similarly, the Hon'ble Madras High Court in the case of Vijay Kumar Koganti (supra) held that the Learned PCIT has to point out specifically that how the assessment order is erroneous. The relevant finding of the Hon'ble High Court is reproduced as under:

*"10. The Hon'ble Supreme Court, in the decision in the case of Malabar Industrial Co. Ltd. v. CIT (2000) 109 Taxman 66/243 ITR 83 held that for exercise of jurisdiction under section 263 of the Act, it was necessary that the order of assessment should be not merely erroneous, but also prejudicial to the interest of the Revenue. Bearing this legal principle in mind, if we test the correctness of the order passed by the Tribunal, as rightly pointed out by the Tribunal, the PCIT did not point out anything specifically as to how the assessment order dated 23-12-2016 was erroneous. After rendering a finding on such aspect, the PCIT was required to render a finding that it was also prejudicial to the interest of the Revenue.*

*12. When the PCIT issued the show cause notice dated 13-11-2018 calling upon the assessee to explain with regard to the increase in capital and also conversion of preference shares during the relevant years, the assessee gave a reply dated 2-1-2019. This has been extracted by the Tribunal in paragraph 3.2 of the impugned order. We find the explanation to be cogent and in fact, the factual matrix was appreciated by the Tribunal to hold that the PCIT could not have invoked the revisionary jurisdiction under section 263 of the Act mainly on the ground that substantial increase in capital investment reflected by the assessee in his balance sheet as compared to the preceding year. The Tribunal further pointed out that these issues were raised by the Assessing Officer in the scrutiny assessment and that the assessee had given proper explanation, which was taken note of by the Assessing Officer while completing the assessment under section 143(3) of the Act."*

*(Emphasis supplied externally)*

6.1.2 The Hon'ble Gauhati High Court in the case of Abdul Hamid (supra) has held that for invoking section 263 of the Act, Ld. PCIT should point out a specific error or mistake on the order of the Assessing Officer rather than using probability or guess work. The relevant finding of the Hon'ble High Court is reproduced as under:

*"19. We also note that Id PCIT in his order u/s 263 of the Act, vide para 5 of his order, has stated that "the Assessing officer made some partial application of mind.". We note that there is*



no concept of "partial application of mind", it should be either application of mind or non application of mind. The relevant para no. 5 of his order is reproduced below:

"5. Considering the submission of the assessee, facts and circumstances of the case as discussed above, I am of the opinion that the Assessing officer made some partial application of mind relating to point no. 3(/7) mentioned above/and regarding point no. 3(i) mentioned above, the assessment order passed on 30-12-2016 u/s 143(3) of the Act was erroneous in so far as prejudicial to the interests of the revenue. In the facts and circumstances of the case, I am of the considered view that the matter should be restored back to the file of the Assessing Officer to treat and tax the undisclosed income of Rs. 3,95,933/- as per provisions of Section 115BBE of the Income-tax Act, 1961."

**From the above concluding para of the order of Id PCIT under section 263 of the Act, it is abundantly clear that Id PCIT is using the probability, likelihood and chances that assessing officer might or might not have applied his mind. It means, Id PCIT has failed to point out the specific error or mistake in the order of AO as he is using probability and guess work which is not permitted under the Income Tax proceedings. The Id PCIT is a senior officer and plays a supervisory role on the Income-tax officer working below him therefore, it is expected from him that he should find specific error in the assessment order and let it know, to the Income-tax officer rather than to use probability and guess work. It is necessary for the Id PCIT to point out exact error in the assessment order proposed to be revised by him as held in CIT v. GK Kabra, Co-operative Industrial Estate [1994] 75 Taxman 503 (AP).**

**Thus, we note that since the Id PCIT has used only probability and likelihood to find the error in the assessment order which is not permitted, he ought to find out specific error in the assessment order, and guide the assessing officer, since he has failed to do so in the assessee's case under consideration, therefore order passed by the assessing officer is neither erroneous nor prejudicial to the interest of the revenue. Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of Revenue in the facts and circumstances narrated above, the usurpation of jurisdiction exercising revisional jurisdiction by the Principal CIT is "null" in the eye of law and therefore we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the PCIT. Therefore, we quash the order of Ld. PCIT dated 11-12-2018 being ab initio void.."**

*(Emphasis supplied externally)*

6.1.3 The Hon'ble Delhi High Court in the case of PCIT Vs Delhi Airport Metro Express Private Limited (supra) has made similar observation and held that the burden is on the PCIT to show that there is an error in the order of the assessment. In absence of which, action under section 263 is not justified. The relevant finding of the Hon'ble High Court is reproduced 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."*

6.1.4 The Hon'ble Delhi High Court in the case of ITO Vs DG Housing Project Ltd (supra) also held that the CIT or PCIT has to examine the order of the Assessing Officer on merit and then form an opinion that order was erroneous. The relevant finding of the Hon'ble High Court is reproduced 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."*

6.1.5 The Mumbai bench of the ITAT in the case of Narayan Tatu Rane (supra) has also arrived at similar finding holding that where the PCIT has not brought any material on record by making inquiries or verification to substantiate his inference, the Learned PCIT is not justified in holding the assessment order as erroneous. The relevant finding of the Tribunal is extracted 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 Vs. V.C. Shukla and Others (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 be 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 and was not correct in law in holding that the impugned assessment orders were erroneous."*

6.1.6 The Tribunal Chandigarh bench in the case of Abhimanyu Gupta (supra) also following the decision of the Hon'ble Delhi High Court in the case of Delhi Airport Metro Express Private Limited (supra) held that it is necessary to demonstrate that the error which the authority seeks to address is set out in the order to show how the error to be prejudicial to the interest of the Revenue. The relevant finding of the Tribunal is reproduced as under:

*"4.4 In the facts of the present case we find that the Pr. CIT has failed to point out the error committed by the assessing officer let alone such an error which can be considered to be prejudicial to the interests of the Revenue. The law does not permit the authority the exercise of revisionary powers to initiate fishing Shri Abhimanyu Gupta ITA No. 771 /Chd/2017 Assessment Year : 2012- 13 and roving enquiries. The assessing officer in the facts of the present case we note has passed an order after conducting detailed enquiries on all the issues the Fr. CIT has flagged various issues and on going through the record we note that he has failed to give any finding as to how and in what manner the order of the assessing officer on the various issues noted by him can be said to be erroneous let alone prejudicial to the interests of the Revenue. We note that no enquiry has been made by the Fr. CIT at his own instance and he has merely directed the assessing officer to pass an order in accordance with law. The law envisages that first the Ld. Fr.CIT is to point out how the order can be said to be erroneous without such an exercise the direction to pass the order in accordance with law becomes meaningless. The responsibility to do so cannot be shunned or abrogated by the said authority whimsically. The law requires that the order passed by the Fr. CIT should be a speaking order pointing out the error as in the absence of the same it is an arbitrary exercise which cannot be countenanced. We find support from the decision of the Hon'ble Delhi High Court in the case of DCIT versus Delhi Airport Metro Express private apart from various other decisions cited by the parties. The Court in categorical terms has held that the law envisages before the revisionary authority exercises jurisdiction under section 263 that the Fr. CIT should proceed by carrying out some minimum enquiries to show that the conclusion of the assessing officer is erroneous and prejudicial to the interests of the Revenue. Even in the circumstances where the Fr. CIT is of the view that the assessing officer did not undertake any enquiry even then it becomes incumbent upon the Fr. CIT to conduct such an Inquiry and in cases enquiry has been done then it is necessary to demonstrate that the error which the authority seeks to address is set out in the order to show how the error can be said to be prejudicial to the interests of the Revenue. In the facts of the present case we find that the Ld. Fr. CIT has failed to address the replies of the assessee even after extracting them in the order and has passed a bald order without bringing out any error whatsoever let alone an error which can be said to be prejudicial to the interests of the revenue. On going through the Explanation 2 to section 263 of the act which has been inserted w.e.f. 01/06/2015 we concur with the conclusions drawn by the coordinate bench in the case of Naryan Tatu Rane cited supra wherein it has been held that explanation cannot be said to have overridden the law as Shri Abhimanyu Gupta ITA No. 771 /Chd/2017 Assessment Year : 2012-13 interpreted by various High courts and the High courts have consistently held that before reaching the conclusion that the order of the AO is erroneous and prejudicial to the interests of the revenue the Commissioner himself has to undertake some*

*enquiry to establish that the assessment order is erroneous and prejudicial to the interests of the revenue. In the facts of the present case we find that no such exercise has been done."*

6.2 In view of the above judicial precedents, we are of the opinion that it is prerequisite for the PCIT to carry out minimal inquiries on the issues on which he has proposed to set aside the order of the Assessing Officer and thereafter demonstrate how the order of the Assessing Officer is erroneous. Simply, observing by the Learned PCIT that the Assessing Officer has not made any enquiry on the issue is not sufficient and he is required to demonstrate error in the order of the Assessing Officer after going through reply of the assessee or after carrying out inquiries which are deemed fit.

6.3 We find that in the instant case, the Learned PCIT has held the assessment order as erroneous and prejudicial to the interest of the Revenue that no inquiries have been carried out by the Assessing Officer on following issues.

1. Difference in figures of revised return and original return
2. unsecured loans
3. sundry creditors and debtors

6.4 We find that before us, the Learned Counsel of the assessee has referred to various queries raised by the Assessing Officer and reply submitted by the assessee. For ready reference, the date-wise questionnaire by the Assessing Officer and reply by the assessee are reproduced as under:

|            |                                                                               |
|------------|-------------------------------------------------------------------------------|
| 10/08/2017 | <i>questionnaire issued by the Assessing Officer( Page 112 of paper-book)</i> |
| 24/08/2017 | <i>reply filed by the assessee ( Page 113 -115 of paper- book)</i>            |
| 17/10/2017 | <i>Question issued by the Assessing Officer(page 116 of paper-book)</i>       |
| 08/11/2017 | <i>Reply filed by the assessee (page 117-118 of paper- book)</i>              |
| 23/11/2017 | <i>Reply filed by the assessee (page 119-120 of the paper-book)</i>           |
| 07/12/2017 | <i>Reply filed by the assessee (Page 1221-123 of paper- book)</i>             |

6.5 The Learned PCIT has made following observations on the three issues:

| Sr. No. | Particulars | Observations |
|---------|-------------|--------------|
|---------|-------------|--------------|

|      |                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|------|---------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| i)   | <i>Discrepancies in the revised and original audit report</i> | <i>The perusal of both the revised and original ITR and audit report reveal that there is difference in the figures under head long term liabilities, surplus, payment to related parties, depreciation, cash in hand and some other heads. Neither the AO asked for the details of changes made in the balance sheet nor the assessee submitted any explanation during assessment proceedings. No reconciliation of various entries has been submitted during the present proceedings. Hence the changes in the various heads in the revised ITR and audit report remain unexplained. The AO is directed to obtain all the details of heads wherever changes have been made and taken necessary action under the provisions of Income Tax Act.</i> |
| ii)  | <i>Unsecured loans</i>                                        | <i>Neither the AO called for complete confirmations to prove identity, creditworthiness and genuineness of the lenders nor the assessee submitted the same. During the present proceedings the assessee only submitted copy of ledgers. No bank account statements or copy of ITR of the lenders has been submitted. Hence, unsecured loan of Rs. 2,95,26,933/- remained unexplained. The AO is directed to verify these unsecured loans and take appropriate actions as per the relevant provisions of Income Tax Act.</i>                                                                                                                                                                                                                         |
| iii) | <i>Creditors and Debtors</i>                                  | <i>In response to questionnaire the assessee submitted list of creditors and debtors. However, the list contained only name of creditors and debtors. No address or PAN were provided. The AO did not make any independent verification about the genuineness of creditors nor did assessee submit confirmations from the creditors and debtors. During the present proceedings also the assessee did not submit confirmations of creditors and debtors. Hence, the same remain unverified.. The AO is directed to verify these creditors and debtors and take appropriate actions as per the relevant provisions of Income Tax Act.</i>                                                                                                            |

6.6 In the first issue of discrepancies in the revised and original audit report, the learned Counsel of the assessee has referred to various pages of the paper-book and shown to us that revision was done due to change in the depreciation and some figures in original balance-sheet, mentioned erroneously under wrong heads, which were later on observed and rectified. In our opinion once the assessee has revised his return within the permissible period, then said return substitute the original return of income for all purposes and the original return is to be ignored. The assessee has already filed revised audit report, which in itself is self-explanatory as how the loss claimed by the assessee has been reduced due to the reduction in claim of the depreciation. We also find that the revised return the assessee has reduced the loss as compared to the original return and hence there was no occasion of any suspicion of excess claim, which warrant comparison of the figures with the original return. Before the Learned PCIT, the assessee has produced all the details of the original return and revised return along with enclosures, but

Learned PCIT has not pointed out any error in the said explanation of the assessee. He has merely directed the Assessing Officer to obtain all the details and take necessary action. This action of the Learned PCIT is not justified in view of the precedents discussed above.

6.7 On the issue of the unsecured loans, the assessee filed all the confirmations of unsecured loans before the Learned PCIT and detailed in respect of addition to loan during the year under consideration. Though the Learned PCIT has mentioned that no bank statement or Copy of IT return has been filed in respect of the lenders and therefore directed the Assessing Officer to verify and take appropriate action. We find that Learned PCIT has not pointed out as which loans have been accepted erroneously by the Assessing Officer. Similarly, on the issue of sundry creditors, it was submitted by the assessee before the Learned PCIT that once trading results are accepted by the Assessing Officer, no addition can be made for sundry creditors under section 68 of the Act. It has been submitted by the Learned Counsel of the assessee that entire audited books of accounts were produced before the Assessing Officer. The Learned PCIT, though mentioned in his order that no address or PAN of sundry creditors were provided to him, however, he himself did not verify as to which creditor was prime facie not genuine.

6.8 We also note from the submission of the assessee before the Learned PCIT that the information in respect of claim of the depreciation, unsecured loans and sundry creditors in prescribed perform were duly filed by the assessee. The paper-book page 116 is a copy of query letter issued by the Assessing Officer on 17.10.2017. In the said query letter, he has inquired about confirmation of unsecured loans and also inquired as why there was increase in interest on unsecured loans. The reply of assessee in respect of the above query raised by the AO is placed on Page 118 of the Paper-book. In said reply, the assessee has complied the direction of the AO and even justified reasons for increase in interest on unsecured loan. Moreover, in the year under consideration, loan was added in case of Sh. B.K. Gupta, Sh. K.L. Gupta, Sh. N.K. Gupta and Sh. Tanuj Datta. All these persons are either director or relative of director and assessed under the same Assessing Officer, and thus all information in respect of these parties were already available with the AO and he was not required to call for such information from the Assessing Officer. Similarly, for verification of ledger accounts of sundry creditors, books of accounts alongwith vouchers were produced before the Assessing Officer. The assessee has filed complete details of sundry creditors before the PCIT, a copy of which is placed on page 161 of the paper-book. We find that the Assessing Officer has accepted the trading results of the assessee and ld. PCIT has also not pointed out any error. When the ld. AO has accepted the trading results, it is deemed that he has verified the sundry creditors/debtors. Thus, to alleged that no enquiry was done by the AO as regard to sundry creditor is not correct. Moreover, the addition cannot be made for sundry creditor, without disallowing purchase as held in the case of Ritu Anurag Agarwal (supra). In the case of assessee, trading results are accepted and no purchase are disallowed. In the circumstances, it cannot be said that no inquiry has been done by the AO, which should have been done in the case. In our opinion, reliance by ld. DR on Explanation -2 below section 263 is misplaced and this explanation which deemed the assessment order as erroneous, if no inquiry is done which should have been, is not attracted in the instant case.

6.9 In the facts and circumstances, we are of the opinion that Ld PCIT has failed to point out any specific error in the order of the Learned Assessing Officer and in absence of which twin conditions of section 263 of the Act are not satisfied and therefore we quash the finding of the Ld. PCIT and set aside the said order of the PCIT. The grounds of the appeal of the assessee are accordingly allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 27<sup>th</sup> July, 2021.

\*\*\*\*\*

