

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER**

ITA NO. 813/MUM/2021 (A.Y: 2016-17)

M/s. Anand Projects Limited 19/3, Sujata Building Rani Sati Marg, Malad (East) Mumbai-400097 PAN: AACT1389G	v.	Pr.CIT – 2 Room No. 344, 3 rd Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee by	:	Shri Chetan Shah
Department by	:	Smt Shailaja Rai
Date of Hearing	:	08.06.2022
Date of Pronouncement	:	29.06.2022

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Principal Commissioner of Income Tax-2, Mumbai [hereinafter in short "Ld. Pr.CIT)"] dated 31.03.2021 for the A.Y.2016-17.

2. The brief facts are that the assessee is publicly listed limited company and is engaged in the business of undertaking EPC contracts

(Engineering, Procurement and Construction). The assessee had filed its return of income for the assessment year 2012-13 on 10.10.2016 declaring total profit at ₹.29,52,15,120/-. The return of income was processed u/s 143(1) of the Act. The case was selected for scrutiny and assessment order u/s 143(3) was passed on 30.12.2018 accepting the returned income.

3. The Principal Commissioner of Income Tax-2, Mumbai deliberated on the assessment records of the assessee for the year under consideration, viz. A.Y. 2016-17, and observed that one of the reasons for selection was to verify whether the liabilities were genuine or not. The Ld.PCIT in his order u/s 263 observed that, there was a huge balance in the name of Lalitpur Power Generation Co. Ltd at ₹. 632.75 crores which was claimed as advance received by the assessee and duly deducted TDS on the same. The total project cost was ₹.2057.32 crores, out of which 5% (i.e. ₹.103 crores) was to be paid in advance and rest was agreed to be paid at different stages of the project development. On examination of the records it was observed that assessee had shown ₹.632.75 crores as advance and the excess advance beyond 5% under current liabilities which should have taken to the profit and loss account. Secondly, the Ld.PCIT observed that the advance received for the purpose of the

projects was diverted and used for illiquid investments in private limited companies which cannot be liquidated. Lastly, Ld. PCIT observed that as per the MOU dated 22.04.2010, the State Government of Uttar Pradesh was initially involved in the project, thus there would be strict disbursement of money only towards the project. Hence he was of the view that the advance received was revenue in nature. That however, these issues were remained unverified at the time of completion of assessment proceedings u/s 143(3) of the Act.

4. Hence based on the above observation, Ld. PCIT considered that AO's order is erroneous and prejudicial to the interest of the revenue and issued show-cause notice u/s 263 dated 26.02.2021 to the assessee.

5. The Ld. PCIT reproduced the submissions of the assessee in his order, wherein the assessee contended that the Assessing Officer has conducted a detailed scrutiny at the time of assessment proceeding on the same reasons recorded in the notice u/s 263 of the Act. The assessee summarised the submissions made by them in response to the notices u/s 142(1) issued by the Assessing Officer and contended that the Assessing Officer has passed a well-considered Order after completely satisfying himself as to the nature, purpose, genuineness of claim and revenue

recognition made by the assessee, therefore, the reasons cited for revision of order u/s. 263 of the Act seems to be unwarranted and unjustified. The assessee placed reliance on various judicial pronouncements to support its claim and submitted that revision action u/s 263 should not be initiated. The said revision of order is bad in law and accordingly the notice u/s 263 should be withdrawn and the proceedings should be dropped.

6. Further, in respect of the advance of ₹.632.75 crores received from Lalitpur Power Generation Ltd. shown as Current Liability, the assessee submitted that the Govt. of Uttar Pradesh has declared Energy Policy, 2009 envisaging development of Independent Power Plants in the state of Uttar Pradesh. In furtherance thereof, the assessee was awarded work contract from M/s. Lalitpur Power Generation Co Ltd (LPGCL) on 20.12.2010 for Contract Price of ₹.787 crores to carry out various works like construction of field hostels, Railway water system, Roads and drain in plant area etc. Subsequently, it was amended and revised contract agreement was executed on 29.11.2014 by increasing the scope of work as described in Schedule I of the said agreement and revising the Contract Price to ₹.2,057.32 crore. The assessee submitted that the revenue of the construction projects are recognised on the basis of Accounting Standard (AS) - 7 'Construction Contract' issued by ICAI

for revenue recognition from construction contract accounting its revenue based on completion of the physical proportion of the contract work. The assessee further submitted that the amount to the extent not recognized as revenue as per AS-7 is required to be shown as Current Liability and same will be recognized as revenue in subsequent years based on percentage of work completed. The assessee submitted the summary of revenue recognized by the assessee till AY 2016 -17 as follows:

AY	Turnover as per Audited Accounts excluding taxes	O/s Balance of Advance from LPGCL as at year end
2012-13	2,86,62,05,180	1,76,85,76,940
2013-14	17,90,44,551	1,96,52,55,592
2014-15	96,12,83,580	1,95,54,89,812
2015-16	1,87,61,52,547	4,43,07,98,762
2016-17	4,71,50,71,583	6,32,75,20,837
	10,59,77,57,441	

7. With respect to the advance received beyond 5% shown under Current Liability, the assessee rebutted the contentions of the Ld. PCIT and submitted as under: -

"In this regards, we would like to submit that assessee has completed part of the Work till end of relevant AY against which the assessee has already offered for taxation the contract price of Rs.1059.77 crore since inception of project, as shown in above table at para 10(g) based on Percentage of completion method consistently followed by the assessee. The assessee company is obliged to perform the remaining part of its obligations. We are

attaching the detailed statement which shows the Nature of work, the contract value, the (original & revised), Billing done till 31.03.2016, balance work and the reasons for the delay in execution of balance work, refer Annexure 6. From the table it can be seen that out of the total work contracted of Rs. 2057.32 crores work to the extent of Rs.914.22 crores are still to be executed even though mobilization advance of Rs.632.57 crores have been received. The revenue for the pending work will be recognized on percentage completion as and when the same is carried out as income for the same. Thus, it is wrong to say that the excess advance shown in current liabilities should have been taken to P&L account."

"In this regards we would like to submit that advance received as per terms of contract is not relevant for the purpose of revenue recognition. The assessee has to recognized revenue only as per the AS 7 "Construction Contract" and which also prescribed under ICDS III Construction Contract issued by CBDT.

For the purpose of revenue recognition, various factors need to be considered i.e transfer of risk and ownership, stage of completion etc. In the absence of the same, assessee has to show the advance amount as current liabilities.

Accordingly, as at end of relevant assessment year, the assessee has shown advance received from Contract amounting to Rs 632.75 crore, as Current Liability based on percentage completion method prescribed as per AS-7."

"The assessee object to para 2 of Notice which state that as per contract, the total project cost is Rs.2057.32 crores which as per letter dated 10. 12.2010 of Lalitpur Power was to be paid on different stage of project progress.

In fact, the total project cost as per letter dated 10.12.2010 was Rs.787 crores. The original contract dated 10.12.2010 was subsequently amended vide agreement date 29.11.2014 wherein the total project cost was revised to Rs.2057.32 crore.

In view of above submission, your honour would appreciate that Advance received from Lalitpur Power Generation Ltd of Rs.632.75 crore is rightly shown as Current Liability- by the assessee."

8. In respect of the investments made in the private limited companies, the assessee submitted that for furtherance of object of the company, it looks forward for similar opportunities in the said arena. For furtherance of the said object and as a strategic move for opening opportunities to increase the business of the company in short to medium term and also keeping the flexibility to exit if the prospect looks discouraging, it had invested in Zero Percent Optionally Convertible Debentures of few companies who are engaged in infrastructure activities including real estate space as under: -

S. No.	Name of Party	Opening as on 01.04.2015	Additional Investment	Sale of Investment	Closing as on 31.03.2016
1	Bajaj International Realty Pvt. Ltd.	Nil	50,00,00,000	Nil	50,00,00,000
2	Abhitech Developers Pvt. Ltd.	Nil	10,00,00,000	Nil	10,00,00,000
3	Lambodar Projects Pvt. Ltd.	308,15,53,800	220,63,00,000	Nil	528,78,53,800

9. It further submitted without prejudice that even if it is assumed that there is an alleged diversion of fund by the assessee, then at most the Lalitpur Power Generation Co. Ltd. can take legal or penal action against the assessee for recovery of advance money as per the terms of contract but same cannot be treated as income of the assessee.

10. With respect to the MOU dated 22.04.2010 between Government of Uttar Pradesh in consortium with Bajaj Hindustan Ltd, the assessee submitted as under:

- a) *"We would like to submit that assessee is not the party to the MOU dated 22.04.2010 between Government of UP and Bajaj Hindustan Ltd.*
- b) *The assessee was awarded the contract by Lalitpur Power Generation Co. Ltd. Further assessee has no obligation towards Govt. of UP for execution of contracts*
- c) *With respect to diversion of fund by the assessee, the same have been explained in detail in para 11 of this submission.*
- d) *The Govt. of UP has not placed any restriction on the assessee for disbursement and utilisation of advance money.*
- e) *Even assuming for while there is an alleged diversion (sic) of fund by the assessee, then at most the Lalitpur Power Generation Co. Ltd. can take legal or penal action against the assessee for recovery of advance money as per the terms of the contract but same cannot be treated as income of the assessee.*
- f) *Thus from above, your honour would appreciate that advance received should not be treated as income based on MOU dated 22.04.2010 between Government of UP was in consortium with Bajaj Hindustan Ltd."*

11. The Ld AR of the assessee controverted the reasons of the Ld.Pr.CIT and vehemently submitted that Assessing Officer had conducted detailed enquiry in the case of the assessee and also stated that as many as on eleven occasions the Assessing Officer heard the assessee and discussed the case and thus, he contended that the Ld. Assessing Officer had passed the order after due consideration of the facts and circumstances of the

case. The Ld AR further contended that the pre-requisite for exercise of jurisdiction u/s 263 by the Ld. Pr.CIT shall be that the order of the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the Revenue. The relevant extract of the assessee's submission is as under:

"The learned PCIT must be satisfied of twin conditions, namely,

(i) the order of the AO sought to be revised is erroneous and

(ii) it is prejudicial to the interests of the Revenue. If one of them is absent, i.e. if the order of the AO is erroneous but is not prejudicial to the interests of Revenue or if it is not erroneous but is prejudicial to the Revenue, recourse cannot be had to s 263(1) of the Act just to re-examine or verify the issues already examined/veted at the assessment level. It is only when an order is erroneous and prejudicial that the section will be attracted."

12. The submissions as above did not find favour with the Ld. Pr.CIT. According to the Ld. Pr.CIT the assessee has not disputed the fact that the advance received was in excess of 5% specified in original and revised contracts. However, the advance receipt has been shown as current liability in the Balance Sheet. Moreover, the assessee was admittedly following percentage completion method for revenue recognition as specified in AS 7 consistently. It was further noted by the Ld. Pr.CIT that a crucial fact now admitted by assessee is that that increase in project advance was due to an amended contract dated 29.11.2014 whereby there was an increase in scope of work., however AS-7 has not been

applied on these enhanced receipts thus, suppressing the profit element therein. It is the finding of the Ld. Pr.CIT that the excess advance beyond 5% ought to have been taken to the P&L account and failure to do so has resulted in the income embedded therein not having suffered tax. The said aspect was not examined during the course of scrutiny. With respect to the other two issues, the Ld. Pr.CIT, based on the submissions made by the assessee concluded that these advances are in the nature of surplus funds available with the assessee which was utilised as free reserves to augment its income as clearly admitted by the assessee, and hence has remarked that the taxability of the income embedded in these advances needed no further elaboration.

13. In view of the above facts, the Ld. Pr.CIT concluded that the action of the AO in accepting the method of accounting followed for revenue recognition and the non-examination of possible income embedded in the advances received has rendered the assessment order erroneous in so far as it is prejudicial to revenue. In arriving at the above conclusion, the Ld. Pr.CIT has relied on decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. and cited various other judicial pronouncements, thus characterizing the order passed by the Assessing Officer u/s. 143(3) of the Act as erroneous and prejudicial to the interest

of the revenue, and thereby setting aside the order with direction to Assessing Officer to examine the stated aspects with regard to revenue recognition and profit determination on the advances received and to frame a fresh assessment in accordance with law.

14. Aggrieved with the above order, the assessee preferred an appeal before us on the following grounds: -

"1. On the facts and in the circumstances of the case, and in law, the Learned Pr. Commissioner of Income Tax ("Pr. CIT") erred invoking the provision of Section 263(1) of the Act without appreciating the fact that the Learned Assessing Officer ("LAO") passed order u/s 143(3) of the Act detailed inquiries/ after and making adequate verification/examination with respect to advance received from M/s Lalitpur Power Generation Ltd. of Rs 632.75 crore shown as Current Liability.

2. The Ld. Pr. CIT grossly erred in stating that no specific query has been raised by the Assessing Officer on the issue of nature of excess advance of Rs 632.75 crores shown in current liabilities claimed as advances received. In fact, the appellant had file various submission and supporting documents during the course of assessment proceeding before LAO with respect to such advances.

3. The Ld. Pr. CIT erred in not appreciating that the appellant has made genuine investments in three entities in the ordinary course of business as strategic move which cannot be treated as diversion of fund or diversion of income.

4. The revision order passed u/s 263 by the Learned Pr. CIT is bad in law and deserve to set aside.

5. The Ld Pr. CIT has grossly erred in directing the LAO to set aside the original order and to frame the assessment order de novo, keeping in mind the observations made under the Order u/s 263 of the Act.

6. *Your appellant leave, to add, to amend, to alter or delete any of the foregoing grounds of appeal and further reserves its right to file a detailed submission during hearing of the appeal."*

15. That during the course of hearing of the appeal it was submitted by the Ld. Authorised Representative (for short 'A.R') for the assessee that the issue on the basis of which revisional jurisdiction had been exercised by the Pr.CIT u/s 263 was at length deliberated upon by the Assessing Officer during the course of the assessment proceedings. It was contended that the matter was examined at length and that after making enquiries a plausible view has been arrived at by Assessing Officer; it cannot be stated that there was lack of enquiry on part of Assessing officer. It was averred by the Ld. A.R that while framing the assessment if a plausible view had been arrived at by the Assessing Officer, in respect of the issue under consideration, then the Principal CIT stands divested of his jurisdiction to exercise the powers vested under him u/s 263 and to dislodge the well-reasoned order of the Assessing Officer. The Ld. AR further submitted that Assessee's case was selected for limited scrutiny u/s 143(2) of the Act to examine following issues: -

- i. Whether contract receipts/fees have been correctly offered for tax.
- ii. Whether sales turnover/receipts has been correctly offered for tax.
- iii. Whether the current liabilities shown are genuine.

16. It was thus averred by the Ld. A.R that the subject matter on which the Ld. Pr.CIT has exercised the revisional jurisdiction u/s 263, is indeed a matter that was already examined by the Assessing Officer in the course of assessment proceedings, and after deliberating on the subject matter in issue, the Assessing Officer has passed the order u/s 143(3). Further, the Ld. A.R, assailing the order of the Pr.CIT has pointed out that detailed enquiry was carried out by the Assessing Officer by issuing notices u/s.142(1) with respect to the issues on the basis of which the Ld. Pr.CIT exercised the revisional jurisdiction u/s.263 and that the assessee furnished all the details duly asked for and the replies were furnished to the A.O during the course of the assessment proceedings and that it was after taking cognizance of all the submissions and after being completely satisfied with respect to the reasons for selection for scrutiny assessment, that AO has passed the order u/s. 143(3) accepting the returned income.

17. It was the further submission of the Ld. A.R. before us that assessee has undertaken only one contract which was awarded by Lalitpur Power Generation Co. Limited (LPGCL) on 20.12.2010 for a value of ₹.787 crores which was further enhanced to ₹.2057.32 crores vide MOU dated 29.11.2014. He submitted that Ld. Assessing Officer never doubted the source of advances. In fact he accepted the revenue recognition policy

consistently followed by the assessee in accordance with Accounting Standard (AS) 7 'Construction Contracts' for the advances received from LPGCL at regular intervals and which was offered as income on project completion basis in accordance with AS-7. Further, TDS was duly deducted on the advances and also no TDS Credit was claimed in the year since revenue had not been recognised. Further, all the facts and replies were duly submitted to the Assessing Officer during the course of proceedings. Thus, the Assessing Officer has applied his mind while passing the order u/s 143(3) after deliberating over all the facts and replies submitted by the assessee. Therefore, the contention of the Ld.Pr.CIT that the Ld. Assessing Officer has failed to examine the income embedded in the project advances received from LPGCL and that his order is erroneous in so far as it is prejudicial to the interest of the revenue is baseless and not sustainable. The Ld. A.R heavily relied upon the following judicial precedents in support of his submissions: -

- (i). *"CIT v. Late Shri Vijay Kumar Koganti" (2020) 4 NYPCTR 606 (Madras HC)*
- (ii). *"Commissioner of Income Tax Vs. Development Credit Bank Ltd" (2010) 323 ITR 206 (Bombay HC)*
- (iii). *"Colour Publications (P) Ltd. Vs. Pr.CIT" ITA No. 4023/Mum/2017 (ITAT Mum.)*
- (iv). *Asaria Lalji Vador vs. Principal Commissioner of Income Tax" - ITA No. 559/Mum/2021 (ITAT Mum.)*

18. On the other hand, the Ld. DR. vehemently submitted the fact that the assessee has not denied the fact that it has received advance beyond 5% as per the terms of the contract. She further contended that the excess advance received shall be taken to the P&L account as it has an element of revenue in it. Further, she submitted that in the balance sheet of the assessee there was no work-in-progress account in accordance with AS-7 to recognise the progress of the project for which advances have been received. It was the further contention of the Ld.DR that though assessee had furnished various confirmations from LPGCL, they cannot be relied upon as they were not signed and it was a mere piece of paper holding no authenticity. The Ld. DR further contended that the utilisation of the advances received by the assessee is not towards the construction cost/ project cost but towards investment in private limited companies, i.e. in illiquid funds which do not form part of construction costs. Hence, the nature of advances received by the assessee is not in relation to the project but are revenue in nature and shall be subject to taxation. The Ld.DR averred that the Pr.CIT after duly appreciating that the Assessing Officer, in the absence of the necessary verifications, had failed to treat the advance received beyond 5% as income, had thus rightly held the assessment order is erroneous in so far as it is prejudicial to the interest

of revenue within the meaning of s.263 of the Act and hence has rightly set aside the order. and revised the same u/s. 263 of the 'Act'.

19. Considered the rival submissions and material placed on record. The Ld. Pr.CIT assumed jurisdiction u/s 263 and set aside the assessment order passed by the Assessing Officer u/s 143(3) on the ground that the assessment order passed by the AO is erroneous insofar as it is prejudicial to the interest of the revenue. The Ld. Pr.CIT assumed jurisdiction on the ground that the Assessing Officer has not carried out requisite enquiries and also not applied his mind with respect to revenue recognition in respect of the advances received by the assessee and with respect to and utilisation of these advances. On a careful consideration of the matter and as is evident from the face of record, the Assessing Officer has deliberated upon the facts and has examined the replies and the submissions made by the assessee during the course of the proceedings and the said fact has neither been disputed by the Pr.CIT nor controverted by the Ld.DR before us. The language used by the legislature in section 263 is to the effect that the CIT may interfere if he considers that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the revenue. It is quite clear that two conditions must co-exist in order to give jurisdiction to the CIT to interfere

in revision. The order of the Assessing Officer in question must not only be erroneous but also it must be prejudicial to the interest of the revenue. In other words, merely because the assessment order is erroneous, the CIT cannot interfere. Each and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. The order passed by the Assessing Officer without making necessary enquiries on certain important points connected with the assessment would be erroneous and prejudicial to the interest of the revenue, when the Assessing Officer who is expected to make required enquiries on a particular item of income does not make an enquiry as expected, and that would be a ground for the CIT to interfere with the order passed by the Assessing Officer. However, in the instant case the fact remains that the Assessing Officer had made enquiries with regard to the nature of advances received by the assessee, who had given detailed explanation in that regard by a letter in writing and all these are part of record of his case and the claim was allowed by the Assessing Officer on being satisfied with the explanation of the assessee. When we examine the facts of the case, it is abundantly clear that the Assessing Officer has called for necessary evidences in support of advances and liabilities by issuing show cause notice during assessment proceedings. Further, the

assessee has furnished the required details to the Assessing Officer and also explained the revenue recognition policy followed by the assessee. The Assessing Officer, on being satisfied with the explanation furnished by the assessee has passed the order u/s.143(3). Once the Assessing Officer has called for necessary enquiries and applied his mind to a particular provision and chose to allow the claim of the assessee, then there is no reason for the Ld. Pr.CIT to assume jurisdiction u/s 263 of the Act on the ground that the Assessing Officer has not conducted required enquiries and also not applied in mind. In the opinion of the Ld. Pr.CIT, the enquiries conducted by the Assessing Officer may be inadequate, but that by itself, would not be a ground for the Ld. Pr.CIT to revise assessment order passed by the Assessing Officer unless the Ld. Pr.CIT specifically points out that the Assessing Officer has grossly overlooked the issue during assessment proceedings. In this case, on perusal of details filed by the assessee, we find that the Assessing Officer has caused necessary enquiries and the assessee has filed all details to justify the recognition of revenue and treatment of advances received therein, therefore, we are of the considered view that the Ld. Pr.CIT was incorrect in terming the assessment order passed by the Assessing Officer as erroneous and prejudicial to the interest of the revenue.

20. In this regard, we may gainfully rely upon the decision of Hon'ble Supreme Court in the case of Malabar Industrial Co Ltd vs CIT (2000) 243 ITR 83. The Hon'ble Supreme Court in the said case held that if order of the Assessing Officer is erroneous, but does not prejudice the interest of the revenue or if it is not erroneous but is prejudicial to the interest of the revenue, recourse cannot be taken u/s 263 of the Income-tax Act, 1961.

The relevant portion of the order is extracted below: -

"A bare reading of section 263(1) makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1).

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue."

21. On a similar note, a coordinate bench in the case of Narayan T Rane vs ITO [(2016) 70 taxmann.com 227 (Mum)] has observed as follows:

"Clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-a-vis its reasonableness in the facts and circumstances of the case. Hence, in our considered view, what is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying out enquiries or verification, which a reasonable and prudent officer would have claimed out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made."

22. We may herein observe that a similar view, as hereinabove, had also been taken by the Hon'ble High Courts in the following cases: -

(i). *"CIT v. Late Shri Vijay Kumar Koganti" (2020) 4 NYPCTR 606 (Madras HC)*

(ii). *"Commissioner of Income Tax Vs. Development Credit Bank Ltd" (2010) 323 ITR 206 (Bombay HC)*

23. We are aware of the fact that strictly speaking resjudicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have

allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasoning's, in the absence of any material change justifying the Revenue to take a different view of the matter- and if there was not change it was in support of the assessee- we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-Tax in the earlier proceedings, a different and contradictory stand should have been taken. In this regard, we may rely upon the decision of the Coordinate Bench in the case of J.R.D Tata Trust, Mumbai vs CIT (E) [3738/Mum/2019] as under: -

"While it is indeed true that there is no res judicata in the assessment proceedings, the principle of consistency, nevertheless has its firm roots in the income tax jurisprudence. Hon'ble Supreme Court's has, in the case of Radhasoami Satsang v. CIT [(1992) 193 ITR 321 (SC)] held that, while strictly speaking, res judicata does not apply to income-tax proceedings but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other, and the parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. In the case of PCIT v. Quest Investment Advisors Pvt Ltd. [(2018) 419 ITR 545 (Bom.)], referring to this judgment and taking note of subsequent legal developments, Hon'ble jurisdictional High Court has, inter alia, observed as follows:

7. We note that the impugned order of the Tribunal records the fact that the Revenue Authorities have consistently over the years i.e. for the 10 years prior to Assessment Years 2007-08 and 2008-09 and for 4 subsequent years, accepted the principle that all expenses which has been incurred are attributable entirely to earning professional income. Therefore, the Revenue allowed the expenses to determine professional income without any amount being

allocated to earn capital gain. In the subject assessment year, the Assessing Officer has deviated from these principles without setting out any reasons to deviate from an accepted principle. Moreover, the impugned order of the Tribunal also records that the Revenue was not able to point out any distinguishing features in the present facts, which would warrant a different view in the subject assessment year from that taken in the earlier and subsequent assessment years. So far as the decision of Radhasoami Satsang (supra) is concerned, it is true that there are observations therein that restrict its applicability only to that decision and the Court has made it clear that the decision should not be taken as an authority for general applicability.

8. *However, subsequently the Apex Court in Bharat Sanchar Nigam Ltd. v. Union of India [2006] 282 ITR 273 has after referring to the decision of Radhasoami Satsang (supra) has observed as under :--*

"20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual ITA No. 3738/Mum/2019 Assessment year: 2014-15 gateways of distinguishing the earlier decision of where the earlier decision is per incuriam. However, these are fetters only on a co- ordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction."
(emphasis supplied)

9. *The principle accepted by the Revenue for 10 earlier years and 4 subsequent years to the Assessment Years 2007-08 and*

2008-09 was that the entire expenditure is to be allowed against business income and no expenditure is to be allocated to capital gains. Once this principle was accepted and consistently applied and followed, the Revenue was bound by it. Unless of course it wanted to change the practice without any change in law or change in facts therein, the basis for the change in practice should have been mentioned either in the assessment order or at least pointed out to the Tribunal when it passed the impugned order. None of this has happened. In fact, all have proceeded on the basis that there is no change in the principle which has been consistently applied for the earlier assessment years and also for the subsequent assessment years. Therefore, the view of the Tribunal in allowing the respondent's appeal on the principle of consistency cannot in the present facts be faulted with, as it is in accord with the Apex Court decision in Bharat Sanchar Nigam Ltd.'s case (supra).

24. In this context, we are of the opinion that given the accepted past history of the case, and given the fact that there were no material factual or legal developments in the relevant financial period, it was not at all unreasonable on the part of the Assessing Officer not to question the revenue recognition policy followed by the assessee. There were no reasons to provoke such an inquiry.

25. Further, the revenue recognition policy followed by the assessee is in accordance with the Accounting Standard – 7 'Construction Contracts' to recognise revenue on project completion basis which is a generally acceptable accounting policy and is undisputed.

26. With regard to investment made by the assessee in the illiquid funds, in our view, this is the decision of the board to decide how the funds of the company to be utilised in its best interest and it is the affected party i.e., Lalitpur Power Generation Co Ltd, who had paid the contract price more than the certified work completion, can object the diversion of funds other than intended purpose. The revenue has no role to play how the funds are being utilized by the assessee, it can only analyse the method of accounting adopted consistently and offered the proper income for taxation. Beyond that they don't have any role to play and they are not expected to enter the shoes of the assessee how their affairs have to be carried out. In the given case, the Assessing Officer had verified the method of accounting in detail and the assessment was also selected (limited scrutiny- to verify contract receipt and current liabilities are genuine) for specifically to verify the recognition of revenue adopted by the assessee. It is fact on record that assessee is following recognised method accounting standard, AS-7 published by ICAI and Assessing Officer has not found any mistake in the revenue recognition and moreover, the revenue can be recognised only on the agreement of both parties by critically evaluating the progress of the project, it merely cannot be based on the receipt of funds. Further it is the other party who makes

the payment, who has not objected or had not made any claim against the misuse of the advance of funds other than the intended purpose. As long as the contracting parties are in agreement with the certification of the progress of the project, the revenue has very little role to play in the revenue recognition and investment activities. We do agree that revenue can always make enquiries and once the assessing authority is satisfied with the submissions on the revenue recognition, which the assessee is following consistently then the matter has to rest at that stage. The Ld.Pr.CIT cannot impose of his another possible view in this circumstances even after detailed enquiry by the Assessing Officer.

27. In this view of the matter and respectfully following the case laws discussed above, we are of the considered view that the assessment order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of the revenue as the issue of advances received by the assessee has been thoroughly examined by the Assessing Officer as is evident in the light of evidence filed by the assessee during the course of assessment proceedings. Therefore, we are of the considered view that the Ld. Pr.CIT was incorrect in setting aside the assessment order passed by the Assessing Officer u/s 143(3) of the Act. Hence, we set aside the order

passed by the Ld. Pr.CIT u/s 263 of the Act, restore the assessment order passed by the Assessing Officer u/s 143(3) of the Act.

28. In result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 29th June, 2022.

Sd/-

(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Mumbai / Dated 29.06.2022
Giridhar, Sr.PS

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum