आयकर अपीलीय अधिकरण
मुंबई पीठ "एच" मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम. बालागनेश, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M.BALAGANESH, ACCOUNTANT MEMBER
आअसं. 696/मुं/2021 (नि. व. 2015-16)
ITA No. 696/MUM/2021 (A.Y.2015-16)

Hubtown Limited,
CTS No. 469A, Hubtown Seasons,
1, R.C. Marg, Chembur (East),
Mumbai-400071.
PAN: AAACA6101D ..... अपीलार्थी /Appellant

बनाम Vs.

PCIT (Central),
Room No. 663, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400020. ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Sh. Vijay Mehta
प्रतिवादी द्वारा/Respondent by : Sh. Purushottam Tripuri, CIT-DR

सुनवाई की तिथि/ Date of hearing : 01/02/2022
घोषणा की तिथि/ Date of pronouncement : 26/04/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Principle Commissioner of Income Tax (Central)-4, Mumbai [hereinafter referred to as 'the PCIT'] dated 30.03.2021 for Assessment Year (AY) 2015-16 passed under section 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Sh. Vijay Mehta appearing on behalf of the assessee submitted that the PCIT invoked revisional jurisdiction under section 263 of the Act for the reason that the Assessing Officer (AO) has erred in allowing assessee's claim of deduction under section 80IB(10) of the Act in respect of sale of FSI generated from its project at Mayanagar, Worli, Mumbai. The PCIT issued show-cause notice under section 263 of the Act on 01.08.2019 only for the aforementioned reason. The ld. Authorised Representative (AR) submitted that the assessee is engaged in the business of development of real estate projects including re-development of Slum Rehabilitation Authority (SRA) Projects, etc. The assessee undertook the construction of Slum Rehabilitation Project under D.C. Regulation at Mayanagar, Worli, Mumbai. The assessee got approval in respect of aforesaid project from Local Authority on 26.11.1998. The assessee claimed deduction under section 80IB(10) of the Act in respect of aforesaid project for the first time in AY 2003-04, however, the claim of assessee was rejected by the AO as the project was incomplete. The assessee accepted the assessment order and filed no further appeal. Thereafter, the assessee made its claim of deduction under section 80IB(10) of the Act in the AY 2013-14. The AO again disallowed by the claim of assessee inter alia on the ground that the SRA project developed by the assessee received approval on 26/11/1998, whereas, per CBDT notifications dated 03/8/2010 and 05/1/2011 the benefit u/s. 80IA(10) can be extended to SRA housing projects approved between 01/4/2004 and 31/3/2008, hence, the project of assessee is not covered by aforesaid notifications. On further appeal by the assessee, the CIT(A) allowed the benefit of section 80IA(10) to the assessee on sale of FSI of SRA project Mayanagar, Worli. The order of CIT(A) was challenged by the Department before the Tribunal in ITA No. 2764/Mum/2018. The Tribunal vide order dated 13.12.2019 upheld the findings of the CIT(A). In the impugned revision

proceedings, the assessee brought the fact to the notice of PCIT that the appeal of assessee for AY 2013-14 was allowed by the CIT(A) on the same very issue and the same SRA project and also the fact that the same has been upheld by the Tribunal. The PCIT disregarded the submissions of the assessee and proceeded to pass the revision order holding that the AO has erred in allowing assessee's claim of deduction under section 80IB(10) of the Act on transfer of TDR for the Mayanagar Project at Worli to the extent of Rs.29.13 crores and hence, the assessment order is prejudicial to the interest of Revenue. The ld. AR assailing findings of the PCIT submitted that the AO in AY 2013-14 rejected the claim of assessee of deduction under section 80IB(10) of the Act on SRA Mayanagar Project, Worli in the impugned AY i.e. AY 2015-16, the AO accepted the assessee's claim of deduction under section 80IB(10) in respect of sale of FSI generated from the same project, this itself shows that there are two views possible. The AO has taken one of the possible views in the impugned AY which is also supported by the order of Tribunal in assessee's own case for AY 2013-14. The ld. AR asserted that where two views are possible and the view taken by the assessing officer is one of the possible views, the assessment order cannot be said to be erroneous merely for the reason that the PCIT favours the other view. To support his submissions the Ld. AR of the assessee relied on the decision in the case of *CIT Vs. Max India Ltd. [2008] 166 Taxman 188.*

2.1. The ld. AR submitted that the order passed by the PCIT under section 263 of the Act is erroneous as the PCIT has failed to follow the order of Tribunal in assessee's own case on the same issue. The PCIT ought to have follow judicial discipline while adjudicating this issue. To support his argument,

the ld. AR draws support from the decision in the case of *Bank of Baroda Vs. H C. Shrivasrsava [2002] 122 Taxman 330 (Bombay).*

2.2. The ld. AR further submitted that revisional jurisdiction under section 263 of the Act can only be invoked where the PCIT is of considered opinion that the assessment order is erroneous and in so far as prejudicial to the interest of Revenue. The power under section 263 cannot be invoked just to keep the issuer alive. The ld. AR asserted that from impugned order it would be evident that it is not the PCIT's own consideration on which revisional powers were invoked. The PCIT on receipt of proposal from Addl. CIT initiated proceedings u/s.263 of the Act. This is against the scheme of Act. To buttress his submissions, the ld. AR placed reliance on the decision of *Alfa Laval Lund AB vs. CIT in ITA No. 1287/PUN/2017 decided on 02.11.2021.*

3. The ld. AR contended that in the notice under section 263 of the Act, the PCIT only mentioned about the disallowance of deduction under section 80IB(10) of the Act. However, while passing the order under section 263 of the Act, the PCIT also rattled the issue of assessee's transaction with M/s Four Zone Realtors Pvt. Ltd. for sale of FSI. The ld. AR pointed that on this issue no show-cause notice was given to the assessee, no opportunity of hearing was afforded to the assessee by the PCIT nor opportunity of hearing in accordance with the provisions of Sec.92CA of the Act was given before making reference to TPO. Further, a perusal of the impugned order would show that there was no application of mind by the PCIT while taking up this issue in revisional proceedings. The ld. AR in support of his submissions placed reliance on the decision in the case of *Damodar Valley Corporation Vs. DCIT, 72 taxmann.com 127 (Kolkata – Trib.)*.

4. Per contra, Sh. Purushottam Tripuri representing the Department vehemently defended the impugned order and prayed for dismissing appeal of the assessee. The ld. Departmental Representative (DR) submitted that the PCIT invoked revisional jurisdiction under section 263 of the Act after receiving proposal from the Range Head i.e. Addl. CIT (Central), Range-5. The proposal was not received from the AO. The AO has taken inconsistent stand on the issue. In AY 2013-14, the AO disallowed assessee's claim of deduction under section 80IB(10) of the Act. On the same very project in Assessment Year 2015-16, the AO decided the issue in favour of the assessee. The PCIT after receiving the proposal examined the records and after proper application of mind, issued show-cause notice. It is not the case where the PCIT has exercised revisional power merely on the proposal received from the Range Head.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decisions and documents furnished by the assessee in the Paper Book (PB).

6. A perusal of the show-cause notice issued under section 263 dated 01.08.2019 (at page 18 to 20 of the PB) would show that the only issue on which PCIT proposed to exercise revisional jurisdiction was assessee's claim of deduction under section 80IB(10) of the Act on account of sale of FSI generated from project at Mayanagar, Worli, Mumbai, constructed under Development Control (DC) Regulation 33(10). Undisputedly, on the very same project the assessee had claimed deduction for the first time in the AY 2003-04, the same was denied for the reason that the project was incomplete. The assessee did not agitate disallowance further. Thereafter, the assessee claimed deduction u/s.80IB(10) of the Act in respect of same very project in AY 2013-14, the AO again disallowed assessee's claim of deduction under section

80IB(10) in respect of Mayanagar project. In first appeal, the assessee succeeded. The Revenue carried the issue in appeal before the Tribunal in ITA No. 2764/Mum/2018 (supra). The Co-ordinate bench discussed the issue threadbare on facts and legal requirements and thereafter upheld the findings of CIT(A). For the sake of completeness the relevant extract of the order by Co-ordinate Bench is reproduced herein below:

> *"10. We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with case laws cited by both the parties. The main dispute between the assessee and the Assessing Officer is with regard to availability of the benefit of deduction u/s 80IB(10) of the Act, in light of proviso to section and also more particularly in light of clause (a) and (b) of said proviso. As per the said proviso, clause (a) and (b) regarding date of commencement and date completion of project has no application, if such project is approved by central or state Government under any laws. It is an admitted fact that the project on which the benefit of deduction was claimed u/s 80IB(10) of the Act, was approved by the state Govt. of Maharashtra, under SRA scheme. In this factual background, if you examine the claim of the assessee, we find that the Government does not compensate the developers the cost of construction of the tenements in slum development projects but only grants FSI, which could be utilized by them either for construction of saleable area in other projects, or sold in open market as per their choice. Since, the assessee did not utilize the FSI of 29,050 sq. feet granted by the government in lieu of the cost suffered in undertaking the Mayanagar project as per DCR 33(10), it was entitled to sell it to anyone without any restriction. The assessee, therefore, sold the FSI generated from its Mayanagar project to Fourjone Realtors Pvt Ltd., a group concern, as per the then prevailing market rate.*
>
> *11. The AO has denied the benefit on three grounds. In so far as, the objection of the Assessing Officer that since deduction u/s. 80IB(10) of the Act made in A.Y. 2003-04 was rejected and as it was not assailed in appeal, the assessee could not repeat the same in the year under consideration. It is noted that in A.Y. 2003-04 the claim was rejected on the ground that the whole of the project was not completed. Most importantly, the assessment order for that year was passed on 30.12.2008 whereas the CBDT issued the notification, exempting notified projects from the condition of completion of the project, on 05.01.2011. Therefore, the assessee has not contested the said order. As against the above, during the relevant previous year, the entire project was completed and the FSI granted by the Government in lieu of the cost factor was in fact sold. It is, therefore, the reference made by the Assessing Officer to the proceedings of A.Y. 2003-04 was illogical and uncalled for as the claim made in the year under appeal was not dependent upon that of the earlier year; and the*

CIT (A) was perfectly justified in refuting such argument canvassed by the Assessing Officer in paragraph 4.12 of his order.

12. With respect to the objection that since the Mayanagar project was approved on 26.11.1998, the benefit of the Notification No. 67/2010 dated 03.08.2010 and the corrigendum issued vide Notification No. 02/2011 Income Tax dated 05.01.2011 was not available. In this regard, it is noted that the inference drawn by the Assessing Officer is contrary to the statutory provisions set out under section 80IB(10) of the Act. For ready reference, it is necessary to reproduce section 80-IB(10) of the Act, as applicable to the year under consideration below:

> *"(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 by a local authority snail be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if. -*
>
> *(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction.-*
>
> *(i) in a case where a housing project has been approved by the local authority before the r! day of April 2004, on or before the 31st day of March, 2008;*
>
> *(ii) in a case where 3 housing project has been, or, is approved by the focal authority on or after the 1st day of April, 2004 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority;*
>
> *(iii) in a case where a housing project has been approved by the focal authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.*
>
> *Explanation.- For the purposes of this clause,-*
>
> *(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;*
>
> *(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate In respect of such housing project is issued by the local authority;*
>
> *(b) the project Is on the size of 3 plot of land which has a minimum area of one acre:*
>
> *Provided that nothing contained in clause (a) or clause (b) shall apply to a housing project earned out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing building in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf. "(Emphasis supplied).*

13. If, you go through the provisions of S.80-IB(10) of the Act, extracted above and the aforesaid notifications issued by the CBDT, we find that the Assessing Officer clearly erred in disregarding the proviso which mandates that the limitations prescribed in causes (a) and (b) were inapplicable to housing projects completed as per the scheme of Central or State Government. ***Indisputably, the Mayanagar project was sanctioned under the scheme of the Government of Maharashtra under DCR 33(10) for rehabilitation of the slum dwellers, and it was covered by the Notifications. Therefore, in view of the unambiguous language of the proviso, the project completed by the assessee was excluded from the restrictions imposed by clauses (a) and (b) of sub-s. (10) of S. 80-IB of the Act Hence, we are of the considered view that rejection of assessee's claim for deduction u/s, 80-IB(IO) of the Act was unjustified, and it was rightly so held by the CIT(A) in paragraph 4.10 of his order****.*

14. We, further noted that a similar interpretation as drawn by the Assessing Officer with respect to the notification dated 05.01.2011, that it was to extend the permissible period in respect of projects approved after 01.04.2004, was considered and adjudicated by the co-ordinate Bench of this Tribunal in the case of Ramesh Gunshi Dedhia v. ITO [148 ITD 356 (Mum)], which was relied upon before the CIT (A). In the said case, it was held that as a consequence of the proviso, the conditions prescribed in clauses (a) and (b) are relaxed if the housing project was carried out in accordance with the scheme of the Central or State Government. Since, the CIT(A) has extracted in extenso the findings recorded by the Tribunal in paragraph 4.16 on pages 23-26 of his order, for the sake of brevity, we refrain from repetition thereof.

15. The other objection of the Assessing Officer is that since the consideration for construction of the rehabilitation building was received in kind and not in cash/cheque, the benefit of S. 80-IB(10) of the Act would not available to the assessee. It is noted that this inference drawn by the Assessing Officer is also untenable as held in various decisions, cited before and considered by the CIT (A) in paragraph 4.19 of his order holding to the contrary. In the premises, we are of the considered view that the CIT (A) was justified in rejecting the argument of the Assessing Officer that since the consideration was received in kind and not in cash/cheque, the assessee was not entitled to the deduction in paragraph 4.19 of his order The order of the CIT (A), therefore, does not call for any interference on this count too.

16. Most importantly, in A.Y. 2015-16 also, a similar claim for deduction u/s. 80-IB(10) of the Act was preferred in respect of the FSI granted and sold in identical fact-situation. We find that after taking note of the entire scheme, statutory provisions and notifications cited hereinabove, the Assessing Officer himself had granted the deduction sought for vide his order dated 28.12.2017 passed u/s. 143(3) of the Act. The following findings recorded by the Assessing Officer in the aforesaid order dated 28.12.2017 are noteworthy:

"3.2 The submission of the assesses has been thoroughly considered with the documents annexed to the submission. It is claiming that construction of Rehab building was approved by Slum Rehabilitation Authority under DC regulation 33(10) of the DCR and the approval was granted to the assesses company for the said project on 26.11.1998. Consequent to the construction of the Rehabilitation building, the assessee has received TDR In lieu of this construction which has been sold to its group concerns during the A. Y. under consideration. The assessee is of the view that it is a eligible for claiming deduction u/s. 80- IB(10) of the I.T. Act on the sale of said TDR. I have gone through the facts of the case as submitted by the assessee and the submission of the assesses I find that DC regulation 33(10) of Development Control Regulation for Greater Mumbai 1991 under which the assesses has constructed the rehab buildings and has been notified by the CBDT. Further the facts based on which the deduction was denied in earlier years do not persist and have changed since then and the project satisfies the conditions stated in section 80IB(10) of the Act. Considering the same and further considering the facts of the case, the contention of the assessee merits acceptance. Therefore the deduction of Rs. 29,13,06959/- on the transfer of TDR claimed u/s. 80IB(10) of the I. T. Act is allowed."

17. We further noted that in arriving at his decision to delete the disputed disallowance during the year under consideration, the CIT(A) has also taken note of the aforesaid order dated 28.12.2017 passed u/s. 143(3) of the Act for A.Y. 2015-16 in paragraph 4.21 of his order. For all the above reasons, we are of the view that the denial of deduction claimed u/s. 80-IB(10) of the Act was unwarranted and unjustified. The reasoned order of the CIT (A) deleting the disallowance is in order and it does not call for any interference.

18. In regard to the other objection raised by the Assessing Officer that the FSI granted was sold to a group entity at an inflated rate, we find that the statute does not prohibit such sale to group concern. Further, the ready reckoner rate is not sacrosanct, and there might be innumerable reasons for demanding higher price. In any case, the transaction under consideration is supported by a valuation report submitted to A.O. in which the rate of FSI was supported with the help of three comparable instances. Further, the inference drawn by the Assessing Officer is based upon his own theory, and neither supported by any independent verification nor after discrediting the valuation submitted by the assessee for valid reasons. We, therefore, are of the considered view that the CIT(A) was justified in refuting the aforesaid stand taken by the Assessing officer.

19. The other objection raised by the Assessing Officer vide ground No. 4, is that since the order of the Tribunal in the case of Aarti Projects and Constructions v. DCIT [ITA No. 4190/Mum/2016 dated 05.01.2017] was not accepted by the Department and appeal there against was filed before the Hon'ble Bombay High Court and the CIT (A) ought not have relied upon the same. In this regard, it is noted that until and unless the order of the

jurisdictional Tribunal is set aside or reversed by the Hon'ble High Court, it holds the field and the authorities functioning within their jurisdiction are bound to follow the same.

20. Last but not the least, we may also refer to the brief note of the Addl. CIT, C.R-5, Mumbai dated 02.08.2019. As per this note, the disputed claim was rejected by the Assessing Officer in A.Y. 2003- 04 and it was also accepted by the assesses, and the disallowance made in the year under appeal was pursuant to Notification No. 02/2011/Income Tax dated 25.01.2011, The other stand taken by the Addl. CIT was that in A.Y. 2015-16 the assessee had suppressed relevant facts relating to claim u/s. 80-IB(10) of the Act for securing the relief from the Assessing Officer, and the CIT (A) had followed such an order while granting the relief. Lastly, it is stated in this note that the order for A.Y. 2015-16 has been made subject to proceedings u/s, 263 of the Act. In this regard, we are of the view that all the above points, except that concerning initiation of proceeding u/s. 263 of the Act for A.Y. 2015-16, which is separate and distinct, have been discussed in the preceding paragraphs and, hence, they are not repeated for the sake of brevity. The reason for which the disallowance made in A.Y. 2003-04 was not challenged in further proceedings, and as to why the claim was made in A.Y, 2013-14 have been considered by the CIT (A) and also discussed elaborately in the preceding paragraphs. For the reasons already stated, the assertions made in the aforesaid note of the Addl, CIT deserve to be rejected.

21. In this view of the matter and ***considering facts and circumstance of this case, we are of the considered view that the limitations prescribed in clause (a) and (b) of proviso to section 80IB(10) of the Act, in respect of date of commencement and completion of the project has no application to projects undertaken under the scheme of Central or State Govt. Thus, in view of the fact that the project on which the benefit of deduction was claimed u/s 80IB(10) of the Act, was approved under DC regulation 33(10) of Govt. of Maharashtra, and also notified by the CBDT u/s 80IB(10) of the Act, we are of the considered view that the assessee is entitled for deduction towards sale of FSI/TDR. The CIT(A) after considering relevant facts, has rightly allowed the benefit and deleted addition made by the AO. Hence, we are inclined to uphold the order of the ld. CIT(A) and dismissed appeal filed by the revenue****."*

[Emphasised by us]

7. Thus, the issue of assessee's eligibility to claim deduction under section 80IB(10) of the Act at Mayanagar SRA Project was decided in favour of the assessee in the AY 2013-14. No doubt while adjudicating appeal for AY 2013-14, the Tribunal has referred to the Assessment Order for AY 2015-16 which is now subject of revision, nevertheless, the Co-ordinate Bench decided the issue

in favour of assessee on merits and not solely by placing reliance on the assessment order for AY 2015-16. The reference to Assessment Order for AY 2015-16 is for giving impetus to the independent findings given in the order. The Tribunal de-hors the assessment order for AY 2015-16 has come to the conclusion that the assessee is eligible to claim deduction u/s 80IA(10) of the Act on SRA project at Mayanagar, Worli approved under DC Regulation 33(10). Once, the issue has been decided in favour of the assessee in preceding AY by the Tribunal, it was incumbent upon the PCIT to follow the order of Tribunal, a superior Appellate Authority. The PCIT in the impugned order does mention the fact about the order of Tribunal in assessee's own case for AY 2013-14, but, decline to follow the same on the premise that the sole reason for allowing claim of deduction u/s. 80IB(10) of the Act was the assessment order for AY 2015-16. The reason given by PCIT to disregard the order of Tribunal for AY 2013-14 is misconceived, hence, unsustainable.

8. The Hon'ble Jurisdictional High Court emphasising the requirement and importance to follow judicial discipline in the case of Bank of Baroda vs. H.C. Shrivatsava observed:

> *"16. …….it will not be out of place to mention that* ***'in the hierarchical system of Courts' which exists in our country, 'it is necessary for each lower tier' including the High Court, 'to accept loyally the decisions of the higher tiers'. 'It is inevitable in hierarchical system of Courts that there are decisions of the supreme Appellate Tribunals which do not attract the unanimous approval of all members of the judiciary. But the judicial system only works if someone is allowed to have the last word, and that last word once spoken is loyally accepted'.*** *The better wisdom of the Court below must yield to the higher wisdom of the Court above as held by the Supreme Court in the matter of CCE v. Dunlop India Ltd. AIR 1985 SC 330."*
>
> *[Emphasized by us]*

The PCIT instead of mechanically rejecting the order of Tribunal ought to have applied the same on identical set of facts in assesse's own case in impugned (subsequent) assessment year.

9. It is evident from records that the Assessing Officer in AY 2015-16 has taken a view that is supported by the decision of Tribunal. The assessment order cannot be held to be erroneous merely for the reason that it has resulted in loss of revenue. The Hon'ble Apex Court in the case of Max India Ltd. (supra) has held that, "*when the Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the Income-tax Officer is unsustainable in law.*"

10. The twine conditions *sine qua non* for exercise of revisional jurisdiction, are:

(i) the assessment order should be erroneous;

and

(ii) prejudicial to the interest of Revenue.

If only one of the twin condition is satisfied, the order passed by the assessing officer cannot be revised u/s. 263 of the Act. In the instant case, we find that the view taken by the assessing officer in allowing assessee's claim of deduction under section 80IB(10) is one of the possible views backed by the order of Tribunal in assessee's own case in respect of the same very project in the AY 2013-14. Therefore, the assessment order cannot be said to be erroneous. The impugned order is unsustainable and is liable to be quashed.

11. Another issue that has been raised by the PCIT in exercise of revisional jurisdiction is transaction of sale of FSI to FourZone Realtors Pvt. Ltd. A perusal of the notice issued under section 263 shows that this issue was not subject of revision. The contention of the assessee is that no opportunity of hearing was

given by the PCIT before referring the issue to TPO. The Hon'ble Apex Court in the case of CIT vs. Amitabh Bachchan reported as 384 ITR 200 has held that, *"What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice.*"

In the case of Damodar Valley Corporation Vs. DCIT (supra), the Kolkata Bench of Tribunal referring to the decision rendered in the case of CIT Vs. Amitabh Bachchan (supra) held that CIT can adjudicate issues other than what is mentioned in the original show-cause notice but the same could be done after affording opportunity of hearing to the assessee on the new issue taken up in revisional jurisdiction.

12. In the instant case, no material is available on record to suggest that on the fresh issue raised while passing the order under section 263 of the Act, the PCIT had granted opportunity of hearing to the assessee. Thus, without affording opportunity of hearing to the assessee on the fresh issue, the PCIT could not have taken up the issue in exercise of his revisional powers. Adjudicating fresh issue without affording opportunity of hearing to the assessee makes the order unsustainable and hence, liable to be quashed.

13. Another argument raised by the ld. AR is that the revisional powers have been invoked by the PCIT consequent to proposal of revision received from Addl. CIT, hence, revision order is unsustainable. Before proceeding further it would be imperative to refer to the relevant provisions of section 263 of the Act. For quick reference, the same are reproduced herein below:

> *" Section 263: (1) The* ***Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any***

> ***order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue****, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order* enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

A bare reading of provisions of section 263 of the Act would show, that for initiating revisional powers under section 263, the primary requirement of section is that the PCIT/CIT has to examine records **and** consider the order passed by the assessing officer. In other words, section 263 mandates two pre-conditions to be complied before coming to the conclusion that the assessment order is erroneous and prejudicial to the interest of revenue. These two primary conditions are, (i) examination of records by the PCIT/CIT, **and** (ii) consideration by the PCIT/CIT of the order passed by assessing officer. Thus, it is the action of PCIT/CIT to examine records and consideration of order that opens the gate for exercising revisional powers u/s. 263 of the Act. From reading of above provisions of the section it is explicitly clear that the section does not give leverage to PCIT/CIT to exercise revisional jurisdiction on proposal received from any other authority under the Act. The key to unlock passage for exercising revisional powers is examination of records and consideration of assessment order by the PCIT/CIT.

14. In the instant case, in para 5 of the impugned order the PCIT has recorded that proceedings u/s. 263 of the Act are initiated consequent to proposal received from Addl. CIT. The relevant extract of the impugned order is reproduced herein below:

> "*5. The office of Pr. CIT (Central)-3, Mumbai had received proposal of revision of assessment u/s 263 of the Act from the Range Head, Addl. CIT Central Range-5, Mumbai on 31.07.2019. Consequently, the proceedings u/s. 263 of the Income Tax Act, 1961 were initiated and notice……issued……..."*

In the entire impugned order the PCIT has nowhere mentioned that the revisional powers u/s. 263 have been exercised upon his examination of records and consideration of the order passed by the Assessing Officer. The PCIT has initiated revisional proceedings consequent to proposal received from Addl. CIT- Range Head, hence, the mandatory requirement of section 263 of the Act in the present case is not satisfied. In facts of the case, we are of considered view that the impugned order suffers from legal infirmity. Ergo, unsustainable.

15. In the light of our above findings we hold the impugned order untenable, hence, the same is quashed.

Order pronounced in the open court on **Tuesday**, the **26th** day of April, 2022.

Sd/-	Sd/-
(M. BALAGANESH)	(VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 26/04/2022
S.K., Sr. PS

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai