IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.3925/Mum/2017
(**Assessment Year: 2010-11**)

Tata Motors Ltd. Bombay House, 24 Homi Mody Street Hutatma Chowk Mumbai-400 001	Vs.	The CIT(LTU) 29th Floor, Centre 1 World Trade Centre Cuffe Parade Mumbai-400 005
PAN/GIR No.AAACT2727Q		
(Appellant)	..	**(Respondent)**

Revenue by	Shri.R.Manjunatha Swamy, CIT, DR
Assessee by	Shri. Rajan Vora & Shri.Nikhil Tiwari, AR's
Date of Hearing	**25/09/2019**
Date of Pronouncement	**13/12/2019**

आदेश / O R D E R

PER G.MANJUNATHA:

This appeal filed by the assessee is directed against, the order of the Ld. Commissioner of Income Tax (LTU), Mumbai u/s. 263 of the I.T.Act, 1961 and it pertains to the Assessment Years (AY) 2010-11.

2. The assessee has raised the following grounds of appeal:-

1. Proceedings u/s 263 is invalid and bad in law

1.1 The learned CIT has erred in law and on facts in holding that order passed by the Assessing Officer ("AO") u/s 143(3) r.w.s, 144C(13) of the Act dated 24.12.2014 is erroneous and prejudicial to the interest of the revenue, without appreciating that the assessment order cannot be said to be erroneous where the AO has taken one of the permissible

views. The learned CIT ought to have appreciated that if two views are possible, revision u/s 263 is not permissible.

1.2 The learned CIT has erred in law and on facts in holding that the order passed by the AO is not correct without appreciating that the AO has passed the order after enquiring and verifying the facts and documents on record, duly supported by various precedents including the judgments of the Hon'ble Supreme Court and CBDT circular which were available at the time of the assessment.

1.3 The learned CIT has erred in law and on facts in ignoring the reasons given by the appellant on the proceedings u/s. 263 being invalid and bad in law and not providing detailed justification in order to prove satisfaction of the conditions specified u/s. 263 of the Act.

2. Disallowance of expenditure related to issue of Non-Convertible Debentures (NCD) of Rs. 139,61.52760/-.

2.1 The learned CIT has erred in law and on facts in directing the AO to treat the expenditure incurred on issue of NCDs as perfection 350 of the Act in as much as the said expenditure is incurred for obtaining the loan for the purpose of business and is allowable u/s 37(1) of the Act.

2,2 The learned CIT has erred in law and on facts in directing the AO to allow only 1/5th of the expenditure related to the issue of NCD u/s. 35D(l)(ii) of the Act and add back the remaining portion of the expenditure,

2.3 The learned CIT ought to have appreciated that it is a settled position in law that expenditure incurred for raising debt for the purpose of business is an allowable deduction u/s 37(1) of the Act. Further, the learned CIT failed to consider the relevant CBDT Circular No 56 dated 19.03.1971 providing that any expenditure on issue of debentures admissible u/s 37(1) of the Act, placing reliance on the Supreme Court judgment in case of India Cement Ltd (60 ITR 52), is not covered under section 35D of the Act.

2.4 The learned CIT has erred in law and on facts in concluding that the said expenditure is in the nature of raising loan to finance the extension of the business inasmuch as the said expenditure is incurred for raising loan on account of refinancing the loan taken in earlier years.

2.5 Without prejudice to the above, the learned CIT has erred in law and on facts in not directing the AO to grant deduction of the balance expenditure in subsequent four assessment years.

3. Addition of foreign exchange hiss of Rs. 10612,81,083/- (net amount of Rs69.9 crores debited to Profit and Loss Account) on account of deposits and loans given in foreign currency while computing book profits u/s. 115JB of the Art

3.1 The learned CIT has erred in law and on facts in directing the AO to i) treat the foreign exchange loss on account of year end translation of deposits and loans given in foreign currency to that of the reporting currency as in the nature of provision set aside for diminution in value of any assets or in the nature of amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities, while calculating book profits u/s. 115JB of

the Act and ii) equating it to the provisions of clause (c) and (i) of Explanation (1) to sub-section (2) of section 115JB of the I,T, Act,

3.2 The learned CIT ought to have appreciated that foreign exchange loss debited in books of accounts merely on account of restatement in a different reporting currency cannot be considered as diminution in the intrinsic value of the asset in foreign currency for the purpose of book profits u/s. 115JB of the Act.

3.3 The learned CIT has erred in law and on facts in treating the foreign exchange loss as contingent in nature,

3.4 The learned CIT has erred in law and on facts in placing reliance upon the CBDT Instruction no. 3/2010 without appreciating the fact that the said instruction is distinguishable on facts. Further the learned CIT ought to have appreciated that the Issue of allowability of foreign exchange loss debited in books of account as per the requirement of Accounting Standard to be followed as per Companies Act, 1956 is settled in favour of the appellant by the Hon'ble Supreme Court in the case of CIT v. Woodward Governor India P. Ltd. (312 1TR 254),

3.5 The learned CIT ought to have appreciated that while computing book profits u/s. 115JB of the Act, the AO cannot go beyond the Profit and loss account prepared in accordance with Part II and Part III of the Companies Act and audited by the statutory auditors; unless it is specifically provided in Explanation 1 to section 115JB of the Act and thus, the adjustment of foreign exchange loss for the purpose of books profits u/s. 115JB of the Act is not permissible.

4. Disallowance of Provision for leave encashment of Rs.29,60,93,000. u/s. 43B of the Act

4.1 The Learned CIT has erred in law and on facts in directing the AO to withdraw the allowance of Provision for leave encashment for the year under consideration disregarding the fact that the AO has after detailed examination and placing reliance on various rulings in support of the position taken by the assessee, has allowed deduction of Provision for leave encashment vide order under section 143(3) r.w.s. 144C of theAct

4.2 The Learned CIT ought to have appreciated the fact that the appellant had paid the applicable taxes and had correctly claimed the deduction in respect of provision for leave encashment in return of income.

43 The Learned CIT has erred in law and on facts in treating the assessment order passed u/s. 143(3) r.w.s. 144C of the Act for the captioned assessment year as erroneous without appreciating the fact that in appellant's own case for AY 2012-13, the Hon'ble Dispute Resolution Panel has allowed the claim of Provision for leave encashment.

5. Disallowance of expenditure of Rs. 23,82,77 ,293/- related to discharge of debt securities [Foreign Currency Convertible Notes (FCCN)] by way of conversion under the normal provisions of the Act by treating the same as capital in nature.

5.1 The learned CIT has erred in law and on facts in directing the AO to treat the expenditure incurred towards discharge of loan Liability as towards raising of capital.

5.2 The learned CIT has erred in law and on facts in treating the transaction of discharge of debt taken in earlier years through the issuance of FCCN akin to the transaction of raising of share capital inasmuch as raising a debt does not partake the character of raising share capital.
5.3 The learned CIT ought to have appreciated that it is a settled position that debentures (whether convertible or non-convertible) when issued is a loan and therefore, the expenditure incurred in connection with discharge of such loan liability is admissible as revenue expenditure u/s, 37(1) of the Act,

The Appellant craves leave to add to, alter, delete or substitute all or any of the aforesaid grounds of appeal.

3. The brief facts of the case are that the assessee is a public limited company engaged in the business of manufacturing automobiles. The assesse has filed its return of income for Asst. Year 2010-11 on 15/10/2010, declaring total loss of Rs.287,54,99,887/-, under normal provisions of the I.T.Act, 1961 and book profit of Rs. 2463,46,60,876/- under MAT provisions of section 115JB of the I.T.Act, 1961. The assessment was completed u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961 on 24/12/2014 determining the loss at Rs.79,54,09,943/- under normal provisions and book profits at Rs.3031,84,10,912/- u/s 115JB of the Act, after making various additions. Subsequently, the Ld.CIT(LTU) issued notice u/s 263 dated 15/11/2016 and called upon the assessee to explain as to why, the assessment order passed by the Ld. AO u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961of the Act, shall not be revised for the following issues:--

** Deduction claimed of Rs. 139,61,52,760/- by the Assessee in respect of expenditure incurred in respect of issue of non-convertible debentures (NCD)*
** Addition of foreign exchange loss of Rs. 1,06,12,81,083/- treating the same as contingent in nature or to be treated as diminution in the value of investment attributable to foreign exchange while computing book profit under section 115JB of the Act*
** Disallowance of Rs. 29,60,93,000/- under section 43B in respect of provision for leave encashment*

** Disallowance of Rs 23,8.77,293/- in respect of expenditure incurred for raising debt through Foreign Currency Convertible Notes ('FCCN')*
** Addition proposed to book profit under section 115JB in respect of refund of excise duty, sales tax and octroi duty however, addition not made and dropped after assessee's submission as this was already subject to tax.*

4. The assessee has filed detailed written submissions, in respect of all issues raised by the Ld.CIT(LTU) vide letter dated 14/12/2016 and submitted that the assessment order passed by the Ld. AO u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961is neither erroneous, nor prejudicial to the interest of the revenue. The Ld.CIT(LTU), however did not convinced with the explanation furnished by the assessee and accordingly, set aside the assessment order passed by the Ld.AO u/s 143(3) r.w.s. 144C(13) of the I.T.Act,1961, on the following issues by holding as under:-

*» **Issue 1.** Deduction claimed of Rs. 139,61,52,760/- by the Assessee in respect of expenditure incurred in respect of issue of non-convertible debentures (NCD) cannot be allowed as the same is capital in nature and is covered by the provisions of section 35D and only 1/5th expenditure is to be allowed*
*» **Issue 2:-** Foreign exchange loss of Rs 1,06,12,81,083 was added to Book Profit under section 115JB treating the same as contingent in nature or to be treated as diminution in the value of investment attributable to foreign exchange*
** **Issue 3:** Deduction for provision of leave encashment of Rs. 29,60,93,000 cannot be allowed as the decision of M/s Exide Industries has been stayed by Hon'ble Supreme Court*
** **Issue 4:** Disallowance of Rs. 23,82,77,293/- in respect of expenditure incurred for raising debt through Foreign Currency Convertible Notes ('FCCN') treating the same as capital in nature*

5. The Ld. AR for the assesee submitted that the Ld.CIT(LTU) has erred in holding that order passed by the Ld. AO u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961, dated 24/12/2014 is erroneous and prejudicial to the interest of the revenue, without appreciating the fact that the assessment order cannot be said to be erroneous, where the Ld. AO has taken one of the permissible views. The Ld.

AR, further submitted that the Ld.CIT(LTU) has erred in holding that the assessment order passed by the AO is not correct without appreciating that the Ld. AO has passed the order after enquiring and verifying the facts and documents on record duly supported by the various precedents, including the judgments of various courts and CBDT circular, which were available at the time of assessment. The Ld. AR, further referring to paper book filed in support of his arguments submitted that all issues questioned by Ld.CIT(LTU) in 263 proceedings are discussed by the Ld.AO, during the assessment proceedings, which is evident from the fact that the Ld.AO has called for specific enquiries pertaining to deduction of expenses claimed in relation to expenses incurred for issue of NCD, vide notice dated 24/09/2013 for which, the assessee has filed a detailed reply and break up of expenses was provided as annexed to the said submission. The assesee also had drawn attention to the AO in the notes to computation of income by making specific disclosure for claim of expenditure by way of note 27 to the computation of income. The Ld. AO after fully satisfied with explanation furnished by the assessee has allowed the deduction for the same by adopting one of the possible views. The Ld. AR, further submitted that as regards, other issues like disallowances of foreign exchange loss, while computing book profit u/s 115JB of the Act, deduction for provision for leave encashment and disallowances of expenditure related to foreign currency convertible notes are all subject matter of verification by the Ld. AO, during assessment proceedings, where the Ld. AO had issued specific notice regarding all those issues for which, the assessee has filed elaborate submissions along with certain judicial precedents. The Ld. AO after satisfied with the explanation furnished by the assessee has

accepted the claim without there being any addition or disallowances. Therefore, merely for the reason that discussions were not find place in assessment order passed by the Ld.AO, it cannot be said that the Ld. AO has not examined the issue and also applied his mind before completion of assessment. In this regard, he relied upon plethora of judicial precedents, including the decision of Hon'ble Supreme Court, in the case of CIT vs Malabar Industiral Limited (2000) 243 ITR 83. The case laws relied upon by the assessee is reproduced as under:-

** Malabar Industrial Co.Ltd. vs. CiT (2000) (243 ITR 83 SC)*
** Gabriel India Ltd. (1993) (203 ITR 108)*
** Colour Publications (P.) Ltd. [2018] 97 taxmann.com 116 (Mumbai-Trib.)*
** Cisco Capital Systems (India) Private Limited (ITA No. 849/Bang/2015 dated 7 Septeber, 2018) (Bangalore ITAT)*
** CIT vs. R.K.Metal Works (1978) (112 ITR 445) (P &H)*
** CIT vs. Kanda Rice Mills (1989) (178 ITR 446) (P& H)*
** Cognizant India Private Limited vs CiT (ITA.NO. 1179/PN/2013 dated 23 October 2015) (Pune ITAT)*
** Punjab Wool Syndicate (2012) 17 ITR 439 (Chd Trib)*

- *Nirav Modi (77 Taxan.com 78) (SC) approving Bombay High Court decision reported in 390 ItR 292 (Bom)*
- *MOIL v. CIT [2017] 396 ITR 244 (Bombay)*
- *CIT vs. Fine Jewellery (India) Ltd. [2015] 372 ITR 303 (Bombay)*
- *Mukesh H Sanghvi (ITA No. 2271/Mum/2014) Dated 11 August 2017(Mum)*
- *S.D.Corporation (P) Ltd. [2019] 175 ITD 164 (Mumbai-Trib.)*
- *Indo Rama Synthetics (I) Ltd. (185 Taxman 277) (Del HC)*
- *Idea Cellular Ltd vs ACIT (47 taxmann.com 341) (2014) (Mum ITAT)*
- *CIT vs Priya Village Roadshows Ltd. (185 Taxman 44) (2009) (Delhi HC)*
- *CiT vs Graphite India Ltd. (221 ITR 420) (1996) (kolkatta HC)*
- *Kesoram Industries & Coton Mills Ltd. (196 ITR 845) (Kol HC)*
- *CIT vs Tata Robins Fraser (2012) (26 taxmann.com 15) (Jha HC)*

6. The Ld. DR present for the revenue, on the other hand strongly supporting order of the Ld.CIT(LTU) submitted that the arguments of the Ld. AR lack substance in the sense that an erroneous order

causing prejudice to the interest of revenue can be passed, even after consideration of the submission made by the assessee. The invocation of authority u/s 263 stands on a very different footing in comparison to invocation of sec. 147 of the Act. The facts to be considered here is not whether, the assessee submitted the details or not, but what needs to be considered is whether, at the end of consideration of all details, the Ld. AO passed the correct order or not, if an erroneous order happen to be passed, whether it caused prejudice to the interest of the revenue or not. The order of the AO is not justified and hence, the revision u/s 263 is considered necessary.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with various case laws cited by both the parties. The Ld.CIT(LTU) has set aside the assessment order passed by the AO u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961, on various grounds in respect of four issues. According to the Ld.CIT(LTU), although the Ld. AO has called for information from the assessee regarding the issues questioned in 263 proceedings, but he had failed to appreciate the submissions of the assessee, in light of the provision of Act, which deals with those issues, before coming to the conclusion that whether, the claim made by the assessee is in accordance with law or not. The Ld.CIT(LTU), further was of the opinion that invocation of jurisdiction u/s 263 stands on a very different footing in comparison to invocation of section 147, because in 263 proceedings, the facts to be considered is whether, the assessee submitted the details or not, but what needs to be considered is whether, at the end of the consideration of all details, the Ld. AO passed the correct order or

not. The Ld.CIT(LTU) ,further was of the opinion that although, the Ld. AO has made a preliminary enquiry of certain issues, but he has failed to apply his mind to the facts in right perspective, in light of various provisions of the Act, including circular issued by the Board, before arriving at the conclusion that the claim of the assesee is in accordance with provision of the Act or not. Accordingly, he opined that the assessment order passed by the Ld.AO is erroneous, insofar as, it is prejudicial to the interest of the revenue.

8. The language used by the legislature in section 263 is to the effect that the CIT may interfere in revision, if he considers that the order passed by the AO is erroneous insofar as it is prejudicial to the interest of the revenue. It is quite clear that two conditions must co-exist in order to give jurisdiction to the CIT to interfere in revision. The order of the AO in question must not only be erroneous but also it must be prejudicial to the interest of the revenue. In other words, merely because the assessment order is erroneous, the CIT cannot interfere. Again, merely because the order of the AO is prejudicial to the interest of the revenue, then that is not enough to confer jurisdiction on the CIT to interfere in revision. The CIT cannot assume jurisdiction u/s 263, if the two conditions prescribed under the provisions of Act, viz. (i) the order is erroneous; and (ii) the same is also prejudicial to the interest of the revenue is not satisfied. Each 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.

9. The phrase "prejudicial to the interest of the revenue" has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue has a consequence of an order of AO cannot be treated as prejudicial to the interest of the revenue. For example, when an AO adopted one of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and the AO has taken one view with which the CIT did not agree with, it cannot be treated as an erroneous order prejudicial to the interest of the revenue because the view taken by the AO is unsustainable in law. The order passed by the AO without making necessary enquiries on certain important points connected with the assessment would be erroneous and prejudicial to the interest of the revenue, when the AO expected to make required enquiries on a particular item of income and he does not make an enquiry as expected, that would be a ground for the CIT to interfere with the order passed by the AO. Since such an order passed by the AO is erroneous and prejudicial to the interest of the revenue. Where the AO had made enquiries in regard to the nature of expenditure incurred by the assessee, who had given detailed explanation in that regard by a letter in writing and all these are part of record of his case and the claim was allowed by the AO on being satisfied with the explanation of the assessee, such decision of the AO cannot be held to be erroneous, simply because in his opinion, the AO did not make an elaborate discussion in this regard.

10. In this legal background, if you examine facts of the present case, we find that the issues questioned by the Ld.CIT(LTU), in respect of disallowances made towards expenditure related to issue

of NCD, disallowances of foreign exchange loss, while computing book profit u/s 115JB of the I.T.Act, deduction for provision for leave encashment and disallowances of expenditure related to foreign currency convertible notes are subject matter of verification from the Ld. AO during the assessment proceedings, which is evident from the fact that the Ld. AO has issued a show cause notice, dated 24/09/2013 for which, the assessee has filed complete details and also, explained how claim made, in respect of those deductions is in accordance with the provisions of the Act. We, further noted that the Ld.CIT(LTU) has adopted another view and review the assessment order passed by the Ld. AO by holding that any expenditure for raising the loan to finance the expansion of the business and such expenditure is allowable only by way of amortization in terms of section 35D of the Act. Similarly, in respect of disallowances of foreign exchange loss, while computing book profit u/s 115JB of the Act, although, the Ld. AO has accepted explanation furnished by the assessee but, the Ld. CIT(LTU) has adopted different view by holding that the exchange loss is to be treated as diminish in the value of investments attributable to foreign exchange and that the foreign exchange is contingent in the nature . But, fact remains that the issue of foreign exchange loss has been elaborately discussed by the Hon'ble Supreme Court, in the case of Woodward Governor vs. CIT 312 ITR 254, where it was held that loss suffered by the assesee, in respect of revenue liability on account of exchange difference as on the date of the balance sheet is an item of expenditure allowable u/s 37(1) of the Act, in the year of accrual. The assesee has explained the above facts and also support its arguments with the help of the decisions of Hon'ble Supreme Court in the above case. The Ld. AO after considering relevant facts has

accepted the claim of the assesee. But, the Ld. CIT(LTU) was of the view that the Ld. AO has not carried out required enquiries to be carried out in accordance with law, without bringing on record how enquiries carried out by the Ld.AO is insufficient or inadequate.

11. Insofar as, deduction for provision for leave encashment, the assesee has claimed deduction for said provision on the basis of decision of Hon'ble Kolkata High Court, in the case of Exide Industries Limited Vs CIT 292 ITR 470 and this fact has been brought to the notice of the Ld.AO. Pursuant to the above, Ld. AO has allowed the deduction for the same, after considering one of the possible views. Subsequently, the Ld.CIT(LTU) adopted another view in 263 proceedings on the basis of Hon'ble Supreme court decision in its first interim order, dated 08/09/2008, in case of Exide Industries Limited. However, it is pertinent to note that the stay given by the Hon'ble Supreme Court was interim stay till further order and thereafter, the Hon'ble Supreme court has passed a subsequent interim order, dated 08/09/2008, wherein it has laid down condition for claiming deduction for provision for leave encashment and thereby stay initial granted by Hon'ble Supreme Court, vide first interim order get vacated. The Hon'ble Supreme Court, further held that the assesee can claim deduction by paying tax as if, section 43B(f) is on statue book. But, at the same time, it would not be entitled to make a claim in its return of income. The assesee on the basis of said findings of the courts has made a claim and same has been accepted by the Ld. AO. Therefore, we are of the considered view that the ld.CIT(LTU) was incorrect in coming to the conclusion that the Ld. AO has erroneously allowed deduction for provision for leave encashment.

12. Insofar as, disallowances of expenditure related to foreign currency convertible notes, the assessee has made all the disclosure in the statutory documents, including in the return of income and notes thereto given in statement of total income. Further, the assesee has specifically drawn attention of the Ld.AO to the aforesaid claim of the expenditure by way of notes to computation of income, wherein it has been explained that said expenditure was incurred on discharge of loan liability and it was written off against securities premium account in the books of accounts in accordance with the provision of section 78 and 79 of the Companies Act, 1956 and for the purpose of income tax, these expenses incurred in connection with discharge of loan liability have been claimed as deduction. All these facts were brought to the notice of the Ld.AO. Pursuant to, the Ld. AO has allowed deduction for the same by accepting the claim of the assesee. The Ld.CIT(LTU) has made the disallowances by holding that said expenses is incurred to discharge loan liability and accordingly, capital in nature, but, the Ld. AO was not examined these aspects before allowing the claim, without bring on record, how the view taken by the Ld. AO is incorrect. Therefore, we are of the considered view that on this count also, the assumption of jurisdiction by the Ld.CIT(LTU) is incorrect.

13. Coming to the case laws relied upon by the assessee. The assessee has relied upon the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co Ltd vs CIT (supra). The Hon'ble Supreme Court, in the said case held that if order of the AO is erroneous, but does not prejudice to the interest of the revenue or if

it is not erroneous but is prejudicial to the interest of the revenue, recourse cannot be taken u/s 263 of the Income-tax Act, 1961. The relevant portion of the order is extracted below:-

> *"A bare reading of section 263(1) makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (\) 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 ITO 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).*
> *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 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 ITA 4023/Mum/2017 erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue."*

14. The assessee has also relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Gabriel India Ltd (supra). The Hon'ble Bombay High Court in the case held as under:-

> "*The power of suo motu revision under sub-section (I) 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 sub-section, viz., (1) the order is erroneous; and (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the revenue. It has. therefore, lo be considered firstly as to when an order can be said to be erroneous. One finds 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'.

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 ITO acting in accordance with la\v 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 ITO, who passed the order, unless the decision is held to be erroneous, Cases may be visualised where the ITO 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 lo the Commissioner he would have estimated the income at a figure higher than the one determined by the ITO. 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 ITO has exercised the quasi-judicial power vested in him in accordance with law' and arrived at a conclusion and such a conclusion cannot be termed la 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 or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser fax than what was just has been imposed Therefore, in order to exercise power under section 263(1) there must be material before the Commissioner to consider that the order passed by the ITO was erroneous insofar as if is prejudicial to the interests of the revenue and that it must be an order which is not in accordance with the fan' or winch has been passed by the ITO without making any- enquiry in undue haste. 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 lo the State has not been realized or cannot be realized 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 ITA 4023/Mum/2017 proceedings far 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 objectives were available from the records called for and examined by such authority The ITO in this case had made enquiries in regard to the nature of the expenditure incurred by the assssee. The assessee had given a detailed explanation in thai regard by a letter in writing. All these were pan of the record of the case. Evidently, the claim was allowed by the ITO on being satisfied with the explanation of the assessee. This decision of the ITO could not 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 ITO to re-examine the matter. That was not permissible. Hence, the provisions of section 263 were not applicable to the instant case and. therefore, the Commissioner was not justified in setting aside the assessment order."

15. The assessee has relied upon the decision of ITAT, Mumbai Tribunal in the case of Colour Publications Pvt.Ltd. Vs. PCIT (2018) 196 TTJ 257 (Mum). We find that the coordinate bench had considered an identical issue in light of provision of section 263 and after considering relevant facts held as under:-

"AO, on being satisfied with the explanation furnished by the assesses, has applied the provisions of section 40A (2) to disallow excess performance bonus paid to the director of the company which is evident from the assessment order passed by the AO where at para 6 of the of order, the AO has evident discussed the issue of payment of performance bonus to the director. Once the AO has called for necessary enquiries and applied his mind to a particular provision and chose to allow the claim of the assesses, then there is no reason for the PCIT to assume Jurisdiction u/s 263 of the Act on the ground that the AO has not conducted required enquiries and also not applied in mind. In the opinion of the PCIT, the enquiries conducted by the AO may be inadequate, but that by itself would not be a ground for the PCIT to revise assessment order passed by the AO unless the PCIT specifically points out that the AO has grossly overlooked the issue during assessment proceedings. In this case, oa perusal of details filed by the assessee, tribunal found that the AO has caused necessary enquiries and the assesses has filed ail details to justify payment of performance bonus, therefore, tribunal was of the considered view that the PCIT was incorrect in terming the assessment order passed by the AO as erroneous and prejudicial to the interest of the revenue.

(Para 11)

Director who was paid performance bonus is holding 36% share capital in the company Is not a reason for the PCIT to suspect performance bonus paid by the assessee when the assesses has fifed various details to prove that such performance bonus is directly linked to duties performed by the director. Therefore, the PCIT" was totally incorrect in coming to the conclusion that payment of performance bonus tea colorable device for evading payment of dividend distribution tax.

(Para 12)

Assessment order passed by the AO is neither erroneous nor prejudicial to the Interest of the revenue, as the issue of payment of performance bonus has been thoroughly examined by the AO in the light of evidence filed by the assesses during the course of assessment proceedings. The assesses has fifed complete details of payment of performance bonus and also explained why the provisions of section 36(1)(ii) could not be applied In the given facts and circumstances of the case. The AO, on being satisfied with the explanation filed by the assessee has chosen to allow the claim of the assessee and disallowed partial amount of claim u/s 40A{2} of the Income-tax Act, 1961. Therefore, tribunal was of the considered view that the PCIT was in correct in setting aside the assessment order passed by the AO u/s 263 of the Income-tax Act, 1961. Hence, tribunal set aside the order passed by the PCIT u/s 263 of the Act, restore the assessment order passed by the AO u/s 143(3) of the Act."

(Para 13)

16. In this view of the matter and considering the facts and circumstances of this case and also, on perusal of various case laws discussed hereinabove, we are of the considered view that the assessment order passed by the Ld. AO is neither erroneous, nor prejudicial to the interest of the revenue. Therefore, we set aside order passed by the Ld. CIT(LTU) u/s 263 of the I.T.Act, 1961 and restored assessment order passed by the Ld. AO u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961

17. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this 13 /12/2019

Sd/-	**Sd/-**
(PAWAN SINGH)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 13/12/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai