आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट

# IN THE INCOME TAX APPELLATE TRIBUNAL
# RAJKOT BENCH, RAJKOT

***(Conducted Through Virtual Court)***

**BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER**
**AND**
**SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

**ITA No.123/RJT/2016**
**Assessment Year :2011-12**

| Shri Rajkot District Cooperative Bank Ltd.<br>'Jilla Bank Bhavan', Kasturba Road<br>Opp: Chaudhari High School<br>Rajkot.<br>PAN : AAAAR 0564 K | Vs. | Pr.CIT, Rajkot-1<br>Rajkot. |
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| **अपीलार्थी/** (Appellant) | | **प्रत्यर्थी/**(Respondent) |
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| Assesseeby : | Shri S.N. Soparkar, ld.AR |
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| Revenue by : | Shri Shramdeep Sinha, ld.CIT-DR |

सुनवाई की तारीख/**Date of Hearing : 17/11/2022**
घोषणा की तारीख /**Date of Pronouncement: 15/02/2023**

**आदेश/O R D E R**

## PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the assessee against order of the ld.Pr.Commissioner of Income-tax, Rajkot-1[hereinafter referred to as "the ld.Pr.CIT"] dated 21.3.2016 passed by invoking provisions of 263 of the Income Tax Act, 1961 [hereinafter referred to as "the Act" for short] for the Asst.Year2011-12.

2. The grounds raised in the appeal are as under:

*"1. The learned Principal Commissioner of Income Tax, Rajkot-1 ("the Principal CIT") has erred in fact and in law in cancelling the Order passed u/s 143(3) dated 04.03.2014 and directing the Assessing Officer to "pass a fresh assessment order", by invoking powers u/s. 263 of the Income Tax Act, 1961 ("the Act") despite the fact that the mandatory conditions stipulated for invoking such extra-ordinary jurisdiction were totally absent, with the result that the impugned order passed u/s.263 is bad in law.*

*2. In the facts and circumstances of the case, in exercising power under section 263 of the Act, the learned Principal CIT has failed to appreciate that:*

*2.1 The order u/s 143(3) passed by learned AO does not in any way represent erroneous order as the AO has taken a view that is sustainable in law and therefore, the action u/s 263 of the Act is merely a "change in opinion", wholly unreasonable, uncalled for and bad in law.*

*2.2. During assessment proceedings u/s 143(3), details on many points were sought and furnished but as per normal practice in framing the orders, claims of the assesse which were accepted by AO were not discussed in Assessment Order by AO and only those points were elaborated which he disallowed as deduction. Such orders cannot be held to be erroneous*

*3. The learned Principal CIT is not permitted in law to pre-judge taxability of Rs. 25.00 Crore transferred from Provision for Bad and Doubtful Debt to Statutory Reserve and propose the same to be taxed which effectively serves as directions to AO to make specified addition to the income leaving no scope for the Assessing officer to redo the assessment or pass a fresh assessment order on his own."*

3. As transpires from order of the ld.Pr.CIT, the error in the order of the Assessing Officer (AO) was that despite records revealing that the assessee had transferred a sum of Rs.25.00 crores from Provision created for bad and doubtful debts for rural advances to its general reserves, which was liable to be taxed as income of the assessee since the provision created had been allowed a deduction earlier, the AO had not considered this matter and had made no verification or necessary inquiries inrelation to the same while finalizing the assessment.The case of the ld.Pr.CIT was that this reduction in theprovision for bad and doubtful debts for rural advance ought to have been routed through profit & loss account and offered to tax and the order having been finalized by the AO without doing so was accordingly an error causing prejudice to the Revenue. The show cause notice of the ld.Pr.CIT issued to the assessee under section 263 of the Act bringing out the above facts is reproduced at page no.2 of the order of the ld.Pr.CIT as under:

> *"A perusal of the records shows that you have furnished the details of Rural Branch for claim of deduction u/s. 36(l)(viia) and the same had been duly allowed to the extend of Rs. 25,15,31,572/-. You have also created a reserve of Rs. 25,15,31,572.38 out of profit & loss account i.e. equivalent amount of deduction u/s. 36(l)(viia) claimed and allowed to you.*
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> *However, it is observed that you have reduced an amount of Rs. 25 crore from the Reserve of bad and doubtful debt (provision for rural advances). This shows that apparently reserve was no longer required. The amount credited to the Reserve for Bad and Doubtful debt had been allowed as a deduction from the total income during the relevant asstt. Year as under:-*
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> |---|---|
> | *A.Y. 2008-09* | *15,53,07,400* |
> | *AY. 2009-10* | *9,76,53,183* |
> | *A. Y. 2010-11* | *2,69,14,620* |
>
> *Further any amount which is reduced from the said reserve should have been offered for tax either by way of credit to the profit and loss account or by way of adjustment in the computation of total income. However, you have directly transferred this amount to the other reserves without routing through the profit and loss account, resulting in reduction of your taxable income by the extent of Rs. 25 crores. The AO while completing the assessment have neither looked into this aspect not asked any question thereto about the treatment of this amount. Therefore, the order is not just erroneous but also prejudicial to the interest of revenue. I therefore, propose to add this amount of Rs. 25 crores to the total income under the powers vested in me u/s. 263 of the Income tax Act, 1961.*
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> *You are requested to show cause why the proposed addition should not be made. Your reply should reach me by 09/03/2015."*

4. Several arguments were made before the ld.Pr.CIT on the merits of the issue as also challenging the jurisdiction to review, who was not convinced with the same and accordingly order was passed under section 263 of the Act holding the assessment order to be erroneous on this count and directing the AO to pass fresh assessment order as per the law.

5. Before us also several contentions were raised by theld.counsel for the assessee both on the merits of the issue, that the impugned reduction from provision created for bad and doubtful debts for rural advances could not be taxed asincome of the assessee, and also on the legal aspect of invocation of *Explanation-2 to* section 263 of the

Act by the ld.Pr.CIT without confronting the same to the assessee causing the order passed to be against principle of natural justice and hence invalid.

6. We shall first take up the contention raised by the ld.counsel for the assessee on the merits of the case.

7. His first and primary argument was that wherever Legislature required any write back from reserves or provisions to be treated as income of the assessee, it had specifically provided so, and in the case of provision for bad and doubtful debts for rural development created as per the provisions of section 36(1)(viia) of the Act, there was no such provision in law for treating the write back or reduction of this provision as income of the assessee. That ipso facto write backs of such provisions could not be treated as incomes. In this regard our attention was drawn to

- the provisions of section 36(1)(vii) of the Act which provides for allowance of bad and doubtful debts along with provision of section 41(4) of the Act which treats recoveries of this bad debts as income of the assessee.
- to the provisions of section 36(1)(viii) allowing deduction of special reserves created by specified entities from profits of eligible business and to section 41(4A) of the Act treating withdrawals from these reserves subsequently as deemed profits and gains of the assessee's business.
- to the provisions of section 33AC, 80HHB(4), 80HHD(5)(a) and 10AA(3) pointing out that all these provisions specifically provided for taxing the amounts credited to the reserve created,as provided under the relevant sections, on non-utilization of the said reserves for the specified purposes.

8. The ld.counsel for the assessee, therefore stated that in the absence of any specific provision under the Act for taxing reductions/withdrawals from provisions created for bad and doubtful debts for rural advances as per section 36(1)(viia)of the Act, in the present case even on merits no addition was warranted and therefore there was no error in the order of the AO for not having taxed the reduction from this provision of Rs.25 Crs by the assessee during the impugned year.

9. The next contention of the ld.counsel for the assessee was to the effect that reversal of an amount from a provision by way of book entry did not tantamount to a taxable event; Reliance was placed on the following decisions for the same:

- Kedarnath Jute Manufacturing Co. Ltd vs CIT (1971) 82 ITR 363 (SC)
- Tuticorin Alkali Chemicals & Fertilizers Ltd. CIT, (1997) 93 taxmann 502 (SC)

10. The real income theory was argued by the ld.counsel for the assessee pointing out that no real income accrued or resulted on account of a mere book entry. Reliance was placed on the decision of Hon'ble Apex Court in this regard in the case of CIT Vs. Excel Industries Ltd., (2013) 38 taxmann.com 100 (SC)

11. Attention was also invited to the decision of Hon'ble Apex Court in the case of Catholic Syrian Bank Ltd. Vs. CIT, (2012) 343 ITR 0270 for the interplay and interpretation of section 36(1)(vii) and (viia) r.w.s 36(2) of the Act. It was contended that the Hon'ble Court had held the two provisions to operate in different domains and thus no parity could be drawn from one to the other as done by the

Ld.PCIT. The ld.counsel for the assessee drew our attention to para-41 of the said order pointing out that the Hon'ble Apex Court had interpreted the provisions as under:

> *The question for our consideration is - whether on the facts and circumstances of the case, the assessee(s) is eligible for deduction of the bad and doubtful debts actually written off in view of Section 36(1)(vii) which limits the deduction allowable under the proviso to the excess over the credit balance made under clause (viia) of Section 36(1) of Income Tax Act, 1961 ("ITA"for short)?*
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> *2. Under Section 36(1)(vii) of the ITA 1961, the tax payer carrying on business is entitled to a deduction, in the computation of taxable profits, of the amount of any debt which is established to have become a bad debt during the previous year, subject to certain conditions. However, a mere provision for bad and doubtful debt(s) is not allowed as a deduction in the computation of taxable profits. In order to promote rural banking and in order to assist the scheduled commercial banks in making adequate provisions from their current profits to provide for risks in relation to their rural advances, the Finance Act, inserted clause (viia) in sub-*
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> *section (1) of Section 36 to provide for a deduction, in the computation of taxable profits of all scheduled commercial banks, in respect of provisions made by them for bad and doubtful debt(s) relating to advances made by their rural branches. The deduction is limited to a specified percentage of the aggregate average advances made by the rural branches computed in the manner prescribed by the IT Rules, 1962.*
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> *Thus, the provisions of clause (viia) of Section 36(1) relating to the deduction on account of the provision for bad and doubtful debt(s) is distinct and independent of the provisions of Section 36(1)(vii) relating to allowance of the bad debt(s). In other words, the scheduled commercial banks would continue to get the full benefit of the write off of the irrecoverable debt(s) under Section 36(1)(vii) in addition to the benefit of deduction for the provision made for bad and doubtful debt(s) under Section 36(1)(viia). A reading of the Circulars issued by CBDT indicates that normally a deduction for bad debt(s) can be allowed only if the debt is written off in the books as bad debt(s). No deduction is allowable in respect of a mere provision for bad and doubtful debt(s). But in the case of rural advances, a deduction would be allowed even in respect of a mere provision without insisting on an actual write off.*

*However, this may result in double allowance in the sense that in respect of same rural advance the bank may get allowance on the basis of clause (viia) and also on the basis of actual write off under clause (vii). This situation is taken care of by the proviso to clause (vii) which limits the allowance on the basis of the actual write off to the excess, if any, of the write off over the amount standing to the credit of the account created under clause (viia). However, the Revenue disputes the position that the proviso to clause (vii) refers only to rural advances. It says that there are no such words in the proviso which indicates that the proviso apply only to rural advances.*

*We find no merit in the objection raised by the Revenue.*

*Firstly, CBDT itself has recognized the position that a bank would be entitled to both the deduction, one under clause (vii) on the basis of actual write off and another, on the basis of clause (viia) in respect of a mere provision. Further, to prevent double deduction, the proviso to clause (vii) was inserted which says that in respect of bad debt(s) arising out of rural advances, the deduction on account of actual write off would be limited to the excess of the amount written off over the amount of the provision allowed under clause (viia). Thus, the proviso to clause (vii) stood introduced in order to protect the Revenue. It would be meaningless to invoke the said proviso where there is no threat of double deduction. In case of rural advances, which are covered by the provisions of clause (viia), there would be no such double deduction. The proviso limits its application to the case of a bank to which clause (viia) applies. Clause (viia) applies only to rural advances. This has been explained by the Circulars issued by CBDT. Thus, the proviso indicates that it is limited in its application to bad debt(s) arising out of rural advances of a bank. It follows that if the amount of bad debt(s) actually written off in the accounts of the bank represents only debt(s) arising out of urban advances, the allowance thereof in the assessment is not affected, controlled or limited in any way by the proviso to clause (vii).*

*3. Accordingly, the above question is answered in the affirmative, i.e., in favour of the assessee(s). For the above reasons, I agree that the appeals filed by the assessees stand allowed and the appeals filed by the Revenue stand dismissed with no order as to costs.*

12. Ld.DR on the other hand vehemently supported the order of the Ld.PCIT, pointing out that he had adequately dealt with all the contentions of the Ld.Counsel for the assessee and had after thoroughly analyzing the issue from all aspects including the general principles of accounting in this regard has found the amount

reduced/ withdrawn from provision,as liable to tax and the assessment order erroneous for not having taxed the same.He filed detailed submissions in writing as under:

*"(A) The Ld. Principal Commissioner of Income Tax-1, Rajkot has held order- u/s. 143(3) of the I.T.Act passed on 04.03.2014 for the A.Y.2011-12 as being erroneous and prejudicial to the interest of the revenue.*

*1. The assessee is a District Cooperative Bank. During the year it has transferred Rs.25 crores from provision for Bad & Doubtful Debts to General Reserve. In case of other assesses who are not governed by provisions of Sec. 36(l)(viia), ordinarily Bad Debts provisions are made after recognizing the respective income in P&LA/c, and only when the assessee considers such receipts as becoming non-recoverable. However, this is not required in case of Banks.*

*2. Since the assessee is a Bank, it is covered by the special provisions of section 36(1)(viia) of the Income Tax Act, 1961. In accordance with these provisions, the assessee Is permitted to transfer a specific amount of its income to provision for Bad & Doubtful Debts, without routing the same through the P&LA/c.*

*3. Ld.PCIT, in a speaking order, discussing various facets of Income tax Act as well as the accounting standards, has held that the assessee should have routed the funds lying in the provision for Bad & Doubtful Debts to the P&L A/c first, and thereafter the same should have, been transferred to the General Reserve, While explaining the underlying accounting principles. Id. PCIT has stated that the General Reserve in Balance Sheet is ordinarily created from Profits after tax. All receipts which are recognized as income are ordinarily to be reflected on the receipt side of the P&L A/c. Thereafter Profits are determined and income is recognized. Taxes are deducted from the Profits. In case of Banks due to special provisions u/s.36(l)(viia) a part of the receipts, which is permitted to be taken to special Bad debts reserve, is however not routed through P&L A/c. Accordingly, Ld. PCIT has held that in case of assessee, being one such bank, as and when the liability for maintaining a Bad Debts Reserve 'ceases' due to any reason, the amount transferred to bad-debts reserve under sec. 36(l)(viia), should be reflected in P&L Account, offered to tax and thereafter the Profits after tax should be transferred to General Reserve.*

*(B) Procedural aspects of Section 263:-*

*Ld. PCIT has given adequate opportunities to the assessee and the order of Ld.PCITis a speaking order. Though Ld.PCIT has taken support from Explanation 2, to sec.263 inserted w.e.f.1.6.2015 by the Finance Act, 2015, the current matter pertains to A.Y.2011-12. There was no procedural requirement to invoke Explanation in the notice u/s.263 as the same did not exist for the purpose of A.Y.2011-12. As such it may be seen that the procedure followed by Ld.PCIT is proper.*

*(C) View taken by the Assessing Officer In assessment order:*

*In the assessment order, Ld.AO has discussed and analyzed only the allowably of Bad-Debt claim. No view has been found with regards to taxability of withdrawals from the Special Reserve (like bad-debt reserve applicable only for banks u/s.36{l){viia)) to the General Reserve in the Balance Sheet with or without routing it through the P&L account. jLd. AO has not analyzed the implication of direct transfer of receipt to "General Reserves" without paying due taxes on the same. As such, on the basis of records, it may be seen that, there is no occasion to hold that this issue was discussed during the assessment proceeds or adjudicated in the assessment order. . Ld.PGT has held that the order is erroneous. The issue involved may be debatable but Ld.AO has neither discussed, nor framed any view in the assessment order. On the order being prejudicial to the interest of revenue, Ld.PCIT has held that the order is prejudicial to the interest of revenue when a 'receipt' is taken to General Reserves, which is used for several purposes, including funding the dividend/ distribution of profits, etc. without charging l)he same to the applicable taxes..*

*(D) Submissions of the CIT-DR:*

*1. It is humbly submitted that, under the scheme of Income tax Act, general provision of cessation of liability u/s.41 exist for all cases which are not specified. Further, income is an inclusive definition. As such, any ceased liability has to be declared in P&L A/c on income/receipt side, taxes have to be computed and deducted from the profits, before transferring the balance funds in the General Reserve. Sec. 41 deals with trading liabilities and their cessation. While in case of non-trading liabilities, viz. a loan taken by the assessee, on which the liability to pay has ceased, for any reason, can be included under income, under the Inclusive definitions of income provided in the Income Tax Act.*

*2. It is also humbly submitted that Ld. AR has incorrectly submitted during oral hearings that the Id. PCIT has not invoked Explanation 2 to Sec. 163 in the show-cause. This case pertains to AY 2011-12 and the Explanation 2 has been inserted with effect from 01.04.2015. Hence for AY 2011-12, there was no occasion or mandate to include Explanation 2 at the notice stage, as the provisions did not exist for the said assessment year. However, the Id. PCIT has taken supports from the provisions of Explanation 2 to sec. 263 and mentioned such insertions in the Impugned order, as the order u/s 263 has been issued 21.03.2016.*

*3. It is submitted that Ld. AO has failed to analyze the implications of transfer of Funds to general Reserves, without routing it through P&L Account, and subjecting it to taxation. The issue has neither been analyzed, nor any possible views (correct views) have been taken by Id. AO in the assessment order. In short, Ld. AO has failed to apply his mind on the issue of transferof funds of Rs. 25Cr from special reserve under Sec. 36(l)(viia) to General same was considered as a ceased liability, without subjecting it to taxation in Reserve, when the P&L account.*

*4. It may kindly be seen that the order of Ld.PCIT explains in detail the incorrectness of accounting methodology followed by the assessee. It discusses the legislative intents of sec.36(l)(viia). It also discusses in para.5.2 as to how the General Reserves are maintained and it isdistinction with the Special Reserves created by the assessee for providing cushion against future bad debts only i.e. NPA in case of banks. In para.5.3 the issue of taxability of real income in context importance of substance over form being a concept for taxation purpose has been discussed. In para.5.4 the fact that the bank has claimed itself to be Zero NPA bank has been brought out. In para.5.5 the action of the assessee being violative of principles of accounting. Thereafter, Ld.BCIT has concluded that the amount in the Special Reserve which has been created before routing of funds through P&L A/c should necessarily have to be routed through P&L A/c. before such funds can be made part of General Reserve.*

*5. The question which requires an answer is whether any assessee can create a 'General Reserve' without subjecting the receipts to taxation through the P&L account? Even when special provisions like Sec. 36(l)(viia) exist, for an assessee, being a bank, under which provisions can the general principles of accounting be overlooked, and the general principles of cessation of liability (and, inclusive definition of income) can be overlooked, and receipts can be transfreed to general Reserves without subjecting them taxation through the Profit and Loss Account? It is humbly submitted that Ld. PCIT has made a strong case for treating the assessment order being erroneous and prejudicial to the interest of the revenue.*

*6. In addition to reliance on the order of Ld. PCIT, reliance is placed on the following case laws:-*

> *(1) In the case of Malabar Industrial Co.Ltd. v. CIT 243 ITR 83the Hon.Supreme Court pointed out that the permissible view of the AO cannot be replaced by the thought of the CIT, however it also pointed out that the order passed without applying the principle of natural justice or without application of mind would also attract the Invocation of power u/s.263. In fact, while justifying the order of the Commissioner u/s.263(l) the Hon.Supreme Court highlighted that the CIT had set aside the order for lack of inquiry and for non-application of mind. The Hon.Court also relied on the decision of Ram Pyari Deri Saraogi vs. CIT (1968) 67 ITR 84 as reported above to uphold that non application of mind renders the order erroneous and prejudicial to the interest of Revenue.*
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> *(2) In the case of "Rain Commodities Ltd. v. Deputy Commissioner of Income-tax" 3(1], Hyderabad(2011) 9 taxmann.com 128 (Hyd.) it has been held,*
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> *The expression "prejudicial to the interest of revenue1 appearing under section 263 in conjunction with the expression 'erroneous1 and that every loss of revenue as a consequence of an order of the Assessing Officer cannot, cause prejudice to the interest of the revenue. In case, where the Assessing Officer adopts one of the courses permissible in law where two views are plausible the*

*Commissioner cannot exercise his power under section 263 to defer with the Assessing Officer even if there has been a loss of revenue. On the other hand, when the Assessing Officer takes a view, which is patently unsustainable, the Commissioner can exercise his powers where the loss of revenue results as a consequence of the view taken by the Assessing Officer. It is also clear that while passing the order under section" 263, the Commissioner has to examine not only the assessment order but also the entire facts on the record. Further, when a regular assessment is made it has to be presumed that it has been passed upon proper application of mind. The Income-tax Officer is not only the adjudicator but also an investigator. He cannot be remain passive in face of an order when it calls for further enquiry. He has to ascertain the truth of the facts stated by the assessee. It is incumbent on the part of the Assessing Officer to make further investigation of the facts stated by the assessee when circumstances would make such an enquiry prudent. The word 'erroneous1 In section 263 and failure to make such an enquiry would make. The assessment order becomes erroneous because such an enquiry is not made and not because there is anything wrong with the facts stated therein or assumed to be correct. An incorrect assumption of facts or an, incorrect application of law will satisfy the requirement of being erroneous. An order passed by the Assessing Officer without application of his mind is said to be an erroneous order. In the facts of the instant case, it was found that the Assessing Officer had not applied his mind to the provisions of section 115JB. No additional facts were necessary before the Assessing Officer to come to the conclusion that the book profit under section 115JB was wrongly computed. The Assessing Officer not had examined the facts before him. The order passed by the Assessing Officer was very cryptic. There was no discussion or methodology of computation of book profit. It seemed that he had accepted the computation of book profit as furnished by the assessee. It could not be said that the Assessing Officer was aware of any of the Tribunal orders on the issues involved. The order of the Assessing Officer was erroneous for want of proper enquiry. He had not recorded reasons for accepting the return of the assessee as submitted by it on the impugned issue. The Assessing Officer without making any enquiry, and recording any reasons accepted the clajm of the assessee and the assessment order was silent about the issue raised by the Commissioner. He had not examined the merit of the claim of the assessee. Therefore, It could not be said that he had taken one of the permissible views in accordance with law. He had not taken any view, except blindly accepting the view of the assessee on the issue. In the instant case, the failure of the Assessing Officer to make an enquiry with regard to the claim of the assessee and to record such a reason, why he was taking particular view, makes the assessment order erroneous and prejudicial to the interest of the revenue.*

*(3) The Allahabad High Court in the case of Meerut Roller Floor Mills Ld. V. Commissioner of Income-tax (2013) 39 taxmann.com 183 (Allahabad), after analyzing the various decisions of the High Courts and Supreme Court observed:*

*Much emphasis was laid by the learned counsel for the petitioner that there is difference in between a case where an inquiry has been conducted and a case where inadequate inquiry had been conducted. Reliance has been placed by him on CIT v. Sunbean Auto Ltd. [2011] 332 ITR 167/[2010] 189 Taxman 436 (Delhi) wherein a distinction has been pointed out by Delhi High Court between lack of inquiry and inadequate inquiry. It was pointed out that the aforesaid decisions had been relied upon by Delhi High Court in subsequent decision in ITO v. D.G. Housing Project Ltd. [2013] 212 Taxman 132/[2012] 20 taxmann.com 587 (Delhi). 10. The Commissioner may consider an order to be "erroneous" for the purpose of section 263 even if error of law may not be apparent on the face of the order. The Commissioner may consider an order of the Assessing Authority to be erroneous not only if it contains some apparent error of reason or of law, or of fact on the face of it but also because it is stereotype order which simply accepts what the assessee has stated in his report and fails to make inquiry which are called for in the circumstances of the case. 11. In the case of Ram Pyari Deri Saraogi v. CIT [1968] 67 ITR 84 the Apex Court while examining the question of revisional power of the Commissioner of Income Tax under the old Act held that where assessment was completed by the Income Tax Officer with undue haste, without holding necessary inquiry it is sufficient to hold that the assessment order is erroneous. 12. The aforesaid decision has been followed by the Apex Court in Smt. Tara Devi Agarwal v. CIT [1973] 88 ITR 323. The facts of this case are interesting. Here, it was contended that the assessee made a voluntary return of her income which cannot be said prejudicial to the Revenue. Repelling the said argument, the Apex Court has held that even where income has not been earned and is not assessable merely because the assessee wants it to be assessed in his or her end in order to assist someone else who would have been assessed to a larger amount, the assessment so made can certainly be erroneous and prejudicial to the interest of the revenue.*

*13. In GEE VEE Enterprises v. Addl. CIT [1975] 99 ITR 375 (Delhi) following the aforesafd two judgments of the Apex Court it has been held that 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 minimum amount of evidence may be accepted by a Civil Court in absence of any rebuttal. The Civil Court is neutral. It simply gives decision on the basis of the pleadings 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 apparent in the order but call 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 notbeen made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct.*

*14. In CIT v. Smt. Rambha Devi [1987] 164 ITR 658, the Patna High Court has laid down that where the necessary facts had not been gone into, a case for exercise of jurisdiction under section 263 of the Act is made out. In this case, the crucial question, what is the source of initial capital, had been explained by the assessee or not, was left unexamined. It was held that it is a case where prejudice is writ large.*

*15. It is not necessary for us to multiply the precedents for the simple reason that the assessment order does not contain the necessary discussion with regard to the various aspects of the case indicated in the revisional order by the Commissioner of Income Tax. 16. It was incumbent upon the Assessing Officer to have examined the cash credit entries appearing in the accounts of the petitioner assessee in detail keeping in view the explanation furnished by the petitioner. Having failed to do so, it is but obvious that the assessment order is erroneous and prejudicial to the interest of the Revenue. Mere filing of the reply by the assessee to which the attention of the Court was invited is not sufficient. We find that with regard to the trade creditors, copies of their account books were filed vide letter dated 9th of November, 2010; that is all. There is no application of mind by the Assessing Authority with regard to the genuineness of the credit entries including that of trade creditors. Reference was made by the learned counsel for the respondents to the assessment order for the assessment year which is enclosed in the connected writ petition (has been dismissed on 15th of May, 2013 on the ground of availability of statutory remedy) wherein on examination, it was found by the Assessing Authority that the assessee was not able to prove the genuineness of certain cash credits. Be that as it may, in view of the order which we are proposing to pass, it is not necessary to dwell upon the merits of the case. Prima facie findings have been recorded by us just to meet the argument of the petitioner.*

*(4) The special Bench of ITAT in the case of Rajalakshmi Mills Limited reported at 121 |TD 343, held:*

*It is not necessary for the Commissioner to make further enquiries before cancelling the assessment order of the Assessing Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Assessing Officer should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. Unlike the civil court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. He tannot remain passive in the face of a return which is apparently in order but calls for further enquiry. 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. The word 'erroneous' in that section includes cases where there has been failure to make the necessary inquiries. It is incumbent on the Assessing Officer to investigate the facts stated in the return when circumstances*

> *make such an inquiry prudent and the word 'erroneous' in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an enquiry 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.*
>
> *It is humbly prayed to dismiss the grounds of appeal by the assessee and not to interfere with the order u/s 263 passed by Ld. PCIT."*

13. We have heard both the parties and have gone throughorder of the ld.Pr.CIT. We are not impressed nor convinced with the contention of the Ld.counsel for the assessee on the merits of the case that the write back of provision for bad and doubtful debts on rural advances was not taxable as income . Considered from all ,any and every aspect, as per law read alongwith accounting principles in this regard, the write back, we hold, is to be treated as income and subjected to tax ,as rightly held by the Ld.PCIT.

14. Before bringing out our reasoning for the same it is pertinent to revisit the facts relating to the issue which are undisputed.Theassessee, during the impugned year, had written back an amount of Rs. 25 Crs from the provision created for bad and doubtful debts relating to rural advances of Rs.27,98,75,203/-. This provision had been allowed to be deducted for the purposes of computing the taxable income of the assessee in the earlier years as and when created, as per the provisions of section 36(1)(viia) of the Act. The details of the said claim have been brought out by the Ld.PCIT in his show cause notice reproduced above.

15.The provisions of section 36(1)(viia) of the Act are very clear, allowing claim of deduction on account of provision for bad and doubtful debts, to the extent the provisions are*made*. This is the exact word ( *made*) used in the section alongwith provision. Which means that when provisions made earlier are reversed, to the extent

reversed or written back the provision no longer remains made. There is no question therefore for any deduction being allowed to assesses to the extent provisions made no longer remain on account of write backs. And the deduction earlier allowed therefore needs to be taxed to the said extent.

To put it otherways, Section 36(1)(viia) of the Act allows claim of deduction of provisions, which otherwise are not allowable as per law, specifically made for bad and doubtful debts of rural advances made by banks.The purpose being to promote rural banking and to assist scheduled commercial banks in making adequate provisions from their current profits to provide for risks in relation to rural advances. The Hon'ble apex courts takes note of the same in its order in the case of Catholic Syrian Bank (supra) at para 42 reproduced above in the earlier part of our order. Clearly the claim of deduction as per section 36(1)(viia) of the Act ,in totality, is allowable only to the extent debts liable to turn bad or are doubtful for recovery are provided for by the assessee .When an amount is reduced from such provisionsmade earlier, it denotes that debts to the said extent are found to be good and no longer require being provided for, for turning bad or doubtful for recovery.Thusprovision to the said extent is written back as no longer required.There can be no case,in such circumstances, as per law therefore, for allowing claim of deduction for provision to the full extent ,even that no longer required. Such write backs,representing excess claims of provision created, necessarily need to be reversed and treated as income for taxation purposes. Such write backs *ipso facto* have to be treated as taxable, so as to restrict the assesses claim of deduction to the extent of provision created for bad and doubtful debts, as required by section 36(1)(viia) of the Act . The Ld.PCIT has

rightly dealt with the issue accordingly at para 5.1 of his order as under:

> *"5.1 Legislative intent for Sec.36(l)(viia)*
>
> *Section 36(l)(viia) of the IT Act is hereby reproduced:-*
> *Section 36(l)(viia)(a) of the Act allows deduction in respect of any provision for bad and doubtful debts made by a scheduled bank [not being a bank incorporated by or under the laws of a country outside India] or a non-scheduled bank or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural ^ development bank to the following extent:*
>
> *"An amount not exceeding seven and one-half per cent (7.5%) of the total income (computed before making any deduction under this clause and Chapter VIA) and an amount not exceeding 10% of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner."*
>
> *Normally no deduction is allowable in respect of a mere provision of bad and doubtful debts. However in order to promote rural banking and in order to assist banks in making adequate provision from their current profits for risks in relation to their rural advances, section 36(l)(viia) was inserted on account for provision for bad and doubtful debts for rural advances.*
>
> *In this case, assessee bank has firstly debited Rs.25,15,31,572 as provision for bad and doubtful debts u/s 36(l)(viia) during relevant AY and has rightfully claimed it as deduction. Over the period this reserve has accumulated to Rs.53,14,06,776. However, during the relevant AY, bank has transferred Rs. 25 crores out of this provision to general reserve. In this case, there is no dispute regarding the eligibility of the bank for claiming deduction u/s 36(l)(viia), as it was legislative intent and at the same time in order to avoid double deduction u/s 36(l)(vii) and Sec. 36(l)(viia) of the same amount, proviso to sec. 36(l)(vii) has been inserted, which limits the allowance for actual write offs, to the excess, if any, of the write off over the amount standing to the credit of the account created under clause 36(l)(viia).*
>
> *As it is evident, Sec 36(l)(viia) is special provision for banks for encouraging them to give more rural advances and to strengthen rural economy. It is different from Sec.36(l)(vii) in the way that in normal business, bad debts will be allowed as deduction only when there are actual bad debts and no provisioning in that regard is allowed but in case of banks, vide sec. 36(l)(viia), provisioning is allowed for bad and doubtful debts irrespective of the fact whether there are actual bad debts or not and when actual bad debts happen in case of banks, these provisions provide them necessary cushion, as public money is involved. Main idea behind Sec.36(l)(vii) and Sec.36(l) (viia) is the stark realty of business that there has to be some bad debts in each business, whether it is trading, manufacturing or banking, and a business should be allowed its deduction to the extent of actual non-recoverables.*

> *Thus, it is evident that basics of Sec.36(l)(vii) and sec.36(l)(viia) are same except to the fact that, sec.36(l)(viia) is applicable only for banks and allow, above,ability of provisions irrespective of actual expenditure. In such scenario, when bad debts are recovered, they become taxable as contained in sec. 41(4) of IT Act, 1961, similarly, when bank is of view that, it does not need any provisions for bad debts, as there is going to be no bad debts, then those provisions will be added back to the income of the bank for taxation purpose, as bank had already claimed deductions in respect of these provisions u/s 36(l)(viia).*

16. Though the Ld.PCIT, above, has drawn parity between the provisions of section 36(1)(vii) and section 36(1)(viia) of the Act, to hold that the principle of taxing bad debts, claimed as deduction u/s 36(1)(vii) of the Act,on being recovered, as per section 41(4) of the Act, would apply to section 36(1)(viia) of the Act also on write back of provisions created, the fundamental reasoning remains the same. Section 36(1)(viia) of the Act allowing deduction of provisions for bad and doubtful debts of rural advances, the deduction cannot exceed the provision created by the assessee for the same and any write back of the provision implying nothing but the provision to that extent no longer required as created by the asseessee, has to be therefore subjected to tax.

Thus as per the provisions of section 36(1)(viia) of the Act itself, we hold, this write back of provision is liable to be subjected to tax.

17. This reasoning and interpretation of law as above is strengthened by the Accounting Principles relating to provisions and their write back, delineated by the Institute of Chartered Accountants of India. Provision in accounting refers to an amount or obligation set aside by business for present and future obligations. They are estimates of probable loss related to the future for events undertaken in the past and present. They are created as a charge

against profits. Accordingly the guidelines issued by ICAI prescribe the write back from provisions created to be recognized as income and routed through the profit & loss account. The Ld.PCIT has rightly referred to the Opinion of the ICAI at para 5.5 of his order in this regard as under:

> *"Where, in an accounting period, there is any write-back of the earlier recognized provision for a liability and a provision for the same item is also being recognized in that accounting period, the write back should be adjusted in arriving at the amount of that provision, viz., only the net amount after adjustment of the write back should be charged/credited to the statement or profit and loss. However, where in an accounting period, there is only write back of the earlier recognized provision and no provision is being recognized, the write back should be recognized as income in the statement of profit and loss using the same classification as was used previously used."*

Therefore, even as per accepted accounting principles, this write back needed to be treated as income and routed through the P&L account, as rightly held by the Ld.PCIT.

Thus going by law, supported by accounting principles, the write back of provisions for bad and doubtful debts of rural advances was required to be routed through the Profit and Loss account and treated as income for taxation purposes.

18. Even going by the real income theory the Ld.PCIT, we hold, has rightly found the write back taxable,noting that the write back of the provision to the general reserve indicated no NPA and hence realization of income. Meaning thereby that the provision created earlier, for cushioning against bad debts on account of rural advances turning NPA , being created out of profits , and when not required as written back, it resulted in income to the assessee.. The Ld.PCIT has dealt with this aspect at para 5.3 of his order as under:

*5.3 Taxability of real income*

> *Furthermore, Hon'ble Supreme court in case of Excel Industries ltd (civil appeal no. 125 of 2013) lays down the key principles for evaluating when income is said to accrue for the purposes of taxability under the Income Tax Act. The ruling reiterates that it is only real income, and not hypothetical income, which can be taxed in India. Further, for real income to accrue under the ITL, the income should be due; there should be a corresponding liability to pay; and practically, there is a plausible realization of such income. In the instant case, these tests are fully satisfied, as assesse bank itself transferred amount out of provision for bad debts to general reserve, which clearly indicates that there is realization of income as there are no NPA. In this landmark judgement Hon'ble Supreme court held that merely by making accounting entry hypothetical income can't be brought to tax and on same analogy just by making accounting entry, real income should not go out of tax net. What to be taxed should be real income only.*
>
> *It clearly shows the importance of substance over form concept for taxation purpose. Substance over form is an accounting principle used "to ensure that financial statements give a complete, relevant, and accurate picture of transactions and events". If an entity practices the 'substance over form1 concept, then the financial statements will show the overall financial reality of the entity (economic substance), rather than the legal form of transactions (form). In accounting for business transactions and other events, the measurement and reporting is for the economic impact of an event, instead of its legal form. Substance overt form is critical for reliable financial reporting. It is particularly relevant in cases of revenue recognition, sale and purchase agreements, etc. The key point of the concept is that a transaction should not be recorded in such a manner as to hide the true intent of the transaction, which would mislead the readers of a company's financial statements."*

19. The ld.Pr.CIT, we hold, has also dealt correctly with the contention of the Ld.Counsel for the assessee that the write back was a mere book entry resulting in no taxable event, dismissing the same at para 4.2 of his order stating that it is not case of mere book entry but transfer of Rs.25 crores from provision, which provision when created was allowed as deduction in the earlier years as per section 36(1)(viia) of the Act. This amount was therefore taxable being write back of an amount earlier allowed as deduction and therefore not a mere book entry. His finding at para 4.2 of the order is as under:

> *"4.2. In para 1 of the further submission dated 16.03.2016, the assessee has contended that the exercise of initiating the proceedings u/s. 263 of the Act in its case was unwarranted as the issue involved is a book entry which has no relevance with the chargeability of a particular item which is*

*otherwise taxable under the Act. The assessee's contention is not tenable because the issue involved in this case is with regard to transfer of amount of Rs.25 Crore which has been claimed and allowed in earlier years according to provisions of section 36(l)(viia) of the Act. This amount has been put in another Reserve instead of bringing it to the P&L account."*

20. Every case law relied upon by the ld.counsel for the assessee for the proposition that it was a mere book entry warranting no taxable event has been distinguished by the ld.Pr.CIT at para 4.5 of his order as under:

*"4.5. In Para no. 2 of the submission dated 16.02.2016, with regard to book entry, the assessee has relied on the following decisions:*

*i. CIT v. HiraLal Mittal & Sons, (1972) 86 ITR 463(All)*
*ii. CIT v. Chunilal V. Mehta & Sons P. Ltd. (1971) 82 ITR 54(SC)*
*iii. CIT v. Mogul Line Ltd. (1963)46 ITR 590,600(Bom)*
*iv. State Bank of India Vs. CIT(1996) 157 ITR 67 (SC)*

*The issue involved in the above decisions is summarized hereunder:*

*(i) CIT v. HiraLal Mittal & Sons, (1972) 86 ITR 463(All)*

*The issue in the cited case was whether the assessee was entitled to the deduction of the interest claimed even though it had not made the necessary entries in its account books.*

*(ii) CIT v. Chunilal V. Mehta & Sons P. Ltd. (1971) 82 ITR 54(SC)*

*The issue in the cited case relate to the taxability under section 10(5A) of Act of a certain amount received by the assessee-firm as compensation on the termination of its managing agency.*

*(iii) CIT v. Mogul Line Ltd. (1963)46 ITR 590,600(Bom)*

*The issue in the cited case was with regard to an amount debited to foreign exchange suspense account.*

*(iv) State Bank of India Vs. CIT(1996) 157 ITR 67 (SC)*

*In issue in this case is with regard to increase in amounts credited due to devaluation and it was held that the increased amount has been utilised by repatriation, it was incidental to the banking business.*

*The issues involved in the decisions relied upon by the assessee differ from the facts of this case and from issues mentioned in the show cause notice u/s. 263. In none of the cases cited above, the issue is with regard to an amount already debited in the profit and loss account and claimed and*

> *allowed as deduction in earlier assessment years. As already discussed, in this case, the issue is with regard to reversal of Provision for bad and doubtful debts which was claimed earlier and allowed as deduction and also transferring the same to another reserve without routing the same through profit and loss account, in contravention to the Accounting Standards prescribed by ICAI and approved by the Income Tax Department."*

21. Considered from all aspects of the issue, on the merits of the case, this provision for bad and doubtful debts relating to the rural advance, having been allowed as claim for deduction in earlier years, any write back from the same, logically needed to be subjected to tax, since clearly the claim allowed in earlier years was excessive to the extent of the write back done by the assessee. Even on the accounting principles as prescribed by the ICAI the write back from the provision needed to be routed through profit & loss account. Therefore, for all purposes, we find that there is no merit in the claim made by the ld.counsel for the assessee that this write back could not be subjected to tax.

22. The argument of the Ld.Counsel for the assessee that in the absence of any specific provision taxing write backs of provisions made u/s 36(1)(viia) of the Act the same was not liable to be taxed , accordingly is rejected as meriting no consideration. Even otherwise most of the provisions referred to by the Ld.Counsel for the assessee are in relation to deductions allowed for profits earned in specific circumstances / businesses, on the condition of creation of reserves to be utilized for specified business purposes such as purchase of plant and machinery for the said business. That when these reserves are not utilised for the purpose created or to the said extent , the reserves to the extent remaining unutilized are to be subjected to tax. For clarity the provisions of section 10AA in this regard are

reproduced and the rest of the sections, i.e 33AC,80HHB, 80HHD are all identically worded.

*10AA. (1) Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) of section 2 of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2006, but before the first day of April, 2021, the following deduction shall be allowed—*

*(i) hundred per cent of profits and gains derived from the export, of such articles or things or from services for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services, as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter;*

*(ii) for the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Reserve Account") to be created and utilized for the purposes of the business of the assessee in the manner laid down in sub-section (2).*

*Explanation.—For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this section and the deduction under this section shall not exceed such total income of the assessee.*

*(2) The deduction under clause (ii) of sub-section (1) shall be allowed only if the following conditions are fulfilled, namely :—*

*(a) the amount credited to the Special Economic Zone Re-investment Reserve Account is to be utilised—*

*(i) for the purposes of acquiring machinery or plant which is first put to use before the expiry of a period of three years following the previous year in which the reserve was created; and*

*(ii) until the acquisition of the machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;*

*(b) the particulars, as may be specified by the Central Board of Direct Taxes in this behalf, under clause (b) of sub-section (1B) of section 10A have been furnished by the assessee in respect of machinery or plant along with the return of income61 for the assessment year*

*relevant to the previous year in which such plant or machinery was first put to use.*

*(3) Where any amount credited to the Special Economic Zone Re-investment Reserve Account under clause (ii) of sub-section (1),—*

*(a) has been utilised for any purpose other than those referred to in sub-section (2), the amount so utilised; or*

*(b) has not been utilised before the expiry of the period specified in sub-clause (i) of clause (a) of sub-section (2), the amount not so utilised,*

*shall be deemed to be the profits,—*

*(i) in a case referred to in clause (a), in the year in which the amount was so utilised; or*

*(ii) in a case referred to in clause (b), in the year immediately following the period of three years specified in sub-clause (i) of clause (a) of sub-section (2),*

*and shall be charged to tax accordingly :*

*Provided that where in computing the total income of the Unit for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (7B) of section 10A, the undertaking, being the Unit shall be entitled to deduction referred to in this sub-section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in clause (ii) of sub-section (1).*

23. Therefore the event for claiming deduction as per the said section is earning of profits from specified businesses and not creation of Reserves, which is only a condition put in place for claiming deduction of profits so as to ensure utilization of profits for investment in plant and machinery of the said business. Non utilization for the specified purpose, tanatmounting to failure to fulfil the condition prescribed for claiming deduction of profits, accordingly results in subjecting the reserves, representing profits, to the extent not so utilized, to tax. These sections therefore cannot be read as specifically providing for taxing of reserves to the extent unutilized, in the circumstance of deduction being provided for on account of creation of Reserves. No parity therefore can be drawn between these sections and section 36(1)(viia) applicable in the present case where the event for claiming deduction in the first place is the creation of provision for bad and doubtful debts. And

therefore the contention of the Ld.Counsel for the assessee that the legislature has specifically provided for taxing withdrawals where required, needs to be dismissed.

24. All other arguments relating to real income theory and mere book entry not resulting in taxable event, have also been adequately dealt with by the Ld.PCIT as noted above by us.

25. The contentions of the Ld.Counsel for the assessee on the merits of the issue, of the withdrawal /reduction from provisions for bad and doubtful debts earlier allowed as deduction,not being taxable, is accordingly rejected.

26. Taking up the next argument of the ld.counsel for the assessee that the *Explanation-2* to section 263 was not invoked by the ld.Pr.CIT and not confronted to the assessee in the show causenotice.This argument has already been dealt with by the ITAT and rejected in the case of Nilaykumar & Bros. Jewellers in ITA No.146/Ahd/2022 order dated 11.1.2023. The findings of the ITAT rejecting the argument are as under:

> *"33. To understand the import of the argument that the invocation of Explanation 2 to section 263 was to be confronted before being applied, it is necessary to see what Explantion-2 to section 263 is all about. For this purpose, provision of section 263(1) of the Act along with the Explanation2 to the same are reproduced hereunder:*
>
> *263. (1) The [Principal Chief Commissioner or Chief Commissioner or 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 [or the Transfer Pricing Officer, as the case may be,] 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,—*
>
> *(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or*
>
> *(ii) an order modifying the order under section 92CA; or*
>
> *(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section].*

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

*....   .....   .....   ....*

*Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] 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 [Chief Commissioner or Chief Commissioner or 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."*

*34. As is evident from the above, section 263 empowers Commissioners/ Pr.Commissioners to exercise revisionary power where they find any order passed by the AO to be erroneous so as to cause prejudice to the interest of the Revenue. Explanation 2 to the section lists circumstances in which the assessment order passed will be deemed to be erroneous, which amongst other, includes an order passed without making inquiries or verification which should have been made as per clause (a) of the Explanation, which clause has been invoked by the ld.Pr.CIT in the present case.*

*35. Having said so, it is but obvious that what Explanation 2 does is only clarify and enlist the circumstances specifically where an assessment order will be deemed to be erroneous. It only explains the scope of the section and clearly by no stretch expands its scope.*

*The import or object of an Explanation was explained by the Hon'ble apex court in the case of Sundaram Pillai v Pattabiraman AIR 1985 SC 582,593 as :*

*The object of an Explanation has been explained in an earlier case as follows:—*

*(a) to explain the meaning and intendment of the Act itself,*

*(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,*

*(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,*

*(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and*

*(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.*

*Explanations are not substantive provisions and are inserted to clear up any ambiguity in the section. They only clarify an existing law. Normally Explanations do not enlarge the scope of the section but only explain the scope.*

*Explanation 2 to section 263, clearly provides additional support to the dominant object of section 263, specifically pointing out situations where assessment orders will be deemed to be erroneous.*

*The main provision of the section and its import has not been altered by the explanation. Therefore where section 263 itself has been invoked and the reason for finding the assessment order erroneous clearly pointed out to the assessee during revisionary proceedings to the effect that adequate inquiries were not conducted by the AO on the issue in question, Explanation 2 to section 263 (a) also being to the same effect of assessment orders being deemed to be erroneous on account of lack of adequate inquiry, we see no reason why pointedly the Explanation also needs to be brought to the notice of the assessee while applying it to the case.*

*36 Once the ld.Pr.CIT brings to the notice of the assessee the reason why he finds the assessment order to be erroneous, which in the present case was inadequate inquiries conducted by the AO on the nature of disclosure made by the assessee during the survey in excess stock found, he need not specifically point out that he has invoked Explanation-2 to sub-clause (a) to the section which is to the same effect of inadequate inquiries conducted qualifying as error in assessment order. The fact that he clearly brings out the reason why he found assessment order erroneous, is sufficient in itself and self-explanatory. It need not to be technically qualified by pointing out the specific clause in respect to which the reason pertained. The entire objectives of confronting anything to the assessee in the process of rendering justice is to offer an opportunity to other party to come up with his/her arguments or contentions in defense. In the present case, it is not disputed that the assessee had been specifically*

*pointed out the error in the order of the AO of non-conducting inquiry relating to the particular issue. The assessee was required to respond to the same, which he did by pointing out that due inquiry was conducted. The fact of mentioning Explanation 2 sub-clause (a) in the notice by the ld.Pr.CIT which dealt with this specific reason or error in the order of the AO of non-conducting of inquiry, therefore, is of no consequence or relevance, since the assessee in very simple words has been confronted with the error. Mentioning of Explanation 2 to sub-clause (a) is therefore only technical addendum to the same. As we mentioned above, the Explanation did not expand the scope of section but only explained the scope of section, and therefore, once the specific section has been invoked, it is not necessary to mention any specific Explanation thereto which has been invoked. Therefore, this contention of the ld.counsel for the assessee is rejected outrightly that the order needs to be set aside for the reason that ld.Pr.CIT did not confront the assessee before invoking Explanation 2 to sub-clause (a) to section 263 of the Act.*

*37. As for the decision of the jurisdictional High Court in the case of Shreeji Prints (supra), relied upon by the ld.counsel for the assessee in support of this contention, the assessee, we hold, cannot derive any benefit from the same.*

*38. On going through the decision of the Hon'ble High Court ,we find that the decision is not on the question framed before it whether Explanation to section 263 of the Act can be said to be validly invoked without first confronting it to the assessee.*

*In the case before Hon'ble High Court in the decision relied upon by the Ld.AR, the Revenue had proposed the following questions as substantial question of law before the Hon'ble High Court:*

> *"(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is correct in holding that the PCIT was not empowered and entitled to revise assessment order u/s. 263 of the Act r/w Explanation 2 thereto by ignoring that the order passed by the AO is erroneous in so far as it is prejudicial to the interest of revenue in as much as the Assessing Officer has passed the assessment order without making inquires/verification in the light of the unsecured loans of Rs. 2.49 Crores received from M/s. Georgette Tradecom Pvt. Ltd (GTPL) and M/s. PurbaAgro Food Pvt. Ltd (PAFPL)?*

*(b) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is correct in cancelling the impugned order u/s. 263 of the I.T. Act and allowing all the grounds of the Assessee?"*

*40. The Revenue had challenged the order of the ITAT setting aside the order passed by the ld.Pr.CIT under section 263 of the Act on account of inadequate inquiry made by the AO on unsecured loans*

*received by it from two parties. The question framed before the Hon'ble High Court was therefore whether the ITAT order was correct when adequate inquiries were not made by the AO. The Hon'ble High Court answered the question against the Revenue, noting that the ITAT had given a finding of fact that the AO had made full inquiries in detail and accepted the genuineness of the loans received by the assessee, and such view of the AO was plausible view, and therefore the assessment cannot be said to be erroneous or prejudicial to the interest of the Revenue. Hon'ble High Court held that in view of such finding of the fact arrived at by the Tribunal, no question of law arose and the appeal of the Revenue was accordingly dismissed.*

*41. At para-5 of the judgment, Hon'ble Court has noted that the Tribunal observed that the ld.Pr.CIT had not mentioned in the show cause notice the invocation of Explanation 2 to section 263 of the Act, though it passed the order invoking the said section and the Tribunal found the order to be not appropriate and sustainable in law.*

*Para-5, as above, is just a noting by the Hon'ble High Court of the findings of the ITAT while allowing the assesses appeal. We find that it is only on the facts of the case as found by the ITAT that the issues were all duly examined by the AO and the AO had taken plausible view, that Hon'ble Court had upheld order of the Tribunal dismissing the appeal of the Revenue.*

*42. Thus it is apparent from the above that the decision of the Hon'ble High Court was not to the effect that Expl 2 to section 263 not being confronted to the assessee its invocation was invalid. Neither was the decision rendered in the backdrop of this question before the Hon'ble High Court, nor does the Hon'ble High Court hold so in its order. What is noted in the order to this effect is only its noting of the findings of the ITAT while setting aside the order passed u/s 263 of the Act. Therefore the decision of the Hon'ble jurisdictional High Court cannot be read as holding that order passed u/s 263 of the Act is invalid when Expl to section 263 is invoked without confronting it to the assessee.*

*43. It is settled law that a precedent is an authority only for what it actually decides and a decision on a question that has not been argued cannot be treated as a precedent. Judgments must be read as a whole and observations in judgements should be considered in the context in which they are made and in the light of the questions that were before the court. The Hon'ble apex court has held so in the case of CIT vs Sun Engineering Works Pvt. Ltd.198 ITR 297 (SC). In the case of Padma Sundra Rao v State of TN 255 ITR 147(SC) the Hon'ble Apex Court had laid down that a ratio laid down by the Court have to be read in the context of the entire facts leading to the said ratio.*

> *44. In view of our elaborate discussion as above, we hold that the assessee cannot derive any benefit from the judgment of Hon'ble High Court in the case of Shreeji Prints P. Ld. (supra), to the effect that non-mentioning of Explanation 2 to section 263 in the show cause notice will render entire revisionary order as non-est in the eyes of law. This contention raised by the ld.counsel for the assessee, is therefore, rejected."*

27. In view of the above, we do not find any merit in the contention of the ld.counsel for the assessee that the order u/s 263 of the Act needs to be set aside for not having confronted the assessee with invocation of *Explanation* 2 to the said section.

28. In view of the above the order of the ld.CIT(A) passed under section 263 of the Act is upheld.

29. In the result, appeal of the assessee is dismissed.

**Order pronounced in the Court on 15th February, 2023 at Ahmedabad.**

| *Sd/-* | *Sd/-* |
|---|---|
| **(T.R. SENTHIL KUMAR)** | **(ANNAPURNA GUPTA)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Ahmedabad, dated 15/02/2023