अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI MANISH BORAD,ACCOUNTANT MEMBER
AND
Ms. MADHUMITA ROY, JUDICIAL MEMBER
Virtual hearing

ITA No.198 & 199/Ind/2020
Assessment Year:2014-15 & 2015-16

Andritz Hydro Private Limited D-17, Mandideep, Mpakvn Industrial Area, Mandideep, Bhopal	**बनाम**/ Vs.	Pr. CIT-1 Bhopal
(Appellant)		(Revenue)
P.A. No.AABCV2466R		

Appellant by	Shri Rahul Kaul, AR
Respondent by	Shri Rajeeb Jain, CIT-DR
Date of Hearing:	**16.08.2021**
Date of Pronouncement:	**29.10.2021**

आदेश / O R D E R

PER MANISH BORAD, A.M:

The above captioned appeals filed at the instance of the Assessee for Assessment Year 2014-15 & 2015-16 are directed against the orders of Ld. Pr. Commissioner of Income Tax-1 (in

short 'Ld. CIT], Bhopal dated 25.02.2020 passed u/s 263 of the Income Tax Act 1961 (in short the 'Act').

2. At first, we shall take up the assessee's appeal i.e. ITANo.198/Ind/2020 for the assessment year 2014-15 wherein the assessee has raised the following grounds of appeal:-

> *"Based on the facts and circumstances of the case, Andritz Hydro Private Limited (here-in-after referred to as the' Appellant') respectfully craves leave to prefer an appeal under section 253 of the Income-tax Act, 1961 ('Act') against the order issued under section 263 of the Act by the Principal Commissioner of Income Tax -1, Bhopal (here-in-after referred to as 'Ld. PCIT') on the following grounds which are independent and without prejudice to each other:*
> *On the facts and circumstances of the case and in law, the Ld. PCIT has:*
> ***On validity of initiation of revision proceedings:***
> *1.Erred in initiating the revision proceedings under section 263 of the Act without appreciating that section 263 cannot be invoked unless the conjunctive conditions that the assessment order passed in erroneous in law as well as prejudicial to the interest of the revenue are satisfied.*
> *2.Erred in invoking revisionary proceedings under section 263 of the Act, without pointing out with proper evidence that on which of the points order passed is erroneous leading to prejudice being caused to revenue and also without appreciating that such an order cannot be made to remand back the matter to the file of assessing officer for conducting fresh enquiry and thereby seeking re-examination of the entire matter, which is against the legislative intent of section 263 of the Act*
> *3.Erred in invoking revision proceedings under section 263 of the Act without considering that the Appellant having followed the decision of Hon'ble Supreme Court of India in the case of CIT vs Woodward Governor India Private Limited (312 ITR 254) and other jurisdictionally binding decisions, there cannot be any prejudice to the interest of the revenue.*
> *4.Erred in initiating erred in initiating revisionary assessment proceedings under section 263 of the Act without appreciating that proceedings under section 263 of the Act cannot be invoked in case where the view taken by the Ld. PCIT is based on the presumption of inadequate enquiry being made at the time of regular assessment proceedings, without pointing out specifically why the assessment order is prejudicial to the interest of the revenue.*

5.Erred in passing the order under section 263 without considering and rejecting the contentions of the Appellant raised in the Appellant's submission dated 19 February 2020.

On merits of the issue involved in revision proceedings:

6.Erred by not accepting the Appellant's contention that the provision for mark to market loss on forward contracts is not a contingent liability and hence it should not be disallowed while computing the gross total income and the adjusted book profits for the purpose of section 115JB of the Act.

7.Erred by not following the law laid down by the Hon'ble Supreme Court in the case of CIT vs Woodward Governor India Private Limited (312 ITR 254) in respect of allowability of foreign exchange losses.

8.Erred by blatantly disregarding the decision of the Hon'ble jurisdictional Indore Bench of the Income Tax Appellate Tribunal in the case of HEG limited vs ACIT (ITA 583 of2012) wherein it was held that mark to market loss on forward contracts is an allowable expense while computing the gross total income.

9.Erred in not following the principle of consistency by holding that the mark to market loss on forward contracts should be disallowed ignoring that fact that the Appellant has consistently followed similar treatment which was never challenged by the revenue.

10.Erred in not directing the assessing officer that if the mark to market losses are disallowed during AY 2014-15, the reversal of mark to market losses on forward contract which has been offered to tax by the Appellant during AY 2015-16 should also be reduced while computing the tax liability."

3. The registry has informed that the present appeal is delayed by 68 days. Ld. Counsel for the assessee submitted that the delay in filing the appeal is due to country-wide lockdowns imposed by the government in wake of Covid-19 outbreak and taking cognizance of the same the government had introduced the taxation and other laws (Relaxation and Amendment of Certain Provisions) Act 2020 in order to relax/extend the statutory timelines for various compliance under various laws including the Income Tax Act 1961.

Prayer was made to condone the delay. Ld. DR opposed the request. We, however, under the given facts and circumstances of the case, are satisfied with the reason giving rise to delay in filing the instant appeal. We condone the delay and admit the appeal for adjudication on merits.

4. Brief facts of the case as culled out from the records are that the return of income for A.Y. 2014-15 was filed on 30.11.2014 declaring income of Rs.18,14,79,168/- which was set off entirely against the brought forward loss of A.Y. 2013-14 and the balance loss and unabsorbed depreciation to be carried forward to subsequent years was shown as Rs.78,07,50,625/-. Further, the assessee filed revised return of income on 14.1.2016 declaring total income of Rs.18,57,70,341/- after set-off of brought forward losses, the balance loss to be carried forward to subsequent years was shown as Rs.78,05,27,292/-. In the draft assessment order, the Ld. AO did not propose any addition in respect of the mark to market loss of INR 30,31,69,199/- on revaluation of the forward contracts claimed by the assessee co. The assessment was finalised on 25 January 2018 without any modification in the draft

assessment order assessing total loss at Rs.77,42,44,939/-. On 16 January 2020, the Ld. PCIT issued a notice under section 263 alleging that the AO's acceptance of such treatment is erroneous and is prejudicial to the interest of revenue. The Ld. PCIT drew this conclusion based on a reporting by the tax auditor in the Assessee's tax audit report wherein they have reported the aforesaid provision as a "liability of a contingent nature". The said show cause notice reads as under:

> *"Please refer to the order u/s 143(3) r.w.s. 144C r.w.s 92CA of the IT Act, 1961 dated 25.01.2018 passed by the DCIT-1(1), Bhopal for A.Y. 2014-15,*
> *The assessee company was engaged in the manufacturing of generators and its equipments besides providing installation and erection services. On perusal of the assessment order and case recordd, it is notices that the assessee company debited Rs.30,31,69,199/- on account of 'Mark to market loss on forward contract' under the head 'other expenses. In the Profit & loss account for the F.Y. 2013-14 relevant to A.Y. 2014-15.*
> *As per the 3CD report (Column 21(g) the provision for Mark to market loss on forward contracts amounting to Rs.30,31,69,199/- recognized in the statement of Profit & Loss as liability of contingent nature. Since the amount of Rs.30,31,69,199/- was of contingent nature of liability and therefore was required to be added back in computation of income which was not done by the AO and was also to be taken into account while calculating book profit u/s 115JB. This omission has resulted in underassessment of income of Rs.30,31,69,199/-.*
> *Keeping in view of the above, the assessment order passed by the Assessing Officer is considered to be erroneous so far as it is prejudicial to the interest of revenue, and therefore, I, propose to invoke powers vested u/s 263 of the Income Tax Act, 1961 in respect*

of the order referred to above. You are hereby given an opportunity of being heard as per section 263(1) of the Income Tax Act to present yourself in person or through an authorized representative on 04.02.2020 at 12:30PM to explain your case. In case no reply is received by stipulated date, it will be presumed that you have nothing to say in the matter and a decision will be taken on the basis of records available in this office."

5. In response to the above, the assessee co. filed its detailed reply filed at page nos.90 to 106 of the paper book explaining why the case is not fit for invocation of powers under section 263 and also on merits of the ground i.e. provision for mark to market loss is not a contingent liability relying upon relevant judicial pronouncements. However, the Ld. PCIT passed her order under section 263 on 25 February 2020 wherein she held that the provision for mark to market loss on derivative contracts is a contingent liability and as such, the invocation of powers under section 263 is justified in this case. Accordingly she set aside the Ld. AO's order dated 25 January 2018 and directed the Ld. AO to make a fresh assessment. Being aggrieved, the assessee co. is in appeal before this Tribunal.

6. Before us, the ld. Counsel for the assessee reiterated the submissions made before the ld. PCIT and submitted that the order

passed by the Ld. AO cannot be revised because the said order is neither erroneous in so far as it is nor prejudicial to the interests of the revenue as the assessee co. in its submission to the Ld. PCIT had explained that the tax treatment of such mark-to-market loss on forward contracts (i.e. claiming the same as an expenditure) followed by the assessee co. has been upheld by this jurisdictional bench of ITAT in the case of HEG limited vs ACIT (ITA 583 of 2012) following the judgment of Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Private Limited (312 ITR 254) (SC). The assessment order is in line with the decision of the Hon'ble Supreme Court and jurisdictional bench of Hon'ble ITAT, therefore, it cannot be said to be erroneous in nature. Hence the essential condition for invoking provisions of section 263 is not satisfied. Accordingly, the Ld. PCIT erred in holding that the Ld. AO's order is "erroneous". Further, the assessee co. had also explained to the Ld. PCIT that the mark to market loss under consideration was reversed in FY 2014-15. Such reversal was credited to the Profit and Loss Account and was accordingly offered to tax during AY 2015-16. Thus, there is no loss to the revenue on account of Ld.

AO's acceptance of the claim of mark to market loss of Rs. 30,31,69,199/- since such loss is reversed in the next year and the assessee company had offered to tax a mark to market gain/reversal of mark to market loss of Rs. 36,45,26,777/- on account of revaluation of forward contracts in FY 2014-15. Hence, the Ld. PCIT was not justified in holding that the order of the Ld. AO is "prejudicial to the interests of revenue". Thus, considering that Ld. AO's acceptance of the claim of mark to market loss of Rs. 30,31,69,199 is neither erroneous nor prejudicial to the interests of Revenue, therefore, the order passed by Ld. PCIT is invalid and bad in law as the mandatory twin conditions for the same are not satisfied. Learned Counsel for the assessee also submitted that the assessee co. had made complete disclosures which were duly considered by the Ld. AO with due application of mind while passing the assessment order. The details of mark-to-market loss on forward contracts were submitted by the assessee co. by way of submission of Financial Statements and Tax Audit Report and the Ld. AO had requested to submit books of accounts. Therefore, the assessee co. had also submitted the trial balance for the subject

year vide submission dated 24 November 2017. The Ld. AO noted that the books of accounts in e-format are checked on a test check basis, therefore, the Ld. AO had duly examined the issue and with due application of mind did not invoke any disallowance on account of mark-to-market on forward contracts. Ld. Counsel for the assessee further submitted that the Ld. PCIT has blatantly ignored the assessee's submission and the relevant judicial precedents. The Ld. PCIT has failed to distinguish even a single judicial precedent relied upon by the assessee. Further, the ld. Counsel for the assessee submitted that the assessee co. has entered into the forward contracts to hedge its business assets and liabilities and not for trading/speculation purposes. Hence, any loss incurred on such forward contracts is an allowable business expenditure under section 37 of the Act and since the assessee co. follows the mercantile system of account, the expenses/losses are to be allowed on the basis of accrual and not on payment/realisation. Thus, the ld. Counsel for the assessee submitted that the Ld. AO has rightly not disallowed the mark to market loss of Rs.30,31,69,199/- on forward contracts.

7. Per contra Ld. Departmental Representative vehemently argued supporting the order of Ld. PCIT and submitted that the provision for mark to market loss on derivative contracts is a contingent liability, therefore, the powers under section 263 were rightly invoked by the ld. PCIT in this case.

8. We have heard rival contentions of both the parties and perused material available on record. We find that the assessee company is engaged in the business of design, manufacture, servicing, erection and installation of hydro and thermal power generator, generator components, hydro turbines, governing equipment, inlet butterfly valves, spherical valves and other related plants and equipment for all types of turbines. The assessee's company's suppliers and customers are located across the globe and the assessee company has significant exposure to foreign currency fluctuations. Hence, the assessee co. enters into various forward exchange contacts to hedge the foreign currency fluctuations on its receivables/payables and unfinished sale/purchase contracts. During the financial year ended 31 March

2014 (FY 2013-14), the assessee co. incurred a mark to market loss of Rs.30,31,69,199/- on revaluation of the forward contracts as on 31 March 2014 and when the assessee co. earns any mark to market gain on forward contracts, the reversal of loss is credited to the profit and loss account duly offering to tax in the normal tax computation as well as in the Minimum Alternate Tax (MAT) computation. The above treatment has been consistently followed by the assessee co. and the same has been accepted by the Assessing Officer. However, the ld. PCIT invoked revisionary powers u/s 263 on 25 February 2020 holding that the provision for mark to market loss on derivative contracts is a contingent liability and directed the ld. AO to make a fresh assessment. We find that as per the provisions of Section 263 of the Act, the order passed by the Ld. AO can be revised only if the said order is erroneous in so far as it is prejudicial to the interests of the revenue. Accordingly, in order to initiate the revision proceedings, two conditions are required to be satisfied simultaneously – (i) the order should be erroneous and also (ii) prejudicial to the interest of Revenue as held by the Hon'ble Supreme Court in case of Malabar Industrial Co. Limited vs CIT

(243 ITR 83) (SC). We observe that the tax treatment of such mark-to-market loss on forward contracts (i.e. claiming the same as an expenditure) followed by the assessee co. has been upheld by this jurisdictional bench of ITAT in the case of HEG limited vs ACIT (ITA 583 of 2012) (page nos.107 to 126 of the paper book) following the judgment of Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Private Limited (312 ITR 254) (SC) (page nos.127 to 141 of the paper book). Jurisdictional ITAT Indore in the case of HEG Limited vs ACIT (supra) on similar facts held that provision for mark to market loss is allowable as a deduction. Further, Hon'ble Supreme Court in the case of CIT vs Woodward Governor India Private Limited (supra) held mark to market loss to be allowable. WE also find that Hon'ble Supreme Court in the case of ONGC vs CIT (322 ITR 180) (SC) upheld the order of Special Bench of Delhi ITAT wherein it held that the foreign exchange fluctuation loss is not contingent or notional. Accordingly, we are of the view that when the assessment order is in line with the decision of the Supreme Court and jurisdictional bench of Hon'ble ITAT, it cannot be said to be erroneous in nature. Further, we find that the

mark to market loss under consideration was reversed in FY 2014-15. Such reversal was credited to the Profit and Loss Account and was accordingly offered to tax during AY 2015-16. The following relevant extract from financial statements of FY 2014-15 was also provided to the Ld. PCIT:

22 Other income	Year ended 31 March 2015	Year ended 31 March 2014
Interest income	434,511	833,045
Export benefits	6,769,464	6,295,112
Provision for estimated loss on forward contracts written back	364,526,777	-
Provision for warranty written back	4,745,449	12,513,800
Provision for estimated loss on onerous contracts written back	-	32,632,365
Liabilities no longer required written back	41,823,019	26,061,118
Other non-operating income	2,779,403	12,458,231
	421,078,623	90,793,671

From above, we find that there is no loss to the revenue on account of Ld. AO's acceptance of the claim of mark to market loss of Rs. 30,31,69,199/- as such loss is reversed in the next year and the assessee co. had offered to tax a mark to market gain/reversal of mark to market loss of Rs.36,45,26,777 on account of revaluation of forward contracts in FY 2014-15. Thus, the order of the ld. Assessing Officer cannot be said to be "prejudicial to the interests of revenue". We also find that the assessee co. had made complete disclosures which were duly considered by the Ld. AO with due application of mind while passing the assessment order. The details

of mark-to-market loss on forward contracts, in respect of which the assessment order is sought to be revised by the Ld. PCIT, were submitted by the assessee co. by way of submission of Financial Statements (page 199 to 229 of the paper book) and Tax Audit Report (page 73 to 89 of the paper book). The relevant extract from the financial statements in respect of mark-to-market loss on forward contracts is reproduced hereunder:

Note on other expenses:

29	Other expenses		Year ended 31 March 2014		Year ended 31 March 2013
	Consumption of stores and spare parts		22,848,234		28,330,737
	Power and fuel		72,507,188		63,414,771
	Rent		38,341,247		27,929,816
	Repairs				
	-Buildings		9,842,685		13,126,877
	-Machinery		47,623,116		27,786,765
	-Others		55,995,317		32,709,751
	Insurance		120,254,169		43,337,234
	Rates and taxes		2,334,059		4,292,406
	Sub contracting expenses		591,251,352		1,036,462,839
	Mark to market loss on forward contracts		303,169,199		-
	Net loss on foreign exchange fluctuations		266,698,378		368,064,017
	Freight and forwarding		301,035,343		280,473,764
	Travel and conveyance		208,636,005		207,691,108
	Site erection expenses		168,063,970		160,014,219
	Royalty		95,915,381		123,874,176
	Warranty cost		71,118,250		90,074,684
	Technical drawing expenses		90,293,891		28,785,985
	Payment to auditors (refer note below)		3,766,644		3,787,035
	Legal and professional charges		37,881,716		35,935,266
	Bad debts written off	56,865,824		2,466,736	
	Less: written off against provision	46,977,171	9,888,653	-	2,466,736
	Provision for doubtful trade receivables		126,070,659		16,282,007
	Net loss on sale of fixed assets		3,051,657		3,553,952
	Loss on onerous contract		-		125,419,273
	Miscellaneous expenses		131,655,745		216,421,127
			2,778,242,858		2,940,234,544

On the accounting policy:

"(h) Foreign currency transactions

Foreign currency transactions are recorded at the rate of exchange prevailing on the date of the respective transactions. Monetary foreign currency assets and liabilities remaining unsettled at the balance sheet date are translated at the rates of exchange prevailing on that date. Gains/losses arising on account of realization/settlement of foreign exchange transactions and on the translation of foreign currency assets and liabilities are recognised in the statement of profit and loss. The premium or discount on a forward exchange contract taken to hedge the foreign currency risk of an existing asset/liability is recognised over the period of the contract. The forward exchange contracts taken to hedge existing assets or liabilities are translated at the closing exchange rates and resultant exchange differences are recognised in the same manner as those on the underlying foreign currency asset or liability. Apart from forward exchange contracts taken to hedge existing assets or liabilities, the Company also uses derivatives to hedge its foreign currency risk exposure relating to firm commitments and highly probable transactions. In accordance with the relevant announcement of the Institute of Chartered Accountants of India, the company provides for losses in respect of such outstanding derivative contracts at the balance sheet date by marking them to market....."

Note on provisions as per AS 29

42 **The schedule of provisions as required to be disclosed in compliance with Accounting Standard 29, "Provisions, Contingent Liabilities and Contingent Assets" is as under:**

Provision relating to:-	Opening balance as at 1 April 13	Created during the year	Payments/ utilised during the year	Write back during the year	Closing balance as at 31 March 14
	2013-14 / (2012-13)	2013-14 / (2012-13)	2013-14 / (2012-13)	2013-14 / (2012-13)	2013-14 / (2012-13)
Provision for warranty	326,760,571	96,751,849	25,633,600	12,513,800	385,365,020
	(236,686,216)	(100,366,473)	(2,029,506)	(8,262,612)	(326,760,571)
Provision for pending sales tax forms	5,045,000	-	-	-	5,045,000
	(5,045,000)	-	-	-	(5,045,000)
Provision for estimated losses on onerous contracts	137,432,848	12,108,697	-	44,741,062	104,800,483
	(12,013,576)	(139,418,237)	-	13,998,965	(137,432,848)
Provision for mark to market loss on forward contracts	200,981,344	504,150,545	-	200,981,345	504,150,544
	(204,482,510)	(200,981,345)	-	(204,482,511)	(200,981,344)

(a) Provision for warranties relates to the provision made for costs likely to be incurred on replacements / repairs of generators in the year of execution of the contracts.
(b) Provision for pending sales tax forms relates to the provision made for sales tax forms not received from customers.
(c) Provision for estimated losses on onerous contracts primarily relates to expenses where the gross margin of the projects are negative and 100% loss is being provided in the books of account.
(d) Provision for loss on mark to market relates to the provision made for loss on mark to market the forward contract taken for highly probable or forecasted transactions.

9. Further, the Ld. AO had requested to submit books of accounts. In this regard, the assessee co. submitted the trial balance of for the subject year vide submission dated 24 November 2017 (*page 230 to 231 of the paperbook*). We find that vide Para 5.3

of the final assessment order, the Ld. AO noted that the books of accounts in e-format are checked on a test check basis. The Ld. AO specifically scrutinized the miscellaneous expenses and also made an addition in this regard. Vide Para 5.2 of the final assessment order, we find that the warranty expenses incurred by the assessee co. have been tested to determine whether the same are contingent in nature. Accordingly, it can be seen that wherever required the Ld. AO had specifically checked if the expenses are contingent in nature. Accordingly, the Ld. AO scrutinized the expenses debited to the Profit and Loss account for the subject year in detail and cannot have said to missed mark-to-market loss on forward contracts which is apparent in the other expenses note of Financial statements. This clearly shows that the documents and submissions/ details filed were duly verified and considered by the Ld. AO while passing the Assessment order. Thus, we find that the Ld. AO duly examined the issue and with due application of mind, the ld. Assessing Officer did not invoke any disallowance on account of mark-to-market on forward contracts. This view is supported by the order of Jurisdictional bench of ITAT in the case of

Vidisha Tractors vs ACIT (53 TTJ 432) (ITAT Indore). We also find that the the case of Himadri Chemicals & Industries Limited vs. PCIT (ITA 813/Kol/2018) (ITAT Kolkata) squarely covers the present case wherein Hon'ble ITAT had quashed the order under section 263 proposing to make addition on account of provision for mark to market loss on derivative contracts considering it to be contingent. We also find that the assessee co. entered into the forward contracts to hedge its business assets and liabilities and not for trading/speculation purposes. Hence, any loss incurred on such forward contracts is an allowable business expenditure under section 37 of the Act. Since the assessee co. follows the mercantile system of account, the expenses/loss are to be allowed on the basis of accrual and not on payment/realisation as held by the Hon'ble jurisdictional Madhya Pradesh High Court in the case of M.P. Financial Corporation vs CIT (supra) wherein it was has held that the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. Thus, we are of the view that when the

assessee co. meets all the requirements viz. it has been consistently following the mercantile system of accounting, it has been consistently recognising the mark to market gains/losses as per the accounting standards and it has been giving the same treatment to mark to market gains as given to mark to market losses i.e. the mark to market gains credited to the Profit and Loss Account are duly offered to tax, then the Ld. AO was justified in allowing the mark to market loss of Rs.30,31,69,199 on forward contracts. We find that the identical issue of mark to market loss on forward contracts (that are not entered for trading/speculation purposes) has also been held to be an allowable deduction by the ratio laid down in the case of HEG Limited vs ACIT (ITA No.583/Ind/2012, order dated 28.9.2018) (Jurisdictional ITAT Indore) (supra). The relevant portion of the order of the ITAT is reproduced hereunder:

> "*11. Now we take up Ground No.4 wherein both the lower authorities disallowed the claim of foreign currency fluctuation loss of Rs.2,82,42,778/- which was suffered by the assessee on account of forward market contract of forex derivatives outstanding at the year end. The Ld Counsel for the assessee submitted that the issue raised in the appeal is squarely covered in favour of the assessee by various judgments including the Special Bench decision in the case of DCIT V Bank of Bahrain & Kuwait 132 TTJ 505 (Mum) (SB). He also submitted that the actual loss incurred in the forward market contracts for foreign exchange for the transactions squared up during the year have already been allowed by the revenue*

authorities but both the lower authorities has denied the claim of loss with regard to pending forward contracts which were due to mature in the subsequent financial year for which notional loss was booked by the assessee in the profit and loss account on the basis of accounting standard (AS) 11 issued by the Chartered Accountants of India. Ld. Counsel for the assessee referred and relied on the following decisions ;
(a) I.T.A.T. Mumbai Bench in the case of ACIT V M/s. D. Dipak & Co I.T.A No.7629/Mum (2011)
(b) Supreme Court in the case of CIT V Woodward Governor India P. Ltd (2009) 312 ITR 254 (SC)
(c) I.T.A.T. Special Bench in the case of DCIT V Bank of Bahrain & Kuwait 132 TTJ 505 (Mum SB) (2010)
(d) I.T.A.T Delhi in the case of M/s. Bechtel India Pvt. Ltd, New Delhi V ACIT ITA No.1224/Del/2017
(e) Bombay High Court in the case of Director of Income Tax (International Taxation) V Citiban N.A. Appeal No.330 of 2013 (2016) 66 rtaxmann.com 373 (Bombay)
(f) Oil & Natural Gas Corpn. Ltd V CIT (2010) 322 ITR 180 (SC)
(g) Perfect Circle India Ltd V Deputy Commissioner of Income Tax (2015) 60 Taxmann.com 424 (Mumbai-Trib)
(h) DCIT Kotak Mahindra Investment Ltd (Mumbai –Trib)
(i) CEE V Ratam Melting & Wires Industries (2008) 13 SCC

12. Per contra Ld. Departmental Representative supported the orders of lower authorities.

13. We have heard rival contentions and perused the records placed before us. We find that the assessee is engaged in the business of manufacture of graphite electrodes, steel, activated carbon cloth, power generation and a 100% export oriented unit of technology centre. Major part of the turnover is from export of graphite which are transported through ships and take long time to reach to the destination and therefore the assessee used to carry out hedging transaction of the foreign currency. A sum of Rs.118.32 crores is claimed as foreign exchange fluctuation expenditure which also includes "marked to market" loss of notional nature at Rs.2,82,42,778/-. Both the lower authorities have allowed the claim of foreign exchange fluctuation expenditure except for the notional loss of Rs.2,82,42,778/- for the reason that those contracts has not squared up at the close of year and the impugned amount is merely notional loss. Ld. Counsel for the assessee has contended that the impugned notional loss has been shown in the financial statement in order to comply to the Accounting Standard-11 issued by the

Chartered Accountants of India for "the effect of changes in Foreign Exchange Rates" which provides that the assessee should show the loss/profit in the profit and loss account arising out of the difference in rate of foreign currency rate at the year end vis-a-vs forward contract rate on the maturity date. It is also contended that in the subsequent year when the alleged "marked to market" forward contract matured/squared, all resultant profit and loss has been booked in the books of accounts after duly adding/reducing the alleged notional loss of Rs.2,82,42,778/-. This plea of the assessee has not been rebutted by the revenue authorities.

14. We find that the Co-ordinate Bench, Mumbai I.T.A No.7629/Mum (2011) in the case of ACIT V M/s. D. Dipak & Co date4d 30.04.2013 dealing with the same issue of "marked to market" loss of notional nature, allowed the issue in favour of the assessee by relying on the Special Bench decision in the case of DCIT V Bank of Bahrain & Kuwait 132 TTJ 505 (Mum SB) (2010) observing as follows (for sake of convenience we have also mentioned the facts of the case) ;

> *"This appeal is preferred by the Revenue against the order of ld. CIT(A) - 27, Mumbai dtd. 28-8-2011 whereby he deleted the addition made by the A.O. on account of "marked to market" loss of Rs. 5,53,02,172/-claimed by the assessee on revaluation of the pending forward contract on the closing day.*
>
> *2. The assessee in the present case is a partnership firm which is engaged in the business of manufacturing, trading as well as import and export of diamonds. The return of income for the year under consideration was filed by n 29-9-2008 declaring total income of Rs. 54,44,2'5,595/-. During the o se of assessment proceeding, it was noticed by the A.O. that the assessee had entered into forward exchange contract which were revalued by it on the closing day of the previous year. On such revaluation, the resultant loss amounting to Rs. 5,53,02,172/- was claimed by the assessee as "marked to market" loss. Since the relevant foreign exchange contract had not been settled in the relevant previous year, the assessee was called upon by the A.O. to explain as to why the marked to market loss claimed by it should not be disallowed being a notional loss. In reply, it was submitted by the assessee that it is engaged in the business of export of diamonds and since such exports are made on credit, it is always exposed to foreign*

currency fluctuation risk. It was submitted that in order to hedge the said risks, the assessee had entered into forward exchange contract with banks. It was submitted that export receivables were being re-valued by the assessee on the closing day of the accounting year following the Accounting Standard _ 11 issued by the Chartered Accountants of India and the resultant loss/profit on such revaluation was claimed in the relevant year I was submitted that similarly the mal-ked to market gain or loss in respect of outstanding forward exchange contract by revaluing these contract as per AS-II was being claimed by the assessee. It was contended that this method was consistently being followed by the assessee and the marked to market loss claimed by it in respect of outstanding forward exchange contract was allowable as held by the Mumbai Special Bench of the ITAT in the case of DCIT vs. Bank of Bahrain and Kuwait (41 SOT 29(Mum).

3. The submissions made by the assessee on this issue were not found acceptable by the A.O. According to him, the relevant foreign exchange contract were still outstanding on the closing day of the previous ear and therefore the "marked to market" loss claimed by the assessee by revaluing The said contract was not the loss actually incurred by the assessee. He held that the actual toss or gain would be ascertained/determined only after the expiry period of the relevant contract or their termination and at that time there might not be any such loss at all. He held that the marked to marked loss claimed by the assessee thus was only the notional loss which was not allowable, As regards the decision of the Special Bench of the Tribunal in the case of Bank of Bahrain & Kuwait (supra) relied upon by the assessee, the A.O. held that the same was distinguishable on facts inasmuch as the foreign currency in that case was held by the assessee as stock-in-trade and he had entered into foreign exchange contract in order to protect its interest against the wide fluctuation in the foreign currency itself He held that in the case of the assessee, foreign currency was not its stock-in-trade and therefore the decision of the Special Bench of the Tribunal in the ease of Bank of' Bahrain and Kuwait (supra) was not applicable in the case of the assessee being distinguishable on facts. As regards the reliance placed by the assessee on Accounting Standard - 11, the A.O. held that the reporting of notional losses to adhere to the accounting guidelines would not by itself make it deductible for Income Tax purposes especially when there is no provision

in the Income 'I'ax Act to allow the deduction on account of notional loss for which the liability has not crystallized. He therefore disallowed the marked to market loss claimed by the assessee in respect of forward exchange contract claimed by the assessee in the assessment completed u/s 143(3) of the Income Tax Act, 1961 (the Act) vide an order dated 24-12-2010.

4. The order passed by the A.O. u/s 143(3) was challenged by the assessee in an appeal preferred before the Id. CIT(A) and the submission., made before the A.O. in support of its claim for "marked to market ass" as a result of revaluation of foreign exchange contract were reiterated on behalf of the assessee before the ld. CIT(A). The reliance was also placed on behalf of the assessee in support of its case on this issue on the decision of Special Bench of ITAT in the case of Bank of Bahrain and Kuwait (supra).

5. After considering the submissions made on behalf of the assessee and he relevant material available on record, the ld. CIT(A) first took note of the facts involved in the assessee's case relevant to this issue in para 5.1 & 5.2 of his impugned order as under:-

"5.1 At the outset, appellant is predominantly engaged in the business of import of rough diamonds, manufacturing i.e. cutting & polishing of same in to polished diamonds and exporting the said diamonds. The total sales are at Rs.I08S.30 Cr, and the entire sales are by way of exports and local sales in diamond dollar account, which are also in foreign currency. Similarly, out of total purchase of Rs.877.63 Cr, imports account for Rs476.68 Cr. and part of the local purchases are also in diamond dollar account. Appellant firm also utilize working capital loans from banks, some of which are also denominated in foreign currency. Out of total outstanding loan of Rs.260.17 Cr, loan denominated in foreign currency is Rs.256.40 Cr. Similarly bur of total creditors for goods of Rs 122 Cr, imports payable account for Rs.102 Cr. Thus, it is evident that appellant is exposed to risk arising out of fluctuation in Exchange rate and as a prudent businessmen likely to hedge its risk.

5.2 From para 6 of schedule-F to Balance Sheet under the heading " Report on Notified Accounting Standards", it is "evident that appellant is reporting all monetary items i.e. Export Receivable, Import Payable and Foreign Currency

Working Capital Loan appearing in balance sheet at closing rate and recognizing the exchange rate difference in Trading Account as expenses or income, as the case may be. Similarly outstanding forward contract are marked to market and resulting loss or gain is being recognized as expenses or income in trading account. It may be mentioned that this method of recording transaction denominated in foreign currency is as per AS-1 I & being consistently followed and there is no change as compared to earlier year.

In the light of the relevant facts as noted by him, the ld. CIT(A) decided this issue by applying the ratio of the decisions laid down in the various judicial pronouncements. In this regard, he referred to the decision of the Hon'ble Delhi High Court in the case of Woodward Governor 294 ITR 451 as affirmed by the Hon'ble Supreme Court (312 ITR 254) wherein it was held that the liability arising out of already concluded contracts stands accrued the minute the contract is entered into and mere postponement of the payment to different date cannot extinguish the liability and render it notional or contingent. He then referred to the decision of Hon'ble Supreme Court in the case of ONGC vs. CIT (322 ITR 180) wherein it was held that when the assessee maintained its accounts on mercantile system of accounting and the loss suffered by it on account of fluctuation in the rate of foreign exchange as on the date of balance sheet was claimed in compliance with Accounting Standards, the same should be allowed as expenditure u/s 37(1) of the act notwithstanding the fact that the liability had not been actually discharged in the year in which the fluctuation in the rate of foreign exchange had occurred. The ld. CIT(A) noted that the business of ONGC was not that of foreign exchange dealer and the similar loss was still held to be allowable by the Hon'ble Supreme Court. He held that the A.O. therefore was not correct in distinguishing the case of Bank of Bahrain and Kuwait (supra) decided by the Special Bench of ITA T involving similar issue on the ground that foreign currency was held in the said case by the assessee as stock-in-trade. The Ld. CIT{A) also took note of the fact that similar method of restatement of foreign exchange was followed by the assessee consistently in the earlier years and the same was accepted by the A.O. The ld CIT (A) accordingly held that the loss incurred by the assessee on restatement of foreign exchange contract at the year end was allowable and deleted the disallowance made by the A.O. on account of restatement of pending forward

contract agreement at the year end. Aggrieved by the order of the ld. CIT(A), the Revenue has preferred his appeal before the Tribunal.

6. At the time of hearing before us, the ld. D.R. relied on the order of the A.O. in support of the Revenue's case on the issue involved in the present appeal while the Id. counsel for the assessee strongly supported the impugned order of the Id. CIT(A) giving relief to the assessee on the said issue submitting that the case laws relied upon by the ld. CITT(A) in support of his decision are squarely applicable to the issue involved in the present appeal. He also relied on the decision of Mumbai Bench of the ITAT in the case of DCIT vs. Banque Indosuez (Known as Credit Agricole Indosuez) reported in (2013) 55 SOT 38 (Mumbai) and in the case of Societe Generale vs. DDIT (International Taxation) reported in (2013) 21 ITR (Trib) 606 (Mumbai) in support of the assessee's case.

7. We have heard the arguments of both the sides and also perused the relevant material available on record, It is observed that a similar claim for marked to market loss claimed by the assessee in respect of forward foreign exchange contract debited to the P&L account has been allowed by the Special Bench of this Tribunal in the case of Bank of Bahrain & Kuwait (supra) after discussing and considering all the relevant aspects of the matter and the relevant observations of the tribunal recorded in this context are summarized as under:-

"[i] A binding obligation accrued against the Appellant the minutes it entered into forward foreign exchange contracts,

(ii] A consistent method of accounting followed by the Appellant cannot be disregarded, The Appellant has consistently followed the same method of accounting in regard to recognition of profit or loss both) in respect of forward foreign exchange contract as per the rate prevailing on March, 31,

(iii) A liability is said to have crystallized when a pending obligation on the balance sheet date is determinable with reasonable certainty,

(iv) As per AS-II when the transaction is not settled in the same accounting period as that in which it occurred, the exchange difference arises over more than one accounting period,

(v) In view of the decision of the Supreme Court " the case 0 Woodward Governor India (I) P. Ltd" the Appellant's claim is allowable.

(vi) In the ultimate analysis, there is no revenue effect and the timing of taxation of loss/profit,"

Although the decision of Special Bench ITAt In the case of 'Bank of Bahrain & Kuwait (supra) cited before the A.O. was distinguished by him on the ground that the assessee in the said case was holding foreign currency as stock-in-trade, the distinction so made by the A.O. was irrelevant and immaterial as rightly pointed out by the ld. CIT(A) in his impugned order relying on the decision of Hon'ble Supreme Court in the case of ONGC (supra) wherein a similar issue was decided by the Hon'ble Apex Court in favour of the assessee despite the fact that ONGC was not a dealer in foreign exchange.

8. In the case of Banque Indosuez (supra) cited by the ld. counsel for the assessee, the co-ordinate Bench of this Tribunal had an occasion to consider a similar issue and the same was decided by the Tribunal in favour of the assessee following the decision of Special Bench of ITAT in the case of Bank of Bahrain & Kuwait (supra) as is evident from para 15 of the order of the Tribunal passed in the said case which is reproduced hereunder:-

"After considering the rival submissions and 'perusing the material on record we find that the assessee entered, into forward foreign exchange contract during the year In respect of the ma contracts as at the year end, the assessee valued such unmatured forward foreign exchange contracts at the rate of exchange prevailing a at the end of the year which resulted into loss of Rs. 7.14 crore. It can be considered by way of simple example. If the assessee undertakes a forward foreign exchange contract as on 18th January, 1998, on which the rate of dollar is Rs. 42. Further suppose that the contract is to mature on 30th April at the price of Rs. 46 per dollar. Suppose at the end of the year 31st March, the rate of dollar has gone up to Rs. 43, the assessee's claim is that the difference of Rs. 1 (Rs. 43 -42) as on 31 st March, 1998 should be taken as loss and allowed deduction accordingly. The Special Bench of the Tribunal in the case of Dv. CIT (International Taxation) v. Bank of Bah rain & Kuwait [201 OJ 41 OT 290 (Mum) has held that

the loss incurred by the assessee on account of evaluation of the contract on the last day of the accounting year i.e , before the date of maturity of the forward contract, is allowable as deduction. In that view of the matter this loss of Rs. 7. -4 c:-ore representing difference of Re. 1 (Rs. 43 - 42) is liable to be allowed as deduction".

9. In the latest decision rendered on 9th January, 2013 in the case of Societe Generale (supra) cited by the ld. counsel for the assessee, the coordinate Bench of this Tribunal has again allowed a similar claim of the assessee for the loss of Rs. 9.16 crores on foreign exchange contracts outstanding as on 31-3-1998 holding that this issue is squarely covered in favour of the assessee by the decision of the Special Bench of ITAT in the case of Bank of Bahrain & Kuwait (supra). In our opinion, the issue involved in the present case thus is squarely covered in favour of the assessee by various judicial pronouncements discussed above and respectfully following the same, we uphold the impugned order of the ld. CIT(A) allowing the claim of the assessee on account of "marked to market" loss on revaluation of the pending forward contract for foreign exchange."

15. From the perusal of the above order of the Co-ordinate Bench the issue raised before us are squarely similar to those adjudicated by the Tribunal. We therefore in the given circumstances of the case are of the considered view that the lower authorities erred in not allowing the assessee's claim of notional loss arising on account of "marked to market" loss on the valuation of the pending forward contract of foreign exchange at Rs.2,82,42,778/-. We accordingly allow Ground No.4 raised by the assessee. In the result Ground No.4 of the assessee is allowed."

The ratio laid down in the following cases also supports our view:

CIT vs D. Chetan & Co. (ITA 278 of 2014) (Bombay HC);

PCIT vs International Gold Company Limited (ITA 1827 of 2016) (Bombay HC);

DCIT vs Bank of Bahrain & Kuwait (2010-TIOL-447-ITAT-MUM-SB) (ITAT Mumbai Special Bench);

Emmsons International Limited vs ACIT (ITA 4603/Del/2019) (ITAT Delhi);

Bharat Serums & Vaccines Limited vs ACIT (ITA 3091/Mum/2012) (ITAT Mumbai).

10. On consideration of above facts and discussion thereof in the light of the judicial pronouncements (supra), we hold that the Ld. AO's order is not erroneous and prejudicial to the interest of revenue since mark to market loss of INR 30,31,69,199 incurred by Company on revaluation of forward contracts is an allowable deduction as the loss claimed by the assessee co. was in accordance with a recognized method of accounting, the loss claimed by the assessee co. was not a notional/contingent loss, but is an actual loss and the mark-to-market loss on forward contracts has not been treated as a contingent liability in the audited financial statements. Thus, the mark-to-market loss on forward contracts cannot be said as contingent in nature. Therefore, the Ld. PCIT has erred in invoking powers under section 263 of the Act. Accordingly, we set aside the order of the ld. PCIT holding it invalid and restore the order of the Assessing Officer. Consequently, grounds raised in the appeal of the assessee for the assessment year 2014-15 stand allowed.

11. Now, we shall take up the assessee's appeal bearing ITA No.199/Ind/2020 for the assessment year 2015-16. The assessee has raised the following grounds of appeal:

> *"On the facts and circumstances of the case and in law, the Ld. PCIT has:*
>
> ***<u>On validity of initiation of revision proceedings</u>**:*
>
> *1. Erred in initiating the revision proceedings under section 263 of the Act without appreciating the section 263 cannot be invoked unless the conjunctive conditions that the assessment order passed in erroneous in law as well as prejudicial to the interest of the revenue are satisfied.*
> *2. Erred in invoking revisionary proceedings under section 263 of the Act, without pointing out with proper evidence that on which of the points order passed is erroneous leading to prejudice being caused to revenue and also without appreciating that such an order cannot be made to remand back the matter to the file of assessing officer for conducting fresh enquiry and thereby seeking re-examination of the entire matter, which is against the legislative intent of section 263 of the Act.*
> *3. Erred in initiating erred in initiating revisionary assessment proceedings under section 263 of the Act without appreciating that proceedings under section 263 of the Act cannot be invoke in case where the view taken by the Ld. PCIT is based on the presumption of inadequate enquiry being made at the time of regular assessment proceedings, without pointing out specifically why the assessment order is prejudicial to the interest of the revenue.*
> *4. Erred in passing the order under section 263 without considering and rejecting the contentions of the Appellant raised in the Appellant's submission dated 19 February 2020.*
>
> ***<u>On merits of the issue involved in revision proceedings</u>**:*
> *5. Erred by considering the assessment order to be erroneous by holding that the assessing officer allowed the deduction of INR*

1,09,47,667 towards reversal/utilization of warranty provision without conducting any enquiry.

6. Erred by not accepting the Appellant's contention that allowance of INR 1,09,47,667 on account of reversal/utilisation of warranty provision does not result in double deduction to the Appellant.

Erred by blatantly ignoring the fact the Appellant had not received any deduction of warranty provision in the year of its creation and hence the deduction was allowable in the year of reversal/utilisation of such warranty provision."

12. The registry has informed that the present appeal is delayed by 68 days. Ld. Counsel for the assessee submitted that the delay in filing the appeal is due to country-wide lockdowns imposed by the government in wake of Covid-19 outbreak and taking cognizance of the same the government had introduced the taxation and other laws (Relaxation and Amendment of Certain Provisions) Act 2020 in order to relax/extend the statutory timelines for various compliance under various laws including the Income Tax Act 1961. Prayer was made to condone the delay. Ld. DR opposed the request. We, however, under the given facts and circumstances of the case, are satisfied with the reason giving rise to delay in filing the instant appeal. We condone the delay and admit the appeal for adjudication on merits.

13. Brief facts of the case as culled out from the records are that the assessee co. has two business units viz. Mandideep Unit near Bhopal and Prithla Unit near Faridabad. Till 2008, these units were housed under 2 separate companies viz. VA Tech Hydro India Private Limited, Mandideep and VA Tech Escher Wyss Flovel Limited, Prithla. Subsequently, with effect from 1 January 2009, the Prithla unit merged into Mandideep Unit. Later on, the name of the amalgamated Company was changed to Andritz Hydro Private Limited. Prior to the merger, both the companies were creating provisions for warranty. The tax treatment for such provision was as follows:

Entity	***Tax treatment of provision for warranty***	
	In the year of creation of provision	***In the year of utilisation/reversal of provision***
Mandideep Unit	*Claimed as deduction*	*No adjustment required*
Prithla Unit	*Added back to the income*	*Reduced separately from the income*

After the merger, the treatment adopted by the Mandideep unit has been continued and has also been upheld by the assessing authorities as well as by the appellate authorities. At the time of

merger i.e., as on 31 December 2008, the amount of provision standing in the balance sheet of Prithla unit was Rs.5,10,50,999/- which was transferred to the books of the assessee co. pursuant to the merger. Post the merger, the assessee co. has been utilising/reversing the aforesaid provision for warranty as and when required. The assessee co. has been claiming deduction of such utilisation/reversal in its return of income as no deduction was claimed in the year of creation of provision in Prithla Unit. The above treatment has been consistently followed by the assessee co. and has been accepted by the Assessing Officer. During the year ended 31 March 2015, the assessee co. claimed a deduction of Rs. 1,09,47,667/- towards utilisation/reversal the aforesaid warranty provision of Prithla Unit in its return of income filed on 30 November 2015. The assessee's case was selected for assessment and the assessment order was passed on 28 November 2017. In the assessment order, the Ld. AO did allowed the assessee's claim of deduction towards utilisation/reversal of warranty provision of Rs.1,09,47,67/-. However, on 16 January 2020, the Ld. PCIT issued a notice under section 263 alleging that the Ld. AO's

acceptance of such treatment is erroneous and is prejudicial to the interest of revenue. The Ld. PCIT referred to the directions of Hon'ble Dispute Resolution Panel and decision of Hon'ble Income Tax Appellate Tribunal ('ITAT') in the assessee's case for past years wherein the provision for warranty has been allowed as a deductible expense. The Ld. PCIT concluded that where the assessee co. has been allowed deduction in the year of creation of warranty provision, a claim of deduction in the year of utilisation/reversal of warranty provision would tantamount to double deduction. The assessee co. filed its response to the notice under section 263 explaining why the case is not fit for invocation of powers under section 263 and also on merits of the ground i.e., the claim of deduction of utilisation/reversal of warranty provision does not lead to double deduction in this case as the assessee co. had not claimed allowance in the year of creation of provision for warranty. However, the Ld. PCIT passed her order under section 263 on 25 February 2020 wherein she held that the aforesaid claim tantamount to double deduction. The Ld. PCIT also held that the Ld. AO did not make any inquiry/verification in respect of warranty. Basis the

above, the Ld. PCIT held that the invocation of powers under section 263 is justified in this case. Accordingly, she set aside the Ld. AO's order dated 28 November 2017 and directed the Ld. AO to make a fresh assessment.

14. Being aggrieved, the assessee is in appeal before this Tribunal. Before us, the ld. Counsel for the assessee reiterated the submission made before the Revenue Authorities and submitted that the said decisions referred to by the ld. PCIT are in respect of AY 2010-11, AY 2011-12 and AY 2013-14 viz. post-merger period i.e., where the allowance was claimed in the year of creation of provision itself and not in respect of pre-merger period of Prithla Unit where the Company had not claimed any deduction of the warranty provision in the year of creation of such provision. Ld. Counsel for the assessee further submitted that the Ld. AO had made inquiries about the warranty provision, not only during the assessment proceedings for AY 2015-16 but for earlier years as well. Further, ld. Counsel for the assessee submitted that there is no loss to the revenue on account of Ld. AO's acceptance of the claim of deduction of utilisation/reversal of that warranty provision

since the said provision was disallowed and offered to tax in the earlier years. Thus, the warranty provision of Rs.1,09,47,677/- was neither erroneous nor prejudicial to the interests of Revenue. Ld. Counsel for the assessee further submitted that after the merger, the tax treatment adopted by the Mandideep unit has been continued and has also been upheld by the assessing authorities as well as by the appellate authorities. Accordingly, the Prithla Unit had created a provision of Rs.5,10,50,999/- which was not claimed as a deduction in the year of creation and upon the merger, this provision was transferred to the books of the merged company. After the merger, the provision has been utilised/reversed during various years and the same has been claimed as a deduction on utilisation/reversal since no deduction was claimed in the year of creation of provision. Therefore, the claim in the year of utilisation/reversal does not tantamount to double deduction as alleged by the Ld. PCIT. Ld. Counsel for the assessee also submitted that the assessee co. had submitted the details of warranty provision by way of submission of Financial Statements and computation of income. The Ld. AO had requested to produce books

of accounts which were produced by the assessee co. in electronic format. The assessee co. had also submitted the trial balance for the subject year vide submission dated 23 November 2017. In the same submission, the assessee co. had also provided details of warranty provision created, utilised and reversed during the subject year. Therefore, the invocation of powers u/s 263 by the ld. PCIT is unjustified.

15. Per contra, ld. CIT-DR relied upon the order of the ld. PCIT and submitted that a claim of deduction in the year of utilisation/reversal of warranty provision would tantamount to double deduction.

16. We have heard rival contentions of both the parties and perused material available on record. We find that the ld. AO had made inquiries about the warranty provision, not only during the assessment proceedings for AY 2015-16 but for earlier years as well as is evident from the assessment orders. Further, in the tax computation furnished by the assessee co. before the Ld. AO vide

submission filed on 29 May 2017, it was specifically mentioned that the deduction of Rs.1,09,47,667 pertains to provision for warranty that was disallowed in the earlier years. Thus, form the assessment order, it is clear that the Ld. AO has duly considered the matter of warranty and only after applying his mind, Ld. AO chose to allow the deduction claimed by the assessee co. We are of the view that as per the provisions of Section 263 of the Act, the order passed by the Ld. AO can be revised only if the said order is erroneous in so far as it is prejudicial to the interests of the revenue. Accordingly, in order to initiate the revision proceedings, two conditions are required to be satisfied simultaneously – (i) the order should be erroneous and also (ii) prejudicial to the interest of Revenue as held in the cases Malabar Industrial Co. Limited vs CIT (243 ITR 83) (SC); CIT vs Associated Food Products (P.) Ltd. (280 ITR 377) (Madhya Pradesh HC); Manish Kumar vs Commissioner of Income-tax (16 taxmann.com 212) (Indore ITAT). We find that the assessee in its submission to the Ld. PCIT, the Appellant had explained that the deduction for utilisation/reversal of warranty provision has been claimed only in respect of the pre-merger provision brought from

Prithla Unit which was disallowed in the return of income of the year of creation of such provision. The assessee co. had also furnished copies of computation of income of Prithla Unit for pre-merger years from which disallowance of warranty provision in the year of creation could be easily verified and the Ld. PCIT has not disputed the above facts as on para 4, the Ld. PCIT has clearly written that "It is noticed that the assessee in the computation of income in the relevant A.Y. 2015-16 has deducted a sum of Rs. 1,09,47,667/- on account of warranty expenses disallowed for earlier years." Accordingly, where the Ld. PCIT has accepted that the claim of deduction in the current year is in respect of warranty provision disallowed in the earlier years, it cannot be said that allowance of such claim is erroneous in nature. Further, we find that there was no loss to the revenue on account of Ld. AO's acceptance of the claim of deduction of utilisation/reversal of that warranty provision since the said provision was disallowed and offered to tax in the earlier years. Therefore, the claim of deduction of utilisation/reversal of that warranty provision of Rs. 1,09,47,677/- was neither erroneous nor prejudicial to the interests

of Revenue. We also find that the assessee had made complete disclosures which were duly considered by the Ld. AO with due application of mind while passing the assessment order. The details of warranty provision, in respect of which the assessment order is sought to be revised by the Ld. PCIT, were submitted by the assessee co. by way of submission of Financial Statements and computation of income and the Ld. AO had requested to produce books of accounts which were produced by the assessee in electronic format. The assessee co. had also submitted the trial balance of for the subject year vide submission dated 23 November 2017. In the same submission, the assessee co. had also provided detailed of warranty provision created, utilised and reversed during the subject year. We find that the Ld. AO noted that the books of accounts in e-format are checked on a test check basis. The Ld. AO has specifically scrutinized the miscellaneous expenses and has also made an addition in this regard. Ld. AO had scrutinised details of warranty to his satisfaction and the documents and submissions/details filed were duly verified and considered by the Ld. AO while passing the Assessment order. Thus, we find that the

Ld. AO has duly examined the issue and with due application of mind did not invoke any disallowance on account of the claim of deduction of utilisation/reversal of that warranty provision of Rs. 1,09,47,677/-. Therefore, we are of the view that the Ld. PCIT was not justified in noting that the Ld. AO did not examine all the material facts of the case during the assessment proceedings. This view is supported by the ratio laid down in the the following judicial pronouncements:

a. *Jurisdictional bench of ITAT in the case of Vidisha Tractors vs ACIT (53 TTJ 432) (ITAT Indore).*
b. *Hon'ble Delhi High Court in its judgment in the case of CIT vs Anil Kumar Sharma 335 ITR 83 (Delhi HC)*
c. *Hon'ble Delhi High Court in its judgment in the case of CIT vs Hindustan Marketing & Advertising Co. Ltd. 341 ITR 180 (Delhi HC)*

17. Further, we find that at the time of merger i.e. as on 31 December 2008, the amount of provision standing in the balance sheet of Prithla unit was Rs.5,10,50,999. This amount has arrived as follows:

Assessment Year	***Amount of provision created***	***Tax Treatment in the return***
AY 2003-04 and earlier years	*1,33,87,575*	*Disallowed*
AY 2004-05	*1,80,424*	*Disallowed*

AY 2005-06	*16,48,000*	*Disallowed*
AY 2006-07	*87,86,000*	*Disallowed*
AY 2007-08	*90,30,000*	*Disallowed*
AY 2008-09	*1,16,01,000*	*Disallowed*
AY 2009-10 (Pre-Merger)	*64,18,000*	*Disallowed*
As on 31 December 2008	***5,10,50,999***	

From above, we find that the Prithla Unit had created a provision of Rs. 5,10,50,999/- which was not claimed as a deduction in the year of creation. This has also been accepted by the Ld. PCIT in para 4 pursuant to verification of tax computations of the above years furnished before the Ld. PCIT. Upon the merger, this provision was transferred to the books of the merged company. After the merger, the provision has been utilised/reversed during various years and the same has been claimed as a deduction on utilisation/reversal since no deduction was claimed in the year of creation of provision. The details of deduction claimed on utilisation/reversal of provision till AY 2015-16 are summarised as under:

Assessment Year	***Deduction claimed (INR)***
AY 2009-10 (Post Merger)	*Nil*
AY 2010-11	*23,94,383*
AY 2011-12	*24,43,079*
AY 2012-13	*44,60,063*
AY 2013-14	*56,51,613*
AY 2014-15	*Nil*
AY 2015-16	*1,09,47,667*

18. On consideration of above facts in the light of the judicial pronouncements (supra) and considering the fact that the deduction in respect of provision was not claimed by the Prithla Unit in the year of creation of provision, we are of the view that the claim in the year of utilisation/reversal does not tantamount to double deduction as alleged by the Ld. PCIT. Therefore, the reversal of provision is not taxable under section 41 of the Act as no deduction was claimed/allowed in the years of creation of the provision. Therefore, the above treatment was neither erroneous nor prejudicial to the interest of the revenue since the allowance upon utilisation/reversal has been claimed only in the case of the provision that was disallowed in the year of its creation. Thus, the order of the Assessing Officer is held not to be erroneous or prejudicial to interests of revenue on account of allowance of deduction of utilisation/reversal of warranty provision. Therefore, we hold that the Ld. PCIT has erred in invoking powers under section 263 of the Act. Accordingly, we set aside the order of the ld. PCIT holding it invalid and restore the order of the Assessing

Officer. Consequently, grounds raised in the appeal of the assessee for the assessment year 2015-16 stand allowed.

19. In result, both the appeals filed by the assessee i.e. ITA Nos. 198 & 199/Ind/2020 for the assessment years 2014-15 & 2015-16 are allowed.

Order was pronounced as per Rule 34 of I.T.A.T. Rules 1963 on 29.10.2021.

Sd/-	Sd/-
(MADHUMITA ROY)	(MANISH BORAD)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore; दिनांक Dated : 29.10.2021
!vyas!

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore