IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
SHRI MANISH BORAD, ACCOUNTANT MEMBER

S.A.No.-03/Jodh/2023
[In ITA No.89/Jodh/2022]
(ASSESSMENT YEAR- 2012-13)

Ajmer Development Authority, Trust Ajmer Todarmal Marg, Ajmer-305001 (Rajasthan).	Vs	CIT(Exemption)/ ITO(Exemption), Jaipur/Jodhpur (Rajasthan)
(Appellant)		**(Respondent)**
PAN No.AAALS0528D		

ITA No.89/Jodh/2022]
(ASSESSMENT YEAR- 2012-13)

Ajmer Development Authority, Trust Ajmer Todarmal Marg, Ajmer-305001 (Rajasthan).	Vs	CIT(Exemption)/ ITO(Exemption), Ajmer/Jodhpur (Rajasthan)
(Appellant)		**(Respondent)**
PAN No. AAALS0528D		

Assessee By	Shri Mahendra Gargieya, Adv.
Revenue By	Shri O.P.Meena, CIT DR
Date of hearing	20/03/2023
Date of Pronouncement	22/03/2023

O R D E R

PER KUL BHARAT, J.M.:

The assessee has filed the present appeal challenging the order dated 30.03.2022 passed by the Ld. CIT(E), Circle,

Jaipur/Jodhpur alongwith Stay Application No.03/Jodh/2023 for the assessment year 2012-13. For the sake of convenience, appeal and stay application filed by the assessee, were taken up together and decided by this consolidated order.

ITA No.89/Jodh/2022]
(ASSESSMENT YEAR- 2012-13)

2. First we take up **ITA No.89/Jodh/2022** pertaining to **AY 2012-13**. The assessee has raised following grounds of appeal:-

1. *"The Id. CIT(E), Jaipur erred in law as well as on the fact of the case in taking the action u/s 263, which is bad in law without jurisdiction and being void ab-initio, the same may kindly be quashed.*
2. *The Id. CIT(E), Jaipur seriously erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act without recording a specific and categorical finding that the subjected assessment order passed u/s 143(3) dated 12.12.2019 is erroneous and prejudicial to the interest of the revenue, in absence of which the entire proceedings u/s 263 is vitiated. Therefore, the impugned order dated 30.03.2022 u/s 263 of the Act kindly be quashed.*
3. *The Id. CIT(E), Jaipur seriously erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly holding that the AO failed to examine the applicability of proviso to S. 2(15) and seriously erred in cancelling/ setting aside the subjected assessment order passed u/s 143(3) dated 12.12.2019, with a direction to the*

AO to examine the deduction so claimed by the assessee. The assumption of jurisdiction u/s 263 and the impugned direction, being contrary to the provisions of law and facts on record hence, the proceedings initiated u/s 263 of the Act and the impugned order dated 30.03.2022 deserves to be quashed.

4. *The Id. CIT(E), Jaipur seriously erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly invoking Explanation 2 to S. 263 as if the same conferred unbridled power upon the CIT even though the facts and circumstances of the case did not justify the application of the said Explanation.*
5. *The Id. CIT(E), Jaipur erred in law as well as on the facts of the case in wrongly setting aside the assessment order dated 12.12.2019 despite there being complete application of mind by the AO on the subjected issues and it was nothing but a case of change of opinion and/or suspicion, based on which, assumption of jurisdiction u/s 263 is not permissible. The impugned order dt. 30.03.2022 therefore, lacks valid jurisdiction u/s 263 of the Act and hence, the same kindly be quashed.*
6. *The appellant prays your honor indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."*

3. Facts giving rise to the present appeal are that in this case, Ld.CIT (Exemption) after examining the records issued a show cause notice u/s 263 of the Income Tax Act, 1961 ("the Act"), calling upon the assessee as to why assessment order framed u/s 147 r.w.s. 143(3) of the Act, dated 12.12.2019 should not be

revised. In response to the notice issued to the assessee, Ld. Authorized Representative ("AR") of the assessee attended the proceedings and filed submissions. However, the submissions filed by the assessee was not found acceptable by the Ld.CIT(Exemption) and he set aside the assessment order and directed the Assessing Officer ("AO") to frame *denovo* assessment as directed in the order.

4. Aggrieved against this, the assessee preferred appeal before this Tribunal.

5. Ld. Counsel for the assessee, Shri Mahendra Gargieya, Advocate vehemently argued that Ld.CIT(Exemption) exceeded his jurisdiction in issuing notice u/s 263 of the Act. He submitted that *ex facie* the order was revised on the ground different from the ground of re-opening of the assessment. He further reiterated the submissions as made in the written submissions and relied upon various case laws as cited in the written submissions. For the sake of clarity, submission dated 18.03.2023 filed by Ld.AR for the assessee is reproduced as under:-

> *Fact: The appellant is governed by the provisions of the Rajasthan Urban Improvement Trust Act, 1959. It derives income from maintenance and development of areas and civic amenities including sale of land within Ajmer District. In this case, the assessment was originally completed vide order dated*

12.12.2019 u/s 143(3) r.w.s. 147 by the ACIT, Circle (Exemption), Jodhpur (the AO), with NIL income. Thereafter, Proceedings have been initiated with reference to the said order on the following grounds:

"On perusal of the assessment records, it is noticed that:

(i) Assessee had a surplus income of Rs.1,46,35,981/-. It had further claimed capital expenditure of Rs.5,25,52,586/-. Thus after it has been concluded that assessee is hit by provisions of section 2(15) of the I.T. Act, 1961, the total taxable income comes to Rs.6,71,88,566/-.

3. In view of the above, it appears that the assessment order passed u/s 147 r.w.s. 143(3) of the IT. Act 1961 in your case for A.Y. 2012-13 on 12.12.2019 is erroneous in so far as it is prejudicial to the interest of the revenue."

The grounds for invoking S. 263 are summarized as under:

1. *That the assessee has a surplus income and had also further claimed capital expenditure.*
2. *That the assessee is hit by S. 2(15) of the Income Tax Act, 1961.*

In response to the show cause notice, the assessee filed detailed written submission dated 16.03.2022 (PB 10-14) along with paper book before the ld. CIT(Exemption), Jaipur. The ld. CIT(Exemption), Jaipur however, feeling dissatisfied, rejected the contentions and held the assessment order u/s 143(3) dated 12.12.2019 (BRAE. 49j-erroneous and prejudicial to the interest of revenue vide impugned Order u/s 263 dated 30.03.2022, in the following words:

"4.1 Further assessee also submitted reply dated 16.03.2022 wherein the assessee has stated that it is undisputedly registered u/s 12AA of the Act and eligible for exemption u/s 11 to 13 of the Act. The assessee further submitted that the subjected assessment can neither be termed as erroneous nor be termed as prejudicial to the interest of the revenue in as much as the cumulative satisfaction of the twin conditions stands fulfilled and the case does not fall within the ambit of section 263 of the Act.

5. The submissions of the assessee dated 14.03.2022 and 16.03.2022 have been duly considered, the facts of the case laws cited are not similar to the case under consideration. However, the assessee has laid major stress on the point that that ADA falls within the definition of "Local Authority" as in specifically defined in the Explanation (iii) reading as under S. 10(20) of the IT Act, 1961. The contention of the assessee is not acceptable in the light of the judgement of the Hon'ble Supreme court in the case of Urban Improvement Trust, Kota (Civil Appeal No. 10577 of 2018) wherein the Apex court stated that, "The High Court based its decision on the fact that functions carried out by the assessee are statutory functions and it is carrying on the functions for the benefit of the State Government for urban development. The said reasoning cannot lead to the conclusion that it is a Municipal Committee within the meaning of Section 10(20) Explanation Clause (iii). The High Court has not adverted

to the relevant facts and circumstances and without considering the relevant aspects has arrived at erroneous conclusions. Judgments of the High Court are unsustainable."

x.....x.....x.....

5.2 In the view of the above discussion, it is very evident the there is no merit in the claim of assessee and the AO is correct in denying the benefits of Section 11 and 12 to the assessee trust vide amended provisions of section 13(8)(effective from 01.04.2009) read with first and second proviso of section 2(15). However, on review of the said assessment order and records, for the relevant year, it was found that though the AO has denied the benefits of Section 11 and 12 of the Act to the assessee but at the same time, failed to tax the surplus income of Rs. 1,46,35,981/- and disallow the claimed capital expenditure of Rs.5,25,52,586/-. Since, the assessee was hit by provision of section 2(15) of the I.T. Act, 1961 the total taxable income comes to Rs.6,71,88,566/- (Rs.1,46,35,981/- + Rs.5,25,52,586/-), therefore, the assessment done at NIL income by the AO is erroneous as the final computation as per the order is not in line with the findings of the said Assessment Order. Consequently, the order of the Assessing Officer sought to be revised is erroneous; and it is prejudicial to the interests of the Revenue.

5.3 In view of the above discussion and legal position the order passed by the AO is set aside within the meaning of

sec. 263 of the Act to AO to do de-novo assessment on the issues discussed after providing proper opportunity of being heard to the assessee and making proper inquiry and arrive at a factually and legally correct finding on these issues."

Thus, feeling aggrieved, the assessee is in appeal.

GOA 1 to 4: Order passed u/s 263 - Invalid

Submissions:

1. Legal Position on Sec.263 - Judicial Guideline: Before proceeding, we may submit as regards the judicial guideline, in the light of which, the facts of this case are to be appreciated.

1.1 The pre-requisites to the exercise of jurisdiction by the CIT u/s 263, is that the order of the Assessing Officer is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The CIT has to be satisfied of twin conditions, namely

(i) The order of the Assessing Officer sought to be revised is erroneous; and

(ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, Sec.263 cannot be invoked.

This provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous as also prejudicial to revenue's interest, then the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interest of the revenue' has to be read in

conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO 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 AO is totally unsustainable in law. Kindly refer Malabar Industrial Co. Ltd. v/s CIT (2000) 243 ITR 83 (SC).

1.2 Also kindly refer CIT v/s Max India Ltd. (2007) 295 ITR 282 (SC) wherein it is held that:

> *"The phrase 'prejudicial to the interests of the Revenue" in S. 263 of the Income Tax Act, 1961, has to be read in conjunction with the expression "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 interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."*

Ratio of these cases fully apply on the facts of the present case in principle. 2. No error at all committed by AO - Activates of ADA held Charitable:

2.1 At the outset it is submitted that the assessee is undisputedly registered u/s 12AA of the Act and eligible for exemption u/s 11 to 13 of the Act. In the order passed by the Hon'ble ITAT Jaipur vide ITA No. 1019/JPR/ 2011 dated 16.01.2015 (PB 15-18), it was held that various activities by the assessee are charitable in nature...:

> *"2.4 We have heard the rival contentions and perused the material available on record. In our considered view, the registration cannot be refused on the basis of vague findings like the "scent of commercial activity" and accounts audit being as per state govt. rules and not a CA. From the verification of the relevant Urban Development Rules, it emerges that assessee carries on various activities which appear to be charitable in nature. In our considered view, the ld. CIT has not appreciated the application for registration in proper perspective, the activities of the assessee can be judged from the documents submitted by it. Thus looking at the entirety of the facts and circumstances of the case, we are inclined to set aside the issue back to the file of the ld. CIT to decide the same afresh in accordance with law by providing reasonable opportunity of being heard to the assessee expeditiously. Thus the appeal of the assessee is allowed for statistical purposes.*

3.0 In the result, the appeal of the assessee is allowed for statistical purposes."

2.2 Recent SC Decisions: It is further submitted that AO has not committed any error in assessing the income at nil also for the reason that recently in the case of ACIT (Exemptions) v. Ahmedabad Urban Development Authority [2022] 329 CTR 297 (SC)/ [2022] 449 ITR 1(SC) (DPB 20-39), it was held as under:

" ----190. In light of the above discussion, this court is of the opinion that:

(i) The fact that bodies which carry on statutory functions whose income was eligible to be considered for exemption under section 10(20A) ceased to enjoy that benefit after deletion of that provision w.e.f. 1-4-2003, does not ipso factopreclude their claim for consideration for benefit as GPU category charities, under section 11 read with section 2(15) of the Act.

(ii) Statutory Corporations, Boards, Authorities, Commissions, etc. (by whatsoever names called) in the housing development, town planning, industrial development sectors are involved in the advancement of objects of general public utility, therefore are entitled to be considered as charities in the GPU categories.

(iii) Such statutory corporations, boards, trusts authorities, etc. may be involved in promoting public objects and also in the course of their pursuing their objects, involved or engaged in activities in the nature of trade, commerce or business...."

Thus, the activities of housing development and town planning, which is the core activity of the appellant in this case also, has been held to be charitable activities within the meaning of Section 2(15) of the Act fully considering the scope of the proviso below S. 2(15). The law as understood and declared thus by the Hon'ble Apex Court shall relate back to the date on which subjected assessment order was passed.

No doubt the Hon'ble Apex Court made the effect prospective but the interpretation made by the Hon'ble court shall be applicable on all pending matters. Recently the Hon'ble apex court in the case of Principal CIT(Exemption) v Servants of People Society (2023) 330 CTR 617(SC) (DPB 40-43) has partly allowed the appeal of the department and restored the matter to AO for fresh consideration in the light of the decision of Ahmedabad Development Authority. In that view of matter, the AO has committed no error while assessing the income at nil. Therefore, there is no valid assumption of jurisdiction and consequently S. 263 cannot be invoked.

3. Due application of mind - Verification as required made:

3.1 It is submitted that the AO issues a show cause to which a detailed reply was submitted by the assesse vide letter dated 02.11.2019 starting from Pg. 4 till Pg. 14 of the assessment order wherein, reliance was placed on several case laws and detailed submission were made even on the aspect the proviso to S. 2(15) of the Act that the same was not applicable in the case of the assesse. Attention of the AO was also drawn towards the above order of the ITAT (vide ITA No. 1019/JPR/ 2011 dated 16.02.2015), though relating to the issue of

registration u/ s 12AA of the Act, yet however, the aspect of second proviso to S. 2(15) of the Act, was also involved.

3.2 Similarly, in the case of Jaipur Development Authority (JDA) also similar view vide its order dated 30.09.2014 (PB 19-42) that such development authorities were entitled to the benefit u/s 11 and the second proviso to S. 2(15) of the Act was not applicable to such cases, reached to the Hon'ble ITAT, Jaipur against denial of registration u/s12AA but the observations made therein support the contention. Further other cases of the development authority are also similarly placed were decided in their favor.

3.3 No doubt the AO has made discussion against the assesse but at the end, he assessed the income at Nil because the important undisputed facts available on the record and in the knowledge of the AO, were that the assesse was granted the registration u/s 12AA of the Act, it has complied with mandatory condition of incurring expenditure of minimum threshold of 85% and audit report in form 10B was filed together with the binding decision of honorable ITAT Jaipur dated 30.09.2014 which was available before the AO. Pertinently all these facts and the legal position, prevailed over the mind of assessing officer when he passed the subjected order and it cannot be denied that the AO is bound by the decision of the jurisdictional Hon'ble ITAT 86 High Court as per Rule of Precedence. The assessing officer therefore, made no error assessing income at Nil.

3.4 Past history supports the AO: Fairly speaking, from the point of a quasi-judicial authority (the AO), the past history of

the case does have a binding value. It is also pertinent to mention here that the department issued several notices under S. 148 in the case of the then UIT, Ajmer for A.Y. 2005-06 to 2007-08 and A.Y. 2009-10 to A.Y. 2011-12 which were duly replied by assesse, vide letters dated 31.08.2017 (PB 43-44) mentioning the fact that the assessee was entitled/registered u/s 10(20)/ 12AA and was enjoying exemption of income accordingly till AY 2011-12. Pertinently in AY 2011-12 the assessment was reopened u/s 147 on account of cash deposits but finding that Ld. COIT had already granted registration u/s 254/ 12AA(1)(b) on 26.12.2018 (PB 49), assessed the income at nil vide order dated nil (PB 45-49). Accordingly, the department did not proceed further in any of these matters and they attained finality. All these admitted facts were available on record, when the AO passed the subjected order.

3.5 The law is well settled that where the AO acted following the decisions of the judicial High Court his order cannot be termed as erroneous. Kindly refer CIT v. G.M. Mittal Stainless Steel (P.) Ltd. [2003] 263 ITR 255 (SC), wherein it is held:

> *"Precedent—Binding nature of judgment—Decision of the jurisdictional High Court—Where the decision of the jurisdictional High Court has not been set aside or at least has not been appended from it would be binding—In view of this CIT proceeding on the basis of the High Court other than jurisdictional High Court on the basis that jurisdictional High Court was erroneous and that the AO who had acted in terms of the High Court's decision had acted erroneously, was not justified"*

3.6 It is under this background also the ld. AO, who was seized with similar controversy in the case of ADA and having the record of the past assessment and also being aware of the law of the land, available on the day when he passed the Assessment Order dated 12.12.2019 which is binding decision of Hon'ble ITAT Jaipur, could have assessed the income at Nil.

3.7 Supporting Case Laws:

3.7.1 Kindly refer CIT v/s Rajasthan Financial Corporation (1996) 134 CTR 145 (Raj). held that:

> *"Once Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the Assessing Offer allowed the claim being satisfied with the explanation of assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order not make an elaborate discussion in that regard."*

3.7.2. In CIT v/s Ganapati Ram Bishnoi (2005) 198 CTR (Raj) 546 held that from the record of the proceedings, in the present case, no presumption can be drawn that the AO had not applied its mind to the various aspects of the matter. In such circumstances, without even prima facie laying foundation for holding that assessment order is erroneous and prejudicial to interest in any matter merely on suspicious ground that the AO was required to make an enquiry, cannot be held to satisfy the test of existing necessary condition for invoking jurisdiction u/s 263. Jurisdiction u/s 263 cannot be invoked for making short enquiries or to go into the process of assessment again and

again merely on the basis that more enquiry ought to have been conducted to find something.

3.7.3 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.

4. It is not the case of CIT that there was a complete/total lack of inquiry. Law is well settled that the Assessment order cannot be held to be erroneous simply on the allegation of inadequate enquiry. Unless there is an established case of total lack of enquiry.

4.1 Kindly refer CIT vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del), wherein Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held that 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 was held 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 CIT 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. The Ld. CIT himself admits that the AO did make enquiries however, in his view it was insufficient and in adequate enquiries, which is not a good basis, more probably, when he did not invoke explanation (Expl. 2(a)) to Sec 263

4.2 In CIT vs. Chemsworth Pvt. Ltd. (2020) 275 Taxman 408 (Kar), it was held that:

> *"Revision—Erroneous and prejudicial order—AO taking plausible view—A0 completed the assessment without considering expenditure which was not allowable under s. 14A—CIT held that non-consideration of disallowable expenditure under s. 14A was erroneous and is prejudicial*

to the interest of the Revenue—Not correct—CIT has held that the enquiry conducted by the AO was inadequate and has assumed the revisional jurisdiction—Assessee has filed all the details before the AO and AO has accepted the contention of the assessee that no expenditure was attributable to the exempt income during the relevant assessment year—Thus, while recording the said finding, the AO has taken one of the plausible views in allowing the claim of the assessee— Therefore, CIT could not have set aside the order of assessment merely on the ground of inadequacy of enquiry—Order passed by the CIT was not sustainable in law hence, the Tribunal rightly set aside the impugned order of the CIT."

5. Beyond the scope of enquiry contemplated u/s 263:

5.1 The law is well settled that the reopening of reassessment as contemplated u/s 147 of the Act is for a specific purpose of assessing the escaped income and therefore, the AO, in the reassessment proceedings can assess only those item of income which have escaped assessment and find place in the reasons to believe but the income not being a part of the reasons recorded cannot be considered in the reassessment proceedings and also therefore, cannot be subject matter of revisionary proceedings u/s 263 of the Act. The facts are not disputed that in this case, the Assessment Order passed u/s 147 / 143 dt. 12.12.2019 has been subjected to revision u/s 263 by the Ld. CIT. A Notice u/s 148 was issued on 29.03.2019 for A.Y. 2012-13 under consideration, and reasons to believe are recorded (PB 1) as communicated to the appellant by the AO vide his letter

No. 128 dt. 08.05.2019. For a ready reference the same are being reproduced hereunder.

> *"The assessee has not filed its return of income for the period in which it had deposited substantial cash, earned interest income 85 purchased immovable property. Since, the assesse has not filed its IT return for the relevant period i.e. A. Y. 2012-13, therefore, no benefit of section 11 & 12 can be given as filing of return of income in time is a pre-condition for availing benefit under section 12AA of the Act as per section 12A(1)(b) of the I.T. Act 1961. As such, cash deposited of Rs. 16,79,12,657/ -in bank accounts, earned interest income of Rs. 20,07,054/ - and purchase of immovable property to the tune of Rs. 17,76,51,821/ - has remained unexplained. In view of the above, it is clear that total amount of Rs. 34,75,71,532/ - has exceeded the maximum amount which is not chargeable to tax in this assessment. Therefore, I have reason to believe that the total amount of Rs. 34,75,71,532/- has escaped assessment to tax for the A.Y. 2012-13 within the meaning of provisions of section 147 of the Income Tax Act, 1961. Thus, it is a fit case for issue of notice u/s 148 of the I.T. Act, 1961."*

A bare perusal of the reasons shows that the AO reopened the assessment u/s 147 for some specific reasons being:

(i) No benefit of s.11 8v s.12 can be given in absence of ROI.

(ii) The cash deposits of Rs. 16,79,12,657/- in bank accounts, interest income of Rs.20,07,054/-, purchase of immovable

property to the tune of Rs.17,76,51,821/- and thus, remained unexplained.

(iii) Thus, total amount of Rs.34,75,71,532/- has escaped assessment to tax for the A.Y. 2012-13 within the meaning of provisions of section 147 of the Income Tax Act, 1961.

5.2 The AO thus, having recorded specific reasons, could not have enquired into and examined any issue other than those already recorded in the reasons to believe, as above. A specific amount was categorically mentioned of the escaped income being Rs. 34.76 crores based on certain items beyond which, the AO was not supposed to have gone in as much as the entire assessment was not thrown open before him. Hence, consequently AO was supposed to complete the assessment u/s 147/148 r/w s.143(3) of the Act as per reason to believe only.

The issues are raised now by the Ld. CIT in the impugned Order u/s 263 being failure of the AO in making disallowance/addition of the surplus income of Rs. 1,46,35,981/- and of the capital expenditure of Rs. 5,25,52,586/-totaling to Rs 6.72 Crores in view of the proviso of s.2(15) of the Act, were not part of the reasons to believe. In other words, the ld. CIT did not touch or did not even whisper anything stated in the reasons to believe based on which only, the proceedings u/s 147 was initiated.

6. Supporting Case Laws:

6.1 In case of CIT vs. Alagendran Finance Ltd, (2007) 211 CTR (SC) 69 (DPB 12-19)

The Hon'ble Supreme Court, while dealing with more or less an identical issue of revisionary power exercised under s. 263 of the Act in respect of an assessment order passed under s. 143(3) r/w s. 147 of the Act, has held in the following manner: -

> *"15. We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the CIT exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, the period of limitation provided for under sub-s. (2) of s. 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional jurisdiction having, thus, been invoked by the CIT beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity."*

6.2 CIT v. Bharti Airtel Ltd. [2013] 37 taxmann.com 218/218 Taxman 112 (Mag.) (Delhi), wherein:

> *"33. This decision in Alagendran Finance Ltd. (supra) has been followed by the Delhi High Court in Bharti Airtel Ltd. (supra) wherein also reassessment order dealt with the issue of non-deduction of tax at source on payment of interest to ABN Amro Bank, Stockholm Branch. Second addition was made on account of ESOP expenses. Subsequently Commissioner of Income-tax issued order under section 263 for failure to deduct tax at source under*

section 194H on three air time provided to distributors and under section 194J on roaming charges paid to other network operators. These issues were different from the subject matter of reassessment order. The Delhi High Court held that the subject matter is different since the Commissioner has found error in regular assessment order, hence limitation shall commence for regular assessment order."

6.3 In Ashok Buildcon Ltd. Vs. ACIT (2010) 325 ITR 574 (Born.) (DPB 5-11), held that:

"Section 263, read with section 147, of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interest of revenue - Assessment year 2004-05 - Whether where an assessment has been reopened under section 147 in relation to a particular ground or in relation to certain specified grounds and subsequent to passing of order of reassessment, jurisdiction under section 263 is sought to be exercised with reference to issues which did not form subject of reopening of assessment or order of reassessment, period of limitation provided for in section 263(2) would commence from date of order of assessment and not from date on which order of reassessment has been passed - Held, yes

Section 147 of the Income-tax Act, 1961 - Income escaping assessment - General - Whether where assessment is sought to be reopened only on one or more specific grounds and reassessment is confined to one or more of those grounds, original order of assessment would

continue to hold field, save and except for those grounds on which a reassessment has been made under section 143(3) read with section 147 - Held, yes

Fact: For the relevant assessment year, the assessee's original order of assessment under section 143(3) dated 27-12-2006 was sought to be reopened on 6-3-2007 solely on the basis that the benefit of section 72A had been wrongly allowed to the assessee. In the order of reassessment, that was passed on 27¬12-2007, the claim made by the assessee with reference to the provisions of section 72A was disallowed. On 30-4-2009, the Commissioner issued the impugned notice under section 263 on the ground that the assessment order passed on 27-12-2007 was erroneous and prejudicial to the interests of the revenue. The assessee challenged said notice contending that though, in form, the Commissioner had sought to revise the order dated 27-12-2007 which was passed on a reassessment made under section 143(3) read with section 147, in substance and in essence, what was sought to be revised was the original order of assessment dated 27-12-2006 and since in respect of that order, the period of limitation for exercising the revisional powers had expired on 31-3-2009 having regard to the provisions of section 263(2), the notice issued on 30-4-2009 was barred by limitation.

6.4 In Tata Power Company Ltd. Vs. PCIT (2021) 90 ITR TRIB (Trib) 554 (Mum), it was held that:

"10. A perusal of the reasons recorded for reopening of assessment under s. 147 of the Act, as reproduced in the body of the re-assessment order, would reveal that the AO has reopened the assessment under s. 147 of the Act for the specific purpose of assessing the amount of Rs. 68,62,780, being the expenditure on furniture and tools. In the reasons recorded, the AO has mentioned that the amount in dispute is ineligible for deduction under s. 43B of the Act as per the report of the auditor. It is also a fact on record that the AO has ultimately completed the assessment under s. 143(3) r/w s. 147 of the Act by disallowing the amount of Rs. 68,62,780, i.e. the income which has escaped assessment as per the reasons recorded. Neither the reasons recorded for reopening the assessment nor any other material on record demonstrate that the issue relating to the claim of deduction under s.801A of the Act was ever a subject matter of dispute in the re-assessment proceedings either at the time of initiation of proceedings under s. 147 of the Act or in course of the reassessment proceedings.

11. A reading of s. 147 of the Act makes it clear that the assessing office, in course of proceedings under the said provision can not only assess/re-assess the escaped income based on which the assessment was reopened, but can also assess any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under the aforesaid provision. Expin. 3 to s. 147 of the Act further

clarifies the substantive provision by saying that the AO may assess or re-assess the income in respect of any issue which has escaped assessment and such issue comes to his notice subsequently in the course of proceedings under s. 147 of the Act, notwithstanding that such issue does not form part of reasons recorded for reopening of assessment. Thus, on a holistic reading of s. 147 of the Act it becomes very much clear that along with escaped income for which the assessment was reopened, the AO can assess other escaped income which subsequently comes to his notice in course of re-assessment proceedings. In the facts of the present case, undisputedly, the issue relating to claim of deduction under s. 80IA of the Act neither was a subject matter of reopening as per reasons recorded, nor did such matter come to the notice of the AO in course of re- assessment proceedings.

12. The reopening of assessment as contemplated under s. 147 of the Act is for the specific purpose of assessing the escaped income. Therefore, in a reassessment proceeding, the AO can only assess those incomes which have escaped assessment. The income which is subject-matter of assessment in the original assessment proceeding, certainly, cannot be considered in the reassessment proceeding. In the facts of the present case, a perusal of the draft assessment order as well as the final assessment order passed under s. 143(3) r/w s. 144C(13) would make it clear that the issue relating to

claim of deduction under s. 80IA of the Act was a subject-matter there. In fact, the AO has dealt with the issue of deduction claimed under s. 80IA of the Act at length in the final assessment order passed under s. 143(3) r/w s. 144C (13) of the Act. Thus, the issue relating to deduction claimed under s. 80IA of the Act, cannot be a subject matter of re-assessment under s. 147 of the Act, as, such reopening of assessment was for assessing a particular income, which escaped assessment. Pertinently, to justify his action of revising the re-assessment order, learned Principal CIT has referred to the third Proviso to s. 147 of the Act, which reads as under: -

"Provided also that the AO may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."

13. A careful reading of the aforesaid Proviso would make it clear that, though, it has come into effect from 1st April, 2008 however, it is not in the nature of an enabling provision. Rather, it restricts powers of the AO in assessing or re-assessing escapement of income, as, it excludes such incomes which are subject-matter of any appeal, reference or revision. Thus, in our considered view, the third Proviso to s. 147 of the Act does not enlarge the scope of s. 147 of the Act for enabling the AO to assess any income which is not the subject matter of reopening of assessment as per reasons recorded or which subsequently did not come to the notice of the AO in

course of reassessment proceedings. Thus, the attempt of learned Principal CIT to get over the decision of Hon'ble Supreme Court in case of CIT vs. Alagendra Finance Ltd. (supra) and the decision of Hon'ble jurisdictional High Court in Asoka Buildcon Ltd vs. Asstt. CIT (supra) by referring to the third proviso to s. 147 of the Act must fail.

14. Rather, the third Proviso to s. 147 of the Act would be an obstacle before the AO in dealing with the issue of deduction claimed under s. 801A of the Act, as, it is a subject-matter of appeal pending before the Tribunal. At this stage, we must deal with certain judicial precedents cited before us.

15. In case of CIT vs. Alagendran Finance Ltd. (supra), the Hon'ble Supreme Court, while dealing with more or less an identical issue of revisionary power exercised under s. 263 of the Act in respect of an assessment order passed under s. 143(3) r/w s. 147 of the Act, has held in the following manner: -

xxxxxxxxxxxxxxx15. We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the CIT exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, the period of limitation provided for under sub-s. (2) of s. 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional

jurisdiction having, thus, been invoked by the CIT beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity."

16. Following the aforesaid decision of the Hon'ble Supreme Court, the Hon'ble jurisdictional High Court in case of Asoka Buildcon Ltd vs. Asstt. CIT (supra), has held, as under: - xx.xxx

17. Similar is also the view expressed by the Hon'ble Jurisdictional High Court in case of CIT vs. ICICI Bank Ltd. (supra).

19. In any case of the matter, in our considered opinion, the ratio laid down by the Hon'ble Supreme Court in case of CIT vs. Alagendran Finance Ltd (supra) and the Hon'ble jurisdictional High Court in the case of Ashoka Buildcon vs. CIT (supra) clinches the issue in favour of the assessee. Further, a reading of the original assessment order would reveal that the issue relating to deduction claimed under s. 80IA was a subject-matter therein. In fact, the draft assessment order passed by the AO on the issue of deduction claimed under s. 801A of the Act was disputed before learned DRP and after passing of the final assessment order, the issue relating to claim of deduction under s. 801A of the Act is now pending in appeal before the Tribunal. Therefore, any attempt by the AO to deal with such issue in re-assessment proceedings would have amounted to review of the original assessment order, which is impermissible. Thus, in the aforesaid scenario, the assessment order passed under s. 143(3) r/w s. 147

of the Act cannot be considered as erroneous and prejudicial to the interest of revenue to subject it to proceeding under s.263 of the Act. If, at all, any order of the subordinate authority which could have been considered as erroneous and prejudicial to the interest of revenue in allowing assessee's claim of deduction under s. 801A of the Act, either due to lack of enquiry or otherwise, is the original assessment order passed under s. 143(3) r/ws.144C of the Act and not the re-assessment order. Therefore, the period of limitation prescribed under s. 263(2) of the Act would run from the original assessment order.

20. Being conscious of the fact that the original assessment order could not be revised under s.263 of the Act due to bar of limitation, as provided under sub¬s. (2) of s. 263 of the Act, learned Principal CIT, as it appears, has proceeded to revise the assessment order passed under s. 143(3) r/w s.147 of the Act to get over the hurdle of limitation. This, in our view, is impermissible. Thus, based on the foregoing reasoning, we hold that the impugned order of learned Principal CIT revising the order passed under s. 143(3) r/w s. 147 of the Act is unsustainable. Accordingly, we quash it.

21. In the result, appeal is allowed, as indicated above".

6.5 Chhabra Syncotex (P) Ltd. Vs. Assistant Commissioner Of Income Tax Ita No. 239/Jp/2018; Asst. Yr. 2008-09 (DPB 91-95)

"If the exercise of revision jurisdiction under s. 263 in respect of issues which formed subject-matter of reassessment after the original assessment was reopened, the commencement of the limitation would be with reference to the order of reassessment, but if the CIT has exercised the jurisdiction under s. 263 on an issue which was not subject-matter of reassessment, then the limitation would reckon from the original assessment order passed under s. 143(3) and not from the reassessment order. Even if an order of assessment is reopened, the whole proceedings would start afresh but it would not disturb the issues which were not subject-matter of reopening of the assessment and even not falling under the purview of Expin. 3 to s. 147. Therefore, for the purpose of limitation under s. 263(2), if the jurisdiction under s. 263 is invoked on an issue which was not subject-matter of reassessment, then the limitation would reckon from the original assessment order and not from the reassessment order.

7. Even Expln. III to s.147 was not applicable:

7.1 It is further submitted that none of the reasons/ basis adapted by the learned CIT for passing the impugned Order u/s 263 came to the notice of the AO subsequently in the course of the reassessment proceedings. Pertinently, even the ld CIT neither in the impugned show cause notice u/s 263, nor in the impugned Order u/s 263, whispered even remotely placing reliance on the Expin. III to s.147 of the Act which clearly implied that the ld. CIT has not taken the shelter of the said

Explanation to find error in the impugned assessment order. In view of these admitted facts and legal positions, the AO could not have expanded the scope for the reassessment of the proceedings before him other than the issues already noted in the reasons to believe, which was a mandatory condition for the AO u/s 148(2) before issuing a notice u/s 148 and before completion the reassessment orders. This being the binding legal mandate, if the AO has not made any addition /disallowance on the issues mentioned in the reasons, no fault or error could be find in the subjected reassessment order. In other words, when the law itself did not require the AO to assess the income on the issues which were not part of the reasons to believe it was a legal impossibility placed upon him and therefore, it was a serious jurisdictional error committed by ld. CIT to invoke section 263 even in respect of those items of income which are beyond the reasons recorded/were not a part of the reasons recorded.

7.2 Another reason for which the said Explanation cannot be revoked is that even assuming, that AO acted in the accordance with the reasons should be due, it is an admitted fact that no addition on account of any of the three items being the alleged escaped income in the reasons, have been made in the final assessed income by the AO. In other words, no addition based on the reasons recorded has been made by the AO in the subjected assessment order (for whatever reasons). If it is so, the AO is not permitted to make additions of other incomes as held in various cases.

7.3 Supporting Case Laws: Similar issue had arisen.

7.3.1 Ranbaxy Laboratories Ltd. vs. CIT (2011) 242 CTR (Del) 117, (2011) 336 ITR 136 (Del). In the said case, the Division Bench had also examined Expin. 3 to s. 147, which was inserted by Finance (No. 2) Act of 2009 with retrospective effect from 1st April, 1989.

7.3.2 CIT vs. Jet Airways India Ltd. (2011) 239 CTR (Born) 183: (2011) 331 ITR 236 (Born) in which it has been held as under :

> *"The effect of s. 147 as it now stands after the amendment of 2009 can, therefore, be summarized as follows : (i) the AO must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year; (ii) upon the formation of that belief and before he proceeds to make an assessment, reassessment or precomputations, the AO has to serve on the assessee a notice under sub-s. (1) of s. 148; (iii) the AO may assess or reassess such income, which he has reason to believe, has escaped assessment and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section; and (iv) though the notice under s. 148(2) does not include a particular issue with respect to which income has escaped assessment, he may nonetheless, assess or reassess the income in respect of any issue which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section."*

7.3.3. CIT vs. Shri Ram Singh (2008) (DPB 44-50) 217 CTR (Raj) 345 ,118: (2008) 306 ITR 343 (Raj) in which it has been observed as under:

> *"It is only when in proceedings under s. 147 the AO, assesses or reassesses any income chargeable to tax which has escaped assessment for any assessment year, with respect to which he had 'reason to believe' to be so, then only, in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under s. 147. To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under s. 147, the AO were to come to the conclusion, that any income chargeable to tax, which, according to his 'reason to believe, had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the AO entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the AO may find to have escaped assessment, and which may come to his notice subsequently in the course of proceedings under s. 147."*

7.3.4 CIT Vs. Software Consultants 341 ITR 240 (DEL.) (DPB 59-62)

In that case pursuant to a notice u/s 148 ROI was filed declaring loss however, the reassessment order was made on 28.03.2002 making no addition and accepting the source of the

investment in the FDR of Rs. 20 Lakhs which was the alleged escaped income in the reasons recorded. The Ld. CIT u/s 263 directed the AO to conduct further enquiry i.r.t. share application money of Rs. 47 Lakh. The Hon'ble ITAT however, quashed the order u/s 263 as no addition on the issues raised in the reasons recorded i.e. escaped income of Rs. 20 Lakh, was made hence no further addition was permissible u/s 147. The same was upheld by the Hon'ble High Court holding as under:

> *"14. For exercise of power under s. 263, it is mandatory that the order passed by the AO should be erroneous and prejudicial to the interest of the Revenue. In the present case, the AO did not make any addition for the reasons recorded at the time of issue of notice under s. 148. This position is not disputed and disturbed by the CIT in his order under s. 263. Sequitur is that the AO could not have made an addition on account of share application money in the assessment proceedings under s. 147/148. Accordingly, the assessment order is not erroneous. Thus, the CIT could not have exercised jurisdiction under s. 263 of the Act."*

7.3.5 Also kindly refer Vipin Khanna 255 ITR 220 (PLisH)

8. Analogous law also supports the contention:

8.1 A somewhat similar legal factual position arose in the cases where assessment has been selected for limited scrutiny purposes. The law is well settled that in the limited scrutiny assessment, the AO cannot be expected to make enquiry only to the extent of the reason/ basis of selection of the case for the

limited scrutiny and therefore, the CIT cannot invoke S. 263 on the issues, which were not made basis for selection of the case. Obviously for the reason that the AO is not legally entitled to enter into those issues, not selected for first scrutiny. Here also the scope inquiry of section 263 is limited to the extent of the reasons to believe but not beyond that.

8.2 Supporting Case Laws: Kindly refer Mahendra Singh Dhankar (HUF) vs. ACIT, (2021) 35 NYPTTJ 458 (Jp) (DPB 81-90) held that:

> *"Revision—Erroneous and prejudicial order—Limited scrutiny assessment—Case of the assessee was selected for limited scrutiny under CASS on account of mismatch of sales turnover as reported in audit report, ITR, AIR and CIB data—AO issued notice under s. 143(2) and enquired about the issues under consideration—Being satisfied, the AO completed the assessment under s. 143(3) without any adverse finding regarding the issues for which the matter was selected for limited scrutiny—Scope of enquiry in case of limited scrutiny is limited to the extent of the issues for which case is selected for scrutiny under CASS—However, in case during the assessment proceedings the AO is of the view that substantial verification of other issue is also required, then the case may be taken up for comprehensive scrutiny with the approval of the Principal CIT/ Director of IT concerned—Without following said procedure and necessary approval of the competent authority, conducting an enquiry on the issue which is outside the limited scrutiny would be beyond the*

jurisdiction of the AO—Therefore, where the matter is selected for limited scrutiny, revisional jurisdiction cannot be exercised for broadening the scope of jurisdiction that was originally vested with the AO while framing the assessment—For the purposes of converting limited scrutiny to complete scrutiny, what is relevant is that there must be some credible material or information on face of the record indicating that there is possibility of underassessment of income if the case is not examined under 'complete scrutiny'—In the instant case, there was no tangible material or information available during the course of assessment proceedings basis which reasonable belief can be formed of escapement or underassessment of income which could have led the AO to seek permission to convert limited scrutiny into complete scrutiny—Issue of valuation of closing work-in-progress as well as matter relating to agriculture income, which are held by the Principal CIT as matters not examined by the AO, are matters which are not part of the reasons for which the case was selected for limited scrutiny—As far as matters for which case was selected for limited scrutiny in terms of mismatch of sales turnover is concerned the Principal CIT has not recorded any adverse findings in terms of lack of enquiry or inadequate enquiry on part of the AO—Therefore, the order passed by the Principal CIT under s. 263 is set aside and the order of the AO is sustained."

8.2.1 CIT v/s Smt. Padmavathi (2020) 4 NYPCTR 682 (Mad)

8.2.2 Su-Raj Diamond Dealers (P) Ltd. v/s PCIT (2020) 203 TTJ (Mumbai) 137

8.2.3 Nayek Paper Converters vs. ACIT (2005) 93 TTJ (Cal) 574

9. No valid assessment order in existence - Sec.263 Cannot be invoked

9.1 It is submitted that the law u/s 263 contemplates the existence of a legally valid order. If there is no order, there cannot be any revision and hence sec.263 cannot be invoked w.r.t. such invalid non-existent order. In the instant case also, AO has not at all made any discussion on issues in the reasons to believe (reproduced above), what to talk of making additions thereon. Consequently, therefore, the subjected re-assessment order dated 30.03.2022 subjected to revision, is completely non-existent being legally invalid and therefore the same could not be revised u/s 263. Other additions than what was stated in the Reasons, could not be made as already submitted in detail in this written submission and the cases of Jet Airways (supra), Ram Singh (Supra) and so on cited.

9.2 Supporting Case Laws:

9.2.1 In the case of Supersonic Technologies (P) Ltd. Vs. Principal Commissioner of Income Tax (2019) 197 TI'J (Del) 889 (DPB 63-80), it was held that:

> *"It is well-settled law that before passing the reassessment order, AO shall have to prepare and serve notice upon the assessee under s. 143(2). The Principal CIT observed that "no formal notice under s. 143(2) has been issued to the assessee". Therefore, these facts*

clearly show that before framing the reassessment order under s. 147/ 148, no notice under s. 143(2) was prepared, issued and served upon the assessee. Therefore, reassessment order is illegal, invalid and bad in law and is liable to be set aside. It is well-settled law that assessee can challenge the validity of the reassessment proceedings in the collateral proceedings (relating to examination of validity of order passed) under s. 263. Since the reassessment order itself is bad in law, counsel for the assessee, rightly contended that the same cannot be revised under s. 263. Only valid reassessment order can be revised under s. 263. On this ground itself the proceedings under s. 263 are bad in law and liable to be quashed. Accordingly, the order of the Principal CIT passed under s. 263 is set aside and the same is quashed. —CIT vs. CPR Capital Services Ltd. (2011) 330 ITR 43 (Del), Principal CIT vs. Silver Line (2016) 283 CTR (Del) 148: (2016) 129 DTR (Del) 191 : (2016) 383 ITR 455 (Del) and Westlife Development Ltd. vs. Principal CIT (2016) 49 ITR (Trib) 406 (Mumbai) followed. (Para 6.1)"

9.2.2 The Hon'ble Delhi High Court in the case of Principal CIT vs. Silver Line (2016) 283 CTR (Del) 148: (2016) 129 DTR (Del) 191 (2016) 383 ITR 455 (Del) held that:

"Order of reassessment cannot be passed without notice under s. 143(2) of the IT Act. The jurisdictional error cannot be cured by s. 29288 of the IT Act". It is well settled law that before passing the reassessment order, AO shall have to prepare and serve notice upon assessee

under s. 143(2) of the IT Act. The learned Principal CIT, however, observed that "no formal notice under s. 143(2) has been issued to the assessee". Therefore, these facts clearly show that before framing the reassessment order under ss. 147/ 148 of the IT Act, no notice under s. 143(2) have been prepared, issued and served upon the assessee. Therefore, reassessment order is illegal, invalid and bad in law and is liable to be set aside. V is well settled Law that assessee can challenge the validity of the reassessment proceedings in the collateral proceedings (relating to examination of validity of order passed) under s. 263 of the IT Act. We rely upon the order of Tribunal, Mumbai Bench in the case of Westlife Development Ltd. vs. Principal CIT (2016) 49 ITR (Trib) 406 (Mumbai) in which it was held "allowing the appeal (i) that jurisdiction aspect of the order passed in the primary proceedings can be examined in collateral proceedings also. Thus, the assessee could be permitted to challenge the validity of the order passed under s. 263 on the ground that the assessment order was non est. Since the reassessment order itself is bad in law, therefore, learned counsel for the assessee, rightly contended that the same cannot be revised under s. 263 of the IT Act. Only valid reassessment order can be revised under s. 263 of the IT Act. On this ground itself the proceedings under s. 263 of the IT Act are bad in law and liable to be quashed. We accordingly, set aside the order of learned Principal CIT passed under s. 263 of the IT Act and quash the same. In

view of the above, the remaining pleas of the assessee are not required to be adjudicated

10. Clear attempt to win limitation already expired u/s 148/149: Apparently, the limitation for taking action u/s 147/148 of the Act has already got time barred in as much as the provisions of section 149, a notice u/s 148 could have been issued only within a period of six years from the end of relevant assessment year i.e. AY 2012-13 which, in the present case falls on dated 31.03.2019 and therefore, no further action u/s 147 was permissible. The ld. CIT being conscious of this fact, issued the showcase notice under S. 263 on 23.02.2022, taking altogether new grounds, which were not part of reasons to believe and hence was unable, from taking any remedial action under s. 147 within the permissible time limit i.e. before 31.03.2019. The ld. CIT, having noted contrary decisions as mentioned in the subjected assessment order, raised altogether new issue (not being a part of the reasons to believe). Thus, the time limit having already gone for taking an action under legally appropriate provision of law, such an attempt on the part of the id. CIT in relation to the assessment year 20012-13, after a lapse of a long period of more than 9 years, is not permissible. It is settled that what cannot be done directly cannot be done indirectly. Needless to say, such an attempt, has got the effect of unsettling the right and obligations already settled between the parties long back. The legislature never intended and permits any party to take action after such a long period. Therefore, the impugned order u/s 263 deserves to be held without jurisdiction.

In view of the above submissions and the judicial guideline, the impugned order passed u/s 263 deserves to be quashed.

The above submissions have been made based on the instructions and the information provided of/ by the client."

6. On the other hand, Ld. CIT DR opposed these submissions and supported the orders of the authorities below. Ld.CIT DR drew our attention to the assessment order paras 4.9 & 4.10. He submitted that the AO after having concluded that from the point of view of common man and general public, the institution was doing same activity which was done by a builder or a developer. This activity was considered by general public as business, trade or commerce so this activity is in the nature of business, trade or commerce. He submitted that despite having concluded that the activity is hit by mischief of section 2(15) of the Act, the AO proceeded to assess income u/s 143(3) of the Act at Rs.NIL. Hence, he submitted that *ex facie* the assessment order is erroneous insofar as it is pre-judicial to the interest of the revenue. He further contended that case laws as relied by the Ld. Counsel for the assessee, are distinguishable on the facts. He placed reliance on the judgement of Hon'ble Supreme Court in the case of *ACIT(E) vs Ahmedabad Urban Development Authority [2022] 329 CTR 297 (SC).*

7. We have heard Ld. Authorized Representatives of the parties and perused the material placed on record. We find that Ld.CIT(Exemption) in notice issued u/s 263 of the Act observed as under:-

> *"Assessee had a surplus income of Rs.1,46,35,951/-. It had further claimed capital expenditure of Rs.5,25,52,586/-. Since the assessee hit by provision of section 2(15) of the I.T.Act, 1961 the total taxable income comes to Rs.6,71,88,566/-."*

8. In view of the aforesaid, he held that the assessment order passed u/s 147 r.w.s 143(3) of the Act in assessee's own case for AY 2012-13 on 12.12.2019 was erroneous insofar as it was pre-judicial to the interest of the Revenue. We find that the AO in paras 4.9 and 4.10 of the assessment order has observed as under:-

> *4.9 "Regarding sale of plots, which is included in the development receipts the properties such as residential and commercial are sold. The amount received shows the magnitude and nature of the main activity carried out by the institution. Commercial principal of business is to derive maximum price of the product/service of the business and the institution is following the same principal by selling property. Builders or real estate developers do the same activity which is being done by the assessee such as purchase and sale of land at commercial principles and rates, development of land and*

sale by auction or otherwise. There is no difference in the activity of the assessee arid businessman as both try to sell the property, If it were not doing activities in the nature of business, it would have been selling property at lesser rate to public charitable trust / institutions but this is not the case. No concession is given considering the purpose of the purchaser, which may be charity or personal use or commercial. The same principal is followed by the businessman then how the assessee can claim that its activities are not in the nature of trade, business or commerce. ***From the point of view of common man and general public, the institution is doing same activity which is being done by a builder or developer. This activity is considered by general public as business, trade or commerce. So this activity is in the nature of trade, commerce or business.***

4.10 In my opinion, the though the assessee trust's activities fall under the ambit of "general public utility", they are of commercial nature and covered by first and second proviso of section 2(15) of the Income Tax Act, 1961. Even though the assessee is registered under section 12AA, no benefits of Section 11 and 12 can be provided to the assessee trust vide amended provisions of section 13(8)(effective from 01.04.2009) read with first and second proviso of section 2(15). Section 13(8) is being reproduced here for the sack of convenience. Section 13(8) says that "Nothing contained in section 11 or section 12

shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in the said previous year." Thus, fact that the assessee, Ajmer Development Authority is registered under 12AA or not does not make any difference as the first and second proviso of section 2(15) and the amended provisions of section 13(8) are applicable."

9. However, in para 5, the AO assessed income of the assessee at Rs.NIL. Therefore, it is not the case that the issue related to section 2(15) of the Act, was not under consideration before the Assessing Authority. In our considered view, any issue which was considered by the AO in the assessment order, such order would be open for revision u/s 263 of the Act, if such order is erroneous and pre-judicial to the interest of justice. The controversy related to application of section 2(15) of the Act, has now been set at rest by the decision of the Hon'ble Supreme Court in the case of *ACIT(E) vs Ahmedabad Urban Development Authority* (supra) by holding that as per provision of section 2(15) of the Act, such advancement of the object would not be considered charitable if an institution is engaged in "trade, commerce or business" or provides any service relating to "trade, commerce or business" for which cess, fee or other consideration is received. In the case in hand, the AO despite

having recorded that though the assessee trust's activity fall under the ambit of "general public utility", they are of commercial in nature and are covered by first and second proviso of section 2(15) of the Act. However, he erroneously assessed income of the assessee at Rs.NIL. Thus, the case laws relied by the Ld. Counsel for the assessee would not help as it is the clear case where the assessment order is erroneous and self-contradictory. Under these undisputed facts, there is no infirmity in the order of Ld.CIT(E) in revising the assessment under section 263 of the Act. Thus, grounds raised by the assessee are devoid of merit hence, dismissed.

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

S.A.No.-03/Jodh/2023 [In ITA No.89/Jodh/2022]
(ASSESSMENT YEAR- 2012-13)

11. Now, we take up **Stay Application No.03/Jodh/2023** pertaining to **AY 2012-13** filed by the assessee. By way of this stay application, the assessee is seeking stay of the operation of the impugned order.

12. Ld. Counsel for the assessee reiterated the submissions as made in the stay application. For the sake of clarity, the relevant contents of the submissions of the assessee are reproduced as under:-

1. "That the appellant derives income from maintenance and development of areas and civic amenities including sale of land within Ajmer District. In this case, the subjected assessment was completed vide order dated 12.12.2019 u/s 143(3) N.s. 147 by the ACIT(E), Circle (Exemption), Jodhpur (the AO), at NIL income.

2. That thereafter, proceedings u/s 263 were initiated with reference to the said order on the following grounds:

a. That the assessee has a surplus income and had also claimed capital expenditure.

b. That activity of the assessee falls within the scope of proviso to S. 2(15) of the Income Tax Act, 1961.

3. That in response to the show cause notice, the assessee filed detailed written submission dated 16.03.2022 along with paper book before the Id. CIT(E), Jaipur. The Id. CIT(E), Jaipur however, feeling dissatisfied, rejected the contentions and held the assessment order u/s 143(3) dated 12.12.2019 erroneous and prejudicial to the interest of revenue vide impugned Order u/s 263 dated 30.03.2022 holding that ***though the AO has denied the benefits of Section 11 and 12 of the Act to the assessee but at the same time, failed to tax the surplus income of Rs. 1,46,35,981/- and disallow the claimed capital expenditure of Rs.5,25,52,586/-. Since, the assessee was hit by provision of section 2(15) of the I.T. Act, 1961 the total taxable income comes to Rs.6,71,88,566/- (Rs.1,46,35,981/- + Rs.5,25,52,586/), therefore, the assessment done at NIL income by the AO is erroneous.*** *Accordingly, the subjected assessment was set*

aside to the AO to do de novo assessment on the issues discussed in the order.

4. That feeling aggrieved, the appellant filed an appeal before the Hon'ble ITAT Jaipur on dt. 02.06.2022 vide acknowledgement no. 1652955419 and registered as ITA no. 89/JODH/2022. [However thereafter, the appeal was transferred to the Hon'ble ITAT Jodhpur]

5. That the said ***appeal is lying pending before the Hon'ble ITAT Jodhpur*** *for want regular functioning in absence of the regular posting of the Hon'ble members al Jodhpur.*

6.1 That Pertinently, ***prima facie there is a very strong case in favour of the applicant assessee*** *in as much as the Id. CIT(E)* ***seriously lacked a valid jurisdiction*** *u/s 263 for the simple reason that (1) The Reasons to Believe recorded u/s 148(2) of the Act states that cash deposits in bank account of Rs. 16.79 crores, interest income of Rs. 20.07 lakh and purchased property at Rs. 17.77 crores totalling to Rs 34.86 crores has escaped assessment. However, the issue of denial for benefit u/s 11&12 in view of the application of S. 2(15) Proviso has never been raised in these reasons as done by the learned CIT(E) now is under challenge. In the reassessment proceeding u/s 147, the AO was supposed to have assessed the income in accordance with the reasons recorded only and not beyond that. On the contrary however,* ***the Id. CIT(E) has not at all whispered/ applied his mind on the reasons to believe but proceeded to find faults of the AO on different grounds which were not part of reasons nor of the subject matter for reassessment.*** *Further once, the alleged escaped*

income of 34.86 crores not having been added to the declared income, no other income could be added in any manner whatsoever (viz. surplus income of 1.46 crore and capital expenditure of 5.26 crore totalling to 6.77 crore) as noted by the CIT(E) based on which, the assessment order was held erroneous. Reliance is placed on CIT vs. Jet Airways (I) Ltd (2011) 239 CTR 0183 : (2011) 331 ITR 0236 and CIT vs. Shri Ram Singh (2008) 306 ITR 343 (Raj).

6.2 That otherwise also there has been due application of mind by the AO and detailed verification was made in as much as the AO issued a show cause to which a detailed reply was submitted starting from Pg. 4 till Pg. 14 of the assessment order wherein, reliance was placed on several case laws and detailed submission were made even on the aspect the proviso to S. 2(15) of the Act that the same was not applicable in the case of the assessee. Attention of the AO was also drawn towards the above order of the ITAT (vide ITA No. 1019/JPR/2011 dated 16.02.2015), though relating to the issue of registration u/s 12AA of the Act, yet however, the aspect of second proviso to S. (15) of the Act, was also involved.

6.3 Pertinently in various years in the past from AY 2005-06 to 07-08 and AY 2009¬10 to 2011-12, also notices were issued u/s/ 148 of the Act in the case of the then U IT, Ajmer (predecessor of ADA). However, considering the fact that the applicant assessee was enjoying benefit of S.11&12 having registration u/s 12AA, assessments were completed at Nil income and have attained finality. ***The AO thus, acted in accordance with the law and took a plausible view."***

13. On the other hand, Ld.CIT DR opposed these submissions and submitted that the assessee by way of present stay application is misusing the process of law as the issue has been decided against the assessee by the Hon'ble Supreme Court.

14. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The present stay application has been filed in Appeal No.89/Jodh/2022 pertaining to AY 2012-13. The hearing of the appeal has been concluded. Therefore, considering the rival submissions and material placed before us and in the light of the judgement of Hon'ble Supreme Court and clear contradiction in the finding of Assessing Authority, the assessee has not made *prima facie* case in its favour. We therefore, dismiss this stay application filed by the assessee.

15. In the result, the stay application filed by the assessee is dismissed.

16. In the final result, the appeal in **ITA No.89/Jodh/2022** and **Stay Application No.3/Jodh/2023** filed by the assessee, both are dismissed.

Order pronounced in the open Court on 22/03/2023.

Sd/-	***Sd/-***
(MANISH BORAD)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Amit Kumar

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File

Asstt. Registrar
Jodhpur Bench