

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND Ms. SUSHMA CHOWLA, JUDICIAL MEMBER**

**ITA Nos.1323 to 1329/PN/2011
Assessment Years: 2000-01 to 2006-07**

D.Y. Patil Education Society
2126, 'E' Tarabai Park,
Kolhapur – 416003

.... Appellant

PAN: AAATD8919M

Vs.

The Dy. Commissioner of Income Tax,
(Central) Circle, Kolhapur

.... Respondent

Appellant by	:	Shri M.K. Kulkarni
Respondent by	:	Smt. M.S. Verma, CIT
Date of hearing	:	01-01-2015
Date of pronouncement	:	30-01-2015

ORDER

PER SUSHMA CHOWLA, JM:

This bunch of appeals filed by the assessee are against consolidated order of CIT(Central), Pune, dated 09.09.2011 relating to assessment years 2000-01 to 2006-07 passed under section 263 of the Income Tax Act.

2. All the appeals relating to the same assessee on similar issue were heard together and are being disposed of by this consolidated order for the sake of convenience. However, reference is being made to the facts in ITA No.1323/PN/2011 to adjudicate the issue.

3. The assessee in ITA No.1323 to 1329/PN/2011 has raised the following concise grounds of appeal:-

1. *On the facts and circumstances of the case and in law the Ld. CIT(Central) was not justified in rejecting the contention of the assessee that the assessments were ab initio void for failure to serve notice u/s.143(2) being statutory and mandatory notice which required to be served in assessment under Ss.153-A and 153-C of the Act. The reliance placed on the Judgment of the Hon'ble Delhi High Court in Ashok Chadha Vs. CIT Delhi is distinguishable on facts and law. The assessments being illegal and without jurisdiction be quashed holding that the action under section 263 is bad in law and it be quashed.*
2. *On the facts and circumstances of the case and in law Ld. CIT (Central) in her fresh order under section 263 simply followed what her predecessor CIT (Central) had held to come to the conclusion that the assessment orders of the A.O. were erroneous as well as prejudicial to the interests of revenue to initiate action under section 263 of the Act. The Ld. CIT (Central) failed to consider the requisite grounds specifically raised before her in connection with applicability of S. 263 of the Act. Except making a statement that various judicial pronouncements cited by assessee in support of the contentions were distinguishable on facts, the Ld. CIT (Central) has not applied her mind to the legal precedents cited before her. This amounts to violation or principles of natural justice and it be held accordingly.*
3. *On the facts and circumstances of the case and in law and without considering the fact that original assessment orders being subject-matter of appeal before Ld. CIT(A)- Kolhapur the provisions of S. 263 (1)(c) are attracted and in view of this the action taken under section 263 to set aside the assessment order is bad in law and without jurisdiction.*
4. *On the facts and circumstances of the case and in law and considering the original assessment order and order passed under s.263 dt. 06-10-2008 the present order passed under section 263 is barred limitation and it be quashed.*
5. *On the facts and circumstances of the case and in law the setting aside of assessment order de novo invoking S. 263 of the Act is impermissible in law. The order under section 263 passed by CIT (Central) be quashed.*
6. *The appellant craves/leave to add, amend or alter any of the above grounds of appeal.*

4. The brief facts of the case are that, order under section 263 of the Act was passed by CIT(Central), Pune relating to assessment years 2000-

01 to 2006-07 on 06.10.2008 wherein the assessment orders passed by the Assessing Officer were held to be both erroneous and prejudicial to the interest of Revenue. The Tribunal in the appeal filed by the assessee against the said order, had set aside the order passed under section 263 of the Act and restored the issue back to the file of Commissioner to decide *denovo* after providing adequate opportunity of hearing to the assessee. The said order was passed on 31.03.2009. Thereafter, the Commissioner observed that adequate opportunity was provided to the assessee and the case was heard. The Commissioner in the second round of proceedings under section 263 of the Act referred to the earlier order passed under section 263 of the Act, dated 06.10.2008. The first issue considered by the Commissioner in the said order was the expenditure claimed by the assessee on car repairs and maintenance. The Assessing Officer in the original round of assessment proceedings, had disallowed the car expenses in various percentages. The case of the assessee was referred to the special auditor who had submitted its Audit Report. The Commissioner observed that the break-up in terms of fuel and maintenance was not taken by the Assessing Officer. Further, the said cars were utilized by various functionaries of the Trust and the same was part of the Audit Report of the special Auditor. The Commissioner under para 2.1 has tabulated the car expenses claimed by the assessee and the car expenses disallowed by the Assessing Officer from year to year. The Commissioner in the first round of proceedings under section 263 of the Act observed that the Assessing Officer had disallowed the expenses at a given percentage, which was varying year after year. Since the Assessing Officer had not mentioned the reasons for adopting different percentages of the disallowance for different years, the Commissioner was of the view that the said disallowance was in thin air

and without any basis. The Commissioner acknowledged that though the order of Assessing Officer had resulted into heavy disallowances, yet the same were without any basis and were going to face adverse fate in the hands of the appellate authorities.

5. Another point raised by the Auditor was that the expenditure had been incurred on the maintenance and running of cars and also that the cars were utilized by various persons of the assessee Trust. The Assessing Officer had not asked for the break-up of details and in the absence of the same, the Commissioner observed that *the Assessing Officer has not called for this detail, nor the Auditor has given these*. The related aspect considered for this issue was that in assessment year 2000-01, the assessee had only one car Hyundai Accent, which was used by the Medical Director. However, in assessment year 2001-02, the assessee purchased Mercedes Benz car, which was placed at the disposal of the founder President. In assessment years 2004-05 to 2006-07, the assessee purchased only costly cars i.e. Toyota Corolla, Mercedes Benz, Toyota Camary, which as per the assessee were used by the various functionaries of the Trust. Another aspect noticed by the Commissioner was that in assessment year 2005-06, one Mercedes Benz car was purchased for Rs.25,13,102/- and was placed at the disposal of Vice President. The Assessing Officer queried as to how many persons were the directors of the assessee company. Similarly, one Mercedes Benz car was purchased in assessment year 2001-02 and was at the disposal of the founder President and one Toyota Camary car was purchased in assessment year 2006-07, which was also used by the President. As per the Commissioner, the Assessing Officer has failed to consider the personal usage of the said cars by the said functionaries of the assessee Trust, which also proved that the vehicles were used for the purpose of

the Trust. Another vehicle was placed at the disposal of the Medical Director at Mumbai. The Commissioner questioned the same as it was not clearly mentioned by the Auditor of the assessee Trust whether it had any branches or offices in operation other than the institution of the Trust at Kolhapur. Similar issues were raised in respect of the cars purchased in assessment year 2006-07. The Assessing Officer having disallowed the expenses at a particular percentage which were varying year after year, was found to be without gathering of basic details. Where the car had been admittedly used by the Trustees, the issue was whether the expenditure was allowable at all or not. Where the cars were being used by the Trustees, the other issues were whether the perquisites value has to be determined and added in the hands of the functionaries and whether the tax has been deducted at source or not. The Commissioner observed that the Assessing Officer had not enquired into the expenditure on each car and the Auditor had also not given the same and hence the order was prejudicial to the interest of Revenue.

6. Another point noted by the Commissioner was that prior to search at the residence of the Trustees, the assessee was not filing the return of income. For the first time, the return of income was filed for assessment year 1999-2000. Since no depreciation had been allowed earlier, therefore, the opening cost of the asset had to be taken for the purpose of written down value, in view of the provisions of section 43(6) of the Act. The Commissioner in this regard, observed that the Assessing Officer had simply dismissed the claim and had allowed depreciation as worked out by the Auditor. The Commissioner observed that the Assessing Officer was not right in simply brushing aside the stand of assessee on the ground that she was going to allow depreciation on the basis of depreciation worked out by the Auditor. As per the Commissioner, the

Assessing Officer should have examined the issue from the point of view of the age of assets on which depreciation had to be claimed. Since the Trust was more than 20 years old, the Commissioner was of the view that the Assessing Officer had to see the year in which equipment had been purchased for which, depreciation was claimed and whether the equipment had so much life that it would last for 20 years. The Commissioner held that the Assessing Officer had not carried on the said exercise. Further, the opening WDV of the building taken by the Assessing Officer was found to be without basis and further critical examination with the help of purchase bills had not been done. The issue had been dealt with only at a legal plane which was prejudicial to the interest of Revenue, was the observation of Commissioner.

7. In respect of the depreciation on hospital building, the Commissioner noted that the cost of construction of hospital building was referred to Valuation Cell, who had determined the value at Rs.18,89,51,000/- as against the value shown by the assessee at Rs.21,29,48,048/-. The Assessing Officer had allowed the depreciation on the value as estimated by the DVO. The case of the assessee however, was that as per the Report of DVO, dated 01.08.2008, the date of commencement of construction was 18.01.2001 and date of completion was December, 2003. The total cost of construction for the period of three years was Rs.18,08,78,703/- and Architects fees of Rs.40,50,000/- which totals to Rs.18,48,28,703/-. Another objection raised by Commissioner was that certain expenditure incurred by the assessee on land and building was un-vouched, which was enlisted in Annexure XIX of the Audit Report and total led to Rs.2,50,50,586/-. As per Commissioner, the same should have been used by the Assessing Officer in support of her stand that the assessee was entitled to lesser

depreciation, which was not done by the Assessing Officer. Further, when the building was completed in assessment year 2003-04, where was the question of incurring expenditure in assessment years 2004-05 to 2006-07. This aspect was also found to have not been enquired into by the Assessing Officer, which was prejudicial to the interest of Revenue.

8. The Commissioner in the order passed under section 263 of the Act has reproduced finding of Commissioner in the earlier order passed under section 263 of the Act in respect of unsecured loans. The Assessing Officer had made addition on account of loans in assessment years 2000-01, 2001-02, 2003-04, 2004-05 and 2005-06. The said addition had made as enlisted at pages 11 and 12 of the order passed under section 263 of the Act. However, no disallowance was made by the Assessing Officer in respect of other credits in other names i.e. Jyotsna Ajit Gundesha of Rs.1,00,000/- and Shantilal Bhimraj Gundesha of Rs.50,000/- though the same fell in the same category. Another entry was made in assessment year 2005-06 of Rs.40 lakhs in the name of Dr. D.Y. Patil Academy. The said Auditor had explained that interest had been paid only with regard to the loans of Gundeshah family and that too @ 4%. As per Commissioner, the rate itself indicates that the loans were bogus and all other loans taken by the assessee year after year were non-interest bearing loans as explained to him by the Auditor in writing. The Commissioner questioned why anybody would give interest free loans. The Commissioner at page 13 under para 5.2 has tabulated the credit of particular amounts in the loan account and there being no corresponding narration in the cash book. The Commissioner observed that the assessee runs a college at Pune and the persons who had given loans were still un-known. The loan of Rs.1.46 crores had figured for the

first time in assessment year 2002-03. The assessee had filed the confirmation of Satya Vijaya Co-operative Bank Ltd one day before the completion of assessment. The allegation of the Commissioner was that the loans were statedly taken by the Trustees on the personal names and given to assessee Trust interest free. The Commissioner vide para 5.3 further observed as under:-

“5.3

As far as the loan of Rs.81,90,478/- is concerned, the assessee filed confirmation one day before the completion of assessment that Rs.78,20,300/- out of this has been taken from Karad Janata Sahakari Bank, Kolhapur, by the Trustees and a sum of Rs.2,99,178/- is interest on FDs of Dynanshanti Agro Farm Ltd credit by Shri Ram Sahakari Bank in the loan a/c of the assessee. Merely on the basis of the certificate given by the banks to the assessee that too one day before the assessment was getting time barred by limitation of time, the A.O. has accepted this loan as correct. ' In the cash book there is no narration whatsoever of the persons who has advanced the loans. In the first instance, one has to see whether the loan taken from the Banks were in fact given to the assessee. What is the reason that the Trustees who take loans on their own names that too interest bearing and given it interest free to the assessee. Why in the cash book, no name is given from the person from whom loan has been taken. There is no doubt in my mind that the assessment has been framed in a hurried manner which is prejudicial to the interest of Revenue. The assessee is in receipt of unaccounted money and it is clear from the Return of Income filed in response to notice u/s 153A, where heavy surrender has been made in the computation of income. Loans could be another term of bringing the unaccounted income in the books of accounts.

9. The next contention of the Commissioner was as against the loans taken by the assessee totaling to Rs.57,88,58,629/-. The Assessing Officer had disallowed only part of the loans and accepted the balance loan, where the loans were interest free. In the absence of the assessee having failed to prove the identity of the person, his capacity to pay taxes and the genuineness of the transaction, the Commissioner at para 5.6 at page 17 has tabulated resulting position in the form of chart submitted, under which loans of D.Y. Patil Pratishthan were also considered. The Commissioner questioned as to why the Assessing Officer had accepted

the loans as genuine. The said Auditor reported that only in few cases interest has been paid on the loan account, but the Assessing Officer had only disallowed the loans, but had not disallowed the interest on the said loans. Such expenditure or non-expenditure of loans and disallowance of interest in a particular manner, as per the Commissioner, could only be described as prejudicial to the interest of Revenue.

10. Another aspect noted by the Commissioner was that the assessee claimed that it had given registration under section 12A of the Act and so was entitled to all the benefits of sections 11 and 12 of the Act, whereas, the stand of the Department was that the assessee never applied for registration and had to be assessed like any other assessee. The appeal of the assessee was pending with the Tribunal. Further, the special Auditor in the report had shown instances that the Trustees were running the Trust like a proprietary concern and the Assessing Officer should have marshaled the facts as thrown by the special Auditor to show that the Trust was violating the provisions of section 13 of the Act from year to year. In respect of various expenditure both Revenue and Capital, the assessee claimed that it was incurred for the purpose of Trust, but there were no vouchers in support. The Commissioner under para 6.2 had tabulated the capital and revenue expenditure not supported by the vouchers as per Annexure XIX, from year to year. The Commissioner vide para 6.3 notes that the Assessing Officer had simply disallowed these expenses, whereas, the claim of the assessee was that even though the expenses were un-vouched, the payments had been made by the cheques. As per the Commissioner, the Assessing Officer should have given one more opportunity and asked the assessee that not only the said expenditure was going to be disallowed, but unless the expenses were linked by cheque or cash payments, the Assessing Officer

would be considered to draw conclusion that the assessee had siphoned funds of the Trust and consequently, hit by section 13 of the Act. As per Commissioner, no such exercise had been done by the Assessing Officer and consequently, no such conclusion was drawn.

11. The Commissioner as per para 6.5 observed that the advertisement had been given in the newspapers on the birthdays of the Trustees and the total expenditure was Rs.13,77,902/- from assessment years 1999-2000 to 2005-06. Further, the birthdays expenses of the Trustees and their relations as enlisted in Annexure XIII, were made which were payments made to the persons mentioned in section 40A(2)(b) and section 13 of the Act. The year-wise total of Rs.13,28,020/- is tabulated at para 6.6 of Commissioner's order. The Commissioner was of the view that the Assessing Officer had not examined the said issue in the light of judgment in Agappa Child Centre Vs. CIT reported in 261 ITR 211, wherein the Hon'ble Kerala High Court had held that once the Trustees misuses the property of the Trust, they were not entitled to the benefits of sections 11 and 12 of the Act. The Commissioner further held that the adhoc manner in which the disallowance had been made and the whole issue had been dealt with was clearly prejudicial to the interest of Revenue. Accordingly, show cause notice was issued to the assessee in this regard.

12. The Commissioner in the set-aside proceedings under section 263 of the Act observed that the assessment orders were erroneous and prejudicial to the interest of Revenue on account of following reasons:-

- (i) Failure to make necessary enquiries;
- (ii) Completing the assessment proceedings without proper appreciation of evidences, facts and law;

- (ii) Not making disallowances / additions which ought to have been made.

13. In reply, the assessee furnished submissions vide letter dated 08.02.2011, which as per Commissioner, were lengthy. However, gist of the contentions raised by the assessee in the letter was as under:-

“(a) The assessments u/s 153A rws 153C of the Act are without jurisdiction, illegal and are not sustainable and, hence, the assessments cannot be revived by invoking provisions of Sec.263. The basis for the above mentioned contention that the assessment proceedings u/s 153A rws 153C are void is as under:

(i) Regular income for regular returns has been assessed u/s 153C instead of assessing undisclosed income.

(ii) Assessment orders were passed without proper application of mind merely depending on the views expressed by the special auditors u/s 142(2A) of the Act.

(iii) Notice u/s 143(2) was not served within the stipulated time.

(iv) The matter was referred to special audit on 06.12.2007 and assessment order should have been completed on or before 06.06.2008 as per clause(ii) of Explanation to Section 153B,

(v) Reference for special audit u/s 142(2A) is without basis.

(b) The CIT(Central) has issued show cause notice u/s 263 only on the basis of audit report of special auditor without forming an independent opinion. Hence, order u/s 263 is illegal.

(c) All the issues raised u/s 263 are subject matter of appeal before CIT(A). As per Explanation (c) of Section 263, Commissioner has powers to deal only with issues which have not been considered and decided by the CIT(A). Therefore, order u/s 263 is without jurisdiction.”

14. The first issue raised by the assessee was that the assessment under section 153C of the Act was without jurisdiction and void, under which, it was contended that only undisclosed income should be assessed under section 153C of the Act and not regular income. The said contention of the assessee was found to be not acceptable by the Commissioner as both the regular and undisclosed income is to be

assessed in a single order and there was no need for two separate assessment orders for assessing regular and undisclosed income.

15. The next contention raised by the assessee was that the Assessing Officer had passed the assessment orders without proper application of mind merely depending on the views expressed by the special auditors under section 142(2A) of the Act, was also rejected by the Commissioner, holding that the assessments were completed under section 153C of the Act by utilizing the report of special auditor and not merely depending on the views expressed by the special auditors.

16. Another objection raised by the assessee was that notice under section 143(2) of the Act had not been served and hence, the proceedings are void. The Commissioner was of the view that even if notice under section 143(2) of the Act was not served, the assessment under section 153A / 153C of the Act were still be valid as no mention has been made in the present procedure of search proceedings to issue notice under section 143(2) of the Act, unlike in the block assessment procedure prescribed under Chapter XIV-B of the Act.

17. The next issue raised by the assessee was that time limit within which the assessments should have been completed vis-à-vis report received from the special auditor under section 142(2A) of the Act. The Commissioner held that the special auditor submitted its audit report on 09.06.2008 and the assessment order was passed on 07.08.2008 which was within 60 days of the receipt of audit report and the contention of the assessee, in this regard was without substance.

18. The last contention of the assessee with regard to the averment that the assessment proceedings was void as to reference for special

audit under section 142(2A) of the Act was without basis, was also rejected as the said reference was made after due application of mind and after recording the reasons. The Commissioner thus, held that in view thereof, the contention of the assessee that the assessment could not be revived by invoking the provisions of section 263 of the Act, was dismissed.

19. The second issue before the Commissioner was that the show cause notice under section 263 of the Act was issued only on the basis of audit report of special auditor without forming an independent opinion and hence, the order passed under section 263 of the Act thus, was not valid. The said objection of the assessee was also rejected holding that the CIT (Central), Pune had reviewed the assessment and after due consideration of totality of the facts and evidences, the Commissioner had come to the conclusion that the assessments were erroneous and prejudicial to the interest of Revenue. The audit report under section 142(2A) of the Act was held to be one of the evidences utilized by the Commissioner for coming to his conclusion.

20. Another issue raised by the assessee was that all the issues raised under section 263 of the Act were subject matter of appeal before the CIT(A). The assessee further submitted that as per Explanation (c) of section 263 of the Act, the Commissioner had powers to deal only with issues which have not been considered and decided by the CIT(A) and therefore, the order under section 263 of the Act passed was without any jurisdiction. The Commissioner noted that since the CIT(A) had not passed the order, it could not be said that the said issues were considered and decided by the CIT(A). It was further observed by the

Commissioner that *the CIT applying the ratio laid down by the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC) held that the assessments for assessment years 2000-01 to 2006-07 were erroneous and prejudicial to the interest of Revenue.* In view of the detailed reasons discussed in the original order under section 263 of the Act, dated 06.10.2008, the assessments were held to be erroneous and prejudicial to the interest of Revenue and were set-aside to the file of Assessing Officer to be framed denovo.

21. The assessee is in appeal against the order of Commissioner passed under section 263 of the Act.

22. The learned Authorized Representative for the assessee pointed out that the Commissioner opined that enquiries were not conducted, sometimes, he shows that inadequate enquiries were conducted. In respect of section 12A registration of the assessee Trust, it was pointed out by the learned Authorized Representative for the assessee that though the registration was there, but since the same could not be produced, in all years, assessment was completed in normal course. He further submitted that enquiries were conducted on 17.06.2008 and replies were filed on 30.06.2008 and it could not be said that the Assessing Officer has not applied his mind. Our attention was drawn to the assessment orders passed for captioned years placed at pages 1 to 75 of the Paper Book and the order of CIT(A) dismissing the appeals as infructuous, which is placed at pages 176 and 177 of the Paper Book. The learned Authorized Representative for the assessee further submitted that in the meanwhile the order under section 263 of the Act was passed which was set-aside by the Tribunal and fresh order under section 263 of the Act was passed. The learned Authorized

Representative for the assessee further drew our attention to the show cause notice issued which is placed at page 1 of the Paper Book. Our attention was also drawn to the Synopsis placed at PB-1, A to H, wherein all the points raised by the Commissioner were met with and we shall refer to same in the paras herein below. The contention of the learned Authorized Representative for the assessee was that the Commissioner had not applied his mind while passing the order under section 263 of the Act. Though the Commissioner says that the order was erroneous and prejudicial to the interest of Revenue, but there was no finding that the assessment order was erroneous and prejudicial to the interest of Revenue. Reliance in this regard was placed upon the judgment of Hon'ble Guwahati High Court in B & A Plantation & Industries Ltd. & Another Vs.CIT & Others (2007) 290 ITR 395 (Gau). It was pointed out by the learned Authorized Representative for the assessee that where Assessing Officer had made certain enquiries and some expenses were disallowed, the matter cannot be revisited by Commissioner. Reliance was placed on the ratio laid down by Hon'ble Delhi High Court in ITO Vs. DG Housing Projects Ltd. (2012) 343 ITR 329 (Delhi) and it was pointed that the Commissioner is not empowered to remit the matter for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order of Assessing Officer was erroneous. Further contention of the learned Authorized Representative for the assessee was that after the conduct of special audit under section 142(2A) of the Act, the audit report was submitted by the special auditors and where the assessment had been made on the basis of said audit report of special auditor, there was no scope for invoking of jurisdiction under section 263 of the Act. Reliance in this regard was placed on the observations of the Chaturvedi & Pithisaria's Income Tax Law Sixth Edition 2014, Volume 6.

23. The learned Departmental Representative for the Revenue took us through the assessment orders passed in the case, placed in Paper Book I and pointed out that the Commissioner at page 2, para 2 onwards had referred to many facts, which were available on record and which have not been looked into by the Assessing Officer while passing the assessment order. Our attention was drawn to the para 7.5.1 and 7.5.3 of the Commissioner, with regard to the depreciation on assets. With reference to para 3.3 at page 9 of the order of Commissioner, the learned Departmental Representative for the Revenue, pointed out that the additions on car expenses were made on adhoc basis. With regard to the depreciation on hospital building referred to in para 4.1 at page 10, the learned Departmental Representative for the Revenue pointed out that there were un-vouched expenses and the Assessing Officer had overlooked the same and adopted the valuation report of the DVO.

24. The next issue raised by the learned Departmental Representative for the Revenue was the unsecured loans raised by the assessee referred to in para 5.1 by the Commissioner, where there was no variation in the cash book. It was admitted by the learned Departmental Representative for the Revenue that though the Assessing Officer had disallowed some of loans, but had not considered the balance loans and had also not considered the disallowance of interest on such loans, which were disallowed by the Assessing Officer. Our attention was further drawn to the para 6.2 to 6.7 of the order of Commissioner. Further, it was contended by the learned Departmental Representative for the Revenue that the Assessing Officer was silent on the issue raised in the special audit and the present case was of lack of enquiry and also lack of application of mind. The learned Departmental Representative for the Revenue placed reliance on the following decisions.

- i) Rampyari Devi Saraogi Vs. CIT (1968) 67 ITR 84 (SC)
- ii) Arvee International Vs. Addl.CIT (2006) 101 ITD 495 (Mum)
- iii) CIT & Another Vs. Infosys Technologies Ltd. (No.2) (2012) 341 ITR 293 (Karn)
- iv) CIT Vs. Jawahar Bhattacharjee (2012) 341 ITR 434 (Guwahati)
- v) CIT Vs. Nalwa Investments Ltd. (2011) 338 ITR 520 (Del)
- vi) CIT Vs. Cray Research India Ltd. (2012) 343 ITR 212 (Delhi)
- vii) CIT Vs. Design and Automation Engineers (Bombay) P. Ltd. (2010) 323 ITR 632 (Bom)

25. The contention of the learned Departmental Representative for the Revenue was that the scheme of Act talks of proper examination of record and does not talk of adhoc disallowance, but talks of correct assessments. The reliance placed by the learned Authorized Representative for the assessee on ITO Vs. DG Housing Projects Ltd. (supra) was claimed by the assessee to be a decision on peculiar facts, where the Commissioner had said that the order passed by the Assessing Officer may be erroneous. Further, it was pointed out that the ratio laid down by Hon'ble Guwahati High Court in B & A Plantation & Industries Ltd. & Anr. Vs. CIT & Others (supra) was a case where, it was the case of Commissioner's opinion, but in the case of assessee, it was not mere Commissioner's opinion, but the audit report also.

26. In reply, the learned Authorized Representative for the assessee pointed out that the Hon'ble Delhi High Court in ITO Vs. DG Housing Projects Ltd. (supra) in para 19 had considered the whole issue and come to the conclusion that the order passed by the Commissioner was incorrect. Further, it was pointed out by the learned Authorized Representative for the assessee that the Assessing Officer had already disallowed the expenses which were un-vouched. In conclusion, the

learned Authorized Representative for the assessee pointed out that the order passed by the Commissioner in the present facts and circumstances, was not valid. The learned Authorized Representative for the assessee further stated that the grounds of appeal Nos.1 and 4 were not pressed and the issue is to be addressed in view of grounds of appeal Nos.2, 3 and 5 raised in the concise grounds of appeal.

27. We have heard the rival contentions and perused the record. The assessee has not pressed the grounds of appeal Nos.1 and 4 and the same are dismissed as not pressed. Further, the assessee vide grounds of appeal No.2, 3 and 5 has raised the issue of exercise of jurisdiction by the Commissioner under section 263 of the Act in holding the assessment orders passed by the Assessing Officer to be erroneous and prejudicial to the interest of Revenue.

28. Under section 263 of the Act, the Commissioner can invoke his jurisdiction where the assessment order passed by the Assessing Officer is both erroneous and prejudicial to the interest of Revenue. An erroneous order which has resulted in the order being prejudicial to the interest of Revenue can be looked into by the Commissioner, while exercising the jurisdictional power to review the orders of the subordinate authorities. The Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. Vs. CIT*, (2000) 243 ITR 83 (SC) held as under:-

"There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase "prejudicial to the interests of the Revenue" 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 confined to loss of

tax. The High Court of Calcutta in Dawjee Dadabhoy and Co. v. S. P. Jain [1957] 31 ITR 872, the High Court of Karnataka in CIT v. T. Narayana Pai [1975] 98 ITR 422, the High Court of Bombay in CIT v. Gabriel India Ltd. [1993] 203 ITR 108 and the High Court of Gujarat in CIT v. Smt. Minalben S. Parikh [1995] 215 ITR 81 treated loss of tax as prejudicial to the interests of the Revenue.

Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Company v. CIT [1987] 163 ITR 129 interpreting "prejudicial to the interests of the Revenue. "The High Court held (page 138) : "In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue administration." In our view, this interpretation is too narrow to merit acceptance. 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 erroneous 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 the 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. "

29. Under the provisions of section 263 of the Act, the term erroneous means a wrong / incorrect decision deviating from the law. This expression also postulates an error which makes an order unsustainable in law. The expression prejudicial to the interest of Revenue is of wide import and is not confined merely loss of tax. The above said propositions have been laid down by the Hon'ble Delhi High Court in ITO Vs. DG Housing Projects Ltd. (supra).

30. The Hon'ble Delhi High Court in Gee Vee Enterprises Vs. Addl.CIT & Others, (1975) 99 ITR 375 (Del) held as under:-

"The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

31. The Hon'ble Delhi High Court in ITO Vs. DG Housing Projects Ltd.

(supra) had laid down the following proposition:-

"11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits."

32. The Hon'ble Bombay High Court in CIT Vs. Gabriel India Ltd.

(1993) 203 ITR 108 (Bom) had held as under:-

"... From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is "erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power, it can be exercised only on fulfillment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be

illegal and without jurisdiction. 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.”

33. The Hon’ble Delhi High Court in ITO Vs. DG Housing Projects Ltd.

(supra) while referring to the decision of Hon’ble Bombay High Court in

CIT Vs. Gabriel India Ltd. (supra) observed as under:-

“From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion . . . There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed . . .”

34. The Hon’ble Delhi High Court in ITO Vs. DG Housing Projects Ltd.

(supra) further while elaborating on the powers of the Commissioner,

observed as under:-

“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 vs. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. 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.

18.....

"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."

35. The Hon'ble Guwahati High Court in *B & A Plantation & Industries Ltd. & Another Vs. CIT & Others* (supra) while elaborating on the powers of the Commissioner while exercising the jurisdiction under section 263 of the Act, had held that it was not open to the Commissioner to consider the order of Assessing Officer as erroneous merely because in his view, certain amount of bonus should have been disallowed. Where the Commissioner had not applied his independent mind to come to the conclusion that the assessment needs to be revised, there was no merit in the order passed by the Commissioner and the same was set-aside and quashed. The Hon'ble High Court held as under:-

"Two circumstances must co-exist to enable a CIT to exercise power of suo motu revision. These circumstances are : (i) the order must be an erroneous one and (ii) because of being an erroneous order, the order must have become prejudicial to the interests of the Revenue. Unless both these ingredients are present in a given case, it is not legally permissible for a CIT to initiate suo motu proceeding under s. 263. "Erroneous assessment" refers to an assessment that deviates from the law and is, hence, invalid. The erroneous assessment

pertains to a defect, which is jurisdictional in nature. It does not refer to the judgment of the AO in fixing the amount or valuation of property. "Erroneous judgment" means one rendered according to course and practice of Court; but contrary to law, upon a mistaken view of law or upon an erroneous application of legal principles. An order cannot be termed erroneous unless it can be shown to be an order, which is not in accordance with law. If the ITO, acting in accordance with law, makes certain assessment, the same cannot be termed as erroneous by the CIT merely because, the order, according to the CIT, should have been more elaborate in writing. Sec. 263 does not visualise a case of substitution of the judgment of the CIT for that of the ITO, who makes the assessment, unless the decision of the ITO is held to be an erroneous one. It is an established position of law that the CIT, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and if it was done by the CIT himself, then he would have estimated the income at a figure higher than the one determined by the ITO; but such opinion would not vest in the CIT the power to re-examine the accounts and determine the same at a higher figure. Sec. 263 does not visualise a case of substitution of the judgment of the CIT for that of the subordinate authority who passed the order which is sought to be revised. The order passed by a subordinate authority in exercise of its quasi-judicial power vested in him in accordance with law, cannot be termed erroneous merely because the CIT does not feel satisfied with the conclusions reached."

36. The Hon'ble Guwahati High Court further held that as under:-

"Viewed thus, it is clear that every error cannot be an error of jurisdiction and every error of an assessing authority is not open to exercise of suo motu revisional powers under s. 263. If an authority which has the power to assess, makes an assessment and commits a mistake or allows a deduction which ought not to have been allowed, such a mistake, unless it goes to the root of the making of the assessment order, cannot be revised under s. 263. This power cannot be exercised as a jurisdictionally corrective power or as a review of the orders passed by subordinate authorities. This power under s. 263 can be invoked only for the purpose of correcting such wrongs, which have taken place because of non-application of law or for a wholly incorrect application of law and when such application or non-application of law causes prejudice to the Revenue"

37. Where there is a finding of fact and as apparent from the record of proceeding that the Assessing Officer had framed the assessment after due application of mind and holding enquiries merely because, the Commissioner is of the view that no enquiries and / or non-sufficient enquiries had been conducted by the Assessing Officer, does not empower the Commissioner to exercise the jurisdiction under section

263 of the Act. It is the record of proceedings from which the presumption can be drawn as to whether the Assessing Officer had applied his mind to the various aspects of the matter or not. In case, the Assessing Officer had applied his mind and come to a conclusion to which the Commissioner does not agree and merely on such grounds cannot satisfy the test of the necessary conditions for invoking the jurisdiction under section 263 of the Act. Where the perusal of record reflects that enquiries have been made by the Assessing Officer and a particular conclusion was reached by the Assessing Officer, with reference to such enquiries made during the course of assessment and if the same is apparent from the perusal of the record of proceedings, then the invocation of jurisdiction by the Commissioner under such circumstances under section 263 of the Act is not sustainable. In any case as held by the Hon'ble Delhi High Court in ITO Vs. DG Housing Projects Ltd. (supra) in cases where there is an inadequate enquiry but not lack of enquiry, then the Commissioner must record a finding that the order / enquiry made by the Assessing Officer was erroneous, which can only happen if an enquiry and verification is conducted by the Commissioner and he is able to establish and show the error or mistake made by the Assessing Officer. The finding of the Commissioner must be clear, un-ambiguous and not debatable. The matter cannot be set-aside to the file of Assessing Officer to make further enquiries without a finding as to the order being erroneous. It has been held by the Hon'ble Bombay High Court in CIT Vs. Gabriel India Ltd. (supra) that exercise of *jurisdiction under section 263 of the Act cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiries ought to have been conducted to find something*. In cases where, two views are possible and the Assessing

Officer had taken one view, with which the Commissioner may not agree, the said order cannot be termed as erroneous as held by the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. Vs. CIT* (supra). Further, the Hon'ble Supreme Court had observed that the phrase 'prejudicial to interest of Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. However, loss of revenue as a consequence to order of the Assessing Officer cannot be treated as prejudicial to the interest of revenue. The Hon'ble Apex Court (supra) further held that where the Assessing Officer had adopted one of the courses permissible and available to him, which in turn, had resulted in loss to the Revenue, cannot make the order prejudicial to the interest of Revenue. In case, where the Commissioner gives his finding that the view taken by the Assessing Officer is un-sustainable in law and therefore, the order is erroneous, which in turn, was prejudicial to the interest of Revenue, then the exercise of power by the Commissioner under section 263 of the Act is to be upheld.

38. Now coming to the facts of the present case, the assessment in the case before us was made under section 143(3) of the Act. The copy of the assessment order is placed at pages 1 to 22 of the Paper Book relating to assessment year 2000-01 reflects that search and seizure action had taken place at the premises of the assessee under section 132 of the Act on 20.07.2005. Survey action was also conducted under section 133A of the Act in the month of July, 2005 at the residential as well as business premises of Dr. D.Y. Patil Group. Pursuant to the search, the case was assigned to DCIT, Central Circle, vide order of CIT-II, Kolhapur dated 29.12.2005. Thereafter, notice under section 153C of the Act was issued on 19.01.2007 requiring the assessee to furnish the return of income. In response, the assessee filed its return of income on 30.03.2007 declaring

total income and agricultural income of Nil. Thereafter, notice under section 142(1) of the Act along with questionnaire dated 25.07.2007 were issue and served upon the assessee. The Assessing Officer in view of the complexity of accounts of the assessee and in the interest of Revenue, made a proposal for carrying out a special audit under section 142(2A) of the Act. The CIT, Central, vide order passed on 21.11.2007 approved the above proposal. Accordingly, the auditor was nominated on 06.12.2007 and the assessee was directed to get its accounts audited. The audit report was submitted on 09.06.2008 and thereafter, a detailed questionnaire was issued to the assessee along with the issues mentioned in the audit report. In response to which, the assessee appeared and submitted the information called for. In between, the assessee was also served with a letter dated 30.07.2007 as to why its income should not be assessed by not applying the provisions of sections 11 to 13 of the Act and treating the assessee as AOP. The Assessing Officer on consideration of the submissions filed by the assessee on 11.10.2007 observed that the assessee had not fulfilled the conditions laid down under section 12A of the Act as it had no registration under section 12AA of the Act. Further, the assessee had not filed any regular returns of income and for the first time, the returns of income were filed after the search action upon the issue. The Assessing Officer after elaborating upon the issue, came to the conclusion that the assessment of the assessee has to be done in the status of AOP treating it as business organization. Thus, in view thereof, the assessee was not entitled for exemptions under sections 11 and 12 of the Act and the assessment was completed under the normal provisions of the Act. Thereafter, the Assessing Officer had considered the issues raised in the audit report furnished by the special auditor under section 142(2A) of the

Act and show caused the assessee to explain as to why the items should not be disallowed. The first issue considered by the Assessing Officer was that the assessee was following mixed system of accounting, which was not allowable from assessment year 1997-98 and the income from business income and from other sources, had to be computed subject to the provisions of section 145(2) of the Act only, in accordance with either cash or mercantile system of accounting regularly adopted method by the assessee. Consequently, the prior period expenses to the tune of Rs.15,73,963/- were disallowed by the Assessing Officer. Further disallowance was made on account of capital expenditure of Rs.1,47,540/-, the default in payment of EPF to the tune of Rs.6,09,892/-, payments to specified persons under section 40A(2)(b) of the Act on account of payments made to the Trustees against telephone and advertisement expenses resulting in addition of Rs.1,77,854/-. The Assessing Officer thereafter, also considered certain expenses incurred which were other than for the objects of the Trust and disallowed Rs.1,57,622/-.

39. The next objection raised by the special auditor in the audit report was that certain capital and revenue expenses were not supported by bills / vouchers and the same were disallowed to the extent of Rs.14,16,753/- on account of revenue expenses and Rs.56,34,753/- on account of capital expenditure. The Assessing Officer noted that the assessee had failed to produce the bills / vouchers and it cannot be ascertained whether the payments were made or expenses were incurred for the purpose of business of the assessee or not. Merely because the payments were made through bank could not prove that the expenses were incurred for the purpose of business and the same was disallowed by the Assessing Officer. The next aspect noted by the Assessing Officer

was the expenses on car, its repairs and maintenance. The Assessing Officer had noted that the assessee had incurred expenses on Hyundai Accent, Mercedes Benz and Toyota Safari cars repairs and maintenance and the said expenses were debited to Profit & Loss Account. The Assessing Officer also noted that during assessment year 2000-01, the assessee had purchased Honda Accent car. The assessee vide letter dated 17.06.2008 was requisitioned to justify that the expenses incurred on the car were incurred for the objects of the Trust. In reply, the assessee submitted that the vehicles were provided to various officials viz. VC, Dean, Medical Superintendent, Directors, Principals and Trustees, etc. who were managing day-to-day affairs of the Trust and various institutions. It was also due to their efforts along with hard work of the President and other Trustees that the Trust and its institutions had received recognition and gained the fame in the world of education. The assessee further stated that the vehicles provided to them were for achieving the objects of the Trust and the facilities were provided as per their professional qualifications, management skills, etc. The said expenditure on providing the facility as per the assessee was a regular expenditure which qualified as a business expenditure and expenditure on the objects of the Trust. The Assessing Officer was of the view that the contention of the assessee was not acceptable fully as the personal element in the use of cars by the Trustees and their relatives, could not be ruled out. Further, the assessee had failed to produce any log book of the cars and in such circumstances, it could not be said that the cars were used for the purposes of business of the assessee, even the auditor in his report under section 142(2A) of the Act made a remark that it was stated by the assessee that the vehicles were used for the objects of the Trust. However, no personal use / official use could be ascertained on

the basis of available record. The Assessing Officer in view thereof, disallowed 30% of the expenses in assessment year 2000-01 as the assessee had failed to furnish any separate vouchers or accounts as to how much was spent on petrol and how much was spent on repairs. The Assessing Officer in the absence of details having been filed by the assessee, held that the Hyundai Ascent car had been used for personal purposes of the Trustees and not for the purpose of Trust. Therefore, the depreciation on Hyundai Ascent car amounting to Rs.76,087/- and interest paid to bank on the car loans amounting to Rs.39,545/- along with 30% of petrol expenses at Rs.78,264/- was disallowed and added back to the income of assessee. The disallowance on car maintenance and depreciation was worked out as per the Annexure-D attached to the assessment order and the interest paid to bank on car loans was computed as per Annexure-C. The perusal of the Annexure-D attached to the assessment order reflects that in assessment years 1999-2000 and 2000-01, the interest on Hyundai Ascent car was disallowed. Further, the interest on Mercedes Benz car purchased in assessment year 2000-01 was disallowed in assessment years 2000-01 to 2004-05. Similarly, interest paid on vehicle loans on Mitsubishi Lancer purchased in assessment year 2003-04 was disallowed for the assessment years 2003-04 to 2005-06. Similar disallowance was made in respect of Toyato Carrola, Toyato Qualis and Santro Zing cars. Another disallowance was made in respect of Mercedes Benz purchased in assessment year 2004-05, Camary in assessment year 2005-06, Innova, Maruti Zen, in assessment year 2005-06. In the assessment year relating to assessment year 2001-02, the Assessing Officer at page 15 had dealt with the expenses on car, its repairs and maintenance. During the assessment year 2001-02, the assessee had purchased one Mercedes car

and one Toyota Safari car and the assessee was asked to justify the expenditure on the said cars and other cars including their repairs and maintenance. Since the assessee had not maintained car-wise maintenance expenses, the assessee was show caused as to why 40% of the expenditure incurred on maintenance of cars should not be disallowed. Further, the assessee had failed to furnish the facts relating to utilization of Hyundai Ascent car, Mercedes Benz and Toyota Safari and accordingly, it was held that the said cars were used for the personal purposes of the Trustees and not for the purposes of Trust and the depreciation on the said cars and interest paid to the bank on car loans amounting to Rs.4,33,290/- and Rs.2,61,957/- was disallowed.

40. The Assessing Officer thereafter, considered the next issue i.e. the claim of depreciation and the assessee was asked as to why the depreciation should not be allowed as per depreciation chart mentioned in the audit report under section 142(2A) of the Act. The explanation of the assessee was that it had started claiming depreciation for the first time from assessment year 1999-2000 and accordingly, cost of assets is to be taken as on 01.04.1998 and for the year under consideration, the WDV of the asset is the actual cost less depreciation actually allowed to the assessee. The Assessing Officer was of the view that the depreciation had to be allowed to the assessee as per the Income Tax Act, details of which were mentioned in audit report under section 142(2A) of the Act. The Assessing Officer also considered the fact that though the assessee had claimed depreciation on original cost of assets in its rectification application in assessment year 1999-2000, its claim was rejected as the assessee had not filed any return of income. The Assessing Officer was of the view that for application of section 43(6) of the Act, the assessee must have filed return of income before and where the assessee had not

filed the return before, the entire depreciation claimed for so many years in one go, in the return of income filed in response to notices issued, shows evasion of tax and the contention of the assessee was thus, rejected and the depreciation as worked out by special auditor was allowed to the assessee as per Annexure B attached to the assessment year.

41. The next aspect noted by the Assessing Officer was the unsecured loans / deposits received during the year under consideration. In assessment year 2000-01, the assessee had received a sum of Rs.5 lakhs from one N.V.Joshi. As the assessee had failed to furnish the evidence in support of the genuineness of the transaction and credit worthiness of the party, an addition of Rs.5 lakhs was made in the hands of the assessee in assessment year 2000-01. Similarly, in assessment year 2001-02, an addition of Rs.10 lakhs was made on account of similar loans being received from N.V. Joshi, for which no explanation was filed.

42. In assessment year 2004-05, the Assessing Officer noted that during the course of search, certain papers were seized from the residential premises of the Trustees regarding construction expenses of hospital building at Kadamwadi site, Kolhapur as well as residence of the Trustees. Reference was made to the District Valuation Officer for the valuation of hospital building. As per the Valuation Report submitted by the DVO, the total cost of construction of the hospital building was Rs.18,89,51,000/- as against the value shown by the assessee at Rs.21,29,48,028/-. The Assessing Officer observed that the building was valued at lesser value by the DVO than the value disclosed by the assessee, which leads to the conclusion that the expenses for Trustees residence were also debited in hospital building expenses. Accordingly,

the Assessing Officer was of the view that the assessee was not entitled to the depreciation on the amount which was spent on the residential premises of the Trustees. The assessee was asked to explain the difference in the value and also to explain as to why depreciation on total value should be allowed to the assessee. In reply, the assessee submitted that certain expenses like site development, land leveling, etc. were not considered by the Valuer, which in fact, was debited to the building account by the assessee. The reply of the assessee is reproduced at pages 20 to 25 of the Paper Book, in which it was explained by the assessee that it had also debited the total expenditure incurred on furniture, EPABX system, etc. to the building account. Further, expenditure was incurred on site development work, which was also debited to the building account. The Assessing Officer however, rejected the explanation of the assessee and after considering the report of the DVO, was of the view that the expenses for Trustees residence were also debited to the hospital building expenses on which, the assessee was not entitled to depreciation. Therefore, the depreciation from year to year was re-worked by the Assessing Officer and an addition of Rs.23,11,060/- was made to the total income of the assessee on account of depreciation disallowed on hospital building in assessment year 2004-05.

43. The Commissioner on 23.09.2008 issued a show cause notice to the assessee under section 263 of the Act relating to assessment year 2000-01 to 2006-07 which is placed at pages 1 to 16 of the Paper Book, in which the assessee was show caused on the various issues. Thereafter, the order under section 263 of the Act was passed by the Commissioner on 06.10.2008. Vide the said order, the Commissioner exercised the jurisdiction under section 263 of the Act rejecting the

adjournment application moved by the assessee holding that there was no reasonable cause seeking adjournment in the case. The copy of the order passed under section 263 of the Act, dated 06.10.2008 is placed at pages 17 to 31 of the Paper Book. The Tribunal in ITA Nos.1341 to 1347/PN/2008 relating to assessment years 2000-01 to 2006-07, vide order dated 31.03.2009 had restored the matter back to the file of Commissioner for re-consideration of the issues and to pass the order *denovo* after granting adequate opportunity of hearing to the assessee. The copy of the said order is placed at pages 76 to 79 of the Paper Book. The Tribunal further in ITA No.1280/PN/2007, vide order dated 27.09.2011 deliberated upon the issue of registration under section 12A of the Act and the same was remitted back to the Commissioner to decide the same afresh. Pursuant to directions of the Tribunal vide order dated 31.03.2009, the COMMISSIONER passed the order under section 263 of the Act, dated 09.09.2011. The Commissioner in the second round of proceedings under section 263 of the Act, referred to the extracts of the order passed under section 263 of the Act, dated 06.10.2008 on various issues, which as per him, were not considered by the Assessing Officer properly resulting in prejudice to the interest of Revenue. The Commissioner had considered various aspects of objections raised by the assessee regarding the procedure for assessment and the notice issued under section 142(2A) of the Act, which are not pressed by the assessee, and hence not deliberated upon by us.

44. The only issue for adjudication is the observation of Commissioner in paras 7.5.1 to 7.5.3. First observation made by the Commissioner was that the Commissioner can record the order as erroneous on the ground in the circumstances of the case, the Assessing Officer should have been made further enquiries before accepting the submissions made by the

assessee in his return. The Commissioner thereafter, made reference to the ratio laid down by the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. Vs. CIT* (supra) and observed that the assessments for assessment years 2000-01 to 2006-07 were erroneous and prejudicial to the interest of Revenue for not making the proper enquiries. On the perusal of the earlier part of the order passed under section 263 of the Act, where reference was made to extracts of order under section 263 of the Act, dated 06.10.2008 which have been upheld by the CIT, we find no merit in the observations of the Commissioner, in this regard. As referred to by us in the paras herein above, pursuant to search and seizure action carried out at the premises of the assessee, assessment proceedings were initiated and questionnaire was issued by the Assessing Officer. After examination of the record, the Assessing Officer was of the view that because of the multiplicity / complexity of entries, special audit was required in the case and permission was sought to refer the matter for special auditor under section 142(2A) of the Act. On the receipt of the audit report from special auditor under section 142(2A) of the Act, the Assessing Officer dealt upon each of the issues raised in the special audit and confronted the assessee as to why addition on such points could not be made. After considering the reply of the assessee, the Assessing Officer has made additions on each of the point raised by the special auditor in the special audit report. The first objection raised by the Commissioner was with regard to car expenses where the Assessing Officer had disallowed expenses varying 40% to 80%. The Assessing Officer has made the aforesaid additions after referring to the facts in each of the assessment years involved and even considered the acquisition of new cars in each of the assessment years and thereafter, worked out the disallowance. The Assessing Officer also called for the

details from the assessee i.e. log book maintained and also to justify whether the expenditure had been incurred for the purposes of business. In the absence of any evidence furnished by the assessee, the Assessing Officer made the disallowance on proportionate basis. Such disallowance made by the Assessing Officer cannot be invalid as the car-wise details were not available, the Assessing Officer had no recourse but to resort to estimation to disallow the expenses, which were not relatable to carrying out of the business of the assessee Trust.

45. The second aspect relating to car expenses was the acquisition of cars from year to year. The perusal of the assessment orders reflects that the Assessing Officer had considered the said acquisitions in each of the assessment years and thereafter, worked out the disallowance out of even the interest paid on car loans, where the said cars were utilized for the personal purposes. In this regard, we find no merit in the observations of Commissioner that the Assessing Officer had failed to make enquiries and failed to look into the issue of personal usage. Another aspect of this issue is car placed at disposal of Medical director at Mumbai. The Commissioner had observed that the institution of the Trust was at Kolhapur and the assessee had no branches or offices in operation other than that. However, the Assessing Officer has referred that the assessee was running various institutions at different places and had allowed the expenditure relating to car placed at the disposal of Medical director at Mumbai. The said aspect has been considered by the Assessing Officer and once the Assessing Officer has taken a decision on the issue merely because the Commissioner had contrary view on the said issue, does not make the order passed by the Assessing Officer erroneous and the Commissioner was not justified in invoking the provisions of section 263 of the Act. In the absence of details being

maintained and furnished by the assessee vis-à-vis each car, the Assessing Officer had no option, but to make an adhoc disallowance on estimate basis. Even the auditor had not given the said details and the Commissioner cannot step into the shoes of Assessing Officer and direct the Assessing Officer to make fresh enquiries to determine the car-wise expenditure in order to work out the disallowance. We find no merit in the directions of the Commissioner in this regard. As mentioned by us in the paras hereinabove, the powers of Commissioner are to be exercised where he finds that the assessment order passed by the Assessing Officer was erroneous. However, where the Commissioner had any doubt about the nature of the expenditure, then that aspect should have been examined by him and he should have come to a finding that the order passed by the Assessing Officer was erroneous. The observations of the Commissioner that the Assessing Officer had not made enquiries in a particular manner i.e. not called for details and segregated them vehicle-wise and similarly, the repairs and maintenance expenses had to be segregated car-wise and set aside the issue back to the Assessing Officer for making further enquiries is not to be adopted while exercising the jurisdiction under section 263 of the Act. The Courts have held that a distinction had to be drawn in cases where the Assessing Officer does not conduct enquiry, as lack of enquiry in itself would render the assessment order to be erroneous and prejudicial to the interest of Revenue; and in cases where the Assessing Officer conducts the enquiry, but finding recorded as per the Commissioner is erroneous. However, in the second set of cases, the Commissioner cannot direct the Assessing Officer to conduct further enquiries to verify and find out whether the order passed is erroneous or not. The said principle has been laid down by the Hon'ble Delhi High Court in ITO Vs. DG Housing Projects Ltd. (supra).

46. The second aspect of the issue is that in order to invoke the jurisdiction under section 263 of the Act, the Commissioner should come to a finding that the assessment order passed by the Assessing Officer was erroneous on the issues, which in turn, was prejudicial to the interest of Revenue. Where the Commissioner on the perusal of the record, was of the opinion that the estimate made by the Assessing Officer was on the lower side and should have been estimated at a figure higher than the one determined by the Assessing Officer, does not empower the Commissioner to re-examine the accounts and re-determine the estimation in the hands of the assessee, where the Assessing Officer during assessment proceedings had made estimated disallowance. Section 263 of the Act does not confer such powers on the Commissioner in exercise of the jurisdiction conferred under section 263 of the Act. In such circumstances, the order passed by the subordinate authorities in accordance with the law, could not be termed as erroneous, merely because the Commissioner is not satisfied with the conclusion reached by the Assessing Officer. In view thereof, we find no merit in the exercise of powers by Commissioner under section 263 of the Act in respect of disallowance on account of car expenses.

47. The next aspect of the order passed under section 263 of the Act is vis-à-vis the claim of depreciation on assets. The Commissioner had held the order of Assessing Officer to be erroneous and prejudicial to the interest of Revenue because of the allowance of depreciation. However, the perusal of the assessment order reflects that the Assessing Officer has not allowed the claim of depreciation to the assessee and had re-worked out the depreciation on the assets in the hands of the assessee, as per the special audit report. In view thereof, where the Assessing

Officer had not allowed the claim of the assessee on account of depreciation on assets, we find no merit in the order of Commissioner in exercising the jurisdiction under section 263 of the Act.

48. The next aspect of the order passed under section 263 of the Act by the Commissioner is on account of depreciation on hospital building. As referred to by us in the paras hereinabove in respect of re-working of depreciation on hospital building in assessment year 2003-04, the Assessing Officer had not allowed the claim of assessee. On the other hand, in view of the report of the DVO, the Assessing Officer had given a finding that the cost of construction declared by the assessee was incorrect and he had adopted the cost of building worked out by the DVO and re-worked the depreciation allowable on the building from year to year. The observations of the Commissioner with regard to the issue are that the special auditor had pointed out that the assessee had incurred certain expenditure on the said building, which was un-vouched amounting to Rs.2.50 crores. On the perusal of the assessment order, we find that the assessee had claimed depreciation on building valued at Rs.21.29 crores, whereas the Assessing Officer had allowed the depreciation only on the value of Rs.18.89 crores. The un-vouched expenses, if any, had been considered by the Assessing Officer and accordingly, we find no merit in the order of Commissioner in holding the assessment order to be prejudicial to the interest of Revenue.

49. One aspect we would like to mention that the Commissioner while considering each of the issues as referred to by us in the paras hereinabove, had only held the order of Assessing Officer to be prejudicial to the interest of Revenue. No finding has been given by the Commissioner in any of the paras that the order passed by the Assessing

Officer was erroneous. However, the twin conditions of the order being erroneous and prejudicial to the interest of Revenue are to be satisfied simultaneously by the Commissioner while invoking his jurisdiction under section 263 of the Act. In the absence of the Commissioner coming to a conclusion that on each of the issues raised, the order of Assessing Officer was erroneous, we find no merit in the observation of Assessing Officer in holding the same to be prejudicial to the interest of Revenue. The Commissioner in conclusion in para 7.5.3 had held that in the facts of the present case, the assessments for assessment years 2000-01 to 2006-07 were erroneous and prejudicial to the interest of the Revenue and reference was made to the detailed reasons discussed in the original order passed under section 263 of the Act, dated 06.10.2008. However, in the said order passed under section 263 of the Act, which was basis for passing the present order under section 263 of the Act, there was no finding of the Commissioner that the order of Assessing Officer is erroneous. On this account also, the order of Commissioner fails.

50. The next issue considered by the Commissioner was vis-à-vis unsecured loans raised by the assessee. The special auditor in the audit report had identified the said loans. The Assessing Officer during the course of assessment proceedings had asked the assessee to establish the genuineness of the transaction and also to prove the credit worthiness of the loan creditors. However, the assessee failed to do the needful and in the absence of same, the Assessing Officer treated the said unsecured loans to be income of the assessee and addition, in this regard was made from year to year. There were certain loans relatable to D.Y. Patil Pratishthan, which were excluded by the Assessing Officer. The Commissioner vide paras 5.6 and 5.7 at page 17 talks about the

total loans taken and after excluding the loans disallowed and loans relating to D.Y. Patil Pratishthan, wondered why the Assessing Officer had accepted the loans which were figuring in column balance. In the absence of any finding of the Commissioner as to the details / nature of such balance loans, in view of the order of Assessing Officer in this regard in disallowing the loans received from various creditors, we find no merit in the order of Commissioner in directing the Assessing Officer to make enquiries in this regard. The exercise of jurisdiction under section 263 of the Act by way of directing enquiries in the matter, is not permissible and we find no merit in the same.

51. Another aspect of the unsecured loans disallowed by the Assessing Officer was the interest relatable to such loans. The Assessing Officer had disallowed the loans relating to certain persons as tabulated at page 18 of the order under section 263 of the Act. However, interest paid on such loans was not disallowed by the Assessing Officer. This aspect of non-disallowance of interest relatable to loans, which had not been allowed by the Assessing Officer makes the order of Assessing Officer prejudicial to the interest of Revenue. We uphold the exercise of jurisdiction under section 263 of the Act by the Commissioner on this aspect.

52. The Commissioner vide para 6 of the order dated 06.10.2008 had also held the assessment order to be erroneous and prejudicial to the interest of Revenue on the issue of claim of the assessee that it had been given registration under section 12A of the Act and further, it was entitled to all the benefits of sections 11 and 12 of the Act. The Assessing Officer while passing the assessment order under section 143(3) of the Act, had come to a finding that the income had to be

assessed by applying normal provisions of the Act, which has been held vide para 12 of the assessment order relating to assessment year 2000-01 that the provisions of section 12A of the Act were not applicable and no exemption was allowable to the assessee under sections 11 and 12 of the Act. The income had to be computed by applying the normal provisions of the Income Tax Act and in the status of AOP. Once the Assessing Officer had given a finding to the said extent that the deductions under sections 11 and 12 of the Act were not to be allowed to the assessee, then there was no merit in the reference made by the Commissioner to the report of special auditor that the Trustees were running the Trust like a proprietary concern. We further find no merit in the observations of Commissioner in para 6.1 that the Assessing Officer should have marshaled the facts as thrown up by the special auditor to show that the Trust has been freely violating the provisions of section 13 of the Act year after year. Once the Assessing Officer had come to a finding that the assessee was not entitled to the exemptions under sections 11 and 12 of the Act as it had no registration under section 12A of the Act, the violation of provisions of section 13 of the Act becomes immaterial as the said provisions of the Act are not applicable while computing income in normal course of business. Accordingly, we find no merit in the observations of the Commissioner in holding the assessment order to be prejudicial to the interest of Revenue and we reverse the same.

53. The next point considered by the Commissioner was the un-vouched revenue and capital expenditure. The Commissioner holds the order of Assessing Officer to be erroneous as the Assessing Officer had simply disallowed the expenses even where the assessee had agitated before the Assessing Officer that though the expenses were un-vouched,

but were made by cheque. The Commissioner was of the view that the Assessing Officer should have made proper enquiries to prove or link the cheque by means of which the payment was made for the expenses while exercising the power under section 263 of the Act. The Commissioner cannot step into the shoes of Assessing Officer, who while conducting the assessment proceedings, had made certain enquiries and had come to the finding that the said expenses were to be disallowed. Once the expenses were disallowed by the Assessing Officer, we find no merit in the order of Commissioner in holding the same to be erroneous and prejudicial to the interest of Revenue. The Commissioner cannot direct the Assessing Officer to conduct further enquiries to verify and hold whether the order passed by the Assessing Officer was erroneous or not.

54. Another aspect noted by the Commissioner was the payment of advertisement expenses and telephone expenses of the Trustees and their relations. The Commissioner was of the view that the said payments made to persons mentioned in section 40A(2)(b) of the Act were not to be allowed and further, whether the Trust was entitled to the benefits of sections 11 and 12 of the Act. As mentioned by us in the paras hereinabove, the Assessing Officer had not allowed any benefit of exemption under sections 11 and 12 of the Act and had also disallowed the telephone expenses relatable to the Trustees. The Commissioner vide para 6.8 observed that the adhoc manner in which, the disallowance had been made and the whole issue has been dealt with, was clearly prejudicial to the interest of Revenue. The Commissioner having failed to come to the conclusion as to how the disallowance made by the Assessing Officer makes the order prejudicial to the interest of Revenue and merely setting aside the matter to the Assessing Officer for making further enquiries had exceeded his jurisdiction in exercise of the powers

under section 263 of the Act. Where the Commissioner has to come to a finding that the order is erroneous and prejudicial to the interest of Revenue such exercise of jurisdiction by Commissioner under section 263 of the Act, is not sustainable. It is paramount that the Commissioner must hold and record reasons as to why the order of assessment passed by the Assessing Officer was erroneous. Where the Commissioner has failed to record reasons for holding the order to be erroneous, then the exercise of such powers by the Commissioner are un-sustainable in law.

55. Now, we shall consider the various case laws relied upon by the Revenue. The learned Departmental Representative for the Revenue placed reliance on the ratio laid down by the Hon'ble Supreme Court in Rampyari Devi Saraogi Vs. CIT (supra). The ratio laid down in the said decision was on its own facts and cannot be applied universally to uphold the order of Revision passed by the Commissioner under section 263 of the Act in all cases. We find no merit in the said reliance placed upon by the learned Departmental Representative for the Revenue.

56. The learned Departmental Representative for the Revenue further placed reliance on the ratio laid down by the Mumbai Bench of the Tribunal in Arvee International Vs. Addl.CIT (supra), wherein it was held that where the assessment order was mechanically passed by the Assessing Officer without due application of mind, shall not only be erroneous but also prejudicial to interest of Revenue within the meaning of section 263 of the Act. Further, finding of the Tribunal was that the Assessing Officer was statutorily required to make assessment under section 143(3) of the Act after scrutiny and not in summary manner and not to pass stereo typed order simply accepting the assessee's statement.

It was a case of no enquiries being made by the Assessing Officer. However, in the instant case before us, the Assessing Officer had made the enquiries as detailed by us in the paras hereinabove and had made certain disallowances to which the Commissioner did not agree and hence, the exercise of jurisdiction under section 263 of the Act. The said ratio laid down by the Mumbai Bench of the Tribunal is not applicable to the facts of the present case.

57. Another reliance placed by the learned Departmental Representative for the Revenue was on the ratio laid down by the Hon'ble Karnataka High Court in CIT & Another Vs. Infosys Technologies Ltd. (supra), wherein it was held that the exercise of jurisdiction under section 263 of the Act was intended to plug leakage of the Revenue by erroneous orders passed by the lower authorities whether by mistake or in ignorance or even by design. The Assessing Officer in the facts of the said case had allowed the deduction by way of tax at source in respect of payments received by its business activities in Canada and Thailand. The said exercise of jurisdiction under section 263 of the Act was upheld by the Hon'ble Karnataka High Court as deduction was allowed or deducted from out of the tax liability of the assessee without indicating the basis, which could be construed as erroneous and prejudicial to interest of Revenue. However, we find no merit in the said reliance placed upon by the learned Departmental Representative for the Revenue as pointed out by us in the paras hereinabove that the Assessing Officer has meticulously gone into the details of the expenditure before making various disallowances and some on estimate basis, in the hands of the assessee.

58. Another reliance placed by the learned Departmental Representative for the Revenue was on the decision of full Bench of the Hon'ble Guwahati High Court in CIT Vs. Jawahar Bhattacharjee (supra), wherein the assessment order was held to be erroneous where the Assessing Officer had failed to hold any enquiries and had not applied his mind to the relevant material. The Assessing Officer in the present case before us had after verifying the return of income and the complexity of accounts of the assessee referred the matter for special audit under section 142(2A) of the Act and after audit report furnished by the Special Auditor, the issues were elaborately considered by the Assessing Officer and suitable disallowances were made. Merely because the Commissioner was of the view that the disallowances made by the Assessing Officer were not sufficient without coming to any finding, does not warrant the exercise of power under section 263 of the Act. Consequently, we find no merit in the said reliance placed upon by the learned Departmental Representative for the Revenue as the facts of the present case are at variance.

59. Another reliance placed by the learned Departmental Representative for the Revenue on the decision of Hon'ble Delhi High Court in CIT Vs. Nalva Investments Ltd. (supra) was on its own facts, wherein the business loss brought forward from earlier years were adjusted against dividend income without any discussion as to how dividend income was business. The exercise of power under section 263 of the Act by the Commissioner in such circumstances was upheld by the Hon'ble Delhi High Court. In the facts of the said case where the adjustment was made against the provisions of law, the exercise of jurisdictional power was merited. Whereas the learned Departmental Representative for the Revenue has failed to point out any such error

being made by the Assessing Officer in passing the assessment order in the present case.

60. The exercise of power under section 263 of the Act in the present case is completely on the fact that the order passed by the Assessing Officer is prejudicial to the interest of Revenue and at no place Commissioner has come to a finding that the said order was erroneous, except for remark at the end of the order saying that the power is being exercised under section 263 of the Act as the order is erroneous and prejudicial to the interest of Revenue and hence, set aside to the Assessing Officer. In the present set of facts where the Assessing Officer after referring matter to the special auditor had incorporated the findings of the special auditor and made the assessment in line thereto, we find no merit in the exercise of jurisdiction by the Commissioner under section 263 of the Act. Further, where the Commissioner has failed to give clear, un-ambiguous finding that the order / enquiry made by the Assessing Officer was erroneous, there is no merit in exercise of jurisdiction under section 263 of the Act.

61. The perusal of the assessment order clearly reflects that the Assessing Officer had considered all the aspects and passed the assessment order. In view thereof, the reliance placed upon by the learned Departmental Representative for the Revenue on the decision of CIT Vs. Design and Automation Engineers (Bombay) P. Ltd. (supra) is mis-placed where the Assessing Officer had not considered all the aspects.

62. Another reliance placed by the learned Departmental Representative for the Revenue was on the ratio laid down by the Hon'ble Delhi High Court in CIT Vs. Cray Research India Ltd. (supra), wherein

the issue was of the re-assessment proceedings and the ratio laid down in the said decision is not applicable to the present case as the issue involved in the present appeal is exercise of revisionary powers by the Commissioner under section 263 of the Act. We find no merit in the said reliance placed upon by the learned Departmental Representative for the Revenue. In view thereof, we set aside the order of Commissioner passed under section 263 of the Act except to the extent of the disallowance of interest on such unsecured loans, which were treated as bogus and were added to the income of the assessee. In view thereof, we partly allow the grounds of appeal raised by the assessee.

63. The facts and issue in ITA Nos.1324, 1325, 1326, 1327, 1328 and 1329/PN/2011 are identical to the facts and issue in ITA No.1323/PN/2011 and our decision in ITA No.1323/PN/2011 shall apply *mutatis mutandis* to ITA Nos.1324, 1325, 1326, 1327, 1328 and 1329/PN/2011.

64. In the result, all the appeals of the assessees are partly allowed.

Order pronounced on this 30th day of January, 2015.

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
JUDICIAL MEMBER

Pune, Dated: 30th January, 2015.

GCVSR

Copy of the order is forwarded to: -

- 1) The Assessee;
- 2) The Department;
- 3) The CIT(Central), Pune;
- 4) The DR "A" Bench, I.T.A.T., Pune;
- 5) Guard File.

By Order

//True Copy//

Assistant Registrar
I.T.A.T., Pune