IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 913/Mum/2021

(A.Y: 2015-16)

M/s. Rallis India Ltd C/o Kalyaniwalla and Mistry LLP, 2nd Floor, Esplanade House, 29, Hazarimal Somani Marg, Mumbai – 400001	Vs.	DCIT, Circle – 8(1)(1) Room No. 624, 6th Floor, Aayakar Bhavan M.K Road, Mumbai – 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCR2657N		
Appellant	..	Respondent

Appellant by :	Mr.Jitendra Jain.AR
Respondent by :	Mr.S.N Kabra. DR

Date of Hearing	03.06.2022
Date of Pronouncement	04.07.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Principle Commissioner of Income Tax (Pr.CIT) – 8, Mumbai passed u/s 263 of the Act.

2. At the time of hearing, the Ld. Counsel for the assessee submitted that there is a delay of 06 days in filing the appeal before the Hon'ble Tribunal and filed the affidavit for condonation of delay. We found the

facts mentioned in the affidavit are reasonable and the Ld. DR has no specific objections. Accordingly, we condone the delay and admit the appeal.

3. Further, the Ld. AR submitted that the assessee has raised the additional ground of appeal challenging the jurisdiction of revision order as under:

> *1. The appellant submits that the notice u/s 263 and the consequential order are barred by limitation.*
>
> *The appellant craves leave to add to, amend, alter, modify or withdraw any or all the grounds of appeal before or at the time of hearing of the appeal, as they may be advised from time to time.*

4. The assessee has raised the following grounds of appeal as under:

> *1) The learned Commissioner of Income Tax erred in passing an order u/s. 263, when the jurisdictional conditions were not satisfied.*
>
> *2) The learned Commissioner of Income Tax erred in violating the principles of natural justice.*
>
> *3) The learned Commissioner of Income Tax erred in assuming jurisdiction u/s. 263, when there was no prejudice to the interests of the revenue.*
>
> *4) The learned Commissioner of Income Tax erred in assuming jurisdiction u/sec 263 even though a detailed inquiry was carried out by the Assessing Officer on the*

issue pertaining to the assessee's claim of long term capital loss on sale of land at Dahej.

5) The learned Commissioner of Income Tax erred in assuming jurisdiction u/s 263 merely on the basis of a difference of opinion with the Assessing Officer.

6) The learned Commissioner of Income Tax cried in holding that the sale of plot at Dahej was not a transfer u/s 2(47).

7) The learned Commissioner of Income Tax failed to appreciate that the sale of plot at Dahej and its subsequent re-purchase were independent and mutually exclusive transactions.

8) The learned Commissioner of Income Tax erred in assuming jurisdiction u/s 263even though an inquiry was made by the Assessing Officer on the issue pertaining to the assessee's claim of deduction u/s 80-IA.

9) The learned Commissioner of Income Tax erred in holding that there was an error as regards the deduction u/s 801A.

10) The learned Commissioner of Income tax erred in disregarding the order of the Hon'ble ITAT in the Appellants own case for Assessment Year 2009-10.

11) Having regard to the facts and circumstances of the case, and the provisions of law, the appellant submits that the order u/s. 263 requires to be cancelled.

5. The brief facts of the case are that, the assessee company is engaged in the business of manufacturing of pesticides and plant, growth nutrients, trade in

pesticides, plant growth nutrients, seeds and tanning materials. The assessee has filed the return of income for the A.Y 2015-16 on 28.11.2015 disclosing a total income of Rs.167,34,51,770/- under the normal provisions of the Act and the Book profits u/s 115JB of the Act of Rs. 200,04,14,975/-. Subsequently the assessee has filed the revised return of income on 14.02.2017 with a total income of Rs. 166,59,29,350/- under the normal provisions and computed the book profits u/s 115JB of the Act of Rs. 200,04,14,975/-. Whereas the assessee has explained that the revised return of income was filed in order to rectify the mistake in claiming deduction u/s 10AA of the Act at the lesser amount than the actual allow ability. Subsequently the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with the questionnaire are issued. In compliance, the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed.

6. On the first disputed issue of disallowance u/s 14A of the Act, the Assessing Officer (A.O) observed that the assessee has claimed the exemption of dividend

income of Rs. 3,76,545/- u/s 10(34) & 10(35) of the Act. The assessee has investments as per the Balance Sheet as on 31.03.2015 of Rs. 24,81,93,000/- and the assessee has made the suo moto disallowance of Rs.3,76,545/- u/s 14A of the Act. The A.O. dealt on the provisions and financial statements and find that the assessee has incurred interest expenditure of Rs. 4,78,64,000/- on the borrowings and has not disallowed the proportionate interest expenses as per section 14A of the Act in respect of earning the exempted income. The A.O has issued a show cause notice on this disputed issue and the assessee has filed the explanations mentioning that assessee's own funds are more than the investments and therefore the assessee has not used borrowed funds for the purpose of investments and the assessee has made su motto disallowance to the extent of exempted income.

7. Whereas the A.O. was not satisfied with the explanations and dealt on the applicable provisions and the judicial decisions and finally worked out the disallowance u/s 14A r.w.r 8D(2)(ii)&(iii) of I T Rules of Rs. 27,60,092 after giving the set off of su omoto disallowance made by the assesee, the net

disallowance worked out to Rs. 23,83,547/-.The AO while calculating the book profits u/s 115JB of the Act has added the disallowance u/s 14A of the Act for the purpose of computing the book profits. (ii) The A.O found that the assessee has claimed the legal and professional expenses of Rs.6,03,64,191/- on account of compliances and required the assessee to furnish the details. The AO on perusal of the information found that some part of the expenses was paid for public relation services and therefore the A.O. is of the view that the expenditure does not take characteristic of business expenditure and observed that the expenses are unverifiable and disallowed Rs.66,00,000/-.Finally the A.O. has allowed the deduction u/s 10AA of the Act for profits of SEZ unit and determined the total income of Rs. 167,49,12,900/- as per the normal provisions of Act and the book profits worked out u/s 115JB of the Act of Rs.200,27,98,522/- and passed the order u/s 143(3) of the Act dated 29.12.2017.

8. Subsequently, the Pr.CIT on perusal of the facts and the assessment record observed that the A.O has not made any enquiry in respect to certain primary

facts/claims and considered the assessment order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of revenue and issued notice u/s 263 of the Act dated 10.03.2021 and is read as under:

> *1. The assessee company filed return of income on 28-11-2015 declaring total income at Rs.167,34,51,770/and book profit u/s 115JB of the Act at RS.200,04,14,975/-. Revised e-return was filed on 14-2-2017 revising the total income at Rs.166,59,29,350 and book profit u/s 1 15JB at Rs.200,04,14,975/-. The assessment order u/s. 143(3) of the Act was passed on 29.12.2017 assessing the income at Rs. 167,49,12,895 and book profit at Rs. 200,27,98,522.*
>
> *2. On perusal of the assessment records it was seen that, the assessee claimed and was allowed carry forward of LTCL of Rs.71123553 on transfer of land at Dahej. It was seen from the submission of the assessee that it was allotted a land Z- 112 at Dahej from Dahej SEZ Ltd. and one of the conditions was to start the operations within specified period. However, the company could not start the operations within the stipulated time and decided to surrender the plot to the Dahej SEZ Ltd. However, instead of giving the land back, the assessee went on to get the same plot re allotted to it and the possession of the plot was never handed over to the Dahej SEZ Ltd. Further, the assessee never got the amount and it was only a book adjustment as the amount receivable against surrender of the plot was adjusted against the allotment of the same plot at Z-1*

12.

As per section 2(47) of the Act, transfer in relation to a capital asset includes any transaction involving in allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in 53A of the Transfer of property Act, 1882. The transactions not covered under section 2(47) of the Act is not considered a transfer. Further, as a maxim, notional incomes are not taxed and notional losses are not allowed under Income Tax Act'.

Thus, the transaction could not be said to be a transfer as the possession of the land always remained with the assessee even before and after the transaction. As no transfer took place, the LTCL claimed and allowed on the said transaction was a notional loss only.

Further, the assessee claimed and was allowed 80 IA deduction of Rs.41487701 on Incinerator facility. In the computation /P&L account for the incinerator unit, the assessee has asserted that the computation of profit has been arrived at by notional savings. As the said facility /incinerator was a cost centre to the assessee, no profit was found earned on the said facility. Rather, it went on to compute notional profit. As the Act allows only the actual profit and not notional profit for deduction, the deduction on the said facility under section 801A was not in order.

3. The aforesaid aspects, which, prima facie warranted inquiry on the facts and circumstances of the case, have not been inquired into while completing the assessment. On the facts and circumstances of the case,

it is clear that in respect of the aforesaid aspects, the order of the A.O. suffers from error within the meaning of Section 263 of the I.T. Act, 1961. This error has resulted in prejudice to the revenue within the meaning of Section 263 in as much as the claim of the assessee is allowed in excess and for income of the assessee has been under assessed. Accordingly, in respect of the aforesaid aspects, enumerated in foregoing paragraphs as above, provision of Section 263 of the Income Tax Act, 1961 are clearly attracted to the facts of this case.

4. In view of the above, it is proposed to suitably revise the assessment order passed by the AO u/s 263 of the I.T. Act, 1961. Accordingly you are hereby requested to make your submission if any ***by*** *17/03/2021 and to explain why the said order u/s 143(3) dated 29/12/2017 should not be revised u/s 263 of the I.T. Act, 1961. If nothing is heard from you by the said date, the necessary order will be passed ex-parte on the basis of material available on record without giving further opportunity to you, which may please be noted.*

9. In compliance to the notice, the assessee has filed the reply letter dated 17-03-2021 online as under:

We are writing this letter under instructions from our above mentioned clients.

This is with reference to your Honour's Notice u/s 263 of the Act dated March 10, 2021, served one- mail on even date, in respect of the captioned Assessment Year which is fixed for hearing today.

Since, the issues relate to a period dating back almost five years, our clients are in the process of compiling the relevant particulars in respect of the said notice, and, therefore, we have to most earnestly request your Honour to please grant an adjournment and re-fix the date of compliance after one week and oblige.

We are making this request because:

a) In the pandemic, our clients offices have been virtually closed.

b) Employees are permitted to attend only one day in the week

c) We need to lead the details of the submissions in the original assessment, which are available in files stored in the godown

We trust that your Honour shall accede to our above request, for which act of kindness our clients shall ever remain grateful. We also regret the inconvenience caused to your Honour and hope to be excused for the same.

10.. Whereas the Pr.CIT was not satisfied with explanations and dealt unilaterally on the facts of the case and the claim of deduction u/s 80IA of the Act and long term capital loss(LTCL) on surrender of plot. The Pr.CIT finally observed that the order passed U/sec143(3) of the Act is erroneous and prejudicial to the interest of revenue and has set aside the assesseement and issued the directions to the AO for de novo assessment. The observations of the Pr.CIT at page 2 Para 3 to 5 of the order are read as under:

3.Thus, as per explanation 2(a) to section 263(1), the Assessment order was held to be erroneous and prejudicial to interest of the revenue since the AO did not conduct adequate enquiry. Based on these fact, a show cause notice u/s.263 of the Income tax Act dated 10/03/2021 was served on the assessee, fixing the date of hearing on 17.03.2021. In response to which assessee filed a letter for adjournment. However, no adjournment is granted in this case because of constraint of time as matter will be get barred of limitation on 31.03.2021.Further the issue is set aside to the file of AO so that assessee will get ample opportunity to make its submission.

4. From the records it was seen that the assessee was allotted a land Z-112 at Dahel from Dahej Sez Ltd. and one of the condition for allotment was to start the within specified period. However, the company could not start the operations within the stipulated time and decided to surrender the plot to the Dahej SEZ Ltd. However, instead of giving the land back, the assessee went on to get the same plot reallocated to it and the possession of the plot was never handed over to the Dahez SEZ Ltd. Further, the assessee never received any amount against surrender of said land and it was only a book adjustment as the amount receivable against surrender of the plot was adjusted against the allotment of the same plot at Z-112.

As per Sec 2(47) of the Act, the transaction could not be said to be a transfer as the possession of the land always remained with the assessee even before and after the surrender and re-allotment of land. As no transfer took place, the LTCL claimed and allowed on the said transaction was a notional loss only which should have been disallowed by the AO. Assessee vide its

submission dated, 16-10-2017 submitted the computation of capital loss and copies of surrender and re allotment of said land. Assessee in its submission mentioned that, 'Since the land was purchased in 2010 and sold in 2014. LTCL is claimed on it'. This claim of assessee is factually incorrect as no sale of the land ever took place. AO did not raise any further query on this submission made by the assessee and accepted its claim without further verification..

Further the assessee claimed and was allowed 80 IA deduction of Rs.41487701 on incinerator facility. In the computation /P&L account for the incinerator unit, the assessee asserted that the computation was finalised by notional savings. As the said facility /incinerator was a cost centre to the assessee, no profit was found earned on the said facility. Rather, it went on to compute notional profit. As the Act allows only the actual profit and not notional profit for deduction, the deduction on the said facility under section 801A was not in order. This aspect was not at all verified by the AO.

The Hon'ble Supreme Court in case of Liberty India Ltd. Vs CIT [2009] 183Taxman 349 (SC) brought out fine distinction between profit linked incentives and investment linked incentives and held that Chapter VIA which provides for incentives in the form of tax deductions essentially belong to the category of profit linked incentives. There is no enabling provision in the Act to allow the deduction computed on notional basis in respect of assesses engaged in infrastructure development.

AO passed the assessment order u/s 143(3) on 29.12.2017 without making any specific inquiry about preference shares. In absence of any specific inquiry made by the AO or recording his reasons for accepting

assessee's submission without any appropriate evidence, it can not be said that documents submitted by the assessee were duly verified by the AO. The AR of the assessee vide letter dated 17.3.2011 has sought more time for filing the requisite documents. This request is not being accorded since these matters are being set aside to the AO for making assessment ft novo after giving adequate opportunity to the assessee to file its submission.

Reliance is placed on, Hon'ble Kolkata High Court's judgement in the case of Rajmandir Estates Private Limited vs. Pr. CIT 386 ITR 162 (Cal) which has been affirmed by the Hon'ble Supreme Court, as also in the case of Daniel Merchants Private Limited vs. ITO pronounced by the Hon'ble Supreme Court on 29.11.2017, that the CIT is entitled to revise the assessment order u/s 263 of the Act on the ground that the Assessing Officer did not make any proper inquiry while accepting explanation of the assessee.

Further reliance is placed on Malbar Industrial Ltd vs CIT (2000) 243 ITR 33C3Cr. As per this judgment the order of the AO can be held to be erroneous, i.e. If the AO's order is passed without application of mind or ii) If the AO has not investigated the issue before him.

Reliance is also placed on Ld. Mumbai ITAT's judgment in the case of Laxmi Ventures (India) Pvt Ltd vs Principal Commissioner of Income Tax-7, Mumbai ITA No_2199/MUM/ 2018), where it has upheld the order u/s 263 by observing that, the AO has not given any reason in the assessment order or even did not discuss the issue concerned which shows that AO failed to exercise due diligence to determine the income. In this case too the AO has not given any reason nor discussed issues for having accepted the assessee's submission.

Reliance is also placed on Mahalakshmi Liquor Promoters (P) Ltd vs. Commissioner of Income Tax (2013) 29 taxmann.com 70, the Ld. Tribunal found that there was no enquiry by the Assessing Officer on the issues raised by the CIT. It was held that the lack of enquiry or inadequate enquiry by the Assessing Officer was a valid reason for revision of the assessment order.

The Ld. Tribunal, therefore, concluded that an order becomes erroneous because inquiries ought to have been made on the facts of the case, were not made and not because there is anything wrong with the order if all the facts stated or the claims made in the return are assumed to be correct. Thus, It is mere failure on the part af of the AO to make the necessary inquiries or to examine the claim made by the assessee in accordance with law, which renders the claim made by order erroneous and prejudicial to the interest of the revenue. Nothing more is required to be established in such a case. If the Assessing Officer passes an order mechanically without making the requisite inquiries or examining the claim of the assessee in accordance with law, such an order will dearly be erroneous in law as it would not be based on objective consideration of the relevant materials. It is therefore, the mere failure on the part of the Assessing Officer in not making the inquiries or not examining the claim of the assessee in accordance with law that per se renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing else is required to be established in such a case to show that the order sought to be revised is erroneous and prejudicial to the interests of the revenue." (emphasis supplied)

The Ld. ITAT, Mumbai in Anuj Jayaendra Shah vs PCIT-35, Mumbai :2016 reported in 67 taxmann.com 38,

held as under:

10. Now, as can be seen above, the amendment to section 263 of the Act by insertion of Explanation 2 to Section 263 is declaratory in nature and is inserted to provide clarity on the issue as to which orders passed by the AO shall constitute erroneous and prejudicial to the interest of Revenue whereby it is provided, inter-alia that if the order is passed without making inquiries or verification by the AO which, should have been made or the order is passed allowing any relief without inquiring into the claim; the order shall be deemed to be erroneous and prejudicial to the interest of Revenue.'

5. in conclusion, the assessing officer has failed to make necessary enquiry and bring an record all facts necessary for determining the true character and nature of the income. Omission to do so has resulted in an order which is erroneous and prejudicial to the interest of revenue. In view of this I am of the view that the assessment order dt. 21/12/2017 is erroneous and prejudicial to the interest of re-re as per provisions of Explanation 2(a) to section 263(1) of the Income Tax and requires to be revised and set aside. Accordingly, the assessment is and set aside to the file of the Assessing Officer. The Assessing Officer is to frame the order de novo, as per observation made in this order above.

11. Aggrieved by the revision order, the assessee has filed an appeal before the Hon'ble Tribunal.

12. Before, we deal on the merits of the case, the assessee has raised the additional ground of appeal on the limitation of issue of notice. The Ld.AR

contentions are that the notice was issued beyond the limitation time, whereas the assessment order u/sec 143(3) of the Act was passed on 29.12.2017 and the notice u/s 263 of the Act, has to be issued within the two years from the end of the financial year in which the assessment was completed and the expiry date is as on 31.03.2020 and whereas the notice u/s 263 of the Act was issued on 10.03.2021. The Ld.AR submitted that there is no intimation was issued before 31.03.2020 and therefore the notice issued is not tenable in the eyes of law. The Ld. DR submitted that the Honble High Court of Allahabad in Writ petition No. 524/2022 has granted some relaxation in respect of the time period and hence the notice was correctly issued and the assessee is bound to comply with the notice.

13. We considering the facts and also the submissions, find that the time limit of provisions of Sec 263 (1)&(2) of the Act are read as under:

> ***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.

Explanation 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have

extended to such matters as had not been considered and decided in such appeal.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any

proceeding under this section is stayed by an order or injunction of any court shall be excluded.

14. We found the assessee has raised the additional ground of appeal on limitation period of issue of notice, since it was pandemic period and the Honble High court has passed the order extending the limitation period and which has to be fallowed. Accordingly, we do not find merits in the additional ground of appeal and is dismissed.

15. On the merits of the case, At the time of hearing, the Ld.AR submitted that the Pr.CIT has erred in set aside the order u/s 143(3) of the Act, which does not satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue and direct the A.O to do afresh assesseement. The Ld.AR submitted that the explanation 2 to sec 263 of the Act ought to be considered only when the AO has not applied his mind, the facts are to be verified and no enquiry is conducted. The A.O in the course of the assessment proceedings has called for the details in respect of claim of deduction U/sec 80IA of the Act and the long term capital loss(LTCL) on the surrender of the plot. The Ld. AR emphasized that the assessee

has complied with the notices and the clarifications were filed. The A.O. has dealt on the facts in respect of the issues raised by the Pr.CIT but there are no observations in the assessment order. The Ld. AR substantiated the submissions with the voluminous paper book, judicial decisions and prayed for allowing the appeal.

16. Contra, the Ld. DR submitted that the A.O has issued notice u/s 142(1) of the Act and the assessee has filed the reply but the details does not satisfy the completeness of the notice. Further the Ld.DR supported the order of the Pr.CIT and made submissions on the application of the provisions and explanation 2 to section 263 of the Act.

17. We heard the rival submissions and perused the material available on record. The Ld.AR contentions are that the order passed by the A.O. does not satisfy the twin conditions that (i) erroneous and (ii) prejudicial to the interest of the revenue. The Ld. AR further submitted that the Pr.CIT is of the opinion that the AO has not conducted enquiry and there are no specific reasons and findings are recorded. The

crux of the disputed issue the Pr.CIT has observed that the long term capital loss(LTCL) on transfer of land which was subsequently allotted at Z-112 Dahej SEZ. Whereas, one of the conditions that the operations should be started but the assessee company has not started the operations within stipulated time and surrendered the plot, however instead of giving the land back, the assessee went on get the same plot re allotted to it and the possession of plot was never handed over to Dahez SEZ Ltd. Therefore the adjustment cannot be treated as transfer as per Sec. 2(47) of the Act as the possession of land always remained with the assessee before and after surrender and re allotment of land. Hence the land transaction was a notional loss and should be disallowed by the Assessing Officer.

18. Further, the assessee also claimed deduction u/s 80IA of the Act on the insulator facility, whereas on perusal of the profit and loss account the Pr.CIT found that the assessee has considered the notional savings and has computed the notional profits. Whereas only actual profits are allowed as deduction u/s 80IA of the Act. On these two issues the Pr.CIT

observed that the order of the A.O. is erroneous and prejudicial to the interest of the revenue. On the disputed issue of Claim of deduction U/sec80IA of the Act, the Ld. AR submitted and demonstrated page 57 of the paper book, where the reply to notice u/s 143(2) of the Act was filed and at point 5 of the reply contains filling of Form-10CCB along with Auditors certificate, Balance sheet and profit and loss account and notes to Accounts for claim of deduction u/s 80IA of the Act- power generation and infrastructure facility . The Ld. AR emphasized that the A.O. has raised the query in the course of assessment proceedings and the assessee has filed the reply on 03.10.2016. Further The A.O has issued a notice u/s 142(1) of the Act dated 16.10.2017 and at point 2 it was very clearly mentioned on these aspects of Claim u/sec 80IA of the Act read as under:

> "*2. It Is seen that the assessee company has claimed deduction totaling to Rs. 5,11,96,658/- which includes deduction u/s 80IA of Rs. 4,14,87,701/- in respect of infrastructure facility incinerator and Rs. 91,52,577 in aspect of power unit at Lote. It is further seen that the assessee company has claimed exemption / deduction u/s 10AA of the Act of Rs. 16,78,85,314/- in respect of*

SEZ Unit. In this regard, please furnish notes explaining as to how the three different undertakings fulfill all the conditions laid down under the Act to claim deductions under respective section."

19. The Ld.AR demonstrated page 61 of the paper book on the reply dated 16-10-2017 at point no 2 explaining claim of deduction U/sec 80IA of the Act filed in compliance to notice u/s 143(2) of the Act as under

"2. Regarding your query for claim of exemption / deduction u/s 10AA and u/s 80IA, detail report duly audited by statutory auditors in form No. 56F and Form No. 10 CCB respectively has been submitted vide letter dated 03.10.2016 and 15.02.2017. The detail reports have been issued by statutory auditors after verifying that the undertakings fulfill all the conditions laid down under the respective provisions of the Act. Also these exemption / deduction are allowed in earlier years based on the auditor report.

20. The contentions raised by the Ld. AR that the A.O has applied his mind and called for the information. The A.O has verified the facts based on the Audited financial statements, in particular statement of profit & Loss of Incinerator-2 at Page 46 and 47 of the paper book and at page No. 49 the Audit

Report in Form No.10CCB under section 80IA(7) of the Act as under:

Extracts from the statement of profit and loss of incinerator – 2 of ankleshwar (Unit-1) for the year ended 31 March, 2015

	Amount (in Lac)
Savings from incinerator 2(based on market price)	*935.19*
	935.19
Expenditure	
Power cost	*61.59*
Gas & Fuel Cost	*317.64*
Repairs & Maintenance Cost	*4.72*
Other operating cost	*129.37*
Depreciation	*99.73*
	613.05
Profit for the year before tax	*322.14*

Notes attached to and forming a part of the extracts of the balance sheet and statement of profit and loss as on 31.03.2015 and for the period 1.04.2014 to 31.03.2015 incinerator -2 at Anckleshwar Unit-1 (the Incinerator-2)

1. *Based on the requirement of Sec 80IA as amended by the Finance (No.2) Act, 2009, the company has prepared the extracts from the financial statements for Incinerator-2. As these extracts from the financial statements have been prepared for the limited purpose of submission before the Income Tax Authorities along with the return of income of the company and are not intended to be used for any other purpose, the disclosure requirements of the applicable accounting*

standards may not have been complied with. Therefore, these extracts from the financial statements should be read together with the relevant annual financial statements of the company.

2. *The extracts from the financial statements have been prepared based on the books of account mainained by Rallis Inida Ltd. The same are prepared based ont eh cost centre extract available in companies accounting system and other infomraion available with the company.*

The basis of allocation of expenditure, assets and liabilities to incinerator-2 is explained as follows.

a. *Direct expenses such as production cost consisting of fuel consumption and maintenance of Incinerator-2 have been extracted from the books of account as referred above. Expenditure not directly attributable to Incinerator-2 has been allocated to the Incinerator-2 in the following manner;*
   i. *Security Service – Payment pertaining to 1 securing person for the year.*
   ii. *Canteen expenses – estimated cost of the food provided by the canteen for the running and maintenance persons from outsourced provided*
b. *Fixed assets, current assets, loans and advances, and current liabilities and provisions attributable to Incinerator-2 have been extracted from the books of account as referred above.*
c. *Corporate assets and liabilities have not been allocated. Head office account represents excess of expenditure over savings.*

21. The Ld.AR emphasized on the claim and demonstrated the circular issued dated 28-09-2013

& 22-12-2014 issued by the Baruch Enviro Infrastructure Ltd placed at page No. 55 & 56 on the subject of Rate Revision for Incineration Waste and effective dates of applicability. The Ld. AR explained that the Honble Tribunal for A.Y 2009-10 has granted the relief in assesses own case in ITA No. 401 & 489/M/2013 dated 16.12.2016 placed at 115 of the paper book. Further the CIT(A) has dealt on the facts and law and granted the relief dealt at page 145 to 147 and internal page at 10 Para 4.6 of the order read as under:

> *4.6 I have considered the facts of the case, oral contentions and written submissions of the appellant as against the observations of the AO his order u/s 143(3) of the Act. The submissions and contentions of the appellant are being discussed and decided as under:*
>
> *i. In respect of eligibility of deduction u/s 80IA in respect of the profit generated from captive consumption of electricity by the appellant and its valuation for the purposes of deduction it would be pertinent to refer to Sec. 80IA of the Act since the said section is relevant in the present case. Sec. 80IA(8) read as follows;*
>
> *(8) Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible*

business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date :

***Provided** that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.*

Explanation.—For the purposes of this sub-section, "market value", in relation to any goods or services, means—

ii.From the plain reading of the section it is clear hat the section specifically provides for the situation where any goods held for the purpose of the eligible business are transferred to any other business carried on by the assessee. In this case the power generated from the eligible business was transferred for consumption to any other business of the appellant. It is further not the facts of the case or the findings of the AO that the captive power generation until of the appellant is not an eligible business in terms of section 80IA of the Act.

iii.It is further seen from the facts of the case that the AO denied the deduction claimed u/s 80IA on the basis of his observation that in respect of revenue generated by the said captive power plant, the narration used in the profit and loss account was savings from captive power plant. In this regard it has been submitted that the intention of the appellant, and the auditors, was to disclose clearly that the revenue was

generated from captive consumption and not from sale to an outsider. It is further the fact submitted to the AO that the amount so mentioned under this caption is actually the market value of the power and other by products transferred to the other business of the appellant.

iv. In such facts of the case and submission of the appellant and keeping in view the provisions of Sec. 80IA which is undertaking specific and not assessee specific and also the case laws relied upon by the appellant it is held that the appellant cannot be denied deduction u/s 80IA for the reasons mentioned by the AO. Accordingly such denial of deduction u/s 80IA by the AO is not found to be justifiably.

v. However a perusal of the said section reveals that where transfer of any goods or services by the eligible business to any other business carried on by the assessee is not recorded in the books of accounts of the eligible business at the market value of such goods or service as on date of the transfer, then for the purposes of the deduction, the profits and gains of such eligible business is required to be computed as if the transfer has been made at the market value of such goods or services as on the date.

vi. As per the explanation market value in relation to the goods would mean the price that such goods would ordinarily fetch in the open market.

vii. The proviso to such section (8) of section 80IA would come into operation only when in the opinion of the AO, the computation of profits and gains of the eligible business in the manner provided in the main sub section presents exceptional difficulty. It is sent that in the facts of the case the appellant has not sold its power to any

third party and further has not produced any details or evidence in respect of demonstration of the value adopted by it being market value of the electricity. The appellant has simply adopted the rates of power supply to it by GEB as market value of the power per unit. In this regard it is mentioned that such price charged by the electricity boards are keeping in view various factors which are in respect of type of use quantity of use and regulatory framework under which the per unit price is fixed. The tariff fixed for sale by the state power distribution agency for industrial consumers could not be called as market price as the regulators fix the tariff considering the wheeling charges. Transmission loss due to leakage, past losses of the distribution agency, etc. Under such circumstances it is arrived at the computation of profits and gains of the eligible business in the manner provided in the main sub section presents exceptional difficulty and accordingly the proviso to Sec. 80IA(A) would be invoked.

vii. Since the amendment to Sec. 80A(6) has been specifically made retrospective from a specific date i.e. w.e.f 01.04.2009, the same would apply with respect to the A.Y 2009-10 onwards. Further, as per the explanation to Sec. 80A(6) the market value means the price the such goods or service would fetch it these if these were sold by the undertaking or nit or enterprise or eligible business in the open market, subject o statutory or regulatory restrictions, if any. In the present case, in the absence of any market the price profit of the appellant from its eligible business will have to be determined as a result of any statutory or regulatory restrictions or as to what should have been the rate at which it was required

to supply the goods as result of any statutory or regulatory restrictions.

viii. Since amendment to sec 80A(6) has been specifically made retrospective from a specific date i.e. w.e.f 01.04.2009, the same would apply with respect to the A.Y 2009-10 onwards. Further, as per the explanation to Sec. 80A(6), the market value means the price that such goods or services would fetch if these were sold by the undertaking or unit or enterprise or eligible business in the open market, subject to statutory or regulatory restrictions, if any. In the present case, in the absence of any market value price. The price / profit of the appellant from its eligible business will have to be determined as a result of any statutory or regulatory restricting or as to what should have been the rate at which it was required to supply the goods as a result of any statutory or regulatory restrictions.

ix. It is pertinent to note that the assessee is net supplying electricity to the state electricity board or to any other power distribution agency. Under such facts and circumstances and when the amended explanation to section 80A(6) is applicable for one year under consideration, it is considered fit to allow deduction u/s 80IA at the rate of 16% return on capital base as per Notification No. 251(E) dt. 30.03.1992, which is also used as a parameter for exercise for fixation of tariff.

x. In view of the aforesaid reasons, the AO is directed to work out the profits eligible for deduction on the basis of 16% return on capital base as per Notification No. 251(E) dt. 30.03.1992 and allow deduction u/s 80IA accordingly.

xi. Accordingly, the grounds No. 2 & 3 are allowed and grounds No. 1 & 4 are partly allowed.

22. Whereas on the second disputed issue of carry forward of long term capital loss(LTCL) on transfer of land and the subsequently which was allotted at Z-112 Dahez SEZ. The Pr.CIT observed that the adjustment/re allotment cannot be treated as transfer as per Sec. 2(47) of the Act as the possession of land always remained with the assessee before and after surrender and the land transaction was a notional loss and can not allowed. Whereas, the assessee has complied diligently on the query raised by the A.O. in the assesseement proceedings We find that the assessee has filed the details on the land transaction and the long term capital loss(LTCL) working on surrender of the plot. The assessee was allotted the plot of land Z-112 in Dahej by the Dahej SEZ Ltd in the year 2010 as per the terms and conditions mentioned in the allotment letter. And on the conditions of the lease that the assessee should start its manufacturing unit within the specified time limit. But the assessee could not start the operations for various reasons and the Ld. AR submitted that

the land was surrendered and re allotted to the assessee on fresh terms and conditions and referred to page 5 of the paper book the computation of income for F.Y.2014-15 reflecting the long term capital loss. The assessee has computed the index cost of purchase cost of plot and worked out the long term capital loss (LTCL) of Rs. 7,05,38,459/- placed at page 7 of the paper book. The Ld.AR submitted that the Assessing officer has raised the query in the course of hearing on the land transaction/allotment and computation of LTCL. The assessee has filed a detailed reply with the Annexures vide letter dated 23.11.2017 placed at page 64 of the paper book explaining the vital facts on surrender of land, allotment letter, working of capital gains, letter of approval JDC-Dahej SEZ, letter of value of surrender land and exit order of land at Dahej Z - 112 at Para 2b of the letter. The Ld.AR demonstrated the offer-cum allotment for of plot by Dahej SEZ Ltd at page 67 to 75. The assessee has entered in to agreement for plot with Dahez Sez placed at page 77 to 85 of the paper book.

23. The Ld.AR also demonstrated the letter from the Development commissioner Dahez SEZ at page 90&91 of the paper book and was brought to the knowledge of the Assessing officer. The assessee has filed the reply in respect of offer cum allotment of plot on 11.12.2014 referred at page 94 & 95 and final exit order issued by the DC-Dahej SEZ dated 13-11-2014 placed at page 96 of the paper book. Therefore the contentions of the Ld. AR are that all these important facts and material evidences filed are examined and verified in the course of assessment proceedings. The Assessing having satisfied with the claims/ submissions has accepted the calculation of Long Term Capital Loss (LTCL) and has passed the asseessement order u/sec143(3) of the Act. Though the Assessing officer has not incorporated the submissions and opinion in the assessment order, the fact remains that the claim of Long Term capital loss(LTCL) has been examined by the A.O cannot be over looked. We find the submissions of the Ld. AR are realistic and duly supported by the material evidences in the paper book and judicial decisions.

24. The Ld. AR submitted that the Pr.CIT has only directed the Assessing officer to make enquiries, whereas the A.O in the notice u/s 143(2) & 142(1) of the Act has called for the information and discussed on the issues as dealt in the above paragraphs. Further, the Pr.CIT has not considered these vital facts on the disputed issues were the A.O has called for the information and the case was discussed and hence there cannot be any non application of mind by the Assessing officer. We find that the A.O has considered one of the possible views based on the information and it is not necessary that the A.O should put all the discussions/observations in the assessment order, and as per explanation (2) to sec 263 of the Act, the authority has to invoke provisions only when there is no verification and enquiry conducted by the A.O. Whereas the A.O has applied his mind and verified the facts and passed the order. The Ld.AR has referred and demonstrated the submissions, financial statements and explanations filed before the A.O. We find the Hon'ble High Court Bombay in CIT Vs. Gabriel India Ltd.(203 ITR

108).(Bom) has observed on the discussions/ findings of the Assessing officer read as under:

> *Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1973-74 - Assessee claimed a sum of Rs. 99,326 described 'as plant relay out expenses' as revenue expenditure and ITO, after making enquiries in regard to nature of said expenditure and considering explanation furnished by assessee in that regard, allowed assessee's claim - Subsequently, Commissioner, exercising powers under section 263, cancelled order of ITO observing that order of ITO did not contain discussion in regard to allow ability of claim for deduction which indicated non-application of mind and that claim of assessee required examination as to whether expenditure in question was a revenue or capital expenditure and directed ITO to make a fresh assessment on lines indicated by him - Whether under section 263 substitution of judgment of Commissioner for that of ITO is permissible - Held, no - Whether ITO's conclusion can be termed as erroneous simply because Commissioner does not agree with his conclusion - Held, no - Whether ITO's order could be held to be 'erroneous' simply because in his order he did not make an elaborate discussion - Held, no - Whether provisions of section 263 were applicable to instant case and Commissioner was justified in setting aside assessment order - Held, no*

25. We Considering the overall facts, circumstances, ratio of the judicial decisions and the details submitted in the course of hearing are of the view that the if any query is raised in the assessment proceedings and it was responded by the assessee, mere fact that it is not dealt with by the A.O. in the assesseement order cannot implied that there is no

application of mind. Hence, the Pr.CIT action cannot be acceptable as the order passed by the A.O. does not satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue. Accordingly, we set aside the order of the Pr.CIT and allow the grounds of appeal in favour of the assessee.

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

Order pronounced in the open court on 04.07.2022.

Sd/-	Sd/-
(S RIFAUR RAHMAN)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 04.07.2022
KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai