

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.117/SRT/2022

(निर्धारणवर्ष / Assessment Year: (2017-18)

(Physical Court Hearing)

Raj Abhishek Corporation 501,KohinoorTextiles Market, Ring Road, Surat-395002	Vs.	Principal Commissioner of Income Tax, Surat-1, Room No.123, Aaykar Bhavan, Majura Gate, Surat—395002
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAJFR 6297 D		
(Appellant)		(Respondent)

निर्धारिती की ओर से /Assessee by : Shri Ketan Jagirdar, C.A

राजस्व की ओर से /Respondent by : Shri Ashok B. Koli, CIT-D.R

सुनवाई की तारीख/ Date of Hearing : 21/12/2022

घोषणा की तारीख/Date of Pronouncement: 16/01/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

By way of this appeal, the assessee has challenged the correctness of the order passed by the Learned Principal Commissioner of Income Tax-1, Surat (in short “ld. PCIT”], in Appeal No. ITBA/REV/F/REV5/2021-22/1040920151(1), dated 16.03.2022 under section 263 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

2. Grounds of appeal raised by the assessee are as follows:

“1) The learned Principal Commissioner of Income Tax-1, Surat (hereinafter referred to as “the ld. PCIT”) has erred in law and on facts in assuming jurisdiction u/s. 263 of the Act.

2) The ld. PCIT has erred in law and facts in setting aside the original assessment made by the ld A.O and directing him to frame assessment de novo after considering eligibility of deduction claimed u/s 80IB of the Act.

3) The appellant prays for granting such other relief as may be deemed just and proper by your Honours considering the factual and legal aspects of the case of the appellant.

4) The Appellant craves leave to add, amend, alter, modify, substitute, delete, change or vary all or any of the Ground or Grounds of Appeal.”

3. The facts necessary for disposal of the appeal are stated in brief. The assessee-firm (M/s Raj Abhishek Corporation) is engaged in the business of developing of Residential Projects and filed its return of income for AY. 2017-18 on 30.10.2017 declaring total income of NIL after claiming deduction u/s 80IB of the I.T. Act of Rs.2,71,51,278/-. Thereafter, the case was selected for complete scrutiny through CASS; and scrutiny assessment under section 143(3) of the Act was finalized on 16.12.2019 accepting the returned income.

4. Later, Learned Principal Commissioner of Income Tax-1, Surat (in short “Ld. PCIT”), has exercised his jurisdiction under section 263 of the Income Tax Act, 1961. On perusal of records, it was noticed by the Ld.PCIT that assessee-firm had started the construction activity on 09.03.2007 and the same was completed on 26.03.2010, the firm was claiming the deduction under sub section (1) r.w.s. sub-section (10) of section 80-IB of the Act. During the course of assessment, the Assessing Officer has asked to furnish the complete list of persons to whom the flats had been sold since inception of project till 31.03.2017 in MS Excel Sheet with Name, PAN and Address. In response to notice, the firm had submitted before assessing officer, the details of flat sold to whom along with PAN and flat Nos. in excel format. The details of the person to whom, the assessee had sold more than one flat is as under:

Flat No.	Name of purchaser	PAN of purchaser
D-19/374	Shilpa Ashok Modi Ashok Dhnsukhlal Modi	ADHPM 6688 G AHSPM 2805 L
D-19/375	Shilpa Ashok Modi Ashok Dhnsukhlal Modi	ADHPM 6688 G AHSPM 2805 L
D-19/376	Shilpa Ashok Modi Ashok Dhnsukhlal Modi	AADHPM 6688 G AHSPM 2805 L
D-19/377	Shilpa Ashok Modi Ashok Dhnsukhlal Modi	ADHPM 6688 G AHSPM 2805 L
B-07/454	Hemant Ramvilas Jain	AALPJ 9974 B
D-03/311	Hemant Ramvilas Jain	AALPJ 9974 B
002/493	Naresh Jagdi Shchandra Vig	ABJPV 9840 R
003/394	Manish Jagdishbhai Barot	ABJPV 9840 R
B-08/561	Ramchalsingh Rajput	AA YPR 5138 A
B-09/162	Sureshchandra Chandrashekhar Mishra	AA YPR 5138 A
B-02/436	Ritaben Anishkumar Shah	AGVPM 643 E
B-11/270	Santoshkumar Bhushan Khalimuni	AGVPM 6433 E

5. On going through the details of flat sold, it was noticed by Id PCIT that assessee firm had sold more than one flat to single person which is in contravention to sub-clause (f) of sub-section (10) of the Section 80IB of the Act. However, while completing the assessment neither the assessing officer has made any inquiry nor made any disallowance in respect of deduction claimed u/s 80-IB of the Act. Thus, Ld. PCIT noted that Assessing Officer has passed the order u/s 143(3) of the Act, dated 16.12.2019 without making inquiries which should have been made and without application of mind. This make the order erroneous in so far as it is prejudicial to the interest of the Revenue. Accordingly, proceedings for revision of order u/s 263 of the Act were initiated by issuing show cause notice bearing DIN No.ITBA/REV/F/REV1/2021-22/1039818399(1) dated 16.02.2022 and duly served on the assessee.

6. In response to said show-cause notice, no any reply has been furnished by the assessee before the assessing officer.

7. Thereafter, one more opportunity was granted to the assessee by Id PCIT, vide notice bearing DIN ITBA/REV/REV1/2021-22/1040196943(1) dated 28.02.2022 issued to the assessee to submit his reply through e-proceedings on or before 04.03.2022.

8. In response to the said notice, the assessee submitted its reply by e-proceeding.

The reply of the assessee is reproduced as under:

“This has with reference to the above. we would like to submit the following in response to notice issued by you.

We were in construction business of residential units during the year under consideration. We have claimed benefit of section 80IB of the Act for our project.

Your notice contains various name of persons to whom we have allotted multiple units.

The detail is as below:

Flat No.			
C-02/493	Naresh Jagdishchandra Vij	ABJPV 9840 R	ABJPV 9840 R
C-03/394	Manish Jagdishchandra Barot	ABJPV 9840 R	BMIPB 0629 H

B-08/561	Ramchal Singh Rajput	AAYP R 5138 A	AAYP R 5138 A
B-09/162	Sureshchandra Chandrashekhar Mishra	AAYP R 5138 A	AKJPM 8488 M
B-02/436	Ritaben Anishku9mar Shah	AGVPM 6433 E	ASIPS 2503 E
B-11/270	Santoshkumar Bhushan Khali Muni	AGVPM 6433 E	AGV[, 6433 E

It can be seen from the above that the department has mistakenly considered same PAN number of different persons. You notice itself is a proof. There cannot be same PAN number to different persons. We have given correct PAN number of allottees mentioned in the notice. You can verify with your system also. Therefore, it is concluded that we have not sold multiple units to above mentioned persons. It seems to be just clerical mistake to consider same PAN for different persons. Therefore, it is not a violation of conditions prescribed u/s 80-IB of the Act for the above-mentioned persons.

Further, we would like to submit the following:

Flat No.	Name	Date of booking
D-19/374 D-19/375 D-19/376 D-19/377	Shilpa Ashok Modi Ashok Dhansukhlal Modi	31/08/2007
B-07/454 D-03/311	Hemant Ramvilas Jain	06/02/2008

We would like to draw your kind attention towards date of booking of such flats. The date of booking falls in FY 2007-08.

We would like to inform you that sub-section (e) of Section 80-IB of the Act is inserted by the Finance Act 2009 i.e. w.e.f. 1st April 2010. Therefore, conditions for non-allotment of 2nd unit is applicable after amendment of the act. There was no any retrospective effect of amendment in this section. Therefore, condition prescribed for non-allotment of 2nd unit is not applicable to unit which was already allotted prior to amendment of the Act.

Booking of such flats had already been made. Advance amount was already received by a/c payee cheque. Hence, it is clearly established that booking was already made prior to amendment of the Act. We are enclosing herewith copy of sale deed of such flats and copy of ledger account for your ready perusal.

Therefore, it can be seen from the above that we have not violated the provision of Section 80-IB of the Act. Hence, we request you to please consider all these facts and drop the proceedings initiated u/s 263 of the Act.”

9. However, Ld. PCIT rejected the contention of the assessee and observed that the assessee stated that while filing submission same PANs has been written for the different persons. However, on going through the details it is noticed that Flat No.C02/493 and C03/394 were sold to Shri Naresh Jagdishchandra and Manish Jagdishchandra, having same father’s name. However, while completing assessment proceedings, the AO has not inquired the issue in the light of the

provisions of clause (f) of the section 80-IB(10) of the Act. The is section reproduced as under:

“Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.

80-IB. (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

... ..

(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 shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if, -

... ..

(f) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely;-

(i) the individual or the spouse or the minor children of such individual,

(ii) the Hindu undivided family in which such individual is the karta,

(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.”

10.The Ld. PCIT noted that the assessee has furnished submission in light of clause-(e) of Section 80-IB(10), which is regarding allotment to any person not being an individual, but this clause is inapplicable because the allotment is made to individuals and their family member. In respect to Flat No. D19/374 to D19/377 sold to Ms. Shilpa Ashok Modi and Mr. Ashok Dhansukhlal Modi and Flat No.B-07/454 and D-03/311 sold to Shri Hemant Ramvilas Jain. The assessee stated that the flats were already booked before 01.04.2010. In support, the assessee has furnished copy of sale deed. The sale deed in favour of Mr. Ashok Modi and Ms. Shilpa Modi was executed during the Month of June, 2010 and sale deed in favour of Shri Hemant Ramvilas Jain was executed in the Month of July, 2010. However, these persons are individuals and their family members and reliance of the assessee on clause ‘e’ of section 80IB(10) is misplaced. In this case there is clear violation of clause ‘f’ of section 80(IB)(10) of the Act, which the AO has failed to take note of and make inquiry in this regard. The assessee

has not submitted any explanation regarding violation of section 80IB(10(f) of the Act.

11. Therefore, Ld. PCIT held that it is clear that the AO has not inquired into the issue of deduction claimed u/s 80-IB of the Act particularly in light of clause 'f' of sub- section 10, of section 80IB and passed the assessment order without application of his mind. Thus, the assessment order dated 16.12.2019 was found to be erroneous in so far as it is prejudicial to the interest of Revenue.

12. Aggrieved by the order of the Ld. PCIT, the assessee is in appeal before us.

13. Learned Counsel for the assessee, argued that some of the flat owners were paid advance amount prior to the commencement of the scheme. Therefore, they are not covered by the issue raised by Ld.PCIT. The Ld. Counsel has submitted the details of the cheques received from the flat owners which are given below:

FLAT NO.	AMOUNT	CH.DATE	CH.NO	FLAT OWNERS NAME	BANK STAT.PAGE
D 19-374	1,70,000	31.08.2007	67971	SHILPA ASHOK	73
D 19-375	1,70,000	31.08.2007		MODI ASHOK	
D 19-376	1,70,000	31.08.2007		DHNSUKHLAL	
D 19-377	1,70,000	31.08.2007		MODI	
D 03-311	50,000	06.02.2008	790527	HEMNTA	74
B 07-454	50,000	06.02.2008	970528	RAMVILAS JAIN	

Thus, Ld. Counsel stated that in the assessment order itself, the Assessing Officer mentioned that he has examined the issue u/s80IB of the Act. Therefore it is not a case of lack of inquiry and Assessing Officer has examined the issue and came to the right conclusion. Therefore, the order passed by Ld.PCIT on the issue which are already examined by the Assessing Officer is not sustainable in the eyes of law and therefore order of ld PCIT must be quashed.

14. On the other hand, Learned CIT-DR for the Revenue submitted that there is complete non- inquiry in the assessee's case. That is, Assessing Officer has not made any inquiry. The Ld. CIT-DR also submitted that Assessing Officer has not

adjudicated the facts in accordance with law and Assessing Officer allowed the claim of assessee without making inquiries. The Ld. CIT-DR also took us through paper book page No.303 and stated that agreement was made in the year 2010, and took us to paper book pages 167 and stated that the agreement was made subsequently. Apart from this, Ld.DR, to bolster his arguments, relied on the judgment of the Co-ordinate Bench of ITAT Delhi Benches in the case of DSIIDC Ltd. vs. PCIT-03, New Delhi in ITA No.2673-2674/Del/2016 dated 09.09.2021, wherein it was held as follows:

“8. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the Assessing Officer has raised only a query before completion of assessment u/s 143(3) relating to claim of 80IA(4). However, the Assessing Officer has not given any cogent finding. Thus, the observation of the Principal Commissioner of Income Tax that the assessment order is erroneous and prejudicial to the interest of the Revenue does have footing. The Ld. DR’s contention that the activities for which claim u/s 80IA(4) was claimed does not come under the purview of infrastructure project specifically Clause (b) is also correct proposition. although the assessee has given the details relating to infrastructure projects, these are included in the definition of infrastructure project u/s 80IA of the Act, has not applied the proper interpretation of Section 80IA(4) in consonance with evidence. Thus, the Principal Commissioner for Income Tax has rightly invoked Section 263 of the Act. The case laws cited by the Ld. AR will not be applicable in the present case as the facts in the present case are different.in fact the Hon'ble Supreme Court in Malabar Industrial Company Ltd vs. CIT (243 ITR 83) (SC) has held that the Commissioner has to satisfy himself of both the conditions i.e. the order is erroneous and prejudicial to the interest of revenue. Both these tests have been seen by the Principal Commissioner of Income tax in the present case and aptly applies in the present case. It is also held by the Hon'ble Apex Court that the provision s 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 and prejudicial to the interest of the Revenue that the section will be attracted. Thus, the Principal CIT has looked into the aspect of the as order in the present case to the extent of erroneous and prejudicial to the interest of Revenue and thus, Section 263 of the Act is attracted in the present case. Section 263 of the Act is not invoked simply for correcting mistake or error committed by the Assessing Officer in the present case. It can be observed that the Pr. CIT has considered all the contentions of the assessee and thereafter rightly came to the conclusion that the Assessing Officer failed to look into the correct applicability of Section 80IA(4) in respect of the assessee’s claim which amounts to erroneous and prejudicial to the interest of the revenue./the present case is covered by the decision of the Hon'ble Apex Court in case of Deniel Merchants Private Limited & Anr. Vs. Income Tax Officer (Appeal No.2396/2017 order dated 29.11.2017). The Hon'ble Supreme Court held as under:

“In all these cases, we find that the Commissioner of Income Tax had passed an order under Section 263 of the Income Tax Act, 1961 with the observations that the Assessing Officer did not make any proper inquiry while making theism and accepting the explanation of the assessee(s) in so far as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry through and detailed inquiry. It is this order which is

upheld by the High Court. We see no reason to interfere with the order of the High Court.

*The Special Leave Petitions are **dismissed.***

*Thus, in the present case the Assessing Officer has not properly adjudicated the issue as per law and, therefore, the Pr. CIT has rightly invoked Section 263 of the Act and passed the order. Therefore, the order under Section 263 of the Income Tax Act, 1961 passed by the Principal Commissioner of Income Tax is just and proper. There is no need to interfere with the same. The appeal of the assessee is **dismissed.***

15. Therefore, ld DR contended that order passed by the ld PCIT may be upheld.

16. We have heard both the parties and noted that the issue under consideration. We note that Assessing Officer during assessment proceedings, issued notice u/s142(1) asking the documents specified in the notice, wherein we note that Assessing Officer has asked the assessee to submit complete list of persons to whom the flats have been sold since inception of project till 31.03.2017 in MS Excel sheet with Name, PAN and address. The notice issued by the Assessing Officer along with Annexure is reproduced below:

*To
Raj Abhishek Corporation
501, Kohinoor Textiles Market, Ring Road
Ting Road, Surat-395002, Gujarat
India*

<i>PAN</i>	<i>AAHFR</i>	<i>AY:2017-18</i>	<i>Dated"19/11/2019</i>	<i>Notice No: ITBA/.AST/F/142(1)/2019-20/1020716041(1)</i>
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Notice under sub-section (1) of Section 142of the Income Tax Act, 1961

Sir/Madam/M/s,

In connection with the assessment for the assessment year 2017-18 you are required to:

- a) Furnish or cause to be furnished on or before 22/11/2019 at 12.20 PM the accounts and documents*
- b) Furnish and verified in the prescribed manner under Rule 14 of I.T. Rules 1962 the information called for as per annexure and on the points or matters specified therein on or before 22/11/2019 at 12.20 PM*
- c) The above mentioned evidence/information is to be furnished online electronically in 'E-Proceeding' facility through your account in 'e-filing' website of Income Tax Department.*
- d) Para(s)(a) to (c) are applicable if you have an account in e-filing website of Income Tax Department. Till such an account is created by*

you, assessment proceedings shall be carried out either through your e-mail account or manually (if e-mail is not available).

- e) *In cases where order has to be passed under section 153A/153C of the Income tax Act, 1961 read with section 143(3), assessment proceedings would be conducted manually.*

*Your faithfully,
Sd/- Karam Chand Dhama
Circle 1(2), Surat*

1. *As you are aware that your case for AY 2017-18 has been selected in scrutiny under CASS and notice u/s 143(2) of the I.T. Act, 1961 dated 16.08.2018 has been duly served upon you. Please furnish the following further details:*
2. *Please provide the complete list of persons to whom the flats have been sold since inception of project till 31.03.2017 in MS Excel sheet with Name, PAN and address.*
3. *Please provide copy of sale deed regarding sale of all commercial space since inception of project to till date.*
4. *Please provide list of all sundry debtors with copy of ledger account of each exceeding Rs.1,00,000/-. Further justify the reason for not charging interest from them.*
5. *You are requested to submit the complete details on or before 22.11.2019.*
6. *Please note that no further adjournment of whatsoever may be will be granted as the assessment is getting time barred. It may please further be noted that, if complete details are not furnish within the stipulated date, the assessment will be completed as per the facts and material available on record without further intimation.*

*Sd/- Karam Chand Dhama
Circle-1(2), Surat*

17. We note that in response to notice u/s 142(1) of the Act, the assessee claimed that it has submitted its reply dated 07.12.2019 which is placed at paper book Pg-100. However, we note that the details of cheques received from flat owners in financial year 2007 and 2008 have not been submitted before assessing officer. We note that first time the assessee stated before Id PCIT that in respect of Shilpa Ashok Modi and Hemant Ramvilas, the date of booking falls in financial Year 2007 and 2008 and this issue has not been examined by the assessing officer. That is, for this specific issue neither assessee submitted details before the assessing officer nor assessing officer has examined this issue during the assessment stage. That is, the following details showing cheque number and date

were not filed before the assessing officer therefore assessing officer did not verify these details, hence AO has not verified the conditions of clause (f) section 80IB (10) of the Act, which is the specific issue raised by the Id PCIT in the revision proceedings, such details of cheque numbers submitted by Id Counsel first time before the Bench are as follows:

FLAT NO.	AMOUNT	CH.DATE	CH.NO	FLAT OWNERS NAME	BANK STAT.PAGE
D 19-374	1,70,000	31.08.2007	67971	SHILPA ASHOK	73
D 19-375	1,70,000	31.08.2007		MODI ASHOK	
D 19-376	1,70,000	31.08.2007		DHNSUKHLAL	
D 19-377	1,70,000	31.08.2007		MODI	
D 03-311	50,000	06.02.2008	790527	HEMNTA	74
B 07-454	50,000	06.02.2008	970528	RAMVILAS JAIN	

Hence, we note that above details, were not available before the assessing officer. Even before Id PCIT, the assessee has submitted general statement about flat owners of Shilpa Modi and Hemanta Ramvilas, therefore Id PCIT has also not examined above details. We also note that in front of four figures, consisting Rs. 1,70,000/- only one cheque number 67971 is submitted by the assessee. For each figure there should be separate cheque number. How one cheque number represents/ may include four figures? Vide assessee`s paper book page No.73, the bank statement shows figure at Rs.6,80,000/-. During the revision proceedings, u/s 263 of the Act such details were not filed before Id PCIT, hence these are new/fresh details before the Bench which were not even available before the assessing officer. We have called the assessment records and observed that even bank statement was not submitted during the assessment stage, only bank account numbers were submitted by the assessee (not the bank statement) before the assessing officer. By way of letter dated 30.04.2019, the assessee submitted bank details, which is reproduced below:

30/04/2019

To,
The Asst. Commissioner of Income tax,
Circle 1(2),
Surat.

Sub : Response to notice u/s 142(1)
PAN : AAJFR6297D
AY : 2017-18

Dear Sir,

This has with reference to the above.

We would like to submit the following as required by you.

1. Copy of the income tax return and computation of income for A.Y. 2017-18 and A.Y. 2016-17
2. Copy of Audit Report for the A.Y. 2017-18 and A.Y. 2016-17
3. Copy of assessment order is being compiled as it is misplaced somewhere. Therefore, we will submit when we find it.
4. Postal address is as follows:
Ramesh Agarwal
35, Anchal plots,
City light,
Surat.
5. Details of AR/CA:
Name : CA Darshak Patel
Mobile : 9427645160
Email : cadcjoffice@gmail.com

6. Details of bank are as follow:

Bank name	Branch	A/c number
State bank of India	Palsana	31540993819
Bank of Baroda	Man darwaja	16530200000972
State bank of India	Ring road	3032211526

7. We are enclosing herewith copy of rajachithhi and completion certificate for ready perusal. If any other details required by you, please let us know.

Thanking you.

18. From the above, it is vivid that assessee has submitted details of banks stating their names and account numbers. We have examined the assessment records and noted that bank statements of the above banks were not before the assessing officer. Hence, assessing officer failed to examine the requirement of clause 'f' of section 80(IB)(10) of the Act, which is the specific query raised by Id PCIT in his revision order. This shows that assessing officer allowed the claim of the assessee blindly without application of mind.

19. The Id Counsel submitted before us that assessee had submitted copy of agreements of flats allotted to Shilpa Modi and Hemant Ramvilas. However, we

note that assessee has submitted only copy of sale deed of commercial shop by letter dated 07.12.2019, which is reproduced below:

07/12/2019

To,
The Asst. Commissioner of Income tax,
Circle 1(2),
Surat.

Sub : Response to notice u/s 142(1)
PAN : AAJFR6297D
AY : 2017-18

Dear Sir,

This has with reference to the above.

We would like to submit the following as required by you.

1. Details of flat sold to whom along with PAN and flat numbers in MS excel format
2. Copy of sale deed of commercial shop sold

Part detail of flat sold and details of sundry debtors exceeding Rs. 1,00,000/- is being compiled and submitted in due course.

Thanking you.

From above letter, it is clear that assessee submitted sale deed of commercial shop only. The copy of agreements of flats allotted to Shilpa Modi and Hemant Ramvilas, were not submitted before the assessing officer, hence assessing officer did not examine the veracity of these agreements. From the above facts, it is abundantly clear that assessing officer has not applied his mind and has not examined the issue raised by ld PCIT.

20. Now, we shall examine the findings of the assessing officer in the assessment order framed by him under section 143(3) of the Act, dated 16.12.2019, which is reproduced below:

"2. The assessee Firm is engaged in the business of Developing of Residential project approved u/s 80IB of the Income Tax Act. Requisite details were called from the assessee and required details were filed by his AR of the assessee which are kept on record"

21. From the above findings of the assessing officer, it is clear that assessing officer called the details and assessee submitted the details, which were kept by

him. The assessing officer nowhere stated that **he has examined** the details filed by the assessee, therefore just **to keep** (kept by him) the details in assessment records does not serve the purpose, it means the assessing officer has not examined the details and did not apply his mind. Moreover, the assessing officer did not ask the assessee to submit before him Bank statements. The assessing officer took the bank account number and bank names from the assessee (not the bank statements), therefore, assessing officer never examined the query raised by ld PCIT. Besides, the copy of agreements of flats allotted to Shilpa Modi and Hemant Ramvilas, were not examined by the assessing officer. Therefore, we note that it is clear violation of clause ‘f’ of section 80(IB)(10) of the Act, because the allotment of flats were made to individuals and their family member more than once. Hence, such specific issue raised by ld PCIT in his revision proceedings, has never been examined by the assessing officer.

22. Let us take the guidance of judicial precedents laid down by the Hon’ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. **In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer’s order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer’s order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him;** then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon’ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. “*prejudicial to the interest*

of the revenue” has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **“unless the view taken by the Assessing Officer is unsustainable in law”**.

23. Taking note of the aforesaid dictum of law laid down by the Hon’ble Apex Court, let us examine the assessee facts under consideration. We note that in respect to Flat No. D19/374 to D19/377 sold to Ms. Shilpa Ashok Modi and Mr. Ashok Dhansukhlal Modi and Flat No.B-07/454 and D-03/311 sold to Shri Hemant Ramvilas Jain. The Id Counsel stated that these flats were already booked before 01.04.2010. In support, Id Counsel has furnished copy of sale deed, which was not examined by the assessing officer. The sale deed in favour of Mr. Ashok Modi and Ms. Shilpa Modi was executed during the Month of June, 2010 and sale deed in favour of Shri Hemant Ramvilas Jain was executed in the Month of July, 2010, these sale deeds were neither called by the assessing officer during the assessment stage nor examined by him. Moreover, the details submitted by the assessee before Id PCIT and bank statements were not examined by the assessing officer. Hence, it is clear violation of clause ‘f’ of section 80(IB)(10) of the Act, which the AO has failed to take note of and failed make inquiry in this regard. Moreover, the assessee has not submitted any explanation regarding violation of clause ‘f’ of section 80IB(10) of the Act, during the assessment stage. Therefore, we note that Assessing Officer has passed the order on incorrect assumption of fact, there is incorrect application of law by assessing officer, the assessment order is passed by the Assessing Officer without application of mind and assessing officer has not investigated the issue before him about clause ‘f’ of section 80IB(10) of the Act. Moreover, there is no two possible views are available before the assessing officer, thus, the view taken by the Assessing

Officer is not sustainable in law, as it is violation clause 'f' of section 80IB(10) of the Act. Hence, based on these facts and applicable legal position on these facts, we are of the view that order passed by the assessing officer is erroneous and prejudicial to the interest of Revenue.

24. Our view is fortified by the Judgment of Hon`ble Delhi High Court in the case of NAGESH KNITWEARS P. LTD in ITA NOS. 591/2008, dated 1st June, 2012 (345 ITR 135(Del), wherein it was held as follows:

"31. Further on 22nd May, 2012, an additional substantial question of law was framed which reads as under: " Whether the Income Tax Appellate Tribunal (ITAT) has erred in setting aside the order passed by the Commissioner of Income Tax under Section 263 of the Income of the Income Tax Act, 1961?" 32. In the two assessment years, the Assessing Officer had in the order under Section 143(3) accepted the computation made by the assessee under Section 80HHC of the Act. The Assessing Officer treated the premium/profit earned on sale of export quota as covered under Section 28(iia) to (iic). 33. The Commissioner of Income Tax, however, issued notice under Section 263 in exercise of power of revision and held that the Assessing Officer had wrongly included premium of Rs.1,16,62,320/- and Rs.73,49,341/- on the sale of quota rights for the assessment years 2000-01 and 2001-02 as covered by Section 28(iia) to (iic) and had computed the deduction. The Commissioner of Income Tax referred to the decision of the Supreme Court in Commissioner of Income-tax Vs. Sterling Foods (1999) 237 ITR 579 and held that under the proviso to Section 80HHC(3), the three categories mentioned in Section 28(iia), (iib) and (iic) have to be included. He held that deduction under Section 80HHC has to be computed by reducing business profit by 90% from the receipts on sale of quota rights. He also observed that the Assessing Officer had not verified facts and no details of export incentives or receipt were taken on record. The Assessing Officer did not examine the provisions of Section 28 (iia/b/c). The Assessing Officer was directed to make fresh assessment and treat the sale of quota rights as "other receipts" under Explanation (baa) to Section 80HHC. He was also asked to verify the receipts on account of export incentives shown for the purpose of deduction under Section 80HHC offered for taxation and ensure that the receipts not covered under Section 28 (iia/b/c) were excluded while applying the provisos to Section 80HHC(3). 34. The Assessing Officer, thereafter recomputed deductions under Section 80HHC and passed assessment orders for the two years. These were made subject matter of challenge by the assessee, who succeeded in the first appeal. It was observed that the Assessing Officer had excluded 90% of the profit on sale of export license while computing deduction under Explanation (baa) to Section 80HHC. It was held that as per the provisos to Section 80HHC(3), the profit has to be computed after increasing the amount which bears to 90% of the same referred to in 28 (iia) i.e. profit on sale The Commissioner Of Income Tax V vs Nagesh Knitwears P. Ltd. on 1 June, 2012 Indian Kanoon - <http://indiankanoon.org/doc/180884801/> 13 of export license, but this had not been allowed and followed by the Assessing Officer. The assessee, therefore, succeeded in the first appeal. 35. The tribunal by order dated 7th September, 2007 in ITA 2210 & 2211/Del/2005 held that the Commissioner was not justified in invoking his power under Section 263 as the view taken by the Assessing Officer was plausible. They referred and relied upon Malabar Industrial Company Limited Vs. CIT (2000) 243 ITR 83 (SC) and the decision of Delhi High Court in Nabha Investments Pvt. Ltd. Vs. Union of India & Others (2000)246 ITR 41. The tribunal also examined the case on merits and came to the conclusion that the addition was not justified in view of the circular issued by the Board. On correct interpretation of law, the assessee was entitled to include premium or profit on sale of export quota in Section 28 (iia/b/c). Accordingly, the twin conditions i.e. order of the Assessing Officer should be erroneous and prejudicial to the interest of the Revenue, were not satisfied. 36. As far as Section 263 is

concerned, we have examined the said Section in depth and detail in ITO Vs. D G Housing Projects Ltd. decided on 1st March, 2012, in ITA No. 179/2011 and observed as under:-

"10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression „prejudicial to the interest of the Revenue is of wide import and is not confined to merely loss of tax. The term „erroneous means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.

11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word „erroneous includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

12. Delhi High Court in *Gee Vee Enterprises v. Additional Commission of Income-Tax, Delhi-I*, (1975) 99 ITR 375, has observed as under:- "The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

13. In the said judgment, Delhi High Court had referred to earlier decisions of the Supreme Court in *Rampyari Devi Sarogiv. CIT (1968) 67 ITR 84 (SC)* and *Tara Devi Aggarwal v. CIT (1973) 88 ITR 323 (SC)*, wherein it has been held that where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. After reference to these two decisions, the Delhi High Court observed:- "These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return."

14. The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry.

15. In the case of *Commissioner of Income Tax v. Sunbeam Auto Ltd.* (2011) 332 ITR 167 (Del), Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held as under:- "We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In *Gabriel India Ltd.* [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113):

"... From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is „erroneous in so far as it is prejudicial to the interests of the Revenue . It is not an arbitrary or unchartered power, it can be exercised only on fulfilment of the requirements laid down in sub- section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See *Parashuram Pottery Works Co. Ltd. v. ITO* [1977] 106 ITR 1 (SC) at page 10) ... From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income- tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion ... There must be some prima facie

material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed ... We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be „erroneous simply because in his order he did not make an elaborate discussion in that regard.”

16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

18. It is in this context that the Supreme Court in Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, (2000) 243 ITR 83 (SC), had observed that the phrase „prejudicial to the interest of Revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be

treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue." 37. In the present case, a reading of the order passed by the Commissioner of Income Tax expositis that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. In paragraph 6, 7, 9 and 10 the Commissioner of Income Tax has observed as under:- "6. The assessee's submissions are carefully considered. Explanation (baa) of section 80HHC clearly states that any receipts which is not directly related to the export of goods out of India has to be reduced from the „profits and gains of business or profession to arrive at „profit of business for computation of deduction u/s 80HHC. Since sale of quota is only incidental to export and source of the same is the Govt. Scheme and not the export of goods, 90% of the same is to be reduced while computing „profit of business of the assessee. In this regard reliance is placed on the decision of the Hon'ble Supreme Court in the case of Commissioner of Income-tax Vs. Sterling Foods [237 ITR 579] wherein it was held that for the application of words "derived from", a direct nexus between the profits and gains and the industrial undertaking was required. It was also held by the Apex Court that the source of the import entitlements were the scheme of Central Government and not the industrial undertaking and the nexus was not direct but only incidental. In the present case also there was no direct nexus and the source of quota was the Government Scheme. Thus, the sale proceeds of quota rights have to be reduced to arrive at „profit of business as per Explanation (baa) to section 80HHC. 7. However, following the principle of strict construction for deeming fictions, the same cannot be added back as it does not fall under any of the three categories mentioned in clauses (iiia) (iiib) or (iiic) of section 28 as required by the proviso to sub section (3) of section 80HHC. On this issue, the liberal interpretation of any statute cannot be relied upon in view of the judgment of the Hon'ble Supreme Court in the case of NOVO Pan India [73 ELT 769] wherein it was held that "The principal that in case of ambiguity, a taxing statute should be construed in favour of the assessee assuming that the said principle is good and sound-does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or any exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz. each such exception/exemption increases the tax burden on other member of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. Hence deduction u/s 80HHC has to be computed accordingly by reducing profit of business by 90% of the receipts from sale of quota rights. 8. x x x x x x 9. Moreover, on perusal of the record, it is seen that the assessment was completed even though there were no details on record of export incentives received by the assessee during the year. The assessee was allowed the claim of deduction under Section 80HHC without even verifying as to whether the receipts on account of export incentive fall within the provisions of section 28(iiia/b/c) of the Act on merit the deduction. 10. In view of the above discussion, it is clear that the impugned assessment order is erroneous and prejudicial to the interest of Revenue as it failed to apply the provisions relating to the deduction under section 80HHC correctly. Therefore, the said assessment order is hereby cancelled under section 263 of the Income-tax Act, 1961 and the A.O. is directed to make fresh assessment as per the provisions of law. While making the fresh assessment, the A.O. is directed to treat the receipt on sale of quota rights as "Other Receipts" as mentioned in explanation (baa) of the section 80HHC. He is also directed to verify that the receipt on account of export incentives shown for the purpose of deduction under section 80HHC are offered for tax in the Profit & Loss account; and that none of these receipts include any item which is not covered by the provisions of section 28 (iiia/b/c), such as DEPB etc."

Accordingly, we answer the substantial question of law framed in ITA Nos.993/2008 and 994/2008 as under:- (i) As held above, proceeds from sale of an export quota is not covered by Section 28(iiiia) to (iiie), and the same cannot be taken into consideration. The first question of law is answered in negative i.e. in favour of the Revenue and against the respondent-assessee. (ii) The tribunal was wrong in holding that the order passed by the Commissioner of Income Tax under Section 263 was bad and contrary to the provisions of the Act. The question of law is answered in negative i.e. in favour of the Revenue and against the respondent- assessee. (ii) The third question is also answered in negative i.e. in favour of the Revenue and against the respondent-assessee.”

25. Thus, we note that Id PCIT found a specific error in the assessment order stating that the view taken by the Assessing Officer is not sustainable in law, as it is violation clause ‘f’ of section 80IB(10) of the Act, as the assessing officer has failed to verify the conditions mentioned in clause ‘f’ of section 80IB(10) of the Act. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. The jurisdictional precondition stipulated under section 263 of the Act, is that the PCIT must come to the conclusion that the order is erroneous and is unsustainable in law. We hold that order passed by the assessing officer is unsustainable in law, based on the reasons cited above, which makes the assessment order erroneous as well as prejudicial to the interest of Revenue, hence we confirm the findings of Id PCIT and uphold his order.

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

Order is pronounced on 16/01/2023 by placing record on notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat
दिनांक/ Date: 16/01/2023
Dkp Outsourcing Sr.P.S

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat