

**THE INCOME TAX APPELLATE TRIBUNAL,
'B' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. Nos. 1274/KOL/2023
Assessment Year: 2012-2013**

***Vrinda Engineers Pvt. Ltd.,.....Appellant
C/o. Subash Agarwal & Associates, Advocates,
Siddha Gibson,
1, Gibson Lane, Suite-213, 2nd Floor,
Kolkata-700069
[PAN: AAACV9131E]***

-Vs.-

***Principal Commissioner of Income Tax,....Respondent
Central-1, Kolkata,
Aayakar Bhawan Poorva,
110, Shantipally, E.M. Bypass,
Kolkata-700107***

-A N D-

**I.T.A. Nos. 1232/KOL/2023
Assessment Year: 2012-2013**

***Vrinda Engineers Pvt. Ltd.,.....Appellant
C/o. Subash Agarwal & Associates, Advocates,
Siddha Gibson,
1, Gibson Lane, Suite-213, 2nd Floor,
Kolkata-700069
[PAN: AAACV9131E]***

-Vs.-

***Assistant Commissioner of Income Tax,....Respondent
Central Circle-1(1), Kolkata,
Aayakar Bhawan Poorva,
110, Shantipally, E.M. Bypass,
Kolkata-700107***

Appearances by:

Shri Siddharth Agarwal, Advocate, appeared on behalf of the assessee

Shri Abhijit Kundu, CIT (DR), appeared on behalf of the Revenue

Date of concluding the hearing : January 25, 2024

Date of pronouncing the order : February 21, 2024

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee has challenged the order of Id. Principal Commissioner of Income Tax, Central-1, Kolkata dated 28.03.2023 passed under section 263 of the Income Tax Act, 1961 in A.Y. 2012-13. This order is being challenged in ITA No. 1274/KOL/2023, whereas in pursuance of the impugned 263 order, Id. Assessing Officer has passed a fresh assessment order on 29.12.2022. The appeal against this order also stands dismissed by the Id. CIT(Appeals), Kolkata-20 vide order dated 22.09.2023 and this order is being challenged by the assessee in ITA No. 1232/KOL/2023.

2. First we take **ITA No.1274/KOL/2023**. This appeal is time barred. In order to explain the delay, the assessee has filed an application. The application reads as under:-

BEFORE THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA

In the matter of:

Vrinda Engineers (P) Ltd.... Appellant

vs.

PCIT, Central -1, Kolkata....Respondent

In the matter of:

An application for condonation of delay in filing appeal before the Hon'ble Tribunal against the 263 order of the Ld. PCIT, dated 28.03.2022 for A.Y: 2012-13.

1. *That an assessment was completed u/s 143(3)/147 vide an order dated 30.09.2019 passed by DCIT, Central Circle-1 (1), Kolkata for A.Y 2012-13 wherein the AO assessed the income as per the returned income.*

2. *That meanwhile the Ld. PCIT initiated 263 proceedings and passed an order u/s 263 dated 28.03.2022 against the said assessment order 143(3)/147 considering the same as erroneous and prejudicial to the interest of Revenue.*

3. *That your petitioner approached its regular tax consultant to seek advice on receipt of order passed under section 263. He suggested your petitioner to participate in the subsequent assessment proceedings pursuant to the revision order u/s 263 and to pursue appellate remedy, if any adverse order is received in the said proceedings.*

*Copy of letter dated 01.04.2022 received from your petitioner's tax consultant is attached herewith and marked as **Annexure: 'A'**.*

4. *That thereafter an assessment pursuant to the order u/s. 263 dated 28.03.2022 was initiated and accordingly a notice u/s 142(1) dated 24.06.2022 has been issued.*

5. *That later after completion of the aforesaid assessment proceedings vide an order u/s 263/147/143(3) dated 29.12.2022 your assessee preferred an appeal before Ld. CIT(A), NFAC wherein the appeal was allowed partly vide an order dated 22.09.2023.*

6. *That then the assessee approached Sri Siddharth Agarwal, Advocate on or around 13.11.2023 to seek his advice in connection with the appellate order dated 22.09.2023. In the course deliberation, the said counsel advised to file an appeal against the order u/s 263 and then the appeal was accordingly prepared by him and the same was deposited in the office of the Hon'ble Tribunal on 28.11.2023 with a delay of around of 551 days.*

7. *That in view of the factors mentioned above, your petitioner most humbly submits that there is a reasonable cause for 551 days' delay in filing the appeal which may please be condoned and the case of your petitioner be heard on merit.*

In the circumstances, your petitioner prays that the delay in filing appeal before this Ld. Tribunal may kindly be condoned and the case be heard on merits or such order/orders be passed as this Ld. Tribunal deems fit and proper.

And for this kind act out of kindness, your petitioner as in duty bound shall ever pray.

FOR VRINDA ENGINEERS PVT. LTD.

Sd/-

Date: 28.11.2023

Director

3. On the strength of this application, it has been submitted by the assessee that after the 263 order, its regular Tax Consultant advised it to contest the assessment order and in case ld. Assessing Officer did not drop the assessment proceeding, then, challenged that order before the higher appellate forum and alongwith that the order of 263 could also be challenged. Due to this misunderstanding, the appeal was not filed. The ld. Counsel for the assessee prayed for condonation of delay and adjudication of the appeal on merit.

4. Ld. CIT(DR), on the other hand, contended that this appeal is time barred by more than 500 days. The assessee should be vigilant about prosecuting its income-tax litigation before appropriate forum and this ignorance of the procedure cannot be a ground to condone the delay.

5. With the assistance of the ld. Representatives, we have gone through the record carefully. Sub-section 5 of Section 253 contemplates that the Tribunal may admit an appeal or

permit filing of memorandum of cross-objections after expiry of relevant period, if it is satisfied that there was a sufficient cause for not presenting it within that period. This expression sufficient cause employed in the section has also been used identically in sub-section 3 of section 249 of Income Tax Act, which provides powers to the ld. Commissioner to condone the delay in filing the appeal before the Commissioner. Similarly, it has been used in section 5 of Indian Limitation Act, 1963. Whenever interpretation and construction of this expression has fallen for consideration before Honble High Court as well as before the Honble Supreme Court, then, Honble Court were unanimous in their conclusion that this expression is to be used liberally. We may make reference to the following observations of the Hon'ble Supreme court from the decision in the case of Collector Land Acquisition Vs. Mst. Katiji & Others, 1987 AIR 1353:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

6. Similarly, we would like to make reference to authoritative pronouncement of Honble Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy (supra). It reads as under:

“Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal Vs. The Administrator, Howrah Municipality [AIR 1972 SC 749]. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor.

But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss”.

7. We do not deem it necessary to re-cite or recapitulate the proposition laid down in other decisions. It is suffice to say that the Honble Courts are unanimous in their approach to propound that whenever the reasons assigned by an applicant for explaining the condonation of delay, then such reasons are to be construed with a justice oriented approach.

8. In the light of the above, let's examine the facts and circumstances of the case. A perusal of the record would reveal that after 263 order, the Id. Assessing Officer immediately took up the proceeding and passed the assessment order on 29.12.2022. Dissatisfied with the assessment order, the assessee has filed a Writ Petition before the Hon'ble Calcutta High Court bearing No. WPA/2181 of 2023. This Writ Petition was decided by the Hon'ble Court on 09.02.2023 and the Hon'ble Court has disposed of the Writ, by permitting the assessee to file an appeal against the assessment order. It should deposit 10% of the disputed tax within a period of ten days and the Id. CIT(Appeals)

would decide the appeal within six months. In this way, the quantum appeal has been decided on 22.09.2023.

9. Apart from the above observation, there is a checkered history for the assessment year 2012-13. During the course of hearing, ld. Counsel for the assessee has tabulated these details in the list of events and filed before us.

10. A perusal of all these materials would indicate that the assessee was always vigilant and has been prosecuting the income tax litigation. He has participated the scrutiny assessment passed on 13.11.2014 under section 143(3) of the Income Tax Act in this A.Y. Thereafter he participated in the reassessment proceeding, which was framed on 07.12.2018. The assessee thereafter again participated the second reassessment order and thereafter ld. Commissioner exercised the powers under section 263. It could not challenge this impugned order before the Tribunal under an impression that outcome of 263 in the assessment order could be challenged simultaneously. In other words, the assessee was of the view that while challenging assessment passed under section 147 r.w.s. 263, the assessee could take the grounds on order passed u/s 263 could be challenged. We are of the view that it is a bonafide procedural misconception based on its regular Tax Consultant's advice and this parallel proceeding in same assessment year repeatedly may give rise of some confusion. By making an appeal time barred, assessee will not gain anything. It cannot adopt as a delaying

strategy for litigating with the Department. Therefore, we condone the delay in filing the appeal and proceed to decide the appeal on merit.

11. The solitary grievance of the assessee is that ld. Commissioner has erred in taking cognizance under section 263 and setting aside the second reassessment order dated 30.09.2019. Before adverting to the show-cause notice issued under section 263, we deem it appropriate to take note of brief facts.

12. The assessee has filed its return of income electronically on 29.09.2012, which was revised on 30.09.2012 showing total income of Rs.1,48,03,950/-. This return was taken up for scrutiny assessment by issuance of a notice under section 143(2) of the Income Tax Act. After due enquiries, ld. Assessing Officer has passed an assessment order on 13.11.2014 determining the total taxable income of the assessee at Rs.1,59,17,780/-.

13. A survey under section 133A of the Income Tax Act was carried out upon the assessee on 01.03.2017. The ld. Assessing Officer thereafter recorded the reasons to reopen the assessment. He issued a notice dated 31.03.2018 under section 148 of the Income Tax Act. In this notice, the ld. Assessing Officer was of the view that DDIT (Investigation), Unit-1(2), Kolkata has transmitted the information that during F.Y. 2011-12, the assessee-company received funds amounting to Rs.31,25,000/- on transfer from the bank account of M/s. Aruna Traders (P) Ltd.

with Kotak Mahindra Bank Limited. The Id. Assessing Officer was of the view that the assessee could not supply the information regarding business link or nexus with the said concern, therefore, this transaction requires to be examined. He examined this transaction but did not make any addition. The assessment was passed on 07.12.2018 accepting the income determined in the original assessment order. In other words, no fresh addition was made under section 147 read with section 143(3) of the Income Tax Act.

14. The Id. Assessing Officer thereafter recorded the reasons for reopening of the assessment second time. Copy of such reasons has been placed on pages no. 10 & 11 of the paper book, which reads as under:-

“M/s Vrinda Engineers Private Limited (hereinafter “the assessee company”) filed its return of income for the assessment year 2012-13 electronically on 30.09.2012 declaring total income of Ra.1,4R,03,9B0/-. The said return was assessed u/s 143(3) of the Income-tax Act, 1961 (in short “the Act”) on 13.11.2014 by determining total Income of Rs. 1,89,17,760/-.

2. A credible information has been received from the Deputy Commissioner of Income Tax, Unit, 2(4), Kolkata wherein it was mentioned that Shri Ashutosh Agarwal, Director of Rupali financial consultants Pvt. Ltd. maintained a current account no. G28003300227 with ICICI Dank, Howrah Branch. It was reported that on perusal of bank statement, it was observed that huge amount was deposited in the aforesaid accounts through chuke/RTGS from different companies and immediately transferred to various entitles/companies on the same day or next day. To verify the transactions, summons were issued u/s 131 of the Act, to M/s Rupali financial consultants Pvt. Ltd but the summons was returned back unserved with postal remarks ‘not known’ & ‘Incomplete address’. Reportedly, after analysis of financial statement of M/s Rupali financial consultants Pvt. Ltd., it was found that the company has either low or nil turnover and very meagre

profit after tax. In view of the above, it was inferred that bank account of M/s Rupali financial consultants Pvt. Ltd. was used for providing accommodation entries to beneficiary companies. It is also observed that fund was transferred to bank accounts of Rupali financial consultants Pvt. Ltd from the bank accounts of Hariom Suppliers Pvt. Ltd., M/s Swampushpa Vanijya Pvt. Ltd, which are also shell/paper companies. Reportedly, M/s Rupali Financial consultants Pvt. Ltd. is a shell company, which is controlled and managed by entry operator Shri Ravi Newatia. During the year under consideration, the assessee-company has received a sum of Rs. 13,00,000/- from the bank account of M/s Rupali Financial consultants Pvt. Ltd.

3. The above facts prima facie indicate that fund was received by the assessee-company through Jamakharchi/Paper companies and as such the genuineness of transaction and creditworthiness of the aforesaid company are not satisfactorily established. Thus, it apparently indicates that the assessee-company has brought back its own unaccounted income in the regular books.

4. In view of the above findings from records and on the basis of aforementioned creditable information, I have reason to believe that income to the tune of Rs. 13,00,000/- chargeable to tax lms escaped assessment within the meaning of section 147 of the Act. In this case, though an assessment has already been made u/s 143(3) of the Act, it is held that the income chargeable to tax has been underassessed within the meaning of Explanation 2(c) (i) of Section 147 of the Act, and it is also held that Income has escaped assessment owing to the failure on the part of the assessee-company to disclose fully and truly all material facts necessary for its assessment for the assessment year 2012-13. In view of above, the assessment for the assessment year 2012-13 is required to be reopen in terms of the first Proviso to section 147 of the Act read with explanation 2(c)(1) of section 147 of the Act.

5. Put up for kind perusal and necessary sanction u/s 151 (1) of the Act, for issue of notice u/s 148 for the assessment year 2012-13.

15. The ld. Assessing Officer was again satisfied with the explanation of the assessee and did not make any addition. He

passed the reassessment order under section 147 read with section 143(3) of the Income Tax Act on 30.09.2019.

16. The Id. Commissioner perused the record and formed an opinion that assessment order dated 30.09.2019 is an erroneous order, which has caused a prejudice to the interest of revenue. Therefore, he assumed jurisdiction under section 263 of the Income Tax Act and issued a show-cause notice. The copy of the show-cause notice is placed at pages no. 22 & 23 of the paper book. Such notice reads as under:-

*OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME
TAX, CENTRAL-1, KOLKATA
3rd Floor, Aatakar Bhawan Poorva,
110, Shanti Pally, E.M. Bt-pass, Kolkata-*

*No. PCIT(C)-1 /263/Vrinda Engineer (P) Ltd./2021-22/ Dated
:03.03.2022*

*To
The Principal Officer
M/s. Vrinda Engineers (P) Ltd.
181 / B, Chittaranjan Avnue,
Kolkata-700007*

*Sir,
Sub: Proceedings uncr section 263 of the Income Tax Act,1961 for
the assessment year 2012-13.. matter regarding.*

*The assessment proceedings for the assessment year 2012-13 in
the case of your company was completed under section 147/143(3)
of the Income Tax Act,1961 (hereinafter referred to as "the Act")
vide order dated 30.09.2019 determining total income at
Rs.1,59,17,180/-.*

*2. On examination of the relevant records, it is noticed that a
survey under section 133A of the Act was conducted against your
company on 01.03.2017 & 02.03.2017 by the Investigation Wing,
Kolkata. In course of the survey operation, statement of Sri Jitendra
Kumar Saraogi, one of the directors of your company was recorded
under section 131 of the Act. Sri Saraogi in his statement admitted
to have paid brokerage @1.5% to 2% and part interest @1.5% to 2%*

in cash from unaccounted funds to the broker in respect of unsecured loans arranged by the finance brokers.

3. *In course of the reassessment proceeding, the AO examined the unsecured loan transaction amounting to Rs.1 5,00,000/- with M/s. Rupali Financial Consultants (P) Ltd. and no adverse inference was drawn. It is observed from the record that during the relevant financial year your company had received unsecured loans amounting to Rs 12,42,00,000/- from various loan creditors including M/s. Rupali Financial Consultants (P) Ltd. and outstanding unsecured loan increased from Ks.7,14,62,118/- as on 31.03.2011 to Rs.13,86,26,978/- as on 31.03.2012. The AO having reopened the case on the issue of unsecured loan had the obligation to examine the genuineness of all the unsecured loans shown to have been received by your company during the financial year 2011-12. Further, in view of the statement of the director of your company that brokerage and interest was paid in cash out of books to the finance brokers through whom the unsecured loans were arranged, the AO should have also enquired whether interest and brokerage in cash were paid out of books in respect of such unsecured loans.*

5. *However, the AO failed to make inquiries as stated above. As a result, the assessment order dated 30.09.2019 is found to be erroneous in so far as it is prejudicial to the interest of revenue in terms of clause (a) of Explanation-2 to section 263 of the Act. In order to revise the said assessment, proceedings u/s. 263 is being initiated herewith.*

6. *You are hereby afforded an opportunity to represent your case before the undersigned either personally or through your Authorized Representative with all supporting materials along with written submission on 11.03.2022 at 12:30 p.m., failing which, the proceedings may be decided on merit without any further reference to you.*

Yours sincerely

Sd/-

(NAVEEN CHANDRA)

Pr. Commissioner of Income Tax.Central-1 .Kolkata

17. The Id. Counsel for the assessee while impugning the order of Id. Commissioner raised three folds submission. In his first fold of submission, it was submitted that second reopening of the

assessment is bad in the eyes of law because this notice was issued after expiry of four years from the end of the relevant assessment year. The assessments have already been framed u/s 143(3) and under section 147 read with section 143(3). According to him, the interdiction provided in the 1st proviso would prohibit the ld. Assessing Officer to reopen an assessment, where assessment has been framed under section 143(3) of the Income Tax Act, and four years have expired from end of A.Y. In other words, ld. Assessing Officer will be precluded to take action under section 147 after expiry of four years from the end of A.Y., unless the assessee failed to declare its income fully and truly. The basic condition is that ld. Assessing Officer has to pinpoint the failure of the assessee in disclosing the details of its income fully and truly, which has attributed to escapement of assessment *qua* those incomes. A perusal of the show-cause notice issued under section 148, nowhere ld. Assessing Officer has alleged this aspect. He only made reference to Explanation 2C(i) of the Income Tax Act, but it is to be appreciated that in this case, not only scrutiny assessment has been passed but thereafter assessment was reopened and no adverse view was taken by the ld. Assessing Officer. For reopening the assessment second time, ld. Assessing Officer ought to be very categorical as to which detail was not disclosed by the assessee fully and truly. He submitted that this aspect is totally missing.

18. Ld. Counsel for the assessee further submitted that there could be a proposition at the end of Revenue that since the assessee was not agreed with the reassessment order passed on

this reopening and, therefore, it is not entitled to challenge any further proceeding on the ground that reopening was bad in the eyes of law. In support of his contention, he relied upon two decisions namely PCIT, Sambalpur Charge –vs.- Badal Prakash Jindal, HUF, Bargarh in ITA Nos. 8, 7, 8, 9 &10 of 2023 decided by the Hon'ble Orissa High Court on 02.03.2023. He has placed the copy of this decision on pages no. 10 to 23 of the paper book. He took us through this decision and submitted that in paragraph no. 9 of this order, while taking cognizance of the facts, Hon'ble Court has observed that one of the stands taken by the assessee before the ITAT was that reassessment proceeding is invalid, therefore, there could not be any 263 order *qua* such a foundation. This aspect has been upheld by the Hon'ble High Court. In support of this very proposition, he relied upon the next decision of the ITAT passed in the case of Westlife Development Limited –vs.- PCIT-5, Mumbai reported in 49 ITR (Trib.) 406 (Mumbai).

19. In his next fold of submission, he contended that the assessment was reopened on the ground that the assessee has received a sum of Rs.15,00,000/- from the Bank Account of M/s. Rupali Financial Consultants (P) Ltd. The genuineness of this transaction was to be investigated in the reopened assessment. The ld. Assessing Officer did not make any addition after due verification because a report from the Income Tax Inspector was called for in the original round, wherein this transaction was reflected at serial no. 1 of the report. Copy of this report dated 10.11.2014 is available on pages no. 16, 17 & 18 of the paper

book. If the ld. Assessing Officer has not made addition on an issue for which an assessment was reopened, then, any other issue cannot be taken. In other words, if assessment is being reopened on account of escapement of income on Point (A) and during the course of assessment proceeding, it revealed that apart from (A) income on Point (B) has also escaped, then, unless addition on Point (A) is being made, no addition is to be made qua Point (B). In this case, once addition of the sum received from M/s. Rupali Financial Consultants (P) Ltd. was not made by the ld. Assessing Officer in reassessment order that means no other item of loan or any other issue could be further enquired. For buttressing his proposition, he relied upon three decisions, namely – (i) Hon’ble Bombay High Court in the case of CIT -vs.- Jet Airways reported in 331 ITR 236, (ii) Hon’ble Delhi High Court in the case of Ranbuxy Laboratories reported in 336 ITR page 136 and (iii) Hon’ble Gujarat High Court in the case of Md. Juned reported in 353 ITR page 172. All these three Hon’ble High Courts are unanimous on the point that expression in section 147 would be construed in a way that if addition on a point for which assessment is being reopened is not made, then, no other addition would be made. The ld. Counsel for the assessee further contended that the ld. Commissioner in this impugned order did not doubt the veracity of acceptance of loan amounting to Rs.15,00,000/- from M/s. Rupali Financial Consultants (P) Limited by the ld. Assessing Officer in the reassessment order. He was of the view that apart from

the small transaction, there were other unsecured loan transactions, which ought to have been examined. its other transactions could have either been examined in the original assessment order. In case addition of Rs.15 lakhs is not made and no fault is being found by the ld. CIT, then any other addition cannot be enquired into.

20. In his third fold of contention, he submitted that the unsecured loan amounting to Rs.12.42 crores from various loan creditors is being reflected in the accounts. A scrutiny assessment was made and if ld. Assessing Officer failed to take action qua those loans, then error could be imputed to that assessment order. The ld. Commissioner is finding fault of loan verification of other unsecured loans but taken the limitation for his action under section 263 from the reassessment order, which is not a justifiable stand. For the sake of argument, if ld. Assessing Officer has committed an error of not examining all the loan transactions, then, that error crept in the original scrutiny assessment and that should have been corrected qua that order by the ld. Commissioner and not in reassessment order, which was reopened only qua one issue. He submitted that on this point, there is a direct decision of Hon'ble Supreme Court in the case of CIT, Chennai -vs.- Alagendran Finance Limited (2007) 293 ITR 1 (SC). He placed on record copy of this decision at pages 36 to 44 of the paper book.

21. The ld. CIT(DR), on the other hand, relied upon the finding of ld. Commissioner and submitted that once a specific information was transmitted by the ld. DDIT(Investigation), then, it was incumbent upon the ld. Assessing Officer to enquire of those loan transactions.

22. We have duly considered the rival contentions and gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

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

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

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

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

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

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

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

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding

or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

23. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a

show-cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the Id. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

- (i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted

to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO 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 AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

24. A perusal of the reasons (extracted supra) as well as the assessment order dated 29.12.2022, which was passed on these reasons would reveal that ld. Assessing Officer is making reference *qua* a search operation, which was conducted under section 132 of the Income Tax Act in the case of Mundra Group.

This search was carried out on 03.02.2017. He further observed that in consequence to this search, survey was also carried out on various companies. It is pertinent to note that survey was carried out upon the assessee also on 01.03.2017. The Id. Assessing Officer was of the view that DDIT(Investigation) has transmitted the information showing that in lieu of certain commission, these companies have taken entries of loan from various shell companies. Now the date of this information is not discernable in the reasons recorded by the Id. Assessing Officer on second occasion, whereas the first reassessment order was passed on 07.12.2018. This reassessment order also talks about DDIT (Information) based upon the search upon the Mundra Group. Therefore, the reasons are totally vague about the source of information. What is the exact information and when it was transmitted to the Id. Assessing Officer and if it relates to before the earlier two assessment orders, i.e. scrutiny assessment as well the first reopening, then, where is the fault of the assessee. A perusal of the reasons further indicates that Id. Assessing Officer has not made out any case within the proviso attached to section 147 of the Income Tax Act. In other words, Id. Assessing Officer has not highlighted which information or details was not declared by the assessee fully and truly in its accounts. Therefore, we are of the view that this reopening is not sustainable and if this reopening is not sustainable, then notice of 263 could not be issued. It is observed that since no addition was made by the Id. Assessing Officer, therefore, there was no occasion to challenge its reopening before the higher appellate forum but once Id. Commissioner took cognizance under section 263, then, the

assessee has every right to defend itself, even before the ld. Commissioner for dropping of the 263 proceeding on the ground that reopening is bad in the eyes of law. We are fortified by the two decisions referred by the ld. Counsel for the assessee. i.e. by the Hon'ble Orissa High Court in the case of Badal Prakash Jindal, HUF (supra) and by the Hon'ble ITAT Mumbai in the case of Westlife Development Limited (supra).

25. Now we take second fold of contention. There is no dispute that assessment was reopened for escapement of income of Rs.15,00,000/-. No addition was made of this item. The ld. Commissioner has not categorically recorded in the show-cause notice that acceptance of Rs.15,00,000/- is erroneous at the end of the ld. Assessing Officer. His show-cause notice just reflects all narrative of facts. Nowhere analytical examination for forming belief that ld. Assessing Officer has failed to conduct a particular enquiry *qua* loan of Rs.15,00,000/- from M/s. Rupali Financial Consultants (P) Ltd. He simply observed that apart from this loan, there are other unsecured loan transaction, which remained to be examined and if no error is being found *qua* acceptance and genuineness of the loan from M/s. Rupali Financial Consultants (P) Ltd., no other issue could be examined. The ld. Commissioner has erred in travelling in that area. This aspect is fully covered by unanimous opinion of three Hon'ble High Courts i.e. – (i) Hon'ble Bombay High Court in the case of CIT -vs.- Jet Airways reported in 331 ITR 236, (ii) Hon'ble Delhi High Court in the case of Ranbuxy Laboratories reported in 336 ITR page 136 and (iii)

Hon'ble Gujarat High Court in the case of Md. Juned reported in 353 ITR page 172.

26. Now we come to third proposition. A perusal of the show-cause notice issued by the ld. Commissioner would reveal that in paragraph no. 3, he recorded as under:-

“it is observed from the record that during the relevant financial year your company had received unsecured loans amounting to Rs.12,42,00,000/- from various loan creditors including M/s. Rupali Financial Consultants (P) Ltd. and outstanding unsecured loan increased from Rs.7,14,62,118/- as on 31.03.2011 to Rs.13,86,26,978/- as on 31.03.2012. The AO having reopened the case on the issue of unsecured loan had the obligation to examine the genuineness of all the unsecured loans shown to have been received by your company during the financial year 2011-12”.

The above observation of the ld. Commissioner would reflect that he was taking note of the fact only from the accounts of the assessee. Thus such aspect should have been examined at the first step when scrutiny

assessment was made. It cannot be put off for waiting reopening of assessment in 2019 so that exercise under section 263 would be carried out in 2022. This aspect has been examined by the Hon'ble Supreme Court in the case of CIT -vs.- Alagendran Finance Limited reported in 293 ITR 1 (SC). The brief facts in that case are that the assessee i.e. Alagendran Finance Limited was incorporated under the Indian Companies Act. It filed its returns for A.Ys 1994-95, 1995-96 and 1996-97 on 23.11.1994, 27.11.1995 and 26.11.1997 respectively. The ld. Assessing Officer has passed the assessment order in all these three years on 27.02.1997, 12.05.1997 and 30.03.1998 in A.Y. 1994-95, 1995-96 and 1996-97 respectively. In these orders, one of the issue was lease equalisation fund and this claim of the assessee was accepted by the ld. Assessing Officer. These assessments were thereafter reopened on 05.03.2004 and the reassessments were completed on 28.02.2002 (it appears that there is some error on the date). The ld. Commissioner took cognizance under section 263 on 29.03.2004. In this background, Hon'ble Supreme Court has held as under:-

“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 Commissioner of Income Tax 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-section (2) of Section 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 Commissioner of Income Tax beyond the period of

limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity.

16. The Tribunal and the High Court, therefore, in our opinion were correct in passing the impugned judgment. The appeal, therefore, being devoid of any merit is dismissed with costs. Counsel's fee assessed at Rs. 25,000/-.

27. In the present case, the original assessment was passed under section 143(3) on 13.11.2014. The process of computation of income commenced when assessee has filed the return of income on 29.09.2012 and it attained finality on 13.11.2014 when scrutiny assessment was passed. Thereafter all reopening would be taken up *qua* any escaped income. In none of the notices of reopening issued, all unsecured loans were ever taken up by the ld. Assessing Officer. Therefore, if any error has crept in the computation of income, then, it should be construed when the original assessment order under section 143(3) was passed. Ld. Commissioner should find fault in this order and should take corrective measure *qua* this order under section 263, but he did not and by now the time limit to take action under section 263 has expired. In sub-section (2) of section 263, it has been contemplated that no order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which orders sought to be revised, was passed. The original error crept in the assessment order dated 31.11.2014. The two years from end of March, 2015 ought to be calculated. Therefore, the third fold of contention is fully covered by the decision of the Hon'ble Supreme Court and this 263 notice is not sustainable.

Taking into consideration all these three fold of contentions raised by the assessee, we are of the view that the impugned order passed under section 263 is not sustainable.

28. Now we take **ITA No. 1232/KOL/2023**. This appeal is directed against the order of Id. Commissioner of Income Tax (Appeals), Kolkata-20 dated 22nd September, 2023. The foundation of this appellate proceeding is an assessment order, which has been passed in consequence of 263 order. Once the very 263 order has been quashed, then, the foundation to pass the impugned assessment order dated 29.12.2022 under section 263 read with sections 147 and 143(3) is not sustainable. The assessment order would be without jurisdiction and accordingly we allow this appeal also by quashing both the orders.

29. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 21/02/2024.

Sd/-

Sd/-

(Manish Borad)
Accountant Member

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 21st day of February, 2024

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- (4) *CIT- , Kolkata*
- (5) *The Departmental Representative;*
- (6) *Guard File*

TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.