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

BEFORE SHRI. G. MANJUNATHA, ACCOUNTANT MEMBER

&

SHRI. RAVISH SOOD, JUDICIAL MEMBER

ITA No.2996 & 2997/Mum/2015
(**Assessment Years: 2010-11 & 2011-12**)

Small Industries Development Bank Of India 4th Floor, Corporate Accounts Department MSME Development Centre C-11, Block-G Bandra Kurla Complex Bandra (East) Mumbai-400 051	Vs.	Pr.CIT-03 Mumbai
PAN/GIR No.AABCS3480N		
Appellant)	..	**Respondent**)

Assessee by	Shri. Rakesh Joshi, AR
Revenue by	Shri. R.Manjunatha Swamy, CIT (DR)
Date of Hearing	**09/10/2019**
Date of Pronouncement	**13/12/2019**

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

These two appeals filed by the assessee are directed against separate, but identical orders of the Ld. Principal Commissioner of Income Tax -03, Mumbai, both dated 20/03/2015, u/s 263 of the Income Tax Act, 1961 for the AY 2010-11 and 2011-12. Since, the facts are identical issues are common, for the sake of convenience, these appeals were heard together and are disposed- off, by this consolidated order.

ITA.NO.2996/Mum/2015 for AY 2010-11

2. The assessee has, more or less raised common grounds of appeal for both assessment years. Therefore, for the sake of brevity, the grounds of appeal filed for the AY 2010-11 are reproduced as under:-

> *1.(a) On the facts and in The circumstances of the case and in law, The learned Commissioner of Income Tax erred in initiating proceedings u/s.263 of the Income Tax Act, 1961 vide show-cause notice dated 03.03,2015 and passing the order u/s, 263 of the Income Tax Act, 1961 and the reasons assigned by him for doing so are wrong and contrary to the facts of the case, the provisions of Income Tax Act, 1961, and the Rules made there under.*
> *1.(b) On the Facts and in the circumstances of the case and in law, the appellant prays that the order of the learned CIT passed u/s.263 of [he Income Tax Act, 1961 may be cancelled being void ab-initio and bad in law.*
> *2.(a) On the (acts and in the circumstances of the case and in law, the learned Commissioner of Income Tax erred in holding that the learned AO without application of mind has incorrectly allowed. The appellants claim for reduction of Rs. 23,93,25,367/-(Rs. 22,49,00,000o/- + R.S. 1,44,25,367/-) from total Income being write back on account of the Provision for restructuring of assets and Provision for bad and doubtful debts and the reasons assigned by him for doing so are wrong and contrary to the acts of the case, the provisions of Income Tax Act,1961, and the Rules made there under.*
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> *2.(b) Commissioner of Income Tax erred in invoking the provision of section 263(1) of the Income Tax Act, 1961,without appreciating the fact that the Id. Assessing officer had after enquiries, examination of facts, applicability of provisions of the law and proper application of mind, allowed the appellant's claim for reduction of Rs. 23.93 crore from total income being write back on account of the Provision for restructuring of assets and Provision for bad and doubtful debts.*
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> *2.(c) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax erred in setting aside the assessment and directing the id. Assessing Officer to make fresh assessment with regard to the issue of not allowing the deduction on account of write back of the provision for restructuring of assets of Rs, 22.49 crore and provision for bad and doubtful debts of Rs. 1.44 crore and the reasons assigned by him for doing so are wrong and contrary to the facts of the case, the provisions of Income Tax Act, 1961 , and the Rules made there under*

2.(d) On the facts and in the circumstances of the ease and in law, the learned Commissioner of Income Tax erred in holding that the write back of Rs. 23.93 crores on account of the Provision for restructuring of assets and Provision for bad and doubtful debts claimed by the appellant as deduction is out of provisions allowed u/s 36(1)(viia) in earlier assessment years and hence not eligible for deduction and the reasons assigned by hint for doing so are wrong and contrary to the facts of the case, the provisions of Income Tax Act,1961 and the Rules made there under.

2.(e) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax failed to appreciate that (i) provision for bad and doubtful debts made in the books of accounts as per RBI guidelines is not claimed as deduction for income tax purposes and is added back in the computation of total income in earlier years and (ii) the claim of provision for bad and doubtful debts u/s 36(l)(viia)(c) is adjusted/reduced/considered against the claim for bad debts written off u/s 36(l)(vii) in terms of proviso thereto and as such the said finding of learned CIT will amount to double addition. Further, the learned Commissioner of Income Tax has also failed to appreciate that there is no nexus between Provision lor restructuring of assets and. deduction allowed u/s 36(l)(viia)(c) as no deduction is allowed u/s 36(l)(viia)(c) in respect of provision for restructuring of assets. Whenever, provision for restructuring is made, it is added back to the computation of total income and therefore, is reduced from computation of total income al the lime writing back of the same.

3.(a) On the facts and in the circumstances of the case and in law. the leaned Commissioner of Income Tax erred in holding that Id. AO has erred in allowing excess deduction of Rs. 1,40,26,066/- u/s 36(l)(viii), which is wrong and contrary to the facts of the case, the provisions of Act and the Rules made there under;

3.(b) On the fact and in the circumstances of the case and in law. The learned Commissioner of Income Tax ought to have reduced interest on income tax refund of Rs. 22.95 crore from numerator as well as denominator while calculating deduction u/s 36(l)(viii) and not doing so is wrong and contrary to the facts of the case, the provisions of Act and the Rules made there under;

3. The assessee, M/s Small Industrial Development Bank Of India (SIDBI), is a state owned non banking finance company engaged in the business long term financing and banking business, filed its return of income for AY 2010-11 on 29/09/2010, declaring total income of Rs. 1,235,95,37,787/-. Subsequently, a revised return of income was filed on 30/06/2011, declaring total income of Rs. 1,236,25,56,905/-. In this case, the assessment has been

completed u/s 143(3) of the I.T.Act, 1961 on 31/12/2012 and determined total income at Rs. 1,285,98,53,832/-, by making various additions/disallowances, including additions towards disallowances of bad debts, amortization of rents, disallowances of provisions for bad debts, disallowances of expenditure u/s 14A and re-working of deduction claimed u/s 36(1)(vii) of the I.T.Act, 1961, for providing long term finance. Thereafter, the Ld.PCIT-3, Mumbai issued a show cause notice u/s 263 of the I.T.Act, 1961 and called upon the assessee to explain as to why, the assessment order passed by the Ld.AO u/s 143(3), dated 31/12/2012 shall not be revised under the provisions of section 263 of the Act, for the reasons stated in his show cause notice. In the said show cause notice, the Ld.PCIT questioned the issue of allowances of deduction of Rs. 22.49 crores towards provision for restructuring of assets written back and Rs. 1.44 crores towards provision for bad and doubtful debts written back. The Ld.PCIT had also questioned the issue of allowances of deduction u/s 36(1)(viii), in respect of long term finance, on the ground that interest on income tax refund was not reduced, while computing profits and gains of business and profession, which resulted in excess allowances of deduction of Rs.1,40,26,066/-. Therefore, he called upon the assesee to file necessary details. In response, the assessee vide its letter dated 16/03/2015 submitted that the assessment order passed by the Ld. AO u/s 143(3) is neither erroneous, nor prejudicial to the revenue, because the issue of allowances of deduction of Rs. 22.49 crores towards provision for restructuring of assets written back and Rs. 1.44 crores towards provision for bad and doubtful debts written back has been examined by the Ld. AO in assessment proceedings and also, after examining the claim made disallowance towards provision for bad

debts. The assessee has challenged the said disallowances made by the Ld. AO before the Ld. CIT(A) and Ld.CIT(A) has decided the issue in appellate proceedings. Insofar as, re-computation of deduction allowed u/s 36(1)(viii), it was submitted that although, the Ld. AO has examined the issue and recomputed eligible profit, but interest on income tax refund has not been reduced from the profits and gains from the business. The assessee, further submitted that no doubt interest on income tax refund should be excluded from profit, while computing deduction u/s 36(1)(viii), however once interest on income tax refund has been excluded from profits and gains, then the same needs to be excluded from income from operations to determine the quantum of deduction and accordingly, filed a revised computation and as per which, the assesee has determined excess deduction of Rs. 79,06,329/- as against of Rs. 1,40,26,066/- worked out by the Ld.PCIT.

4. The Ld.PCIT, after considering relevant submission of the assessee and also by relied upon plethora of judicial precedents, including the decision of Hon'ble Supreme Court, in the case of Malabar Industrial Company Limited vs CIT 243 ITR 83, held that the assessment order passed by the Ld. AO is erroneous, insofar as, it is prejudicial to the interest of the revenue and accordingly, set aside assessment order passed by the Ld.AO and direct the AO to make a fresh assessment after conducting enquiries and a detailed verification of the facts, in light of discussions given in his revision order. The relevant findings of the Ld.PCIT are as under:-

> *5. I have carefully considered the facts of the case as well as the assessee's contentions mentioned at Para 4 above. The issues raised u/s 263 of the Act in this case; the arguments of the assesses and my observations /opinion are discussed in the subsequent paras.*

6. In this connection, it is noted that the assessment order passed u/s.143 (3) of the Income Tax Act, 1961 for the AY.2010-11 by the Addl.CIT, Range-3(3) is without proper examination of the facts and hence treated as erroneous and prejudicial to the interest of the revenue for the reasons as mentioned herein under:-

7 On perusal of the records, it is seen that the assessee had claimed a deduction of Rs.22,49,00,000/- towards Provision for restructuring of assets written back and also claimed deduction of Rs.1,44,25,367/- towards Provision for bad debts written back',

ii) Further, the aforesaid claims of the assessee made in the computation of income have been allowed by the AO in the order passed u/s. 143(3) dated 31-12-2012. However, on perusal of the records, it is revealed that the department had from A.Y. 2002-03 onwards allowed the Provisions for bad and doubtful debts made by the assessee in the books of account subject to limit of 5% of total income in accordance with the provisions of Section 36(1)(viia)(c) of the Act.
iii) Section 36 (1)(viia)(c) provides that an assessee, being a public financial institution or a state financial corporation or a state industrial investment corporation, is eligible for deduction in respect of any Provision for bad and doubtful debts made subject to limit of 5% of total income.
iv) However, the AO has allowed deduction u/s,36(1) (viia)(c) in every assessment years. In addition to this, the AO has also allowed the claim of the assessee in respect of Bad debts written off u/s. 36(l)(vii) in the computation of income in every assessment years from 2002-03 onwards.
v) Therefore, the total write back of provision for bad and doubtful debts and provision for restructuring of assets of Rs.23,93,25,367/- [224900000+14425367] is out of the Provisions allowed u/s. 36(1)(viia) and bad debts allowed in the computation of income in earlier assessment years and hence not eligible for deduction.

vi] Thus, the order passed u/&.143(3) of the Act, dated 31-12-2012, allowing the aforesaid claims i.e., 'provision for restructuring of assets written back' and 'provision for bad and doubtful debts written back' totaling to Rs. 23,93,25,367/- are erroneous and prejudicial to the interest of the revenue.

vii] Further, on perusal of the records of the assesses company, it is seen that the assessee company had claimed deduction u/s 36(1)(viii) of Rs.83,31,54,230/-, being 20% of profits and gains of business of Rs. 1363,07,75,789/-. During the course of scrutiny assessment, the assessing officer, after certain additions and deletions had arrived profits and gains of business income at Rs.1353,29,35,769/- and allowed deduction of Rs,82,71,73,952/- as against the assessee's claim of Rs.88,31,54,230/-.

viii) In this regard, it is noted that for the year under consideration, the assessee had interest income of Rs.22,94,72,711/- on account of income tax refund (vide note 20 to the balance sheet) and this was included in other income in P&L A/c, This income being income from other sources, it should have been reduced while computing profits and gains of business. However, this was not done, leading to excess allowance of deduction by Rs,l,40,26,066/- and the detailed working is as under:

(in rupees)

Profit and gains of business as per para 6 of A.O]	*13532935769*
Less: Income from other sources	*229472711*
Profits and gains of business	*13303463058(A)*
Revenue from long term finance	*9388559239(B)*
Total Revenue from operations	*30720205538 (C)*
*Deduction allowable 20%*A*B/C*	*813147886/-*
Deduction actually allowed	*827173952/-*
Excess allowed	*14026066/-*

ix) From the above working, it is amply clear that the assessee has been erroneously allowed excess deduction u/s,36(l)(viii) amounting to Rs.1,40,26,066/- and thus the order passed u/s.143(3) dated 31.12.2012 is erroneous and prejudicial to the interest of the revenue.

8. Jurisdiction u/s 263 of the Act: The assessee, in his submission has challenged the action u/s 263, contending that the allowance of deduction of Rs 22,49,00,000/- towards provision for restructuring of assets written back and Rs 1,44,25,367/- towards provision for bad and doubtful debts written back are proper and the same were considered by the A.O while passing the assessment order. Accordingly, any change in the position regarding the same as contemplated by the CIT will tantamount to change of opinion and not make the assessment order 'erroneous'. The following orders have been quoted in its favour, (1) Supreme Court order in the case of Malabar Industrial Co. Ltd vs C1T(243 ITR 83} (2) Ashok Manilal Thakkar Vs. ACIT, 279 ITR (AT) 143 , (3) CIT VS Gabriel India Ltd ,203 ITR 103(1993) (4) Dy. Commissioner of Agricultural Income Tax and Sales Tax Quilon & Another (5) CIT vs. Honda Siel Power Products Ltd (235 CTR 336} (6) CIT vs. Vikas Polymer (194 Taxman 57) (7) CIT vs. International Travel House Ltd 194 Taxman 324 (8) PIEM Hotels Ltd vs DCIT 128 ITD 275 (9} CIT vs. Hindustan Coca Cola Beverages Pvt. Ltd. 1TA Hos.l39L / 2010, 1394/2010 & 1396 / 2010.

8.1 In this regard, I maintain that the decision of the Apex Court in the case of Malabar Industrial Co. Ltd vs CIT (243 ITR 83) cited by the assessee in support of his case can also be relied upon in support of action u/s 263. The Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd reported in 243 ITR 83 held that the exercise of jurisdiction by the CIT suo moto u/s 263 should satisfy the conditions like (i) the order of the AO sought to be revised is erroneous, (ii) it is prejudicial to the interest of the Revenue, (iii) if the AO passed an order without application of mind or failed to apply his mind to the case in all perspective, the order passed by him was erroneous (iv) mere acceptance of a statement filed by the assessee, in absence of any supporting material and without making any enquiry, would make the order of the AO erroneous. I have examined the issues with the case records and I am satisfied that these conditions are satisfied in the case of the assessee, for exercising jurisdiction u/s 263 of the Act. The powers u/s.263 came up for consideration before the Karnataka High Court in the case of CIT v, Infosys Technologies Ltd., (341 ITR 293). Reference was made by the Karnataka High Court to the observations of the Supreme Court in the cases of Electro House (82 ITR 824) and Malabar Industrial Co. Ltd. v. CIT, to hold that since the AO had not disclosed the basis on which the tax reliefs were arrived at in the assessment order, being important for determination of tax liability, there was definitely a possibility of the order being both erroneous and prejudicial. The High Court held that the argument that the materials had been placed before the AO and therefore, the AO had applied his mind to the same could not be accepted to restrict the power of the CIT to revise the orders u/s.263.
Further, the following specific findings were made by the High Court to uphold the exercise of revisional power of the CIT u/s.263.
"We are of the clear opinion that there cannot be any dichotomy of this nature as every conclusion and finding by the assessing authority should be supported by reasons, however brief it may be, and in a situation where it is only a question of computation in accordance with the relevant articles of a DTAA and that should be clearly indicated in the order of the assessing authority, whether or not the assessee had given, particulars or details of it. It is the duty of the assessing authority to do that as if the assessing authority has failed in that, more so in. extending a tax relief to the assessee, the order definitely constitutes an order not merely erroneous but also prejudicial to the interest of the revenue. "

9. In view of the above, I am satisfied that the AO has not applied his mind and has failed to make enquiry with regards to client code modification and hence the assessment order is erroneous and prejudicial to the interest of revenue. The Hon'ble Chennai Bench of the Tribunal while deciding the case of Rajya Laxmi Mills Ltd held that the AO should have made enquiries, before accepting the claim of the assessee. In another case, Jagdish Kumar Gulati (269 ITR 71) decided by the Hon'ble Allahabad High Court, the Court has held that the assessment order can be held to be erroneous and prejudicial when passed without proper enquiries. Considering a situation where in the AO did not raise any special query to examine the claim, still the assessment is held to be

erroneous and prejudicial to the interest of revenue. The Mumbai Bench of Handle ITAT? in the case of Tata B. Solan India (1TA No,3381/Mura/2009 dated 30.9.2010), supports this situation. In that case, since the enquiries were not made by the AO, the order passed by the CIT exercising jurisdiction u/s 263 was held to be valid and the same was upheld. Similar views have been expressed by the said Handle Tribunal in the case of Arvee International reported in 101 ITD. In that case, it is held that when an assessment is made without application of mind, the order will be erroneous. Reliance is also placed on the following decisions where action u/s 263 was upheld.

i. Where relief was granted to the assessee without proper verification. Indian Textiles v CIT, (1986) 157mlTR 1123(Mad): {1985) Tax 79(3) 327.
ii. Assessment made without enquiry into the facts stated in the return. Gee Vee Enterprises v Addl, CIT(1975] 99 IT 375(Del)
iii. Where the Assessing Officer has accepted the claim of the assessee as to non taxability of income erroneously without making proper enquiries, it is beyond dispute that the Commissioner has under section 263 power to set aside the assessment order and send the matter for fresh assessment if he is satisfied that further enquiry is necessary and that the order of the Assessing Officer is prejudicial to the interest of Revenue. Swarup Vegetable Products Industries Ltd (No.l) v CIT 87 ITR 412 (All).
10. In the light of the facts discussed above, the assessment order passed u/s, 143 (3) of the IT. Act, 1961, by the Assessing Officer is found to be erroneous and prejudicial to the interest of revenue within the meaning of Section 263 of the Act. Hence the assessment made by AO is set-aside with a direction to the AO to make a fresh assessment after conducting enquiries and a detailed verification of submission given by the assessee in the return and the statements filed, While completing the fresh assessment proceedings, ***the A.O. will give proper opportunity to the assesses and will examine and consider all the submissions as well as evidence which the assesses may produce before him and thereafter decide this issue on merits on the basis of findings given above and make a fresh assessment as per law.***

5. The Ld. AR for the assesee submitted that the issue is squarely covered in favor of the assesee by the decision of ITAT 'E' bench in assessee own case for AY 2007-08 and 2008-09, where under identical set off facts and an identical issue the Ld.PCIT has revised the assessment order under the provision of section 263 of the Act, but the ITAT has quashed 263 order passed by the Ld. AO, on the ground that when, the issue on which the proceedings has

been initiated by the Ld.PCIT u/s. 263 was subject matter of dispute between the Ld.CIT(A), then there is no jurisdiction to the Ld.PCIT to invoke jurisdictional powers u/s 263 of the I.T.Act, 1961. The Ld. AR, further submitted that insofar as, the second issue questioned by the Ld. PCIT, regarding excess deduction allowed u/s 36(1)(viii) towards long term finance given by the assesee, although the issue has been examined by the Ld. AO and recomputed deduction allowed under the act, but fact remains that interest on income tax refund was not excluded from income from business or profession before allowing deduction u/s 36(1)(viii). He, further submitted that once, interest on income tax refund is considered as income from other sources and excluded from profits and gains of business, then certainly, the same needs to be reduced from total revenue from operations to determine amount deductable u/s 36(1)(viii) of the I.T.Act, 1961 and accordingly, filed a revised computation, however, the Ld.PCIT has ignored the computation filed by the assessee. Therefore, he argued that there is no merit in the contention of the Ld.PCIT that the assessment orders passed by the Ld. AO is erroneous, insofar as, it is prejudicial to the interest of the revenue.

6. The Ld. DR, on the other hand, strongly supporting order of the Ld.PCIT submitted that it is incorrect on the part of Ld. AR for the assessee to argue that the issues questioned by the Ld.PCIT in revision proceedings is subject matter of appeal before the Ld.CIT(A), because the issue taken up by the Ld.PCIT and the issue before the Ld.CIT(A) are altogether different. Therefore, the Ld.PCIT was right in taken up the issue of allowances of deduction of Rs. 22.49 cores towards provision for restructuring of assets written back. He, further submitted that insofar as, re-computation of

excess deduction allowed u/s 36(1)(viii), it is an admitted fact that the Ld.AO has not considered the facts in right perspective of the Act, to allow deduction, which resulted in excess deduction of Rs. 1.40 cores, which is evident from the fact that the assessee has admitted the fact that interest on income tax refund has to be excluded from profit and gains of business, however contended that the same needs to be excluded from total revenue from operations in order to compute eligible deduction. Therefore, he submitted that the assessment order passed by the Ld.AO is erroneous, insofar as, it is prejudicial to the interest of the revenue and hence, there is no error in the findings of the Ld.PCIT in revision of assessment order and his order should be upheld.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with case laws cited by both parties. The Ld.PCIT had an inherent jurisdiction to suo-moto revise the assessment order passed by the Ld. AO, if he is satisfied that the assessment order is erroneous, insofar as it is prejudicial to the interest of the revenue. Therefore, in order to invoke revisional jurisdiction, the Ld.PCIT should satisfy himself that the assessment order is erroneous, insofar as it is prejudicial to the interest of the revenue. Further, as per the said provisions, in order to term an assessment order is erroneous, insofar as it is prejudicial to the interest of the revenue, the twin conditions provided therein must co-exist i.e, the assessment order is erroneous and it is prejudicial to the interest of the revenue, unless the two conditions are co-exist, the Ld.PCIT does not have any power to revise the assessment order this is because, if the order is erroneous, but not prejudicial to the interest of the revenue are vice-

a –versa, the Commissioner does not have any power to revise the assessment order.

8. In this legal background, if you examine the facts of the present case, we find that the assesee has claimed deduction from total income towards written back of restructured assets of Rs. 22.49 crores, on the ground that the said written back has not been taken out of provisions for bad and doubtful debts, which have been allowed to the assesee u/s 36(1)(viia)(c) in earlier years. Further, the same has not been claimed as deduction u/s 36(1)(viia)(c) and also, the provision created in earlier years has been disallowed in the computation of total income. Similarly, in respect of provision for bad and doubtful debts written back, the assessee has not claimed the benefit of deduction in earlier year and also, the same has been added back to the total income. From the above, it is very clear that whenever, a provision was created in earlier years the assesee has not taken the benefit of deduction u/s.36 (1)(viia)(c) and consequently, when the amount is written back from provision and credited to profit and loss account, the same cannot be treated as income u/s. 41(1) of the I.T.Act, 1961. Therefore, we are of the considered view that the Ld.PCIT was erred in coming to the conclusion that Ld.AO has wrongly allowed deduction of Rs. 22.49 crores, towards provision for restructuring of assets written back and towards provision for bad and doubtful debts written back.

9. We, further noted that this issue has been subject matter of consideration from the ld. AO during the assessment proceedings and also, the Ld. AO has disallowed amount claimed towards deduction under the head bad and doubtful debts, which is evident

from the fact that the assessee has challenged the disallowances made by the Ld.AO towards provision for bad and doubtful debts before the Ld.CIT(A). Once, an issue is subject matter of assessment proceedings and also, bone of contention between the assessee and the AO before the first appellate authority, then the assessment order passed by the Ld.AO, insofar as that issue get merges with the order of the Ld.CIT(A) and the Ld.CIT(A) can proceed with the issues in accordance with law. Further, once the issue is subject matter of appeal before the Ld.CIT (A), then as per the provision of Explanation 3 to section 263(1) revisional jurisdiction cannot be invoked by the Ld.PCIT to revise the assessment order. This proposition has been considered by the coordinate bench of ITAT, Mumbai 'E' bench in assessee own case for AY 2007-08 in ITA No. 3488/Mum/2018, where it was held that when, the issue taken up by Ld. PCIT in revisional proceedings was subject matter of assessment proceedings and also, litigation before the Ld.CIT(A), then there is no power to the Ld.PCIT to revise the said assessment order on the issue as per the provision of Explanation (3) to section 263(1) of the Act. The relevant findings of the Tribunal are as under:-

> *7. We have heard the rival submission of the parties and have gone through the orders of authorities below that the assistance of ld. Representative of the parties. The ld. AR of the assessee submits that the Assessing Officer while passing the assessment order made detailed investigation and raised sufficient enquiry. The Assessing Officer vide its notice under section 142(1) dated 24.08.2009 raised various enquiries including claim of bad and doubtful debts written off along with the reasons to show as to why it should be allowed along with the necessary evidence and so that debtors have actually been written off in the accounts. The details of bad-debts recovered and the order in which the claims have been offered for taxation and no claim as deduction under section 36(1)(vii). The copy of notice dated 28.04.2009 is placed on record. The Assessing Officer further vide notice dated 25.06.2009 again required necessary details regarding deduction under section 36(1)(vii)(a) and 36(1)(viii) the assessee vide its reply dated 02.06.2009 in response to the notice under section 142(1) dated 28.04.2009 furnished the details*

to the Assessing Officer along with note on the claim of bad debts written off and provision for bad and doubtful debts along with the list of bad-debts written off and vouchers dated 31.03.2007 evidencing the actual write off such debts in the accounts of assessee. The Assessing Officer after considering the details furnished by assessee passed the assessment order. The Assessing Officer while passing the assessment order made disallowance of Rs. 15.87 crore on account of bad debts under section 36(1)(viii). Against the disallowance, the assessee filed appeal before the ld. CIT(A) on the disallowance made by assessee. The Assessing Officer passed the assessment order after full satisfaction of the case. As the assessee has filed appeal before the ld. CIT(A) on similar issue, therefore, the ld. PCIT was precluded from revising the assessment order. The ld. AR submits that the Assessing Officer while passing the assessment order has taken one of the possible views. Therefore, the assessment order was not erroneous. The twin condition as provided under section 263 of the Act when the order is erroneous in so far as prejudicial to the interest of revenue are not satisfied. In support of his submission, the ld. AR of the assessee relied upon the decision of Malabar Industrial Company Ltd. (supra), decision of Hon'ble Mumbai High Court in CIT vs. Gabriel India Ltd. (supra).

8. On the principle of merger, the ld. AR of the assessee relied upon the decision of jurisdictional High Court in CIT vs. Paul Brothers (supra), CIT Vs K Sera Sera Productions Ltd (374 ITR 530 Bom) and Gujarat High Court in CIT Vs Nirma Chemicals works P. Ltd (309ITR 67 Guj).

9. On the other hand, the ld. Departmental Representative (DR) for the revenue supported the order of ld. PCIT. The ld. DR submits that the Assessing Officer has not discussed the issue in details while passing the assessment order and that the Assessing Officer after receiving the reply of assessee allowed the relief to the assessee. Therefore, the order passed by Assessing Officer is not only erroneous but prejudicial to the interest of revenue.

10.We have considered the rival submission of the parties and have gone through the orders of authorities below. The ld AR for the assessee vehemently submitted that against the partial disallowances of bed debts the assessee filed appeal before First appellate authority and that in view of clause (c) of Explaination-1 of section 263 the ld PCIT was precluded to revised the assessment order on the subject matter of appeal. We have seen that the assessee while filing the reply to the show cause notice under section 263 has specifically brought this fact in the notice of ld PCIT, which has been duly recorded by ld PCIT in his order. However, the ld PCIT failed to address the objection raised by the assessee that their appeal on the similar issue is pending before ld CIT(A). This fact was not disputed by ld. CIT-DR for the revenue. The ld. AR for the assessee has filed on record the copy of the ld. CIT(A) dt. 10.03.2011 (page No. 56 to 61 of PB).

11. For appreciation of the contention of ld AR for the assessee, the relevant part of Section 263 of the Act and Explanation (c) there under

which are material for consideration on the issue in this appeal and read as under

> *"263. Revision of orders prejudicial to revenue.—(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. Explanation.[1]-For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—*
>
> *******
>
> *(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal, the powers of the Commissioner under this sub-section shall extend to such matters as had not been considered and decided in such appeal."*

12. A careful reading of the provisions of section 263 makes it clear that the Commissioner of Income-tax is entitled to revise an assessment order insofar as the order is erroneous and prejudicial to the interest of the revenue, however, Explanation (c) places an embargo on the Commissioner of Income-tax in case of subject-matter of any appeal which has been considered and decided in such appeal. In other words, before the Commissioner of Income-tax exercises the jurisdiction under section 263 of the Act, the Commissioner of Income-tax is required to ascertain whether the order referred to in sub-section (1) of section 263 of the Act had been the subject-matter of any appeal, and if yes, the revisional powers shall be available only if such subject-matter had not been considered and decided in such appeal

13.The Hon'ble Bombay High Court in CIT Vs K Sera Sera Productions Ltd (374 ITR 530 Bom) held where issues of income of assessee from production of film and deduction of cost of production there against had been considered and decided in appeal by first appellate authority, said issues could not be made subject matter of revision under section 263. The relevant part of the order is extracted below:

> *" 10. We find that despite this position emerging from the record and being undisputed, the order under section 263 of the Income Tax Act makes detailed reference to the show cause notice. The show cause notice as also this order passed under section 263 make detailed reference to the claims of the Assessee and which were part of the Appeal before the Commissioner and dealt with by him in his order dated 12th October, 2011. The order of the Commissioner under section 263 dated 29th March, 2012, from paras 8 onwards, makes extensive reference to these aspects. In the circumstances, what further emerges is that not only did the revisional authority purport to revise the Assessing Officer's order, but he purported to deal with the same direction which was issued*

in the order of the first appellate authority and which was given effect to by the Assessing Officer. Meaning thereby, the contents of the remand report, giving effect to the order of the first appellate authority, as submitted by the Assessing Officer, came to be reconsidered and revisited. In addition thereto, one more aspect of sale of theatrical rights of "Darna Zaroori Hai" to M/s. RGV Enterprises was considered. Naturally, therefore, the doctrine of merger was invoked by the Assessee and it was applied by the Tribunal to uphold the objection raised by the Assessee. 11. In the above factual circumstances, we do not find that the Tribunal erred in holding that clause (c) of the Explanation to sub section (1) of section 263 of the Income Tax Act, 1961 cannot be applied. In the present case, that has no application because the matters which have been considered and decided in the Appeal by the first appellate authority are being made subject matter of the revisional authority's order. In other words, the power to revise, as conferred by section 263, is sought to be exercised so as to deal with the same matters which have been considered and decided in the Appeal. We do not find any merit in Mr. Mohanty's submission because detailed references have been made in the foregoing paragraphs to the case of the Assessee before the Assessing Officer, his initial order, the order of the first appellate authority, the direction issued by the first appellate authority and which was given effect to by the Assessing Officer. All these would denote that something which was very much part and parcel of the appellate authority's order and dealt with extensively therein is now sought to be revised and revisited. Firstly, if the income of the Assessee from the film is Rs.11,25,00,000/-, then, whether the explanation of the Assessee that it is not so deserves to be considered or not by the Assessing Officer is grievance No. 1/ground No. 1 before the first appellate authority. Secondly, if that is taken to be the income of the Assessee and without admitting it to be so the cost of production of the film needs to be deducted by applying Rule 9A of the Income Tax Rules. Thus, that is ground No. 2 in the memo of Appeal before the first appellate authority and in his order dated 12th October, 2011. Both these matters are very much part of the revisional authority's order dated 29th March, 2012. The attempt to reopen them cannot be saved as clause (c) of Explanation below sub-section (1) of section 263 of the Income Tax Act, 1961 had no application.

14.The Hon'ble Gujarat High Court in CIT Vs Nirma Chemicals works P. Ltd (309ITR 67 Guj) held that the Commissioner is entitled to revise an assessment order insofar as the order is erroneous and prejudicial to the interest of the revenue, but the Explanation (c) to section 263 places an embargo on the Commissioner in case of subject-matter of any appeal which had been considered and decided in such appeal. In other words, before the Commissioner exercises the jurisdiction under section 263, he is required to ascertain whether the order referred to in sub-section (1) of section 263 had been the subject-matter of any appeal, and if yes, the revisional powers should be available only if such subject-matter had not been considered and decided in such appeal.

> *15.Further Hon'ble Bombay High Court in Sonal garments Vs JCIT (95 ITD 363 Mum) held that from the chronology of events it appears that computation of deduction under section 80HHC was a subject-matter of appeal before the Commissioner (Appeals). The Commissioner (Appeals) had given some findings on the computation of deduction under section 80HHC. Therefore, the assessment order had merged with the order of the Commissioner (Appeals). Thus, under Explanation (c) to section 263(1), such action of the Commissioner was not permissible. The word 'matter' is certainly a word of wide import and represents a subject or situation that one needs to think about, discuss or deal with. The Hon'ble High Court also after considering the similar objection of the department held that it was difficult to accept the submission of the department that the issue of depreciation being optional or the issue whether the assessee was at all entitled to deduction under section 80HHC or not, was not a subject-matter of appeal filed by the assessee before the Commissioner (Appeals). A matter might have many aspects and the above-mentioned two factors might be the aspects of the matter but not the entire 'matter' itself. The 'matter', in the instant case, was deduction under section 80HHC. Therefore, the assessment order, so far as it related to deduction under section 80HHC, had merged with the order of the Commissioner (Appeals) and, therefore, exercise of power by the Commissioner under section 263 was even not available under Explanation (c) to section 263(1).*
>
> *16. In view of the above legal and factual discussions, the order passed by ld. PCIT under section 263 was not a valid order in the eyes of law, which we quashed. Considering the fact that we have quashed the order of ld. PCIT on one of the legal submissions of the ld. AR for the assessee therefore, the discussions on other legal submissions and merit of the case has become academic.*

10. In this view of the matter and considering the facts and circumstances of this case, we are of the considered view that insofar as, the issue of allowances of deduction of Rs. 22.49 crores towards provision for restructuring of assets written back and Rs. 1.44 crores towards provision for bad and doubtful debts written back, the assessment order passed by the Ld.AO cannot be termed as erroneous, insofar as it is prejudicial to the interest of the revenue and hence, we set aside the findings of the Ld.PCIT and restored the findings of the Ld.AO.

11. Coming back to the second issue questioned by the Ld.PCIT. The Ld.PCIT has questioned deduction allowed u/s 36(1)(viii) of the I.T.Act, 1961 of Rs. 1.40 crores, being profits from long term finance given by the assesee, on the ground that although, the Ld. AO has examined the issue and recomputed eligible profit and gains and income from operations, but failed to reduce interest received on income tax refund of Rs. 22.95 crores from profits and gains of business before allowing deduction u/s 36(1)(viii) of the I.T.Act, 1961 and consequently, allowed excess deduction of Rs. 1.40 crores. We find that although, the Ld. AO has examined the issue at the time of assessment proceedings and recomputed eligible deduction u/s. 36(1)(viii), but failed to exclude interest received on income tax refund from profits and gains of business before allowing deduction u/s. 36(1)(viii) of the I.T.Act, 1961. We further noted that the assesee has accepted the fact that the said interest on income tax refund needs to be excluded from profits and gains of the business. However, further contended that once, it has been excluded from profits and gains of the business, then the same needs to be excluded from revenue from operations in order to compute eligible deduction u/s.36(1)(viii) and accordingly, filed a revised computation of eligible deduction u/s.36(1)(viii), which is part of paper book page 107 filed by the assessee. Therefore, we are of the considered view that insofar as, this issue is concerned the assessment order passed by the Ld. AO is erroneous, insofar as it is prejudicial to the interest of the revenue. However, as regards excess deduction computed by the ld. PCIT and excess deductions worked out by the assessee, there is a difference, which needs to be thoroughly examined by the Ld.AO in light of facts gathered by the Ld.PCIT and revised computation filed by the assessee in revisional proceedings. Hence,

we are of the considered view that the assessment order passed by the ld. AO u/s 143(3), insofar as, this issue is concerned is erroneous, insofar as prejudicial to the interest of the revenue.

12. In this view of the matter and considering the facts and circumstances of this case, we are of the considered view that the assessment order passed by the AO u/s 143(3) is neither erroneous, nor prejudicial to the interest of the revenue, insofar as, the first issue of allowances of deduction of Rs. 22.49 crores towards provision for restructuring of assets written back and Rs. 1.44 crores towards provision for bad and doubtful debts written back. Insofar as, the second issue of excess allowances of deduction u/s.36 (1)(vii), the assessment order passed by the Ld.AO is erroneous, insofar as it is prejudicial to the interest of the revenue and hence, we modified the findings of the Ld.PCIT. However, while considering the second issue of excess deduction allowed u/s.36 (1)(viii), we direct the AO to exclude interest on income tax refund from profits and gains of business and also from total revenue from operations for the purpose of determination of allowable deduction u/s.36(1)(viii) of the I.T.Act, 1961.

13. In the result, appeal filed by the assesse ITA No.2996/Mum/2015 for AY 2010-11 is treated as partly allowed.

<u>ITA NO. 2997/Mum/2015 for AY 2011-12</u>

14. The assessee has raised the following grounds of appeal:

> *1.(a) On the facts and in The circumstances of the case and in law, The learned Commissioner of Income Tax erred in initiating proceedings*

u/s.263 of the Income Tax Act, 1961 vide show-cause notice dated 02.03.2015 and passing the order u/s, 263 of the Income Tax Act, 1961 and the reasons assigned by him for doing so are wrong and contrary to the facts of the case, the provisions of Income Tax Act, 1961, and the Rules made there under.
1.(b) On the Facts and in the circumstances of the case and in law, the appellant prays that the order of the learned CIT passed u/s.263 of [he Income Tax Act, 1961 may be cancelled being void ab-initio and bad in law.
2.(a) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax erred in holding that the learned AO without application of mind has incorrectly allowed. The appellants claim for reduction of Rs. 1,23,67,016/- from total Income being write back on account of the Provision for for bad and doubtful debts and the reasons assigned by him for doing so are wrong and contrary to the acts of the case, the provisions of Income Tax Act,1961, and the Rules made there under.

2.(b) Commissioner of Income Tax erred in invoking the provision of section 263(1) of the Income Tax Act, 1961,without appreciating the fact that the Id. Assessing officer had after enquiries, examination of facts, applicability of provisions of the law and proper application of mind, allowed the appellant's claim for reduction of Rs. 1.24 crore from total income being write back on account of the Provision for restructuring of assets and Provision for bad and doubtful debts.

2.(c) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax erred in setting aside the assessment and directing the id. Assessing Officer to make fresh assessment with regard to the issue of not allowing the deduction on account of write back of the provision for bad and doubtful debts of Rs, 1.24 crore the reasons assigned by him for doing so are wrong and contrary to the facts of the case, the provisions of Income Tax Act, 1961 , and the Rules made there under

2.(d) On the facts and in the circumstances of the ease and in law, the learned Commissioner of Income Tax erred in holding that the write back of Rs. 1.24 crores on account of the Provision for bad and doubtful debts claimed by the appellant as deduction is out of provisions allowed u/s 36(1)(viia)(c) in earlier assessment years and hence not eligible for deduction and the reasons assigned by hint for doing so are wrong and contrary to the facts of the case, the provisions of Income Tax Act,1961 and the Rules made there under.
2.(e) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax failed to appreciate that (i) provision for bad and doubtful debts made in the books of accounts as per RBI guidelines is not claimed as deduction for income tax purposes and is added back in the computation of total income in earlier years and (ii) the claim of provision for bad and doubtful debts u/s 36(l)(viia)(c) is adjusted/reduced/considered against the claim for bad debts written off

u/s 36(1)(vii) in terms of proviso thereto and as such the said finding of learned CIT will amount to double addition.

3.(a) On the facts and in the circumstances of the case and in law. the leaned Commissioner of Income Tax erred in holding that Id. AO has erred in allowing excess deduction of Rs. 73,30,298/- u/s 36(1)(viii), which is wrong and contrary to the facts of the case, the provisions of Act and the Rules made there under;

3.(b) On the fact and in the circumstances of the case and in law. The learned Commissioner of Income Tax ought to have reduced interest on income tax refund of Rs. 14.73 crore from numerator as well as denominator while calculating deduction u/s 36(1)(viii) and not doing so is wrong and contrary to the facts of the case, the provisions of Act and the Rules made there under;

15. The facts and issues involved in this appeal filed by the assessee are identical to the facts and issues, which we had considered in ITA No. 2996/Mum/2015 for AY 2010-11. The reasons given by us in proceedings paragraphs in ITA No. 2996/Mum/2015 shall mutatis mutandis apply by this appeal, as well. Therefore, for similar reasons, we modified the findings of the Ld.PCIT in 263 proceedings and partly allowed appeal filed by the assessee.

16. In the result, appeal filed by the assessee ITA No. 2997/Mum/2015 for AY 2011-12 is partly allowed.

17 As a result, both appeals filed by the assessee are partly allowed.

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

Sd/-	**Sd/-**
(RAVISH SOOD)	**(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