IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.977 & 978/Mum./2019
(Assessment Year : 2013–14 & 2014–15)

ACC Limited
Cement House
121, M.K. Road
Mumbai 400 020
PAN – AAACT1507C

……. Appellant

v/s

Asstt. Commissioner of
Income Tax (LTU)–1, Mumbai

……. Respondent

Assessee by : Shri Yogesh Thar a/w
Shri Hardik Nirmal
Revenue by : Shri Anadi Varma

Date of Hearing – 03.09.2019	Date of Order – 28.11.2019

O R D E R

PER BENCH

Aforesaid appeals have been filed by the assessee challenging two separate orders passed under section 263 of the Income Tax Act, 1961 (for short *"the Act"*) by the learned Commissioner of Income Tax (LTU), Mumbai, for the assessment years 2013–14 and 2014–15.

2. Brief facts are, the assessee, an Indian company, is engaged in manufacturing of cement. The Assessing Officer passed draft assessment orders under section 143(3) r/w section 144C(1) of the Act for the assessment year 2013–14 on 30th December 2016 and for the assessment year 2014–15 on 29th December 2017. Against the draft assessment orders, since, the assessee did not file any objections before the Dispute Resolution Panel, final assessment orders were passed under section 144C(3) of the Act in due course.

3. Learned Commissioner of Income, in exercise of power under section 263 of the Act, called for the assessment records pertaining to the impugned assessment years and after perusing them found that in the years under consideration assessee had received excise duty exemption in respect of its plant at Gagal, Himachal Pradesh. However, in the returns filed assessee did not offer the excise duty exemption as income on the plea that it is capital receipt and the Assessing Officer has accepted it. Noticing this she was of the view that the assessment orders are erroneous and prejudicial to the interests of Revenue, as the Assessing Officer without conducting any enquiry has allowed assessee's claim of excise duty subsidy as capital expenditure. Accordingly, learned Commissioner of Income Tax issued notices under section 263 of the Act calling upon the assessee to show cause as to why the assessment orders should not be revised. In

response to the show cause notice, the assessee filed its reply objecting to the initiation of proceedings under section 263 of the Act and submitted that the assessment orders passed cannot be considered to be erroneous and prejudicial to the interests of Revenue, since, the Excise Duty exemption received by the assessee, whether revenue or capital, has been decided in favour of the assessee by learned Commissioner (Appeals) in assessee's own case as well as in various other judgments. Therefore, the view taken by the Assessing Officer being a possible view cannot be considered to be erroneous and prejudicial to the interests of Revenue. Learned Commissioner of Income Tax, however, did not find merit in the submissions of the assessee and concluded that by not treating the excise duty exemption as revenue receipt and bringing it to tax at the hands of the assessee, the assessment orders passed are erroneous and prejudicial to the interests of Revenue. Accordingly, while setting aside the assessment orders for the impugned assessment years, she directed the Assessing Officer to treat the Excise Duty exemption as revenue receipt and bring it to tax.

4. Before we proceed to deal with the rival contentions on the issues raised in the present appeal, it is necessary to discuss certain relevant facts. The appeal was initially heard on 16th April 2019. In the course of such hearing, the leaned Counsel for the assessee had called

into question the validity of the orders passed under section 263 of the Act. The precise contention of the learned Counsel was, learned Commissioner, while exercising power under section 263 of the Act, has revised the draft assessment orders. He had submitted that the draft assessment orders since cannot be considered as assessment orders, section 263 of the Act cannot be invoked to revise such an order. Initially, the appeals were heard on the aforesaid preliminary issue only. However, subsequently it was found that in the grounds raised by the assessee concerning the aforesaid issue, a reference has been made to the final assessment orders. Therefore, to get clarity on the inconsistencies arising between the grounds raised and the arguments advanced by the learned Counsel, the appeals were re–fixed for further hearing and were finally heard on 3rd September 2019 on all the issues arising in the appeals. In the course of hearing on the aforesaid date, the learned Counsel has raised the following additional grounds:–

> *"WITHOUT PREJUDICE TO GROUND I,*
>
> *GROUND IV – ORDER PASSED BY THE LD. CIT REVISING DRAFT ASSESSMENT ORDER IS BAD–IN LAW:*
>
> *1. On the facts and circumstances of the case and in law, the learned CIT erred in invoking the provisions of section 263 of the Income–tax Act, 1961 ("the Act"), for revising the draft order passed by Deputy Commissioner of Income–tax (LTU) ["the A.O"] u/s 143(3) of the Act dated December 30, 2016, ("the draft orde") on the alleged the ground that the said draft order was erroneous and prejudicial to the interest of revenue.*

2. The Appellant therefore, prays that the order passed by the Ld. CIT revising the draft assessment order be held ab–initio and/or otherwise void and bad–in–law.

WITHOUT PREJUDICE TO GROUND I and IV,

GROUND V - CORRIGENDUM ORDER DATED APRIL 24, 2019 ('CORRIGENDUM') PASSED BY CIT IS BAD-IN-LAW:

1. On the facts and circumstances of the case and in law, the Ld. CIT erred in further passing the corrigendum to the original revision order dated February 04, 2019 and thus, its bad-in-law.

2. The Ld. CIT failed to appreciate and ought to have considered/held that:

a. Corrigendum passed by the Ld. CIT is barred by limitation;

b. Without prejudice, corrigendum passed without providing opportunity of being heard by issuing a notice, is bad-in-law;

c. Without prejudice to above, jurisdictional issues cannot be rectified merely by passing corrigendum;

d. Without prejudice, Corrigendum passed...by the Ld. CIT without providing an opportunity of being heard to the Appellant violates the principles of natural justice and thus, bad-in-law;

3. The Appellant therefore prays that the corrigendum order passed by the Ld. CIT is bad- in-law and therefore, liable to be quashed."

5. Since, the additional grounds raised by the assessee can be decided on the basis of facts and material available on record without investigating into fresh facts, we admit the additional grounds for adjudication.

6. Ground no.1, of the memorandum of appeal along with additional ground (IV) are on the validity of the revision orders passed under section 263 of the Act. Whereas, the additional ground no. (V) is challenging the corrigendum dated 24th April 2019, passed by the learned Commissioner.

7. Apropos ground no.1, additional grounds no.(IV) and (V), Shri Yogesh Thar, the leaned Counsel for the assessee, submitted, in the show cause notices issued under section 263 of the Act for the assessment years under dispute, learned Commissioner had proposed to revise the draft assessment orders passed under section 143(3) r/w section 144C(1) of the Act. He submitted, even in the orders passed under section 263 of the Act, learned Commissioner has referred to the draft assessment orders for revising under section 263 of the Act. He submitted, as per section 144C(1) of the Act, the draft assessment order cannot be considered to be assessment order until the final assessment order is passed either under section 144C(3) or under section 144C(13) of the Act. He submitted, since the draft assessment orders are not assessment orders in strict sense of the term, they cannot be subjected to proceeding under section 263 of the Act. He submitted, at the stage where the draft assessment order is passed, the assessment proceedings are still pending. Hence, the draft assessment order cannot be revised. He submitted, to give effect to

the directions of learned Commissioner, the Assessing Officer is required to pass the order under section 143(3) r/w section 263 of the Act which is possible only if the final assessment order is revised / set aside. Moreover, the demand can be enforced as a consequential result only on revision of the final order. Thus, he submitted, the orders passed under section 263 of the Act should be declared void ab initio and quashed. In support of such contention, the learned Counsel relied upon the following decisions:–

i) Apollo Tyres Ltd. v/s ACIT, [2017] 53 ITR (T) (Coch.) 548;

ii) Bausch & Lomb India Pvt. Ltd. v/s ACIT, [2017] 189 TTJ 860 (Del.); and

iii) Apollo Tyres Ltd. v/s ACIT, 108/Coch./2019, dtd 03.10.2018.

8. Shri Anadi Varma, the learned Departmental Representative submitted, the intention of learned Commissioner had always been to revise the final assessment orders. Therefore, the reference to the date of draft assessment order in the show cause notice as well as the orders passed under section 263 of the Act is inadvertent clerical/typographical error which should not and cannot vitiate the proceedings under section 263 of the Act. He submitted, the inadvertent mistake committed by learned Commissioner in show cause notice as well as revision orders now stand removed by virtue of the corrigendum issued by learned Commissioner rectifying the

mistake by referring to the final assessment order dated 22nd February 2017, in place of the draft assessment order dated 30th December 2016. Thus, he submitted, the contentions raised by the assessee challenging the validity of the revision orders being devoid of merit should be discarded.

9. In rejoinder, the leaned Counsel for the assessee submitted, the appeal was heard by the Tribunal on the preliminary issue on 16th April 2019. He submitted, on 24th April 2019, learned Commissioner issued the corrigendum referring to the final assessment orders in place of draft assessment order. He submitted, the time limit for passing the revision order under section 263 expired on 31st March 2019. He submitted, through the corrigendum, learned Commissioner sought to revise / rectify the order passed by her on 4th February 2012. Thus, he submitted, since, learned Commissioner had time to pass the revision order on/or before 31st March 2019, on which date the original revision order was getting barred by limitation, the corrigendum issued on 24th April 2019, is barred by limitation, hence, has to be quashed. For such proposition, he relied upon the following decision:–

i) Sanco Trans Ltd. v/s ACIT, 61 ITD 317 (Mad.); and

ii) Vijay Television Pvt. Ltd. v/s DRP, 369 ITR 113 (Mad.).

10. Without prejudice, the leaned Counsel for the assessee submitted, after the appeals filed by the assessee were heard by the higher appellate forum and pending for decision, learned Commissioner could not have passed the corrigendum violating the norms of judicial discipline. Further, he submitted, without affording an opportunity of being heard to the assessee, the corrigendum has been passed which is in violation of principle of natural justice. Further, he submitted, since the starting point of the revision proceeding itself was invalid, the same could not be rectified by merely passing a corrigendum as the jurisdictional defect cannot be cured by issuing such corrigendum. Thus, he submitted, both, the revision order as well as corrigendum has to be quashed.

11. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. There is no dispute with regard to the factual position that in the show cause notice issued under section 263 of the Act as well as the revision orders passed under section 263 of the Act, learned Commissioner has referred to the date of draft assessment orders passed under section 144C(1) of the Act. The orders under section 263 of the Act for the assessment years 2013–14 and 2014–15 were passed by learned Commissioner on 4th February 2019 and 6th February 2019 respectively. The corrigendum were issued by learned Commissioner

substituting the reference to the draft assessment orders with the final assessment order in the orders passed under section 263 of the Act, on 24th April 2019. As per section 154(7) of the Act, any mistake apparent from the record can be rectified suo–motu within a period of four years from the end of the financial year in which the orders sought to be amended was passed. However, the period of limitation gets curtailed to six months in a case where the order under section 154 of the Act is to be passed on an application for rectification filed by the assessee or deductor or the collector. Further, sub–section (3) of section 154 of the Act provides that if the amendment to be made has the effect of enhancing the assessment order or reducing the refund or increasing the liability of the assessee or the deductor or the collector, no order under section 154 of the Act shall be passed unless the assessee or the deductor or the collector is given a reasonable opportunity of being heard. Thus, on reading of section 154 of the Act as a whole, it becomes clear that an Income Tax Authority on his own motion can rectify/amend an order within the period of four years. Further, unless the amendment/rectification has the effect of enhancing the liability or reducing the refund, no opportunity of hearing needs to be given to the assessee. That being the case, the contention of the assessee that it should have been given an

opportunity of being heard before issuance of corrigendum cannot be accepted.

12. As regards the issue of limitation, undisputedly, the revision orders were passed in February 2019, and corrigendum were issued in April 2019, which is well within the period of limitation provided under section 154(7) of the Act. That being the case, the corrigendum issued cannot be held as barred by limitation. As regards the contention of the leaned Counsel for the assessee that after hearing of the appeal by the Tribunal and pending its decision no corrigendum should have been issued, we are unable to accept the same. As per section 154 of the Act, a mistake apparent on the face of record can be rectified within the period of limitation prescribed therein. Therefore, the pendency of the appeal before the Tribunal cannot debar learned Commissioner from rectifying a mistake apparent on the fact of record.

13. Having held so, now we will deal with the substantive issue raised by the assessee regarding the validity of the orders passed under section 263 of the Act on the plea that they are for the purpose of revising the draft assessment orders. As could be seen from the facts on record, in the show cause notices issued under section 263 of the Act, learned Commissioner has referred to the dates of draft assessment orders passed under section 144C(1) of the Act. In reply

to the aforesaid show cause notices issued under section 263 of the Act, the assessee had filed objections before learned Commissioner. Neither in the said objections nor in course of proceedings before learned Commissioner, the assessee raised any objection regarding the jurisdictional error committed by the learned Commissioner by referring to the draft assessment order in the show cause notices. Only after the revision orders were passed under section 263 of the Act, wherein, learned Commissioner again referred to the draft assessment orders, due to inadvertent error for which corrigendum were subsequently issued, the assessee in the appeals filed before the Tribunal raised the jurisdictional issue challenging the validity of the assessment orders on the plea that the draft assessment orders cannot be subjected to proceedings under section 263 of the Act. In our view, the aforesaid issue raised by the assessee is not bona fide. Had the assessee been honest and serious in its stand and approach, it should have raised this issue of validity of proceedings initiated against the draft assessment order at the first instance itself while replying to the show cause notices or even in the course of hearing of the revision proceedings. However, the assessee deliberately and consciously chose not to do so with the anticipation that the mistake committed in the show cause notices would also creep into the revision orders and, in fact, it did happen. Thus, the assessee was waiting for the mistake

to be repeated in the orders passed under section 263 of the Act, so that, it can take advantage of it before the higher appellate forum. In fact, the assessee has done so by raising the issue before us. The bonfide of the assessee would have been established had he raised the issue either in the reply to the show cause notice or in course of proceedings before learned Commissioner so that learned Commissioner would have got an opportunity to address the grievance of the assessee. Thus, from the aforesaid facts, certainly, one gets the impression that the assessee knowingly and deliberately desisted from objecting to the initiation of proceedings against the draft assessment order in course of revision proceedings to take advantage of such mistake in future. Thus, from the aforesaid facts, it is very much clear that the assessee has not approached the Tribunal with clean hands on this issue. Therefore, no relief can be granted to the assessee. The decisions relied upon by the assessee would also be of no help as they would not apply to facts of these appeals. The grounds raised by the assessee challenging the validity of the revision order on the plea that they have been passed against the draft assessment orders are devoid of merit, hence, cannot be entertained. In any case of the matter, the mistake in the revision orders with reference to the mentioning of the draft assessment order stands rectified by issuance of corrigendum by learned Commissioner. Therefore, for the present, assessee's

challenge regarding the validity of the revision orders no longer survives. As regards assessee's contention that learned Commissioner does not have the power to issue corrigendum, we are unable to accept the same. Accordingly, ground no.1 along with additional grounds no.(IV) and (V) 4 and 5 are dismissed.

14. Now, we propose to deal with the other substantive issue relating to the exercise of power under section 263 of the Act to revise the assessment orders on the issue of not bringing to tax the excise duty exemption received by the assessee.

15. Since, we have already dealt with the factual aspect of this issue earlier, it is not necessary to deal with them over again.

16. The learned Counsel for the assessee submitted, in the course of original assessment proceedings, the Assessing Officer has duly examined assessee's claim of excise duty exemption as a capital receipt. He submitted, the assessee has adequately disclosed the reasons for not offering excise duty exemption to tax in the original as well as revised computation of income and also in the notes appended to computation of income. He submitted, in the course of assessment proceedings, the Assessing Officer has raised specific query with regard to the nature of excise duty exemption. In this context, he drew our attention to the notice dated 24th October 2016, issued under

section 142(1) of the Act, a copy of which is at Page–10 of the paper book. He submitted, in response to the specific query raised by the Assessing Officer, the assessee in its reply dated 26th December 2016, explained the reason for not offering excise duty exemption as income. He submitted, in support of its claim, the assessee also furnished various documentary evidences including the industrial policy resolution, exemption notification issued by the Government of Uttarakhand and Himachan Pradesh. Further, to support its claim, the assessee relied upon a number of judicial precedents. He submitted, after conducting detailed and thorough enquiry, the Assessing Officer completed the assessment by treating the excise duty exemption as capital receipt. Thus, he submitted, the observation of the learned Commissioner that the Assessing Officer has failed to examine the issue is factually incorrect and is not borne out from record. He submitted, this is further proved from the fact that while the Assessing Officer allowed the claim of excise duty exemption under the normal provisions, he made addition of the same while computing the book profit under section 115JB of the Act. In this context, he drew our attention to the relevant observations of the Assessing Officer. Thus, the leaned Counsel for the assessee submitted, neither it is a case of inadequate enquiry nor lack of enquiry. He submitted, merely because in the opinion of learned Commissioner, the excise duty exemption is

not a capital receipt, the assessment order cannot be held as erroneous and prejudicial to the interests of Revenue. For such proposition, he relied upon the following decisions:–

i) MOIL Ltd. v/s CIT, [2017] 396 ITR 244 (Bom.);

ii) CIT v/s Maharashtra Hybrid Seeds Co. Ltd., [2019] 102 taxmann.com 48 (Bom.);

iii) CIT v/s Nirav Modi, [2017] 390 ITR 292 (Bom.);

iv) Amira Enterprises Ltd. v/s PCIT, ITA no.3206/Del./2017 (Del.);

v) CIT v/s Sunbeam Auto Ltd., [2011] 332 ITR 167 (Del.);

vi) ITO v/s DG Housing Projects, [2012] 343 ITR 329 (Del.);

vii) CIT v/s Vodafone Essar South Ltd., [2013] 212 Taxman 184 (Del.);

viii) Khatiza S. Oomerbhoy v/s ITO, [2006] 100 ITD 173 (Mum.); and

ix) Narayan Tatu Rane v/s ITO, [2-016] 70 taxmann.com 227 (Mum.).

17. The leaned Counsel for the assessee submitted, in assessee's own case, learned Commissioner (Appeals) has decided the issue in favour of the assessee in the assessment years 2012–13 and 2008-09. He submitted, merely because the decision of learned Commissioner (Appeals) was not accepted by the Revenue and an appeal was preferred to the Tribunal, learned Commissioner cannot refuse to follow the decision of the higher Courts or the Tribunal. He submitted,

when the Assessing Officer has passed the assessment order on the basis of law laid down by the Courts and Tribunal, it cannot be termed as erroneous only because such decision is not acceptable to the Revenue. In this context, he relied upon the decision of the Hon'ble Gujarat High Court in Garden Silk Mills Ltd. v/s CIT, [1996] 221 ITR 861 (Guj.). The leaned Counsel submitted, for exercising jurisdiction under section 263 of the Act, twin conditions of erroneous as well as prejudicial to the interests of Revenue have to be fulfilled. He submitted, when the assessment orders passed by the Assessing Officer on the issue of excise duty exemption are in conformity with the principle laid down by the Hon'ble Supreme Court as well as different High Courts, such order cannot be held to be erroneous even if there may be prejudice caused to the Revenue. For such proposition, he relied upon the following decisions:–

i) CIT v/s Gabriel India Ltd., [1993] 203 ITR 108 (Bom.);

ii) CIT v/s Paul Brothers, [2005] 216 ITR 548 (Bom.);

iii) Russel Properties Pvt. Ltd. v/s ACIT, [1977] 109 ITR 229 (Cal.); and

iv) Hindustan Construction Co. Ltd. v/s DCIT, [2008] 25 SOT 359 (Mum.).

18. The leaned Counsel for the assessee submitted, there is no requirement in law that the Assessing Officer has to pass a detailed order covering all aspects examined during the course of assessment

proceedings. He submitted, in any case, the assessee does not have any control over the way the assessment order is drafted. He submitted, generally the issues which are accepted by Assessing Officer do not find mentioned in the assessment order and only those aspects find mention in the order in respect of which assessee's explanation are rejected and additions / disallowances are made. He submitted, merely because a particular aspect, though, examined by the Assessing Officer does not find place in the order, it would not mean that the issue has not been dealt with by the Assessing Officer. In this context, he relied upon the following decisions:–

i) CIT v/s Honda Siel Power Products Ltd., [2011] 333 ITR 547 (Del.);

ii) CIT v/s Nirma Chemical Works Pvt. Ltd., [2009] 309 ITR 67 (Guj.); and

iii) CIT v/s Reliance Communication Ltd., 396 ITR 217 (Bom.).

19. Further, the leaned Counsel for the assessee submitted, if the view taken by the Assessing Officer on a particular issue one of the possible view, power under section 263 of the Act cannot be exercised. For this proposition, leaned Counsel for the assessee relied upon the following decisions:–

i) CIT v/s Max India Ltd., [2007] 295 ITR 282 (SC);

ii) CIT v/s Fine Jewellery India Ltd. [2015] 372 ITR 303 (Bom.);

iii) MOIL Ltd. v/s CIT, [2017] 396 ITR 244 (Bom.);

iv) CIT v/s Ballarpur Industries Ltd., [2017] 85 taxmann.com 10 (Bom.); and

v) PCIT v/s Mukesh Kimtani, ITA no.1038 of 2016, (Gom.).

20. Further, he submitted, while exercising powers under section 263 of the Act, learned Commissioner cannot assume the role of the Assessing Officer to examine all the aspects of the assessment. He submitted, learned Commissioner can only indicate omission/incorrect actions of the Assessing Officer. He submitted, by deciding the nature of excise duty exemption at her level, learned Commissioner has left no option for the Assessing Officer to decide the issue on merits. Thus, there is a clear violation of principle of natural justice. In this context, he relied upon the decisions of the Tribunal in ACIT v/s Manas Salt Iodization Industries Pvt. Ltd., [2015] 38 ITR 502 (T) (Gau.). Without prejudice to the aforesaid submission, the learned Counsel submitted, the assessee has strong case on merit also as the issue is squarely covered in favour of the assessee by various decisions of the Hon'ble Supreme Court as well as different High Courts. In this context, he relied upon the following decisions:–

i) Shree Balaji Alloys v/s CIT, [2011] 333 ITR 335 (J&K);

ii) CIT v/s Ponni Sugars & Chemicals Ltd, [2008] 306 ITR 392 (SC); and

iii) CIT v/s Chaphalkar Brothers, [2018] 400 ITR 279 (SC).

21. Drawing our attention to the industrial policy resolution and exemption/subsidy scheme of the Government of Himachal Pradesh and Uttarakhand and similar scheme issued by the Jammu & Kashmir Government, the leaned Counsel for the assessee submitted, the nature of excise duty exemption is identical, hence, the decisions of the Hon'ble Supreme Court and different High Courts would squarely apply to assessee's case as well. Thus, he submitted, due to all these factors, the assessment orders can neither be held as erroneous nor prejudicial to the interests of Revenue so as to empower learned Commissioner to revise them under section 263 of the Act. Thus, he submitted, the revision orders passed under section 263 of the Act should be quashed.

22. The learned Departmental Representative submitted, though, the Assessing Officer at initial stage of the proceedings might have raised a query in the notice issued under section 142(1) of the Act, but such query is general in nature and after receiving the reply of the assessee, the Assessing Officer has not taken enquiry to its logical end. The Assessing Officer has not at all examined the nature of excise duty exemption received by the assessee. He submitted, at this stage what is required to be seen is, whether due to lack of enquiry by the Assessing Officer, the assessment order has become erroneous and

prejudicial to the interests of Revenue. He submitted, the Assessing Officer has not at all examined the issue in the light of various decisions and he failed to apply the purpose test to examine the nature of excise duty exemption. He submitted, before accepting it to be of capital nature, it has to be established that such exemption is for setting–up of a new industrial unit in backward area and not for making the business of the assessee more profitable. He submitted, the Tribunal as a second appellate authority cannot convert itself to the position of the Assessing Officer to examine the nature of exemption received by the assessee. He submitted, the enquiry regarding the nature of exemption received by the assessee should have been conducted by the Assessing Officer which he has failed to do. Therefore, learned Commissioner was justified in invoking the power under section 263 of the Act to revise the assessment orders. The learned Departmental Representative submitted, at the time of completion of assessment for the assessment year 2013–14, the orders of learned Commissioner (Appeals) for the assessment years 2012–13 and 2008–09, were not available before him. Therefore, it cannot be said that the view taken by the Assessing Officer is a possible view. He submitted, when the Assessing Officer has not at all taken any view, it cannot be said that his view is a possible view. Thus, he submitted, in the facts of the present case, exercise of power

under section 263, is valid. As regards the merits of the issue as to whether the excise duty exemption is capital or revenue in nature, the learned Departmental Representative submitted, this has to be examined and decided by the Assessing Officer after verifying the exemption scheme, relevant case laws and other materials on record.

23. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. The core issue which needs to be addressed at the very outset is, the validity of exercise of power under section 263 of the Act. It is fairly well settled that for exercising power under section 263 of the Act, twin conditions of erroneous and prejudicial to the interests of Revenue have to be satisfied cumulatively. The factual matrix would reveal that in the return of income filed for the assessment year 2013-14, the assessee did not offer the following income/receipt, as noted below, on the plea that they are in the nature of capital receipts.

Sales Tax Incentives	*₹99,17,41,517*
Excise Duty Incentives	*₹254,44,56,144*
Refund of Royalty	*₹25,17,62,233*

24. Even while computing book profit under section 115JB of the Act, the assessee excluded the aforesaid income/receipt. Factual position is more or less similar in assessment year 2014-15, except, the figures.

While completing the assessment for the A.Y. 2013–14, the Assessing Officer held that the sales tax incentive and incentive in the nature of refund of royalty are revenue receipt, hence, taxable under the normal provisions of the Act. Whereas, while computing book profit under section 115JB of the Act, the Assessing Officer included all the three items of income viz. sales tax incentive, excise duty incentive and refund of royalty. The decision of the Assessing Officer in assessment year 2014–15, is on identical lines as the assessment order on the issue is more or less similarly worded. On a perusal of the impugned assessment order, it becomes clear that assessee's contention with regard to non–inclusion of the aforesaid items income both under the normal provisions as well as while computing book profit is identical. It is the case of the assessee that since these receipts are in the nature of capital receipts, they cannot be treated as income. Even, for the purpose of computation book profit under section 115JB of the Act, the assessee had submitted that these receipts since do not have any element of income or profit embedded therein, they are not includible in the profit and loss account for computation of book profit. Thus, the main plank on which the assessee had sought exclusion of these items of income from being taxed is, they are in the nature of capital receipts. Interestingly, the Assessing Officer while computing income under the normal provisions of the Act, though, has treated the sales

tax incentive and refund of royalty as revenue receipt, however, he has not mentioned even a single word in respect of excise duty incentive. Whereas, while computing book profit under section 115JB of the Act, the Assessing Officer has included all the three items viz. sales tax incentive, excise duty incentive and refund of royalty. It is also relevant to observe, while treating the sales tax incentive and refund of royalty as revenue receipt, the Assessing Officer has referred to similar decision taken by him in the earlier assessment years. Whereas, he has not followed his decision with regard to excise duty incentive as taken in earlier assessment years, wherein, he has treated it as revenue receipt. Though, it may be a fact that the Assessing Officer in the annexure attached to the notice issued under section 142(1) of the Act has called upon the assessee to justify its claim that the aforesaid receipts are capital in nature and the assessee has also replied to the query raised by the Assessing Officer, however, thereafter, as it appears from the facts on record, the Assessing Officer has neither applied his mind to the reply of the assessee nor carried the enquiry any further to ascertain the correctness of assessee's claim of excise duty incentive as capital receipt. When the Assessing Officer has treated the sales tax incentive and refund of royalty as revenue receipt, he should have provided proper reasoning and justification why he omitted the excise duty exemption from being

considered as revenue receipt. The aforesaid omission on the part of the Assessing Officer is glaring considering the fact that in the preceding assessment years including A.Y. 2008–09 and 2012–13, the Assessing Officer had added back all the three items of receipts viz. sales tax incentive, excise duty incentive as well as refund of royalty both under the normal provisions as well as under section 115JB of the Act by treating them as revenue receipt. Therefore, if the Assessing Officer wanted to deviate from the decision taken by him in the earlier assessment years on the very same issue, he should have provided adequate reasoning/justification for doing so, that too, by referring to the change in facts which persuaded him to take a different view from the view taken by him on the very same issue in the earlier assessment years. Such reasoning of the Assessing Officer is all the more required considering the fact that while computing book profit under section 115JB of the Act in the impugned assessment year, the Assessing Officer has rejected assessee's claim of the aforesaid items of income as capital in nature. The view of the Assessing Officer on the taxability of excise duty incentive is conflicting and contradictory as he has given different treatment to the same item of income while computing income under normal provisions and under section 115JB of the Act. It is relevant to observe, at the time of completion of assessment for A.Y. 2013–14, the appellate orders of learned

Commissioner (Appeals) for the A.Y. 2012–13 and 2008–09 were not available before the Assessing Officer. Therefore, the Assessing Officer certainly did not have the benefit of such orders to deviate from the decision taken by him on the very same issue in earlier assessment years. Thus, the aforesaid facts clearly demonstrate that the Assessing Officer has completely overlooked/omitted to properly examine/enquire into the nature and character of the excise duty incentive received by the assessee. Such enquiry/examination was certainly required, since, the Assessing Officer himself has rejected similar plea made by the assessee in respect of excise duty incentive in the earlier assessment years. The Assessing Officer has not whispered even a single word in the impugned assessment orders justifying his action in accepting assessee's claim of excise duty incentive as capital receipt, that too, only while computing the income under the normal provisions of the Act. Thus, the facts and materials on record clearly demonstrate that the Assessing Officer has failed to conduct proper enquiry or has made perfunctory enquiry with regard to assessee's claim of excise duty incentive as capital receipt. Whether the excise duty incentive is capital or revenue depends upon various factors, including, the scheme formulated by the Government allowing incentive/subsidy. Therefore, the Assessing Officer is required to examine the issue factually and only thereafter apply the ratio laid

down in the judicial precedents. In the facts of the present case, the Assessing Officer has not even undertaken the exercise required to be undertaken by him in the first step to factually examine the nature of incentive. Therefore, allowance of assessee's claim in respect of excise duty incentive while computing the income under the normal provisions without necessary inquiry has certainly made the assessment order erroneous and prejudicial to the interest of Revenue. That being the case, the conditions of section 263 of the Act are fulfilled so as to enable the learned Commissioner to revise the assessment orders under section 263 of the Act. Therefore, in our considered opinion, the exercise of power under section 263 of the Act in the facts of the present case is valid. Though, we respectfully agree with the ratio laid down in the decisions cited before us by learned Counsel for the assessee, however, they would not be of any help to the assessee as we have factually found that before allowing assessee's claim in respect of excise duty incentive, the Assessing Officer has not conducted any inquiry.

25. However, we do not approve the decision of learned Commissioner in directing the Assessing Officer to disallow the excise duty incentive and add it to the income of the assessee. In our considered opinion, the issue whether the excise duty incentive is capital or revenue has to be examined by the Assessing Officer as he

has not enquired into or examined it in the course of assessment proceedings. Therefore, he has to examine the issue and take a final decision on it without any fetters being put by the higher appellate authorities. Therefore, the direction of learned Commissioner insofar as it relates to addition of excise duty incentive is set aside/modified. The Assessing Officer is directed to examine the issue in proper perspective and take an independent view after considering all relevant facts and materials on record, submissions made by the assessee, the relevant incentive schemes/notifications, ratio laid down in the decisions to be cited as well as the orders passed by the Appellate Authorities on the issue in assessee's own case in other assessment years. We make it clear, while deciding the issue the Assessing Officer should not be influenced by any of the observations of learned Commissioner on merits. Needless to mention, the assessee must be provided adequate and proper opportunity of being heard in the matter. Ground no.2 is partly allowed for statistical purposes.

26. In the result, appeals are partly allowed for statistical purposes.
Order pronounced in the open Court on 29.11.2019

Sd/-	**Sd/-**
MANOJ KUMAR AGGARWAL	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 29.11.2019

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai