

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SMT BEENA A. PILLAI, JUDICIAL MEMBER

ITA No. 3927/DEL/2016  
[A.Y 2012-13]

Jubilant Energy [P] Limited  
FKA Jubilant Enpro Pvt. Ltd  
Plot No. 1A, Sector 16A,  
Institutional Area, Noida

Vs.

The Dy. C.I.T  
Circle - 1  
Noida

PAN : AAACE 0653 L

[Appellant]

[Respondent]

Date of Hearing : 02.07.2018  
Date of Pronouncement : 04.07.2018

Assessee by : Shri K.M. Gupta  
Shri Rishab Malhotra, Adv

Revenue by : Shri Vijay Varma, CIT- DR

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal filed by the assessee is directed against the order of the Principal Commissioner of Income Tax, Noida dated 11.05.2016 pertaining to A.Y 2012-13.

2. The sum and substance of the grievance of the assessee is that the PCIT wrongly assumed jurisdiction u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] and by assuming so, the PCIT erred in setting aside the assessment order dated 28.03.2015 framed u/s 143(3) of the Act.

3. The representatives of both the sides were heard at length. The case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

4. Briefly stated, the facts of the case are that the assessee is engaged in the business of providing support and other services to international companies in oil and gas sector, aviation, trading in paper, chartering and leasing of aircrafts. Return of income was E-filed declaring income u/s 115JB of the Act at Rs. 66.45 crores and the taxes were paid accordingly. The return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee.

5. During the course of assessment proceedings, the assessee was asked to furnish certain details/information relating to capital loss claimed by it. The assessee filed a detailed reply on various dates. After considering the detailed reply of the assessee, the AO came to the conclusion that the capital loss of Rs. 133.77 crores which included loss of Rs. 92.91 crores with respect to extinguishment of shares in Enpro Oil Ltd approved under Capital Reduction Scheme was disallowed. The assessee preferred appeal before the CIT(A). However, in the meantime, the AO issued notice u/s 154 of the Act and pointed out that the following issue needs rectification:

*"loss on transfer/write off of investments" of Rs. 118.45 crores should have been treated as diminution in value of investment of shares and added back to the book profit u/s 115JB of the Act."*

6. In response to the said notice, the assessee filed its reply. However, the ld. PCIT assuming jurisdiction u/s 263 of the Act issued show cause notice to the assessee alleging that the assessment order framed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the Revenue and needs to be set aside. The show cause notice reads as under:

The Return declaring an income of Rs. 23,22,46,394/- on book profit of Rs.66,45,67,654/- was filed on 30.11.2012 and thereafter, the case was selected for scrutiny and the assessment was completed u/s 143(3) of the I.T. Act, 1961 on 28.03.2015 at returned income i.e. Rs.23,22,46,394/- on book profit of Rs.66,45,67,654/-. A perusal of the assessment record reveals the following discrepancies:

2. During review of Balance Sheet, P/L Account, Form- 3CD, Form-29B and related annexure it has been observed that assessee company has claimed an expenditure of Rs 118.45 crores towards "loss on transfer/write off of Investments" which is added back to its income while computing tax under normal provision of the Act. The assessee company had also claimed a carry forward of Rs 133.78 crores as capital loss which was disallowed by the A.O. after discussion in assessment order.

Further scrutiny revealed that assessee had invested in 3,99,39,516 number of Equity shares in Enpro Oil Pvt. Ltd., a group company having value of Rs.183.91 crore. During the year, EOPL had gone through a Court approved Capital Reduction Scheme., pursuant to which the paid up share capital of EOPL was reduced from its.42.59 crore (5,25,87,944 Equity shares of Rs. 10/- each) to Rs. 8.44 crore (84,37,765 Equity shares of Rs. 10 each) with a corresponding decrease in share premium from Rs. 145.73 crore to Rs.83.09 crore leading to a net decrease of Rs96.79 crore.

Consequently, reduction of share capital due to cancellation of specified shares held by the company in EOPL, has charged to P & L, account by Rs92.91 crore.

Subsequent to this, a scheme of arrangement {scheme} involving EOPL, Jubilant Industries Ltd, and Jubilant Agri& Consumer Products Ltd. was approved by the Hon'ble High Court wherein the retail division of EOPL was demerged into JACPL and Equity Shares of JIL were issued to the shareholders of EOPL. Consequently, the assessee company received 35,96,837 Listed Equity Shares of JIL, valuing Rs,60.99 crore {on the basis of market price) during the year. The valuation was approved by the Hon'ble Court in such a manner that the shareholders of demerged entity I.e. EOPL may not suffer loss, it was noticed that when the assessee company has itself added back the expenditure of Rs 118.45 crores towards "loss on transfer/write off of investments", in its computation of income under normal provision and same was also treated as reduction in value of investment of shares, the same should have been treated as diminution in value of investment of shares as held by Principal Bench of ITAT, Mumbai in the case of ITO Vs. TCFC Finance Ltd.-iTA No. 1299/Mum./2009 dated 09.03.2011 and added back to the book profit under Section 115JB."

The notice under Section 154 was issued by the Assessing Officer on 12.08.2015 and in compliance reply was filed on 15.09 2015 which was pursued but not found satisfactory with regard to addition of Rs 118.45 crores towards "loss on transfer/write off of investments in the book profit under Section 115JB, assessee has

submitted that for the purpose of computation of book profit u/s 115JB the provision for diminution is to be added back but the loss of Rs. 8.45 crore is not a provision for diminution as alleged in the notice of this office. The loss on transfer of shares comprised loss on transfer of investment Rs.25.53 crore as well as loss of Rs.92.91 crores on extinguishment of 3,20,26,473 equity shares of h'OPL, on reduction of Share capital. This loss has been debited in P &L and added while computation the business income. The reply of the assessee has been perused in the light of order of Principal Bench of ITAT, Mumbai in the case of ITO Vs, TCFC Finance Ltd. in ITA No. 1299/Mum /2009 dated 09.03.2011 and it not acceptable.

In view of the above facts and circumstances discussed above, it is clear that the assessee company has claimed an expenditure of Rs 118.45 crores towards "loss on transfer/write off of investments" which is added back to its income while computing tax under normal provision of the Act, 1951 and same was also treated as reduction in value of investment of shares, / diminution in value of investment of shares. Therefore, required to be added back to the book profit under Section 115JB. Hence in view of the above, the assessment order passed u/s 143(3) on dated 28.03.2015 is considered erroneous and prejudicial to the interest of revenue and it is proposed to invoke the provisions of section 263 of the I.T. Act, 1961 and passed appropriate order and/or issue appropriate directions to the AG resulting in the revision of the assessment order.

3. In case you have any objections to the above proposal, you are requested to appear before the Principal Commissioner of Income Tax, Noida at Aayakar Bhawan, A-2D, Sector-24, Noida on 22.12.2015 at 11.45 AM Sharp either in person or through an authorized representative and furnish your explanation failing which it would be presumed that you have no objection to the proposed action under section 263 of the I.T. Act and accordingly order will be passed."

7. Thus, it can be seen that the issues which prompted the PCIT to assume jurisdiction u/s 263 of the Act are the same which prompted the AO to issue notice u/s 154 of the Act. Ironically, as stated by the Id. AR, no order u/s 154 of the Act has been framed till date by the AO. Be that as it may, coming to the assumption of jurisdiction by the PCIT, it is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can

revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 taxmann.com 272 (Bombay). This view is further supported by the decision of the Hon'ble Gujarat High Court in the case of Shri Prakash Bhagchand Khatri in Tax Appeal No. 177 with Tax Appeal No.178 of 2016, wherein the Hon'ble Gujarat High Court was seized with the following *substantial question of law*:-

*"Whether the Tribunal is right in law and on facts in upholding the order passed by the CIT under [section 263](#) of the Act on merits and still storing the issue of allowability of deduction under [section 54](#) of the Act to the file of Assessing Officer even though the working of allowability of deduction under [section 54F](#) is available in the order under [section 263](#) which is not disputed by the assessee before ITAT."*

8. And the Hon'ble High Court, after considering the facts, held as under:-

"6. It can thus be seen that though final order of assessment was silent on this aspect, the Assessing Officer had carried out inquiries about the nature of sale of land and about the validity of the assessee's claim of deduction under [section 54F](#) of the Act. Learned counsel for the Revenue however submitted that these inquiries were confined to the claim of deduction under [section 54F](#) of the Act in the context of fulfilling conditions contained therein and may possibly have no relevance to the question whether the sale of land gave rise to a long term capital gain. Looking to the tenor of queries by the Assessing Office and details . A.Y. 2009-10 supplied by the assessee, we are unable to accept such a condition. In that view of the matter, the observation of the Tribunal that the Assessing Officer having made inquiries and when two views are possible, revisional powers could not be exercised, called for no interference. Since with respect to computation and assertions of other aspects of deduction under [section 54Fofthe](#) Act, the Tribunal has remanded the proceedings, nothing stated in this order would affect either side in considerations of such claim.

7. No question of law arises. Tax Appeals are dismissed."

09. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd., 243 ITR 83, has laid down the following ratio:

"A bare reading of [section 263](#) of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-- recourse cannot be had to [section 263\(1\)](#) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous ".

10. In the light of aforesaid judicial discussion, let us now consider the facts of the case in hand.

11. Exhibit 29 is the notes to the financial statements having details of non current investment and the same is as under:

As at 31st March		2012	2011
<b>2.12 NON-CURRENT INVESTMENTS</b>			
Number	Nominal Value per Share	Long Term Investments-Non-Trade Unquoted	
		Investments in equity Instruments (fully paid up equity shares)	
		-in Subsidiary Companies	
7,913,043 (39,939,516)	Rs 10/-	Enpro Oil Pvt. Ltd. ✓	3,001.56 18,391.43
21,500 (21,500)	Rs 10/-	Western Drilling Contractors Pvt. Ltd.	2.15 2.15
13,152 (13,152)	Euro 100/-	Jubilant Energy Holding B V	790.67 790.67
10 (10)	Rs 10/-	Jubilant Oil & Gas Pvt. Ltd.	- 0.00
10 (10)	Rs 10/-	Jubilant Energy (Kharsang) Pvt. Ltd.	0.03 0.03
10 (10)	Rs 10/-	Jubilant Offshore Drilling Pvt Ltd	- 0.00
Nil (28,341,225)	Rs 10/-	Focus Brands Trading (India) Pvt. Ltd.	- 2,563.08
20 (20)	Rs 10/-	Jubilant Energy (NELP-V) Pvt. Ltd.	- 0.00
50,20,000 (5,020,000)	Rs 10/-	Jubilant Motorworks Pvt. Ltd.	502.00 502.00
10,000 (10,000)	Rs 10/-	Jubilant Aeronautics Pvt. Ltd.	1.00 1.00
		Long Term Investments-Non Trade quoted - in Associate Companies	
32,107,947 (34,031,736)	Rs 10/-	Jubilant Food Works Ltd	3,622.45 3,839.50
3,596,837	Rs 10/-	Jubilant Industries Limited (Note no 2.29 c) ← 9.34	6,098.44 -
		Long Term Investments-Non Trade Unquoted - in Joint Ventures	
46,920 (46,920)	Rs 10/-	Enpro Secan (India) Ltd. *	4.69 4.69
558,930 (558,930)	Rs 10/-	Geo Enpro Petroleum Ltd.	55.89 55.89
324,000 (324,000)	Rs 10/-	B & M Hot Breads Pvt. Ltd.	108.75 108.75
		- in others	
78,000 (71,825)	Rs 10/-	Jubilant Biosys Ltd.	7.80 7.16
		Investments in Preference shares -in Subsidiary Companies	
1,780,000 (1,780,000)	Rs 100/-	Jubilant Oil & Gas Pvt Ltd 12 % Cumulative Redeemable Preference Shares	8,800.00 8,800.00
		Share Application money paid to Jubilant Energy Holding B V	5,612.20 -
		Government Securities -Non Trade Unquoted	
		9 Year National Savings Certificate(VIII th Issue) (Pledged with Sales Tax Authorities)	0.08 0.08
		Total	28,607.71 35,066.43
		Less : Provision for Diminution in the Value of Investments	4.69 4.69
		Total	28,603.02 35,061.74

## 12. Exhibit 34 contains other disclosures and the same is as under:

*-OTHER DISCLOSURES . Contingent Liabilities not provided for in respect of*

*(Amount in Rs. Lac)*

	<i>As at</i>	<i>As at</i>
<i>(a) Bank Guarantees ( against this Fixed deposit of Rs. 12.29 Lacs have been given to respective bank)</i>	<i>12.59</i>	<i>25.87</i>
<i>(b) Corporate Guarantees given to the Financial Institutions, Banks and Bodies Corporate on behalf of subsidiary companies.</i>	<i>109735.00</i>	<i>6251 1.25</i>
<i>- Amount Outstanding against given corporate guarantees</i>	<i>88375.64</i>	<i>48816.00</i>
<i>(c) Amount involved in litigation arising in Income Tax assessments for the AY 1997-98, 1998-99, 1999- 2000, AY 2004-05, AY 2005- 06, AY 2006-07, AY 2007-08 .AY 2008-09 and AY 2009-10. (Does not include interest wherever cannot be precisely quantified )</i>	<i>2123.16</i>	<i>1192.90</i>
<i>'d) Demand made by Central Excise and Sales Tax Authorities , disputed by the Company *</i>		
<i>(i)Demand of Service tax against dispute relating to export of services, valuation and classification of services</i>	<i>1172.71</i>	<i>1133.90</i>
<i>(ii) Demand of Sales tax on sale of fixed assets, non submission of D/C/Ei forms for A.Y 09-99 .02-03 and 03-04</i>	<i>3.62</i>	<i>3.62</i>
<i>i e ) Unpaid dividend on Cumulative Redeemable Preference Shares</i>	<i>1529.07</i>	<i>1039.07</i>

*\* Based on discussions with the solicitors/legal opinions taken by the Company, the management believes that the Company has a good chance of success in above-mentioned cases and hence, no provision there against is considered necessary.*

*b) A consultant has filed a claim against the Company for Rs 1672.81 Lacs (Previous Year Rs. 1473.31 lacs towards professional charges. This is towards his*

professional fees for assisting in formation of a joint Venture with some foreign parties for entering into a new business in Telecom Sector. Since the business could never take off, the Company has been legally advised that his claim is not tenable in law. The matter is pending before the Hon'ble Delhi High court.

The company held an investment of Rs 18391.43 Lacs in Enpro Oil Pvt Ltd (EOPL) represented by 3,99,39,516 Nos of equity shares as at 1st April 2011. During the year EOPL had gone through a Court approved Capital reduction Scheme, pursuant to which, the paid up Share Capital of EOPL was from Rs. 4258.79 Lacs (4,25,87,944 Equity Shares of Rs. 10 each) to Rs. 843.78 Lacs (84,37,765 Shares of Rs. 10 each) with a corresponding decrease in share premium from Rs 14572.98 to Rs 8308.69 Lacs leading to a net decrease of Rs 9679.30 Lacs. Consequently, reduction of share cancellation of specified shares held by the Company in EOPL has been charged to Profit and Loss by Rs. 9291.43 Lacs."

13. The details of other expenses are given in Exhibit 33 which are as under:

For the Year ended 31st March,	2012	2011
2.26 OTHER EXPENSES		
Travelling & Conveyance	256.73	259.11
Auditors' Remuneration - Audit Fee	8.50	8.00
- Tax Audit Fee	1.75	2.75
- Certification & Other Services	0.88	0.17
- Out of pocket expenses	0.23	0.33
Legal & Professional Expenses	304.40	297.04
Postage, Telegram & Telephones	59.01	75.35
Rent	599.31	594.52
Fines & Taxes	7.65	15.28
Repair & Maintenance Charges - Others	175.65	161.73
Donations	8.28	17.17
Insurance/Expenses	54.27	46.27
Vehicle Running & Maintenance	61.13	62.60
Water & Electricity Expenses	16.71	18.38
Bank Charges	3.02	14.11
Miscellaneous Expenses	49.26	51.55

Loss on transfer/write off of investments	11,844.51	2,720.61
: bad debts and Sundry Balance Written Off	0.42	2.07
Provision for Doubtful Debts and Advances s/	73.27	-
Loss on Fixed Assets Sold / Discarded	10.04	11.98
Advertisement, Publicity & Business Promotion	86.39	76.03
	13,621.41	4,435.05

14. Book profit is computed and report in Form No. 29B is placed at pages 48 to 50. It can be seen from the aforementioned details given in the audited financial statement of account that the assessee company had clearly disclosed the investments in EOPL and their diminution in value due to court approved Capital Reduction Scheme. It can be further seen that the assessee has written off loss on transfer/write off of investment under the head 'Other expenses' and details of non-current investments mentioned elsewhere that the provisions for diminution in value of investments is only 4.69 lakhs.

15. A perusal of the order of the PCIT shows that he has proceeded on wrong proposition that the assessee has not only claimed loss in diminution in value of shares in Profit and Loss account, but has suo moto added back while computing the taxable profit at normal rate of tax. We find that this very basis is bad on facts of the case in hand. The assessee did add back loss while computing the profit at normal rate of tax but the same has been claimed as capital loss under the

head 'income from capital gains and this very claim of loss has been disallowed by the AO while framing the assessment order u/s 143(3) of the Act.

16. The second fallacy in the order of the PCIT is that he has presumed that the diminution in the value of shares has been claimed as a provision in the balance sheet and, therefore, the same has to be added back for the purpose of calculating book profit u/s 115JB of the Act. On the contrary, the fact is that the assessee never claimed this as provision in the balance sheet and has, in fact, written off by reducing its assets and, therefore, claiming that provision has to be added back is bad in law.

17. In our understanding of law, the AO, while computing the income u/s 115JB of the Act has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The AO, thereafter, has limited power of making increases and reductions as provided for in Explanation 1 to section 115JB of the Act. Thus, it can be safely concluded that the AO does not have jurisdiction to go behind the net profit shown in the profit

and loss account except to the extent provided in Explanation 1 to section 115JB of the Act. For this proposition, we draw support from the judgment of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd 255 ITR 273. Before the Hon'ble Supreme Court, the following issue arose for consideration:

*"Can an Assessing Officer while assessing a company for income tax under [Section 115-J](#) of the Income Tax Act question the correctness of the profit and loss account prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the [Companies Act](#) ?*

*For deciding this issue, it is necessary for us to examine the object of introducing [Section 115-J](#) in the [IT Act](#) which can be easily deduced from the Budget Speech of the then Hon. Finance Minister of India made in the Parliament while introducing the said Section which is as follows:*

*"It is only fair and proper that the prosperous should pay at least some tax. The phenomenon of so-called "zero-tax" highly profitable companies deserves attention. In 1983, a new [Section 80VVA](#) was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby every company will have to pay a "minimum corporate tax" on the profits declared by it in its own accounts. Under this new provision, a company will pay tax on at least*

30% of its book profit. In other words, a domestic widely held company will pay tax of at least 15% of its book profit. This measure will yield a revenue gain of approximately Rs. 75 crores."

8. The above Speech shows that the income tax authorities were unable to bring certain companies within the net of income-tax because these companies were adjusting their accounts in such a manner as to attract no tax or very little tax. It is with a view to bring such of these companies within the tax net that [Section 115-J](#) was introduced in the [IT Act](#) with a deeming provision which makes the company liable to pay tax on at least 30% of its book profits as shown in its own account. For the said purpose, [Section 115-J](#) makes the income reflected in the companies books of accounts as the deemed income for the purpose of assessing the tax. If we examine the said provision in the above background, we notice that the use of the words "in accordance with the provisions of Part II and III of Schedule VI to the [Companies Act](#)" was made for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, an assessing officer under the [IT Act](#) has to accept the authenticity of the accounts with reference to the provisions of the [Companies Act](#) which obligates the company to maintain its account in a manner provided by the [Companies Act](#) and the same to be scrutinized and certified by statutory auditors and will have to be approved by the company in its General Meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of

the company are maintained in accordance with the requirements of the [Companies Act](#). In spite of all these procedures contemplated under the provisions of the [Companies Act](#), we find it difficult to accept the argument of the Revenue that it is still open to the assessing officer to re-scrutinize this account and satisfy himself that these accounts have been maintained in accordance with the provisions of the [Companies Act](#). In our opinion, reliance placed by the Revenue on Sub-section (1A) of [Section 115-J](#) of the IT Act in support of the above contention is misplaced. Sub-section (1A) of [Section 115-J](#) does not empower the assessing officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the [Companies Act](#) which mandate, according to us, is bodily lifted from the [Companies Act](#) into the [IT Act](#) for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income-tax. Beyond that, we do not think that the said sub-section empowers the authority under the [Income-tax Act](#) to probe into the accounts accepted by the authorities under the [Companies Act](#). If the statute mandates that income prepared in accordance with the [Companies Act](#) shall be deemed income for the purpose of [Section 115-J](#) of the Act, then it should be that income which is acceptable to the authorities under the [Companies Act](#). There can not be two incomes one for the purpose of [Companies Act](#) and another for the purpose of income tax both maintained under the same Act. If the legislature intended the assessing officer to reassess the company's income, then it would have stated in [Section 115-J](#) that

*"income of the company as accepted by the assessing officer". In the absence of the same and on the language of [Section 115-J](#), it will have to held that view taken by the tribunal is correct and the High Court has erred in reversing the said view of the tribunal.*

*9. Therefore, we are of the opinion, the assessing officer while computing the income under [Section 115-J](#) has only the power of examining whether the books of account are certifies by the authorities under the [Companies Act](#) as having been properly maintained in accordance with the [Companies Act](#). The assessing officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the assessing officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to [Section 115-J](#).*

18. As mentioned elsewhere, since the assessee has actually reduced its assets, it cannot be said that he has shown provision on the liability side of the balance sheet. Therefore, Explanation 1 to section 115JB of the Act is not at all applicable. Moreover, this very issue was examined by the AO during the course of scrutiny assessment proceedings and has specifically disallowed the claim of loss. Therefore, it cannot be said that the AO never examined the issue.

19. The Hon'ble Bombay High Court in the case of Gabriel India Ltd 203 ITR 108 has held as under:

"The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this subsection, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles".

12. 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 conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. 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. We, therefore, hold that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material

before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power.

It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority.

The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be

"erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of section 263 of the Act were not applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."

20. The AO while framing the assessment u/s 143(3) of the Act has taken a possible view by disallowing the claim of capital loss and at the same time, not considering the same for computation of book profit u/s 115JB of the Act, the PCIT cannot impose his view upon the AO on wrong appreciation of facts.

21. The Hon'ble Supreme Court in the case of Max India Ltd 295 ITR 282 has held as under:

*"In our view at the relevant time two views were possible on the word "profits" in the proviso to Section 80HHC(3). It is true that vide the 2005 amendment the law has been clarified with retrospective effect by insertion of the word "loss" in the new proviso. We express no*

*opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular case when the order of the Commissioner was passed under [Section 263](#) of the Income Tax Act, 1961, two views on the said word "profits" existed.*

*It is not in dispute that when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with [Section 80HHC](#) is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of [Section 263](#) particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5, 1997, in purported exercise of his powers under [Section 263](#) of the Income Tax Act.*

3. For the above reasons, civil appeals filed by the department stand dismissed.”

22. Considering the facts of the case in totality from all possible legal angles, we failed to persuade ourselves to accept the order of the PCIT framed u/s 263 of the Act, which, in our opinion, has to be set aside. We accordingly set aside the order of the PCIT and restore that of the AO framed u/s 143(3) of the Act.

23. In the result, the appeal of the assessee in ITA No. 3927/DEL/2016 is allowed.

The order is pronounced in the open court on 04.07.2018.

Sd/-

[BEENA PILLAI]  
JUDICIAL MEMBER

sd/-

[N.K. BILLAIYA]  
ACCOUNTANT MEMBER

Dated: 04<sup>th</sup> July, 2018

VL/

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	