

आयकर अपीलीय अधीकरण, न्यायपीठ –“A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri P. M. Jagtap, VP & Shri A. T. Varkey, Judicial Member]

I.T.A. No. 421/Kol/2020
Assessment Year: 2015-16

P. S. Srijan Height Developers (PAN: AAJFP5356R)	Vs	Principal Commissioner of Income- tax-11, Kolkata.
Appellant		Respondent

Date of Hearing (Virtual)	06.07.2021
Date of Pronouncement	09.09.2021
For the Appellant	Shri S. K. Tulsiyan, Advocate & Mrs. Pooja Somani, CA
For the Respondent	Shri Manish Kanojia, CIT, DR

ORDER

Per Shri A. T. Varkey, JM:

This appeal of assessee is against the order of Ld. Pr. CIT-11, Kolkata passed u/s. 263 of the Income-tax Act, 1961 (*hereinafter referred to as the “Act”*) dated 22.06.2020 for AY 2015-16.

2. At the outset, the Ld. AR of the assessee Shri S. K. Tulsiyan, Advocate submitted that he is assailing the decision of the Ld. Pr. CIT-11 to have invoked the revisional jurisdiction u/s. 263 of the Act without satisfying the condition precedent as prescribed by the statute i.e. *without validly holding that the order of the AO was erroneous as well as prejudicial to the interest of the revenue.*

3. Brief facts of the case is that, the assessee is engaged in the business of real estate development and had undertaken project titled ‘Ozone’. For the relevant AY 2015-16, the assessee had filed return of income by declaring income of Rs.5,70,900/-. The case was selected for scrutiny under CASS. Thereafter the AO issued statutory notices calling for details in respect of the items selected for ‘Limited Scrutiny’. The AO acknowledged in the assessment order that, the Ld. AR of the assessee appeared from time to time and complied with the requisition issued by him, by filing the documents, details and relevant

explanations. After having examined the details called for and after hearing the Ld. AR, the AO assessed the total income at the same sum as returned by the assessee.

4. Thereafter, the Ld. Pr. CIT-11 issued Show Cause Notice (*hereinafter referred to as "SCN"*) u/s. 263 of the Act pointing out one fault on the part of the AO in *allowing the deduction for the interest expenditure of Rs.84,27,773/- debited to the P&L Account on account of borrowed fund*. According to the Ld. Pr. CIT, the assessee had allowed the partners to siphon its borrowed funds through their respective current account. The Pr. CIT was of the view that the AO had *failed to examine* the commercial expediency of the assessee in advancing interest free loan to the partners, when the assessee-firm was paying interest on the borrowed capital.

5. In response to the above SCN, the assessee objected to the exercise of revisional jurisdiction by the Ld. Pr. CIT by pointing out that AO had in fact enquired into this issue and therefore his allegation that the order of the AO lacked enquiry was not correct. The assessee brought to the notice of Ld. Pr. CIT that, the AO has sought explanation on items for which the case was selected under CASS inter alia including the claim of this interest expenditure, which was responded by letters dated 12.09.2017 (*refer to pages 4-6 of paper book*) and letter dated 04.10.2016 (*refer to page 3 of the paper book*). The complete break up of interest expenditure to the tune of Rs.84,27,773/- along with supporting ledgers was provided to the AO. The break-up of Rs.84,27,773/- is as follows:

i)	interest on secured loans from ICICI Bank	Rs. 47,37,803/-
ii)	loan processing fees paid to ICICI Bank	Rs. 35,00,000/-
iii)	interest on delayed payment of service tax	Rs. 1,68,868/-
	TDS	Rs. 21,102/-

4. The assessee further pointed out to the Ld. Pr. CIT that, upon examining the above replies, the AO had required it to furnish the bank statement evidencing the payment of interest and loan processing fees along with the copy of the sanction letter from the ICICI Bank. In response, the assessee vide submission dated 05.12.2017 (*refer to pages 7-47 of paper book*) had provided the supporting bank statement and the sanction letter, which is kept at pages 24-25 of paper book viz., a Credit Arrangement Letter of the ICICI Bank for

financial assistance by way of term loan not exceeding Rs.350.00 million (TM), Over Draft Facility – not exceeding Rs.100.00 million (OD) as a sub-limit of capital RPL, bank guarantee-not exceeding Rs. 50.00 million (BG) as sub-limit of OD and Letter of Credit not exceeding Rs.50.00 million (LC). Having regard to the aforesaid documents, the AOthe required the assessee to explain as to why the interest expenses of Rs.84,27,773/- should not be disallowed, *since a portion of the loan amount was utilized by the partners interest free.* The assessee vide its submission dated 28.12.2017 (*refer to pages 48-50 of paper book*) explained that interest of Rs.47,37,803/- and loan processing fee of Rs.35,00,000/- paid to the ICICI Bank was in connection with the loan taken for business purpose viz., Project ‘Ozone’, which was self-evident from the copy of sanction letter of the ICICI bank. With regard to the allowability of the same, it was submitted that once the loan is shown to have been obtained for business purpose, then irrespective of whether the loan has been further lent as interest free or utilized otherwise is not material to determine the allowability of interest paid thereon. In support of this proposition, the assessee had placed reliance on the decision of this Tribunal in the case of ITO Vs. Snowtex Investment ltd. (ITA No. 356/Kol/2012) wherein it was held as under:

“It is further submitted that there is no bar against advancing of loan interest-free or at a low rate of interest. There may be very many considerations, including business considerations, for not charging interest or charging interest at a low rate. Dispute between the Revenue and the assessee often arises when money is borrowed with interest and loan is advanced interest-free or at a low rate of interest. In such a case the tendency of the AO generally is to disallow the interest paid on the money borrowed either in full or proportionately depending upon the quantum of loan advanced and interest, if any, charged. But whether the assessee charged interest on loan advanced or not is not at all a relevant consideration for determining allowability of interest paid under section 36(1)(iii) of the Act. As already explained, the relevant consideration is whether the moneys have been borrowed for the purposes of business or profession and whether interest paid.

In the interest of maintain good business relation, interest-free loans or loans at a low rate of interest may be given to others with whom the assessee has business relation or with whom he expects to establish business connection or with whom he has other business obligations, present or past. There may be many other reasons also, both business or non-business. If interest-free loan or loan at a low rate of interest is given for business consideration out of the capital borrowed with interest then a/so the borrowing would be for the purposes of business, and interest paid on the borrowed capital would be allowable as deduction under section 36(1)(iii) of the Act.

There is no compulsion that interest should always be charged on any lending, nor there is any requirement that income must be earned by utilizing the capital borrowed with interest so as to be entitled to the deduction under section 36(1)(iii) of the Act. Merely for the reason that interest was not charged or charged at a low rate on the lending, the interest paid for borrowing cannot be disallowed. It is a matter of business prudence and entirely upto the assessee as to how he utilizes the fund in the interest of his business. The basic requirement is that the borrowed capital should be used for the purposes of business or profession. An argument may be advanced that if interest-free loan had not been given then the assessee could have reduced his debt and consequently the interest payment.”

5. The assessee thus pointed out that the AO had indeed enquired into the interest cost incurred by it and its allowability in the course of assessment. It was contended that, after taking into account the above documents and explanations furnished by the assessee, the AO had taken a plausible view on the issue wherein he accepted the allowability of interest and no adverse inference was drawn in the assessment order passed u/s 143(3) of the Act. The Ld. Pr. CIT however was not agreeable to the contentions put forth by the assessee and set aside the assessment order dated 29.12.2017 for de-novo assessment.

6. Assailing the action of the Ld. Pr.CIT, the Ld. AR of the assessee submitted that the AO made several enquiries as afore-stated and after going through the documents submitted and explanations put forth by the assessee, that the AO had accepted the claim. The Ld. AR pointed out that the assessee, which had undertaken real estate project titled 'Ozone', was promoted by two reputed real estate groups i.e. PS Group & Srijan Group of Kolkata. Both these groups through their flagship companies, who were partners of the assessee company, were managing, supervising and executing the said project. The project 'Ozone' was being marketed under their joint brand names. He submitted that the assessee firm had availed the loan from ICICI Bank in connection with the said business of real estate development. Referring to the audited accounts, the Ld. AR submitted that these two partners had withdrawn the monies from the current account in connection with and for the purpose of marketing & business development the said project. He further submitted that, any advantage garnered by these two promoter groups resulted in corresponding advantage and indirect benefit to the assessee's project, which was being marketed under their brand name. Citing the principles of commercial expediency, supplemented by the fact that both these partners were engaged in the same line of business and were also managing, promoting and marketing the assessee's project, the Ld. AR contended that even if any portion of the interest expenditure is held to be relatable to the partner's current account (debit), the same was allowable u/s 36(1)(iii) as having been incurred in the course and for the purposes of business. In this regard, he relied on the decision of S.A.Builders (288 ITR 1). Additionally, he also reiterated the decision of this Tribunal in the case of ITO Vs. Snowtex Investment Ltd. (supra) cited before the AO in support of the allowability of interest expenditure. So according to Ld. A.R., there can be no doubt that AO has discharged his duty as an

investigator an adjudicator while allowing the claim of interest expenditure to the tune of Rs. 84,27,773/-, which according to him, was a plausible view supported by catena of judicial precedents. The Ld. AR thus contended that the action of Ld. Pr.CIT interfere in the impugned assessment by exercising his revisional jurisdiction u/s. 263 of the Act was untenable on facts and in law.

7. Per contra, the Ld. CIT, DR supported the order of the Ld. Pr.CIT. According to him, the enquiries made by the AO were inadequate in as much as he did not properly examine the claim of interest expenditure. He submitted that since loan was withdrawn by two partners, the AO ought to have enquired in depth about the purpose of withdrawal of loan; and since assessee failed to show the commercial expediency for parting away the loan to partners interest-free while the assessee incurred interest expenditure, the relevant facts should have been enquired in depth and ascertained by AO, which he failed, so the Ld. Pr. CIT had rightly stepped in to correct the error. So, according to Ld DR, the Ld Pr.CIT rightly invoked section 263 of the Act to interdict the assessment order of AO, which action of Ld Pr.CIT does not require any interference from our part.

8. We have heard the rival parties. The assessee firm has challenged in the first place, the very usurpation of jurisdiction by Ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction was existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order has passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the

principle of natural justice; or (iv) if the order is passed by the Assessing Officer is without application of mind; or (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law"**.

9. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us now examine whether the assessment order passed by the AO u/s 143(3) dated 29.12.2017 is erroneous as well as prejudicial to the interest of the revenue. In order to do that, let us examine the facts of this case. We note that the case of the assessee was selected for 'Limited Scrutiny'. The AO in his notice issued u/s 143(2), which is available at Pages 1-2 of the paper book, had enquired about the details of interest expense, to which the assessee had furnished replies vide letters dated 04.10.2016 and 12.09.2017. On perusal of these replies, which are available at Pages 3 to 6 of the paper book, the assessee had given the details of the interest expenditure (as set out supra). Having perused these details, the AO had required the assessee to furnish sanction letter of the loan from ICICI Bank along with the bank statement evidencing payment of interest to the ICICI Bank. We note that the assessee had filed the sanction letter of the ICICI Bank, which is found placed at pages 24-25 of paper book along with other documents and the bank statement, which is found placed at pages 27-47 of the paper book. The AO vide notice dated 01.08.2017 issued u/s 142(1) of the Act had required the assessee to explain as to why the interest expenditure should not

be disallowed, to which the assessee had furnished its explanation dated 28.12.2017, which is available at page 48-50 of the paper book. It is noted that the assessee had explained to the AO that the loan had been sanctioned and borrowed for its business i.e. project 'Ozone' and therefore the interest was allowable u/s 36(1)(iii) of the Act. On examination of these details furnished before the AO, we thus note that the assessee had furnished all relevant details and explanation, which enabled the AO to make enquiries into the nature and allowability of interest expenditure. Hence, we do not agree with the Ld. Pr. CIT that AO allowed the claim of interest expenditure without conducting enquiry.

10. The sheet anchor on which the Ld. Pr.CIT has found fault with the AO's order in the present case is the lack of enquiry on the part of the AO into the utilization of the borrowings and corresponding withdrawals by the partners so as to ascertain the allowability of interest cost. In this context, we find that the law is well settled that there is a clear distinction between "*lack of enquiry*" and "*inadequate enquiry*". If there is an enquiry, even if inadequate, that would not by itself give occasion to the Ld. Pr.CIT to interfere by exercising his revisional jurisdiction merely because he is of the opinion that some more enquiries should have been conducted in the matter. In a case where the Pr.CIT finds that the enquiry conducted by the AO is not in accordance with his subjective standards, then the Ld. Pr.CIT should himself conduct the investigation and thereafter record a clear finding in his order u/s. 263 that the view followed or acted upon by the AO in his order was unsustainable in law. In the given facts of the present case, as noted earlier, the AO had made enquiries into these nature and allowability of the interest expenditure. The AO had also enquired into the utilization of loan and why claim of interest should be allowed. We thus note that the AO had consciously applied his mind to the facts made available before him and adopted one of the plausible view permissible in law. For these reasons, we are of the considered view that the assessment order is not the result of non-application of mind or wrong assumption of facts or without any enquiry. Useful reference in this regard may be made to the judgment of the Hon'ble jurisdictional Calcutta High Court in the case of CIT Vs J.L. Morrison (I) Ltd (366 ITR 593), wherein their Lordships explaining the difference between 'lack of enquiry' and 'inadequate enquiry' held as follows:-

"86. Whether the assessment order dated 28th March, 2008 was passed without application of mind is basically a question of fact. The learned Tribunal has held that the assessment order was

not passed without application of mind. The records of the assessment including the order sheets go to show that appropriate enquiry was made and the assessee was heard from time to time. In deciding the question Court has to bear in mind the presumption in law laid down in Section 114 Clause - e of the [Evidence Act](#):-- "that judicial and official acts have been regularly performed;"

87. Therefore, the Court has to start with the presumption that the assessment order dated 28th March 2008 was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under [Section 142](#) (1) of the Act could not have been formulated.

88. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons.

89. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of [Section 114](#) of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact the order was passed by the assessing officer after due application of mind.

90. The judgments cited by Mr. Nizamuddin do not really support his contention. The judgment in the case of Meerut Roller Flour Mills (P.) Ltd. (supra) does not apply because the High court in that case was satisfied that the assessment order was passed without enquiry.

91. The judgment of Cochin Bench of Income Tax Appellate Tribunal in ITA No. 116 /Coch/ 2012 relied upon by Mr. Nizamuddin is evidently based on an erroneous impression that "the proceedings before the Assessing Officer are judicial proceedings". This impression, which is patently contrary to the views expressed by Apex Court in the case of S.S. Gadgill (supra), was responsible for the views taken by the Tribunal. When the premise is wrong, the conclusion is bound to be wrong.

92. The judgment in the case of Infosys Technologies Ltd. (supra) is distinguishable on facts. The step taken by the CIT under [Section 263](#) in that case was justified because the Income Tax records produced before him did not show that the assessing officer had considered the double taxation avoidance agreement on the basis whereof the claims were made by the assessee. Therefore, that was a clear case to show that the assessment order was passed without considering the relevant pieces of evidence.

93. The judgment in the case of Anusayaban. A. Doshi (supra) does not apply because the High Court in that case was dealing with the need on the part of the learned Tribunal to give reasons in support of its order.

94. The judgment in the case of Hindusthan Tin Works Ltd. (supra) also does not apply because there the Delhi High Court was dealing with the duty of the learned Tribunal to disclose reasons in support of its appellate order.

95. The judgment in the case of S.N. Mukherjee (supra) is clearly distinguishable. The point for consideration in that case was whether it was incumbent for the Chief of Army Staff while

confirming the findings and the sentence of the General Court Martial, and for the Central Govt. while rejecting the post confirmation petition of the appellant, to record reasons for the orders passed by them.

96. The function of an Assessing Officer is to estimate the income of the assessee and to recover tax on the basis of such estimate as laid down by the Apex Court in the case of S.S Gadgil (supra). Their Lordships opined that the income tax proceedings do not partake the character of a judicial proceeding between the State and the citizen. Therefore, the principles applicable to a proceeding before a judicial or a quasi-judicial authority where there are two contesting parties cannot be made applicable to the proceedings before an Assessing Officer.

97. Mr. Nizamuddin contended the judgments cited by Mr. Poddar indicate that the Assessing Officer is not required to write an elaborate judgment. He contended that the assessing officer may not have any such obligation but it cannot be said, according to him, that the Assessing Officer is under no obligation to record anything in his assessment order. It is not in the first place a fact that he has not recorded anything. From the assessment order, the following facts and circumstances appear:--

"Return was filed on 29/11/06 showing total income of Rs.3,80,66,940/-. In response to notices u/s. 143(2) and 142(1) of the I. T. Act, 1961, Sri P. R. Kothari, A/r appeared from time to time and explained the return. Necessary details and particulars were filed. The business of the assessee is manufacturing and trading of cosmetics and dental care products as in earlier years. In view of above total income is computed is under:"

98. Unless the aforesaid recital is factually incorrect or the computation is legally wrong, it is not possible to hold that the assessment order was passed without application of mind. On the top of that when the Assessing Officer accepted the contention of the assessee there was no occasion for him to make any discussion in his order.

99. If the assessing officer cannot be shown to have violated any form prescribed for writing an assessment order, it would not be correct to hold that he acted illegally or without applying his mind. The third question is, for the reasons discussed above, answered in the negative."

11. Further, as pointed out by the Ld. AR, the project 'Ozone' of the assessee was being co-developed with its two (2) partners viz., M/s PS Group Realty Limited and M/s Srijan Realty Pvt Ltd. Both these partners who had withdrawn from their respective current accounts are reputed real estate builders of Kolkata engaged in the same line of business and were in-charge of managing, promoting, marketing and overall execution of the assessee's project. The project 'Ozone' of the assessee was accordingly being promoted & marketed under their valuable brand name of 'PS Group' and 'Srijan'. These partners were also managing and executing the said project for which no fee or remuneration was being charged by them. The funds thus had been withdrawn by these partners in course and for the purpose of business of real estate development. We agree with the Ld.AR that the advantage garnered by these two promoter groups by utilizing these funds consequently resulted in corresponding advantage and indirect benefit to the assessee's project, which was admittedly

being marketed under their brand names, free of any charge or cost. We thus find merit in the contention of the Ld. AR that the funds withdrawn by the two partners met the principles of commercial expediency and for that reason the AO had rightly allowed the interest expenditure incurred by the assessee noting that it had nexus with the business of the assessee. For coming to such conclusion, we rely on the decision of the Hon'ble Supreme Court in S. A. Builders Vs. CIT 288 ITR 1 (SC) wherein the view of the Hon'ble Delhi High Court in CIT v. Dalmia Cement (B.) Ltd. [2002] [254 ITR 377](#) was upheld by observing that, *once it is established that there was nexus between the expenditure then the purpose of the business (which necessarily be the business of the assessee itself) the revenue cannot justifiably claim to put itself in the arm chair of the businessmen and further that no businessmen can be compelled to maximize its profit was approved.* In the decided case, the Hon'ble Supreme Court held that, though the borrowed amount was not utilised by the assessee in its own business and had been advanced as an interest free loan to the sister concern, but that is not relevant. What is relevant is whether the assessee advanced such amount to its sister concern as a measure of commercial expediency.

12. Further, while explaining the meaning of the phrase “for the purpose of business” the Hon'ble Supreme Court has used the word “*commercial expediency*”. By using this phrase Hon'ble Supreme Court has given a new dimension and clarified the concept further. In the judgment the Supreme Court has defined commercial expediency as “*an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on grounds of commercial expediency*”.

13. Following the above judgment, the Hon'ble Delhi High Court in the case of *Punjab Stainless Steel Industries Vs. CIT* (2010) 324 ITR 396, held as under:

“The commercial expediency would include such purpose as is expected by the assessee to advance its business interest and may include measures taken for preservation, protection or advancement of its business interests, which has to be distinguished from the personal interest of its directors or partners, as the case may be. In other words, there has to be a nexus between the advancing of funds and business interest of the assessee-firm. The appropriate test in such a case would be as to whether a reasonable person stepping into the shoes of the directors/partners of the assessee-firm and working solely in the interest of the assessee-firm/ company, would have extended such interest free advances. Some business objective should be sought to have been achieved by

extending such interest free advances when the assessee-firm/company itself is borrowing funds for running its business”.

14. We thus note that the assessee had demonstrated before the AO that the loan was availed from ICICI Bank for business purpose and in connection and for the benefit of their project ‘Ozone’. Having regard to the facts as discussed in the foregoing, it thus cannot be said that arrangement carried out by the assessee with these two partners lacked commercial expediency. Thus, the AO, after being satisfied with the explanation/ submission/documents, had allowed the deduction of interest of Rs.84,27,773/- incurred in the course of business. Such view taken by the AO was indeed a plausible view and cannot be said to be ‘unsustainable in law’.

15. The Ld. AR further pointed out that on similar facts and circumstances, no adverse view was taken against the claim of interest in the assessment/intimation issued u/s 143(1) for AY 2016-17. Inviting our attention to the order dated 15.12.2019 passed u/s 143(3) for AY 2017-18, he pointed out that the claim of interest expenditure had been accepted by the AO’s successor. Appreciating the commercial expediency involved, the AO’s successor did not take any adverse view in AY 2017-18 even though debit balance in current account of these partners were M/s. P. S. Group Realty Ltd. was to the tune of Rs.1,22,24,715/- and M/s. Srijan Realty Pvt. Ltd. to the tune of Rs.1,39,72,204/-. Having regard to the foregoing facts and applying the rule of consistency, we are of the opinion that the Ld. Pr. CIT ought not to have disturbed the assessment order for the relevant year on this issue of allowability of interest expenditure.

16. We also note that the order of the Ld. Pr.CIT proceeded on erroneous assumption of facts. According to Pr.CIT, examination of the partner’s current account revealed that that the assessee had given to (i) M/s P S Group Realty Ltd. Rs.15,32,75,000/- and (ii) M/s Srijan Realty Pvt. Ltd. Rs.59,05,57,694/- [Total Rs.74,38,32,694/-]. However on examination of the audited financials submitted by the assessee at Page 78-86 of paper book, it is noted that the partner’s had withdrawn monies on several dates which aggregated to Rs.44.87 crores and at the same time they had remitted back Rs.29.50 crores. We thus note that the net withdrawal by the partners during the year was only to the tune of Rs.15.37 crore

and not Rs. 74 crore as wrongly assumed by the Ld. Pr.CIT. We thus find force in the argument of the Ld. AR that the impugned order was passed by the Ld. Pr.CIT without due application of mind to the facts of the case and material available on record.

17. In light of the facts and circumstances set out above, we thus conclude that the Ld. Pr.CIT wrongly asserted that AO did not examine the balance sheet of the assessee and did not enquire into the commercial expediency of withdrawal of fund by the partners. The facts and figures assumed by the Ld. Pr.CIT are also found to be erroneous. We find that the AO had discharged his duty as an investigator on this issue. And his view as an adjudicator on this issue is based on the relevant material placed on record, which we find to be in consonance with the decision of the Hon'ble Apex Court in S. A. Builders vs. CIT (supra). Hence, following the decision of Apex Court in Malabar Industries Ltd. vs. CIT (supra), we are thus of the considered opinion that, while passing the assessment order the AO did not follow a view which can be said to be 'unsustainable in law'. In the circumstances therefore, the jurisdictional facts for usurping the jurisdiction, being absent, we hold that the action of Ld. Pr. CIT was without jurisdiction and therefore 'null' in the eyes of law. We accordingly quash the order of Ld. Pr. CIT impugned before us.

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

Order is pronounced in the open court on 9th September, 2021.

Sd/-
(P. M. Jagtap)
Vice President

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 9th September, 2021

Jd, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s. P. S. Srijan Height Developers, Srijan House, 36/1A, Elgin Road, Kolkata-700 020.
2. Respondent – Pr. CIT-11, Kolkata
3. The ITO, Ward-31(4), Kolkata
4. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata
