IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 171/Jodh/2018
(ASSESSMENT YEAR-2013-14)

M/s Nokha Agro Services, 18 KM Stone, NH-15, Sriganganagar Road, Bikaner.	Vs	Pr. Commissioner of Income Tax, Bikaner.
(Appellant)		**(Respondent)**
PAN: AAFFN 8164 R		

Assessee By	Shri Amit Kothari & Ashok Mundra (CAs)
Revenue By	Shri K.C. Badhok CIT-DR
Date of hearing	16/03/2020
Date of Pronouncement	20/03/2020

O R D E R

PER SANDEEP GOSAIN, J.M.

The present appeal has been filed by the assessee against the order of Ld. Pr. CIT, Bikaner dated 16.03.2018 passed U/s 263 of the Income Tax Act, 1961 (in short, the Act) for the assessment year 2013-14. Following grounds have been taken:

> *"1. The order passed by the ld. Pr. CIT, Bikaner u/s 263 is bad in law and bad on facts.*
>
> *2. The ld. CIT had erred in observing that original assessment made u/s 143(3) on 31st March, 2o16 was erroneous so far as prejudicial to the interest of revenue.*

3. *The ld. CIT had no firm belief that the original order passed was erroneous or prejudicial to the interest of Revenue, and has erred in setting aside the original order.*

4. *The impugned order U/s 263 is illegal and most unjustified, as the same is not based on any valid material or legal evidence whatsoever on records, but the same is merely based on wrong suspicions and baseless presumptions. The impugned order deserves to be quashed.*

5. *The ld. Pr. CIT has erred in observing that the interest expenses and interest payment had not been properly verified by the ld. AO at the time of original assessment and purpose of the business needs was not examined and order was therefore erroneous and prejudicial.*

6. *The ld. Pr. CIT has erred in observing that the deduction u/s 80IB(A) had not been properly examined by the ld. AO as there is payment of rent also. The ld. Pr. CIT has erred in observing that the same is only partly acceptable.*

7. *The ld. Pr. CIT has further erred in making a general observation that the payment of Municipal Taxes and insurance had not been properly examined.*

8. *The ld. Pr. CIT has further erred in observing that the deduction of 100% income claimed in relation to Branch office income had not been fully examined.*

9. *The ld. Pr. CIT has further erred in observing that the Ld. AO has not properly examined the income shown from Handing and Transportation and Weigh Bridge Income.*

10. *The ld. Pr. CIT has further erred in observing that the ld. AO has not properly examined the claim of depreciation.*

11. *The ld. Pr. CIT has erred in observation that the Dunnage material expenses claimed has not been examined with regard to any scrap realization of such material.*

12. *The ld. Pr. CIT has erred in observing that no remuneration to partners had been paid and high income had been shown and if remuneration would have been paid the same would have been*

taxable in the hands of the partners and such issue has not been examined.

13. *The ld. CIT has erred in expanding the scope of proceedings u/s 263 beyond the notice issued as if the fresh assessment proceedings were being conducted which is bad in law and bad on facts.*

14. *The appellant pray for suitable costs.*

15. *The appellant pray for stay of impugned order.*

16. *The appellant crave liberty to add, amend, alter, and modify any of the ground of appeal on or before its hearing before your honour."*

2. The main grievance of the assessee relates to passing of order U/s 263 of the Act by the Pr.CIT.

3. The ld AR appearing on behalf of the assessee has reiterated the submissions as were made before the ld. Pr.CIT and also filed written submissions. The main contents of the written submissions filed before the ld Pr.CIT was reproduced as under:

> It appears from the notice that present proceeding have been initiated by considering the assessment order to be erroneous and prejudicial to the interest of the revenue for the reason that following facts have not been enquired and investigated before passing the assessment order:
>
> i) claim of net interest Rs. 75,81,296/- allowed without verification of nature of interest, business need of loans on which interest paid,
> ii) Godown rent allowed Rs. 10,15,93,864/- at Head office against deduction claimed u/s 80IB(11A) in respect of ware house receipts without verification,
> iii) Claim of municipal tax, insurance charges, depreciation, dunnage material without verification,

iv) Claim of deduction u/s 80IB(11A) on Handling, transportation and weigh bridge receipt while assessee has no transport vehicle and weighbridge,
v) No claim of remuneration to working partners with an intention to get maximum benefit of exemption u/s 80IB(11A),

We may be permitted to submit that on facts of the case and in view of settled law on the subject, the aforesaid issues not warrant any action u/s 263 of the Act because the assessment order passed by the learned Assessing officer has been made after detailed scrutiny of the books of account, after making enquiries, verification and examination of net interest, godown rent, municipal tax , insurance charges, depreciation, dunnage material expenses claimed and claim of deduction u/s 80IB (11A) for ware house receipts, handling, transportation and weigh bridge receipts and no claim of remuneration to working partners. As such your views that assessment was completed in undue haste and without making inquiries and investigation, so the order passed by the A.O. is erroneous and prejudicial to the interest of revenue is not correct and not justified. It seems that full facts have not been placed before your good self. Kindly permit us to elaborate the same.

An order cannot be termed as erroneous unless it is not in accordance with law. If A.O. acting in accordance with law makes 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.

In CIT Vs Gabriel India Ltd. (1993) 114 CTR (Bomb) 81 it was held by the High court that order sought to be revised must be erroneous and also by virtue of its being erroneous prejudice must have been caused to interest of the revenue. Sec 263 does not visualise substitution of judgement of Commissioner for that of A.O. unless the decision is held to be prejudicial when it has caused loss of revenue. There must be material before the Commissioner to satisfy himself prima facie that two requisites are present, power cannot be exercised at the whims and caprice of Commissioner.

In Vidisha Tractors Vs ACIT (1995) 53 TTJ (Ind) 432 it was held by I.T.A.T. Indore bench that merely because Assessing officer did not meticulously dealt with the issue of commission payments and

genuineness of credit entries it can't be said that there was no application of mind by him, CIT was in error in exercising his revisionary power, impugned order quashed.

We submit point wise reply in details against your observations in the following paras:-

(1) <u>EXPLANATION IN RESPECT OF CLAIM OF NET INTEREST RS. 75,81,296/-</u>

In show cause notice your honour has stated that from appraisal of assessment record it is observed that assessee firm has received interest income Rs. 84,20,153/- against which interest paid during the year Rs. 1,60,01,449/- as such net interest of Rs. 75,81,296/- claimed as expenditure. The A.O. has not enquired and verified the nature of interest paid, necessity of heavy loan taken on interest for business need. As such claim of net interest is not only wrongly claimed but wrongly allowed by the A.O. without any enquiry and verification of the facts.

The proposed revision u/s 263 for issue of non verification and enquiry of net interest allowed as expenditure is unwarranted and unsustainable due to the following reasons:-

i) During the course of assessment proceeding the A.O. vide questionnaire has asked the assessee to submit details of interest received and paid together with explanation regarding sources of loans on which interest paid and justification of advance or investments on which interest received.

In reply to the said question assessee has submitted details of interest paid Rs. 1,60,01,449.00 to bank i.e. Punjab National Bank, DCBL and ICICI Bank and Unsecured loans and interest received Rs. 84,20,153/- from FDR with Punjab National Bank and DCBL and Interest on advances to parties. The net interest of Rs. 75,81,296/- charged to Profit and Loss as expenditure.

In the course of assessment preceding the learned A.O. has accepted the claim of interest (Net) only after

satisfaction that interest received is out of FDR with PNB and DCBL made for the purpose of Bank guarantee given to the NCDEX and other authorities. The interest received from advances to parties for short period for proper utilisation of surplus fund of the firm. TDS has been deducted by the parties on interest paid to the assessee firm.

Interest paid on Term loan from DCBL, OD limit from Punjab National Bank and ICICI Bank and Unsecured loans from the parties. TDS has been deducted on interest paid to unsecured loans.

ii) The A.O. has appraised the claim of interest paid on term loan, O.D. limit and unsecured loans after satisfying himself that these loans are for the purpose of warehousing activities of the assessee business.

iii) While framing the assessment order learned A.O. has reviewed the reason for investment in FDR where in assessee earn lower interest than the interest paid on borrowed loans. The learned A.O. has accepted need of investment only after verification the fact that FDR is required for Bank guarantee to NCDEX and it is essential and legitimate need of the business.

Looking to the above explanation, record and facts placed on record it is proved that interest allowed by the A.O. is neither erroneous nor prejudicial to the interest of revenue.

(2) <u>EXPLANATION FOR GODOWN RENT RS. 10,15,93,864/- ALLOWED IN HEAD OFFICE WHILE DEDUCTION CLAIMED U/S 80IB (11A) AGAINST WARE HOUSE RECEIPT</u>

In show cause notice your honour have stated that from appraisal of Trading, Profit and Loss Account it is observed that assessee has claimed Godown rent paid Rs. 10,15,93,864/- in Head office account, neither assessment record kept such details nor the A.O. asked and verified the facts that assess has paid godown rent while deduction u/s 80IB(11A) claimed

against ware house receipt. As per provision of section 80IB (11A) deduction against ware house receipts allowed only to those assessee which have own ware house.

The proposed disallowance of claim of Godown rent of Rs. 10,15,93,864/- paid by H.O. is unwarranted and unsustainable due to the following reasons:-

*i)*The learned DCIT Circle 2, Bikaner (A.O.) in his assessment order clearly stated That "*During the course of assessment proceedings, as stated above the issues for allowing claim of deduction u/s 801B (11A) were elaborately discussed with the A/R and detailed queries as stated below were raised:*

" In this regard, in continuation of assessment proceeding your attention is drawn towards the first questionnaire issued by the undersigned dated 25.01.2016 whereby it was pointed out in query no. 18 that for claiming deduction u/s 80IB, it is mandatory that as per rule 18BBB of IT Rules, a report of audit in form no. 10CCB is appended with tax audit report given in the form 3CD/CB but in the audit report submitted the same was not found enclosed therewith, and in reply to that vide your reply dated 03.02.2016 you have not commented anything but now submitted a copy of said report in 10CCB which was uploaded electronically in the departmental site on 02.10.2013. Perusal of this report reveals that this has been filed in respect of your unit at Bikaner situated at 18KM. stone, NH-15, Khara. Now from this report as well as the audit report submitted in form 3CD earlier raises some more queries which are mentioned as under:

1. *You are claiming three independent undertakings as according to you initial assessment year of commencement of operation of each of the unit is different but the online submission of the audit report in form 10CCB is only in respect of Ist unit at Khara and no mentioning of other units situated at Boranada(Jodhpur) and Nokha is done therein. It*

is not understandable that how you have made a consolidated claim of 80IB in your computation of Rs. 2,11,31,163/-.

2. *Since it is an established fact that no separate audit report in form 10CCB have been uploaded electronically by the firm in respect of two other units which claimed as your other undertakings doing eligible business just like the unit at khara, Bikaner and entitled for deduction on account of claim u/s 80IB, but the conditions for claiming deduction under section 80IB for these two units have not been fulfilled and please state why not any deduction of claim for these units under section 80IB situated at Nokha and Jodhpur, be disallowed?*

In due course of the assessment proceedings at various stages the assessee's A/R vide his detailed reply quoting various judicial pronouncements. The relevant portions of the submission of the A/R in regard to all the above three points are re-produced hereunder in order to testify his submission critically:

1&2 In the matter of three separate audits report in form no. 10CCB for each unit:

We would like to state that new units established at Boranada and Nokha were completely separate from the unit situated at Khara. Its location, administration office, Invoices, books of Accounts, Financial Statements and other required documents were managed separately. The year under review was the first year in which the e-filing of the audit report in form 10CCB under section 80IB became mandatory. Therefore it was construed that like report u/s 44AB, only one report can be e-filed hence, composite report comprising of the aggregate deduction was electronically filed at the portal of the income tax department. After end of the year separate trial balances are generated with

reference to each unit and financial statements are clubbed out. Even interest on capital paid by the units situated at Boranada and Nokha to its Khara office against investment of capital at these locations which is shown in the Profit and Loss account of the respective Branches. The assessee is hereby furnishing separate reports in form no. 10CCB u/s 80IB of the I.T. Act in relation to all the eligible business activity which qualify for deduction u/s 80IB (11A). The assessee have made a consolidated claim of the 80IB in his computation is Rs. 21131163.00. Statement showing how the assessees have calculated the amount of claim u/s 80IB is enclosed with the letter."

The learned A.O. in his order stated that *"during the course of assessment proceedings the A/R of the assessee was queried regarding working and justification of the amount of the claim made u/s 80IB by the firm as the working given by him in reply to the specific query made in the questionnaire in this regard. He has furnished the calculation of net profit regarding "Rental" income and "Infrastructural" income in respect of head office as well as branch offices. This year the assessee firm has claimed 25% of deduction u/s 80IB (11A) on its first unit started commencing business at 18th KM Stone, NH-15, Khara form AY 2008-09, being the sixth year of the claim and in respect of other two undertakings situated at Nokha (year of commencement of business AY 2012-13) and Boranada, Jodhpur (year of commencement of business AY2009-10), the firm has claimed 100% of deduction u/s 80IB . On perusal of the details furnished by the A/R as well as on the examination of books of accounts it was found that there is disproportionate claim of expenses under various heads keeping in view the nature and scale of business activities shown by the assessee under the head of Rental and Infrastructural income. Computation of net profit worked out or claiming deduction u/s 80IB reveals*

that gross receipts in respect of branch Office has been shown under the head of Rental and Infrastructure to the tune of Rs. NIL and Rs. 3,16,61,031/- respectively and in respect of Head office the same is shown at Rs. 16,10,13,701/- (0+16,10,13,701/-) and the gross receipt of Infrastructure come at Rs. 4,70,33,779/- (1,53,72,748+3,16,61,031) and the ratio between Rental income and Infrastructure income comes as 77.44:22.60.

However on comparison of following expenses after bifurcation between Rental and Infrastructure receipts the different ratios are being noticed as per the following working:-

1. Fumigation Charges
Against Rental Receipts - Rs.20,07,559/-
Against Infrastructure receipt - Rs.6,48,483/-
Ratio between the above two - 76:24

2. Godown Expenses
Against Rental Receipts - Rs.24,99,789/-
Against Infrastructure receipt - Rs.4,43,613/-
Ratio between the above two - 85:15

3. Godown Salary
Against Rental Receipts - Rs.37,62,531/-
Against Infrastructure receipt - Rs.7,48,813/-
Ratio between the above two - 83:17

4. Bardana Expenses
Against Rental Receipts - Rs.5,93,185/-
Against Infrastructure receipt - Rs.98,327/-
Ratio between the above two - 86:14

5. NCDEX Charges
Against Rental Receipts - Rs.30,91,044/-
Against Infrastructure receipt - Rs.7,00,863/-
Ratio between the above two - 82:18

6. Travelling Expenses
Against Rental Receipts - Rs.2,82,208/-
Against Infrastructure receipt - Rs.29,481/-

Ratio between the above two - 91:9

Thus, there is disproportionate claim of expenses out of gross receipts of rental income and infrastructural income. Since deduction u/s 80IB is only granted on infrastructural income, hence variation in claim of expenses definitely effects the computation of allowable deduction. During the assessment proceedings, the A/R of the assessee when confronted with this aspect fairly admitted the effect of this disproportion in the claim of deduction u/s 80IB made by the firm. Considering this fact a lump sum addition of Rs. 5,50,000/- is made to cover up excessive claim of expenses out of rental income. Accordingly, a sum of Rs. 5,50,000/- is added to the total income of the assessee firm.

Hence your view that A.O. has not verified and investigate the claim of Godown rent paid against ware house receipts eligible for deduction u/s 80IB (11A) is not correct and not tenable in eye of law.

ii) We beg to draw your kind attention that assessee has submitted statement of calculation of Net Profit for deduction u/s 80IB of Head office for the year ended 31st March, 2013 the same statement is kept on assessment record.

On perusal of the said statement it may be observed that assessee has claimed deduction u/s 80IB (11A) @25% on H.O. infrastructural receipts only and not on Rental receipts. From the said statement it may be observed that during the financial year 2012-13 assessee has received rental warehouse receipts of Rs. 16,03,99,154.82 against which godown rent paid Rs. 10,15,93,864.61 and total expenses claimed Rs. 14,37,77,947.95 so net profit remains in Rental account Rs. 1,72,35,753.18 on which assessee has not claimed any deduction u/s 80IB(11A).

Your view that assessee has wrongly claimed deduction u/s 80IB (11A) on warehouse income

which was taken on rent from third parties and further let out these warehouses. Hence assessee has wrongly claimed deduction u/s 80IB (11A) on those warehouses which are not owned by the assessee. Your view that A.O. has not verified and investigate the Godown rent paid at H.O. Rs. 10,15,93,864/- against which assessee has claimed deduction u/s 80IB (11A) is not correct because assessee has not claimed deduction u/s 80IB(11A) on this rental income. So your holding that order of A.O. is erroneous and prejudicial to the interest of revenue is not correct.

(3) <u>EXPLANATION IN RESPECT OF NON VERIFICATION OF MUNICIPAL TAX AND INSURANCE CHARGES RS. 3,29,282/- AND 40,36,507/- RESPECTIVELY.</u>

In show cause notice your honour have stated that from appraisal of assessment record it is observed that assessee has claimed municipal tax and insurance charges Rs. 3,29,282/- and 40,36,507/- respectively. Assessment records neither kept any details and evidence for such payment nor any explanation about the expenditure incurred for which properties. The A.O. has not verified the claim of expenditure so order of A.O. is erroneous and prejudicial to the interest of revenue.

The proposed disallowances are unwarranted and unsustainable due to the following reasons:-

i) In the course of assessment proceeding learned A.O. has scrutinised the rental income of H.O. and expenses claimed their against. During the financial year 2012-13 assessee has paid Muncipal tax of Rs. 3,29,282/- for ware house taken on rent at Kadi to M/s Build Well Corporation against the agreement of lease executed between party and assessee. The said municipal tax is against rental income at Kadi ware house and for which no deduction u/s 80IB (11A) has been claimed.

ii) In the course of assessment proceeding learned A.O. has verified the insurance charges of Rs. 40,96,386.00 claimed by the assessee at H.O. against infrastructural

receipt and rental receipt of which details are as under:

S.No.	Insurance Charges paid for	Amount	Insured Property
i)	Infrastructural receipt	3,28,975.32	Own warehouse building and goods store on ware house.
ii)	Rental receipt	37,07,531.68	Goods stored on rented ware houses.

Hence your view that A.O. has not verified the expenditure claimed is neither correct nor prejudicial to the interest of revenue.

(4) EXPLANATION IN RESPECT OF NON VERIFICATION OF DEDUCTION @ 100% OR 25% U/S 80IB(11A) ON WAREHOUSE INCOME OF HEAD OFFICE AND BRANCHES

In show cause notice your honour have stated that from appraisal of assessment record details about ware house receipts eligible for deduction of warehouse receipts of Head office and branches are not available. There is no evidence in assessment record which proved that the A.O. has verified the claim of 100% deduction of ware house receipts of branches. There is no evidence which confirm that the A.O. has verified the dates for purchase of land, conversion of land, construction of warehouse and put to use of warehouse. Hence A.O. have not enquired and verified the facts before allowing the claim of deduction u/s 80IB (11A).

The proposed revision on issue of non verification and enquiry to claim 100% deduction by branches on their warehouse receipts is unwarranted and liable to be quashed due to the following reasons:-

i) The learned A.O. in his assessment order specifically stated that assess was queried regarding working and justification of the amount of the claim made u/s 80IB by the firm. In the assessment order A.O. held that " *This year the assessee firm has claimed 25% of deduction u/s 80IB(11A) on its first unit stared commencing business at 18th KM*

Stone, NH-15, Khara from AY 2008-09, being the sixth year of the claim and in respect of other two undertakings situated at Nokha (year of commencement of business AY 2012-13) and Boranada, Jodhpur (year of commencement of business AY2009-10), the firm has claimed 100% of deduction u/s 80IB .

*ii)*In the assessment order learned A.O. has specifically stated that "*You are claiming three independent undertakings as according to you initial assessment year of commencement of operation of each of the unit is different but the online submission of the audit report in form 10CCB is only in respect of Ist unit at Khara and not mentioning of other units situated at Boranada (Jodhpur) and Nokha is done therein. It is not understandable that how you have made a consolidated claim of 80IB in your computation of Rs. 2,11,31,163/-.*

The assessee in his reply stated that "The year under review was the first year in which the e-filing of the audit report in form 10CCB under section 80IB became mandatory. Therefore it was construed that like report u/s 44AB, only one report can be e-filed hence, composite report comprising of the aggregate deduction was electronically filed at the portal of the income tax department. The assessee is hereby furnishing separate reports in form no. 10CCB u/s 80IB of the I.T. Act in relation to all the eligible business activity which qualify for deduction u/s 80IB (11A). The assessee have made a consolidated claim of the 80IB in his computation is Rs. 21131163.00. Statement showing how the assessees have calculated the amount of claim u/s 80IB is enclosed with the letter."

The above submission of the A/R of the assessee is found to be technically correct for the reason uploading of filed electronically audit report did not have the feature of separately filling the same in respect of each of the undertaking (unit) of the assessee and that made compulsion to filed a consolidated Audit report electronically.

Hence your view that A.O. has not enquired and verified the claim of deduction u/s 80IB (11A) for Bikaner H.O. and other branches at different rates is not correct and not tenable.

(5) <u>EXPLANATION IN RESPECT OF NON VERIFICATION OF HANDLING & TRANSPORTATION RECEIPTS OF RS. 13,43,806/-</u>

In show cause notice your honour have stated that on appraisal of assessment record it is observed that assessee has shown Handling and transportation income of Rs. 13,43,806/- while assessee has no transport vehicle. The A.O. has accepted the claim of deduction without verification of facts. As such claim of deduction as exempted income is not only wrongly claimed but wrongly allowed by the A.O. Hence order of A.O. is erroneous and prejudicial to the interest of revenue.

The proposed disallowance of claim of deduction under section 80 IB (11A) for income earned under handling and transportation amounting to Rs. 13,43,806/- is unwarranted and unsustainable due to the following reasons:-

i. In this connection we would like to state that literal interpretation of words "integrated business of handling, storage and transportation of food grains" will not lead to any absurdity or produce any manifestly unjust result. The Legislative intent is not to encourage transportation or handling of food grains but the Legislative intent is to encourage construction of godowns and warehouses with a view to providing storage of food grains. If we consider the entire combat of the scheme relating to the tax holiday provided by the Legislature, we find that the deductions are available under various provisions when the assessee has contributed something towards the infrastructure development of the country.

The same views were expressed in the case of Shankar K. Bhanage, Mumbai Vs Department of Income Tax on 29 August, 2012 (INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH 'J' MUMBAI)

Further in the case of A. P. State Warehousing Corporation V/s. Dy. Commissioner of Income-tax, Hyderabad (Income Tax Appellate Tribunal – Hyderabad- 24/01/2014) it was held that:

"The insertion of sub-section (11A) is intended to encourage building of storage capacities, by providing that any undertaking engaged in integrated bulk handling, storage and transportation would be allowed hundred per cent deduction for the first five years and thirty per cent deduction for the next five years. Thus, Sec 80IB (11A) is applicable to income derived from the integrated business of handling, storage and transportation of food grains. A perusal of the activities of the assessee in association with the Food Corporation of India, as demonstrated by the learned counsel for the assessee in the paper-book filed, clearly indicates it is engaged in the integrated business of handling, storage and transportation of food grains. There is no dispute that the assessee main business is to provide warehousing facility for food grains. The Assessee has been constituted under with these very objects in view. Merely because the assessee has engaged outsiders for transportation or leased out some of the godowns for storage does not mean that the assessee is not engaged in the integrated business of handling and storage of food grains. In the course of their integrated business, the assessee had collected rentals for storing food grains and had engaged outsiders to transport the food grains.

ii. In the present case assessee firm's main business is providing storage services in respect of food grains. Handling & transportation services are allied activities which are undoubtedly present there. Handling & transportation are essential for main business.

Because without providing handling & transportation, loading-unloading, shifting, repacking & cleaning activities it is impossible to run business of warehousing / storage services. Without handling and transportation services deposit and withdrawal of goods to/from godowns couldn't possible. Hence this is not worthwhile to reach the

conclusion that there was not "Integrated business of handling, storage and transportation of food grains".

In the case of A. P. State Warehousing Corporation v/s. Dy. Commissioner of Income-tax, Hyderabad (Income Tax Appellate Tribunal – Hyderabad- 28/08/2014) same views were expressed.

Moreover assessee firm's profit & loss account shows Rs. 13,43,806/- towards income from handling & transportation for the year under consideration. This is proving that assessee firm involve in "Integrated business of handling, storage and transportation of food grains".

iii. Your honour has failed to consider that handling and transportation facility is one of the basic requirement to store the food grain but nowhere mentioned that assessee must have transport vehicle and transportation has to be done by the assessee own trucks.

In the case of Gendmal Bhikulal Banthia, Pune V/s ITO, Ward-1(4), Parbhani. (IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE BENCH "A", PUNE on dated- 22/03/2013) the main reason for rejecting the claim of the assessee by ITO is that the assessee is not providing facility of transportation of food grains. In this connection authority said "The wordings transportation of food grains does not indicate that transportation has to be done by the assessee own trucks or transport system. The transportation of food grains may be through hired vehicles as well. The assessee should not be deprived of beneficial provisions of section 80IB (11A) of the Act because certainly he is engaged in the handling, storage and some part of transportation of food grains cannot be ruled out."

It was held that taking over all situations under consideration and to encourage the storage of food grains at doorsteps of farmers. The storage of food grains in warehousing at door steps will certainly improve the economic conditions of farmers by ensuring them proper cost at proper time and they will also be saved perpetual exploitation of middle men. Such beneficial provisions should not be sacrificed for

technical narrow interpretation of relevant provisions. Even minor transportation facility should help assessee for claiming benefit of provisions of section 80IB (11A) of the Act. In the interest of justice, we set aside the order of the Assessing Officer as well as the CIT (A).

In the case of Smt. Tarulata Shyam and Others Vs. CIT, 108 ITR 345 it was held that while interpreting a particular word or expression the intention of the legislature behind insertion of the particular provisions has to be kept in mind. According to him when Sec 80IB(11A) is read along with Memorandum of explaining the provisions, it would emerge that the word "handling" in its ordinary sense and in the context of food grains would cover within it ambit the process and activities relating to creation of facilities for cleaning and removing of foreign material from the food grain so as to prevent damage from such material, Facilities for drying of food grains to prevent loss during storage due to excessive moisture, pre storage bulk grain dumping and drying facilities, creation of facilities for mechanized sampling, weighing and detection of live infectants, mechanized receiving and handling by storing in Silos equipped with facilities of aeration and fumigation, loading and unloading facilities and traffic management and dumping pits, chain conveyors, elevators and facilities for mechanized shipment so as to integrate storage with quick transportation. Keeping the overall intent of this particular provision it is clear that the word "handling" can not include the manufacture or transportation of food grains by any stretch of imagination. The provisions of the Act have to be interpreted in a way that absurdity and mischief is avoided. In this regard he referred to the decision of Hon'ble Supreme Court in case of KP Varghese Vs. ITO, 131 ITR 597. In fact a particular word and expression has to be given purposive construction and in this regard he referred to the decision of Hon'ble Supreme Court in case of R&B Falcon Pvt. Ltd, 301 ITR 309. He also referred to various other decisions where principles of interpretation of statutes have been given. He referred to the contention of the Ld. Counsel for the

assessee with regard to the circular and clarification given by the Ministry of Food Processing wherein various incentive provisions are reproduced. Detail of various benefits in form of duty and tax benefits are disclosed and various sections of processing sectors have been defined and classified on the basis of a data for the purpose of clarity and compilation of data.

iv. In case of The DCIT, Circle-4, Ahemdabad V/s. Mahadev Pulses Pvt. Ltd., Kalupur (IN THE INCOME TAX APPELLATE TRIBUNAL AHMADABAD, 24/08/2016) "it was held that the Legislative intent is not to encourage transportation or handling of food grains but the Legislative intent is to encourage construction of godowns and warehouses with a view to providing storage of food grains".

Hence in views of all the above orders and business activities carried by assessee firm it is clear that the present case is definitely covered under the eligibility criteria of section 80IB (11A).

v. During the course of assessment proceeding the A.O. has accepted the claim of exempted income of handling and transportation only after detailed scrutiny of receipts and expenditure claimed their against.

vi. Your honour has failed to consider that H.O. (Khara) has tractor shown in fixed assets schedule of which w.d.v. is Rs. 2,47,459.00 used for transportation of goods stored in warehouse.

vii. Yours honour has not considered the fats that Branches have received handling and transportation receipts of Rs. 6,74,730/- against which wages for handling and transportation charges paid Rs. 1,64,487/-.

viii. Head office (Bikaner) received handling and transportation Rs. 6,69,076/- out of which Infrastructural receipt is only 54,525/- against which wages for handling and transportation paid Rs. 19,307.51 while balance receipt of Rs. 6,14,547/- is rental account against which assessee has paid wages Rs. 2,17,594.49 and on rental income assessee has not claimed deduction u/s 80IB (11A).

Hence your view that order of the A.O. is erroneous and prejudicial to the interest of revenue is not correct.

(6) <u>EXPLANATION IN RESPECT OF NON VERIFICATION OF WEIGH BRIDGE CHARGES RS. 7,21,105/-</u>

In show cause notice your honour have stated that on appraisal of assessment record it is observed that in H.O. books weigh bridge charges is Rs. 6,52,595/- while assessee has no weigh bridge at Head office. As such claim of deduction as exempted income is not only wrongly claimed but wrongly allowed by the A.O. Hence order of A.O. is erroneous and prejudicial to the interest of revenue.

Your honour has failed to consider that in books of H.O., H.O. has acquired weigh bridge and cleaning & grading machine on 1.10.2007 at the cost of Rs. 18,31,710/-

Hence your view that order of A.O. is erroneous and prejudicial interest of revenue is not correct.

(7) <u>EXPLANATION IN RESPECT OF CLAIM OF DEPRECIATION</u>

In show cause notice your honour have stated that on appraisal of depreciation chart it is observed that you have claimed depreciation on branches property like Delhi, Indore, Jaipur, Gujarat, Kota, Sriganganagar, Ankola, Sangli, Maharashtra. There are no documents which shows the godowns taken at these places are with or without Plant and Machinery, agreement of lease of such godowns are also not kept on assessment record. In absence of these documents it is proved that A.O. has not verified and investigate these facts before allowing the depreciation. Hence order of A.O. is erroneous and prejudicial to the interest of revenue.

In this regard we beg to draw your king attention that on appraisal of Fixed assets schedule marked Schedule 'E' of Balance sheet as at 31.03.2013, it may be observed that Fixed assets situated at branches like Delhi, Indore, Jaipur , Kadi, Kota, Sri Ganganagar, Akola, Sangli includes only office equipments (Like computer, furniture, cooler, fan, air conditioner), vehicle, mobile, weighing scale, lab equipment

and fire extinguisher having very nominal value required at ware houses.

All these fixed assets are owned by the assessee and wholly used for ware housing business so assessee is entitled to claim depreciation on such assets. Balance sheet with schedules, Form No 3CD and Annexure of depreciation claimed are part of assessment record so your view that A.O. has not verified the records before allowing depreciation is neither correct nor tenable in the eyes of law. Hence your holding that order of A.O. is erroneous and prejudicial to the interest of revenue is not correct and not justified.

(8) <u>EXPLANATION IN RESPECT OF CLAIM OF DUNNAGE MATERIAL</u>

In show cause notice your honour have stated that on appraisal of Trading account assessee has claimed dunnage material of Rs. 23,10,287/-, in support of the claim no evidence is kept on assessment record. Dunnage material is capital expenditure and not consumed or wasted in a year but having some useful life over years. If part of the dunnage material is destroyed same is saleable as scrap. The A.O. has not enquired and verified before allowing the claim as expenditure.

In this connection we beg to draw your kind attention that dunnage material are waste fill flooring material used to provide moisture free areas for storing food grains at ware house so that stored goods kept safely. Dunnage is in form of flooring sheets of different sizes.

Hence your view that dunnage material is a capital expenditure is not correct. Dunnage materials are waste material stored on surfaces of floor. As such it is not saleable as scrape. Dunnage materials at H.O. are used in Rental warehouses and on rental warehousing income assessee has not claimed any deduction u/s 80IB.

Hence order of A.O. is neither erroneous nor prejudicial to the interest of revenue.

(9) <u>EXPLANATION IN RESPECT OF REMUNERATION TO WORKING PARTNERS NOT CLAIMED</u>

In respect of remuneration to working partners you are of the view that assessee firm has not given remuneration to working partners despite the facts that assessee firm earned considerable profit. Intention of the firm for not allowing remuneration to working partners was to get maximum benefit of exemption under section 80IB (11A), if remuneration allowed to partners they are liable to tax on such remuneration. In this relation Assessing officer has neither asked question nor made any enquiry or investigation. The A.O. is required to compute the remuneration payable as per partnership deed and provisions of the Income tax Act.

The proposed disallowance of deduction under section 80IB (11A) by mandatorily allowing remuneration to working partners is unwarranted and unsustainable due to the following reasons:-

i. The act of compulsory allowing the remuneration to working partners is unjustified and unlawful. Section 40(b) of the Income Tax Act, 1961 provides the manner by which remuneration payable to partners shall be calculated and allowed but not expressly mentioned that it is allowed mandatorily in any situation. It is discretionary for the assessee to have made claim of remuneration to working partner.

ii. Your honour has not considered the provision of Sec 40(b) which provides that remuneration payable to working partner is allowable where the said remuneration is authorized by and is in accordance with the terms of the partnership deed. Partnership deed clause provides that the partners shall be entitled to increase or reduce or nil the above remuneration and may agree to pay/ not to pay remuneration to working partner or partners as the case may be.

iii. Your honour has wrongly considered that provision of section 40(b)(v) of the Income Tax Act, 1961 mandatorily while it is discretionary for the assessee to have made such a claim. All partners of the firm were agreeing not to pay remuneration to working partners.

iv. In case of **TULSA RAM KANHIYALAL & SONS vs. INCOME TAX OFFICER , ITAT, JODHPUR 'SMC' BENCH, ITA No. 226/Jd/2008; Asst. yr. 2005-06** decision given in the favour of the assessee that the finding reached by learned CIT(A) that the assessee has circumvented the tax liability by not claiming the deduction on account of salary and interest to partners so as to take benefit of set off of brought forward losses will not result into tax evasion but was merely on legitimate tax planning done by the appellant. Keeping in view the overall conspectus of the case, no justification in the action of the learned CIT (A) in upholding the decision of learned Assessing authority in enforcing deduction of interest on capital and remuneration to working partners of the firm while computing the assessable income for the year under consideration.

v. As per provision of section 40(b) remuneration must be authorised and according to the terms of partnership deed. We beg to draw your kind attention that remuneration clause of the partnership deed dated 23.03.2006 provides that "The partners shall be entitled to increase or reduce or nil the above remuneration and may agree to pay / not to pay remuneration to other working partner or partners as the case may be. The parties here to may also agree to revise the mode of calculation of the above said remuneration as may be agree to by and between the partners from time to time." Hence there is no question to mandatorily allow remuneration to working partner.

vi. Remuneration to working partner is not justified due to following reasons:
    a) Remuneration was not provided /paid in the book of account.
    b) Partnership deed authorised the partners to reduce or NIL the remuneration.
    c) Firm paid a huge amount in the account of salary to its staff/employees.

Thus allowing mandatorily remuneration in the case of assessee is unjustified and unlawful.

vii. During the course of assessment proceeding the learned A.O. has enquired and verified that the partner's remuneration not claimed as per terms of partnership deed. The decision of the A.O. cannot be held to be erroneous only because in his order he did not made an elaborate discussion in this regard.

4. On the other hand, the ld CIT-DR has relied on the order of the Pr.CIT.

5. We have heard the ld. counsels for both the parties and have also considered the material placed on record, order passed by the Revenue Authorities as well as judgements relied upon by the parties. From the record, we notice that main issue in the present controversy is as to whether the order passed by the A.O. can be said to be erroneous or prejudicial to the interest of revenue. In case the order passed U/s 143(3)/148 of the Act, the A.O. is not erroneous then eventuality the power U/s 263 of the Act cannot be exercised. From the facts, we notice that in the reassessment order passed, the issue had been duly examined and on the basis of the examination of the relevant records and the application of law, one of the possible opinion had been drawn by the A.O., which cannot be said to be erroneous so far as prejudicial to the interest of revenue. In this regard, we drawn interest from the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ld. Vs CIT (2000) 243 ITR 83 (SC) wherein the Hon'ble Supreme Court had observed that "Section 263 of

the Income Tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commission suo moto under it, is that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue. Even if one of them recourse cannot be held to Section 263(1) of the Act. The A.O. after going through the material on record and after considering the explanation of the assessee, had applied his mind. His view was that the amendment are not applicable in the case of the assessee for the year under consideration which is a possible view. The CIT did not agree with the conclusion reached by the ITO. However, Section 263 of the Act does not empower him to take action on these facts to arrive at the conclusion that the order passed by the ITO is erroneous and prejudicial to the interest of the revenue. Since the material was there on record and the said material was considered by the ITO and a particular view was taken, the mere fact that different view can be taken, should not be the basis for an action U/s 263 of the Ac and it cannot be held to be justified.

6. The basis for an action U/s 263 of the Act and it cannot be held to be justified. The order can be said to be erroneous assessment only if it deviates from the law and if the AO acting in accordance with law makes a assessment, the same cannot be branded as erroneous by the Commissioner. The AP has exercised the quasi-judicial power vested in him accordance with law and arrived at a conclusion and such a conclusion

cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. In the present case it cannot be said that there is an incorrect application of law so that the order being erroneous. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. In view of above we find that there is no error in the conclusion drawn by the AO while passing the order and therefore, the impugned order U/s 263 of the Act is not justified and the same is hereby quashed.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 20/03/2020.

Sd/-	**Sd/-**
(R.C.SHARMA)	**(SANDEEP GOSAIN)**
Accountant Member	**Judicial Member**

Dated :. 20/03/2020
*Ranjan
Copy of the order forwarded to :
1. The Appellant
2. The Respondent
3. CIT
4. The CIT(A)
5. DR, ITAT, Jodhpur
6. Guard File (ITA No. 171/Jodh/2018)

Assistant Registrar
Jodhpur Bench