

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER

I.T.A. No. 2594/Mum/2024
Assessment Year: 2020-21

Raghuleela Estates Private Limited 301 Platina, Plot No. C-59, G Block Bandra Kurla Complex Bandra East Maharashtra - 400098 [PAN: AAACW5273G]	Vs	PCIT (Central), Mumbai-3, Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Madhur Agarwal, A/R
Revenue by :	Smt. Sanyogita Nagpal, CIT, D/R

सुनवाई की तारीख/Date of Hearing : 13/08/2024
घोषणा की तारीख/Date of Pronouncement : 20/08/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM :

This appeal by the assessee is preferred against the order dated 26/03/2024, framed u/s 263 of the Act by the PCIT (Central), Mumbai-3 (in short 'PCIT'), pertaining to Assessment Year 2020-21.

2. The sum and substance of the grievance of the assessee is that the PCIT erred in assuming jurisdiction u/s 263 of the Act and further erred in holding that the assessment order dated 31/03/2022 framed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the revenue.

3. Briefly stated the facts of the case are that, the assessment order was framed in the name of Wadhwa & Associates Realtors Pvt. Ltd.,

whereas the assessee got amalgamated with Raghuleela Estates Pvt. Ltd., as per the order dated 11/02/2021 of the NCLT, Mumbai with the appointed date being 01/10/2019. The effective date of amalgamation was 17/12/2021. All these facts have been mentioned by the AO in the body of the assessment order. Therefore, at the very outset, we have no hesitation in holding that the assessment order has been framed in the name of a non-existing assessee and the PCIT grossly erred in assuming jurisdiction u/s 263 of the Act in the case *non-est* entity.

4. On identical facts the Hon'ble Jurisdictional High Court of Bombay in the case of *Pr. CIT vs. M/s. Westlife Development Ltd. in ITA No. 1168 of 2017*, held as under:-

“2. In a nutshell, the Assessing Officer had passed an order of assessment order, admittedly, against non existing entity. Against that order, CIT exercising his powers under [Section 263](#) of the Act set aside the order of the Assessing Officer and remanded the matter back for a *denovo* consideration. The Assessing Officer had also not considered certain points regarding valuation of shares and payments for those shares. The assessee-respondent preferred an appeal before the ITAT against the order of remand of CIT and the ITAT had passed an order setting aside the order of CIT on the grounds that any order against non existent entity is bad in law. The ITAT held that framing of assessment against non existing entity would go to root of *Meera Jadhav 2/2 407.ITXA-1168-17.doc* matter and was not mere procedural irregularity, but a jurisdictional defect. ITAT held that assessment proceedings having been initiated against the non existing company even after amalgamation of assessee company with another company were illegal, and thus order passed under such proceedings was without jurisdiction and null and void.

3. Aggrieved by this order of ITAT this appeal has been preferred. We totally agree with the view expressed by ITAT that framing of assessment against non existing entity would go to the root of matter and was a jurisdictional defect. The assessment proceedings against non existing company was illegal and any order passed therein was without jurisdiction and null and void as held by this court in the matter of [Alok Knit Exports Ltd. Vs. The Deputy Commissioner of Income Tax Circle 6\(1\)\(1\) & Anr.](#)

4. In our view, the ITAT has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

5. The appeal is devoid of merits and it is dismissed with no order as to costs.

5. But for the sake of completeness, we would like to refer to the notice dt. 29/06/2021 u/s 143(2) of the Act wherein one of the issues of which further verification is required was "high interest expenditure/finance costs", and the assessee vide his reply dated 27/08/2021 furnished the details of "interest expenditure/finance costs". Vide notice dated 23/03/2022 u/s 142(1) of the Act, the AO further raised the following query:-

"2. It is seen that there is large claim of expenditure (Rs.50.76 Crores) on account of interest. At the same time, there are non current investments of Rs.671 Crores, long term loans and advances of Rs.15.90 Crores, short term loans and advances of Rs.687.44 Crores and other investments. These advances and investments exceed the own funds. In the light of the above, please explain and justify your claim of deduction of interest expenditure against 'Income from House Property' and 'Income from Other Sources'; clearly establishing the nexus between the income earned and the interest expenditure claimed against the same."

6. Vide reply dated 28/03/2022, the assessee furnished details of claim of deduction of interest expenditure against income from house property u/s 24B of the Act and income from other sources u/s 57(iii) of the Act and the details are as under:-

Wadhwa & Associates Realtors Pvt Ltd
Assessment Year : 2020-2021

Interest Working u/s 24B	
Particulars	Amount
Loan Funds	
Loan O/s from HDFC Limited as on 30/09/2019	10,68,44,55,804
Loan O/s from Piramal Capital & Housing finance Ltd as on 30/09/2019	1,15,23,99,444
Total Loan Funds Available	11,83,68,55,248
Less : Loan utilised for Construction of Property	1,15,23,99,444
Total Loan funds Availble (A)	10,68,44,55,804
Owned Funds	
Share Capital as on 01/04/2019	8,01,00,000
Reserve & Surplus as on 01/04/2019	-2,68,19,527
Lease Deposit as on 01/04/2019	60,74,61,757
Loss from Partnership Firm as on 30/09/2020	77,31,389
Depreciation on Platina Building	3,03,90,330
Total Own funds Available (B)	69,88,63,949
Total Funds Available (A+B)	11,38,33,19,753
% of Loan Funds (A/A+B*100%)	93.86%
% of Own Funds (B/A+B*100%)	6.14%
Investment in Platina Building Book Value as on 01/04/2019 (C)	3,84,74,36,004
Less: Own Funds (C *% of Own Funds) (6.14%)	23,62,08,275
Investment finance through loan funds (i.e. 93.86%)	3,61,12,27,729
Weighted Average rate of Borrowings	10.28%
Interest Eligible for u/s 24B for Platina Building	37,12,34,211
Interest allowed u/s 24B for Platina Building for Half yearly (ii)	18,56,17,105

Wadhwa & Associates Realtors Pvt Ltd (WARPL)

Assessment Year : 2020-21

Note on claiming Interest expenses 57(iii) of the Income Tax Act

During the year under consideration under a scheme of amalgamation under section 230 to 232 of the Companies Act, 2013 the assessee Company was amalgamated with Raghuleela Estate Pvt. Ltd (REPL) as per the order dated 11/02/2021 issued by the National Company Law Tribunal, Mumbai Bench, Mumbai. The appointed date of amalgamation is 01/10/2019. The scheme has come into effect from 18/03/2021 being the date on which the certified copy of the order of the NCLT is filed with the Registrar of Companies, Mumbai. As per the Scheme of Amalgamation, all assets, properties and all liabilities comprised in the business of Wadhwa & Associates Realtors Pvt. Ltd of whatsoever nature is transferred to and vested with REPL.

The assessee had filed its original return of income for the assessment year 2020-21 on 15/02/2021 i.e. declaring total income at Rs 41,00,52,840/- prior to the order of the NCLT (amalgamation with Raghuleela Estate Pvt. Ltd.) On the scheme became effective on 17/02/2021, the assessee company has prepared its revised financials for the Period 01.04.2019 to 30.09.2019 (i.e. AY 2020-21) to give effect to the merger and accordingly has filed its revised return of income for the assessment year on 31/03/2021 declaring total income of Rs. 19,65,78,020/-

WARPL has been consistently year after year claiming deduction under section 57(iii) against the interest income earned. The deduction under section 57(iii) of the Income Tax Act is claimed by the assessee Company as the loans were wholly and exclusively used for the purpose of giving loan.

We enclose herewith chart of Income from loans and deduction claimed by the company under section 57(iii) of the Income Tax Act

	PARTICULARS	WARPL 01.04.2019 to 30.09.2019)
1	<u>Post Merger (01.04.2019 to 30.09.2019)</u>	
	<u>INCOME FROM OTHER SOURCES:</u>	
	Interest received on loan given	24,96,23,126
	Less: Interest Expenses u/s 57(iii)	21,89,61,984
	Net Income	3,06,61,142

The assessee has offered interest income received from Wadhwa Construction and Infrastructure Limited of Rs 24,96,23,126 under the head Income from other Sources and has allocated interest on borrowing



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from. HDFC Bank Ltd. as a deduction under section 57(iii) of the Income Tax Act. The assessee has worked out a weighted average Interest cost of 10.28% on the proportion of borrowed funds which workout to be Rs 21,89,61,984/- u/s 57(iii) of the I.T Act. (Working of Calculation enclosed for your ready reference). Since the loan was exclusively used for earning the interest income the assessee has claimed a deduction of interest expenses under section 57(iii) of the Income Tax Act.

b) 24(b) of the Income Tax Act.

The Company WARPL prior to the merger received rental income on its property Platina situated at Bandra West and had claimed deduction of Interest on Constructed property under section 24(b) of the Income Tax Act.

We enclose herewith a chart on the post-merger income from House Property and deduction of Interest claimed by assessee company under section 24(b) of the Income Tax Act.

	PARTICULARS	WARPL (01.04.2019 to 30.09.2019)
1	Post Merger (Effective dt 1.10.2019)	
	INCOME FROM House Property	
	<u>Lease Rentals</u>	
	"- WARPL (Platina)	50,21,71,644
	Less: Property Tax	-
		50,21,71,644
	<u>Less: Allowable Deduction U/s. 24</u>	
	Standard Deduction @ 30%	15,06,51,493
	<u>Interest on Loan u/s 24b</u>	-
	"- WARPL (Platina)	18,56,17,105
	Preconstruction Interest (1/5 of total claimed)	-
	Net Income	16,59,03,045

During the year under consideration the assessee company has claimed interest of Rs. 18,56,17,105/- u/s 24(b) of the Income Tax Act against rental income received from the properties at Platina. The interest is paid on loan taken from HDFC Ltd. which is partly used for Construction of the property. Vide section 24(b) the assessee is eligible for deduction of interest against rental income where the property has been acquired/constructed with borrowed capital. Since the loan was used for the construction/ purchase of

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property, interest attributable to the said loan of Rs. 18,56,17,105/- is considered for claim u/s 24(b) of the Income Tax Act. (Working of Claim of Interest Enclosed Separately).

c) We refer to your notice dtd. 23.03.2022 wherein you have raised a query regarding large claim of expenditure of RS 50.76 crores on account of interest whereas the assessee has non current investments of RS 671 crores, long term advances of Rs 15.90 crores and short term advances of Rs 687.44 crores. The assessee submits that as evident from the balance sheet the investments, short term advances and long term advances are in the nature of Investment in House property, shares and debentures, Advances tax, loans and advances from which the assessee has mainly received interest and other business advances. The assessee submits that the assessee has received rental income from its investments in property and also has received interest from the loans and advances given. The assessee has claimed interest related to property under section 24(b), interest deduction under section 57(iii) under the head Income from Other Sources and has suomoto disallowed balance interest of Rs 10,30,40,019 for usage of funds for giving interest free advances and usage of funds for non business purpose. Thus the interest expenditure has been claimed as under:

We also enclosed table below of total allowance of Interest claim during the year:-

Statement showing Disallowance of Interest Expenses during the year

Particulars	Amount
Total Interest Incurred including loan processing charges & other charges related to finance cost	60,72,08,544/-
Less : - Capitalised to Capital Work in Progress	9,95,89,436/-
Total Interest Debited to Profit and Loss A/c including loan processing charges	50,76,19,108/-
Less: Interest Claimed u/s 24(b) against House Property	18,56,17,105/- ✓
Less: Interest Claimed u/s 57(iii)	21,89,61,984/- ✓
Total Interest Disallowed Under PGBP	10,30,40,019/- ✓

7. It can be seen from the above that specific queries were raised by the AO while scrutinizing the return of income to which specific replies were furnished by the assessee along with supporting evidences which were thoroughly examined by the AO before framing the assessment order u/s 143(3) of the Act.

8. The basis for the assumption of jurisdiction by the PCIT is the assessment proceedings of Raghuleela Estates Pvt. Ltd. for AY 2020-21 wherein also enquiries were conducted into the use of loans claimed by

Raghuleela Estates Pvt. Ltd., against the house properties and interest therein claimed u/s 24B of the Act and since as per the AO Raghuleela Estates Pvt. Ltd., was unable to exactly co-relate the loans that were used for acquisition or repair of the said properties. Interest expenditure u/s 24B of the Act was disallowed for the period 01/10/2019 to 31/03/2020 and taking a leaf out of the same, the PCIT wanted to disallow the interest for the period up to 01/10/2019 in the case of Wadhwa & Associates Realtors Pvt. Ltd.

8.1. It would be pertinent to refer to the order of the Id. CIT(A)-53, Mumbai dt. 05/08/2024 in the case of Raghuleela Estates Pvt. Ltd. for AY 2020-21 wherein, the Id. CIT(A) has allowed the claim holding that this is not a case where the funds are alleged to be diverted for non-business or personal purposes.

8.2. Since the basis has been removed, the super structure i.e., the order of the PCIT u/s 263 of the Act, must fall. As mentioned elsewhere, the queries raised during the scrutiny proceedings to which specific replies were given by the assessee.

8.3. Further, a close look at the order of PCIT framed u/s 263 of the Act would show that the PCIT has assumed jurisdiction on the proposal dated 14/02/2024 for revision sent by the Assessing Officer, DCIT, Central Circle-5(4), Mumbai, which had been forwarded by the Addl. CIT, Central Range-5, Mumbai vide letter dated 15/02/2024. This clearly shows that the PCIT has not applied his mind independently and has been simply carried forward by the proposal made by the AO forwarded by Addl. CIT, Central Range-5, Mumbai.

9. The Hon'ble High Court of Guwahati in the case of *Karan Jain vs. UOI & Ors* [2024] 465 ITR 1 (Gauhati), had the occasion to consider an identical situation and held as under:-

"30. Section 263 of the Act would not be invoked merely to correct a mistake or error committed by the Assessing Officer unless it has caused prejudice to the interests of the revenue. If an order is based on incorrect assumption of facts or on incorrect application of law or without applying the principles of natural justice and without application of mind, it would be treated as erroneous. If due to an erroneous order of the Assessing Officer the Revenue is losing tax lawfully payable by a person, it would be certainly prejudicial to the interests of the Revenue. Reference is made to the decision of Delhi High Court in CIT v. Leisure Wear Exports Ltd. [2011] 11 taxmann.com 54/202 Taxman 130/341 ITR 166 (Delhi).

31. In the present case, the suo moto revisional proceeding was initiated on the basis of a proposal under section 263 of the Act dated 22.03.2021 submitted by the Assistant Commissioner of Income Tax which was duly forwarded by the Joint Commissioner of Income Tax. On the basis of the said proposal, the notice of hearing under section 263 of the Act dated 28.12.2018 was issued by the Revisional Authority. This will be evident from paragraph 3.0 of the order dated 28.12.2018 passed by the learned Principal Commissioner of Income Tax under section 263 of the Act, which reads as under-

"3.0. In view thereof a proposal under section 263 of the Income Tax Act 1961, dated 22.03.2021 was received from the ACIT, Circle 1, Guwahati duly forwarded by the JCIT Range-1, Guwahati. In ORDER TO EXAMINE THE MATTER a notice for hearing was issued vide this office DIN & notice No. ITBA/REV/F/REV1/2020-21/1031736689(1) dated 24.03.2021 filing the case for hearing on 26.03.2021 at 12:00 PM. "

32. From the aforesaid, it is clear that suo moto revisional proceeding was initiated simply on the basis of a proposal under section 263 of the Act and there was no independent application of mind by the Principal Commissioner of Income Tax. From a plain reading of section 263 of the Act, it is clear that proceeding under section 263 of the Act can be initiated only when the Commissioner on the basis of materials available on record called for by him, comes to a conclusion that the order passed by the assessing authority is erroneous in so far as the same is prejudicial to the interest of Revenue. Thus, the order has to be firstly erroneous and by virtue of the order being erroneous prejudice has been caused to the interests of the revenue. Both the conditions has to be satisfied. The satisfaction must be on the material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present and that if the action of the authority is challenged before the Court it would be open to the Courts to examine whether the relevant objective factors were available from records called for and examined by such authority.

33. In Baijnath Biswanath v. State of Assam [1998] 2 GLR 474 this Hon'ble Court held that the suo moto power of revision conferred on the Commissioner cannot be

exercised mechanically or at the behest of some other authority other than on the own discretion of the assigned Officer. The Commissioner cannot exercise his discretion on the dictation of some other authority. In the said judgment it was held as under- "As indicated earlier, the suo moto power of revision conferred on the Commissioner is of wide amplitude. He can revise an assessment when the order of assessment passed is not in accordance with law in consequences of which the State is deprived of its lawful revenue. The power reposed on the Commissioner, no doubt, is a power of judicial nature and therefore such power is to be exercised lawfully and with due application of mind. The power cannot be exercised mechanically or at the behest of some other authority other than on the own discretion of the assigned officer. The Commissioner, therefore, is not to exercise his discretion on the dictation of some other authority."

34. It was further held that the Commissioner is authorized to take any decision as he deems fit and is free to draw any inference from the facts available. The Commissioner, however, is to act on factual material and not on conjectures, assumptions and presumptions, else the decision will suffer from the vice of perversity.

35. In the present case the learned Principal Commissioner of Income Tax has initiated the proceedings simply on the basis of the proposal of the subordinate authority and has not applied his mind after perusal of the records called for by him and thereby the very initiation of the proceeding in the instant case is illegal, without jurisdiction and not tenable in law....."

10. Similar view was taken by the Co-ordinate Bench in the case of *Alfa Laval Lund AB v. CIT(IT/TP) [IT Appeal No. 1287 (Pun.) of 2017, dated 2-11-2021], (2022) 215 TTJ (Pune) 814*, wherein the Co-ordinate Bench held as under:-

"It can be seen from the CIT's order that: "A proposal for revision under s. 263 was received from Dy. CIT through the Jt. CIT". It is thus manifest that the edifice of the revision in the extant case has been laid on the bedrock of receipt of the proposal from the AO. Process of revision under s. 263 can be initiated only when the CIT calls for and examines the record of any proceeding under the Act and considers that any order passed by the AO is erroneous and prejudicial to the interests of the Revenue. The twin conditions of-(i) the CIT calling for and examining the record; succeeded by (ii) his considering the assessment order as erroneous etc.-are sine qua non for the exercise of power under this section. The use of the word 'and' between the expression 'call for and examine the record' and the expression 'if he considers that any order is erroneous' abundantly demonstrates that both these conditions must be cumulatively fulfilled by the CIT and in the same order, that is, the first followed by the second. In other words, the kicking in point for invoking jurisdiction under s. 263 is calling for and examining the record of any proceedings under the Act by the

CIT leading him to consider the assessment order erroneous etc. A communication from the AO is not 'the record of any proceedings under this Act'. To put it simply, the consideration that the assessment order is erroneous and prejudicial to the interests of the Revenue should flow from and be the consequence of examination of the record of proceedings by the CIT(A). If such a consideration is not preceded by the examination of record of the proceedings under the Act, the condition for revision does not get magnetized. It is trite that a power which vests exclusively in one authority, cannot be invoked or cause to be invoked by another, either directly or indirectly. Sec. 263 confers power on the CIT to revise an assessment order, subject to certain conditions. In this case the revision was initiated on the basis of the proposal sent by the AO to the CIT and not on the CIT suo motu calling for and examining the record of the assessment proceedings and thereafter considering the assessment order erroneous and prejudicial to the interests of the Revenue. The AO recommending a revision to the CIT has no statutory sanction and is a course of action unknown to the law. If AO, after passing an assessment order, finds something amiss in it to the detriment of the Revenue, he has ample power to either reassess the earlier assessment in terms of s. 147 or carry out rectification under s. 154. AO cannot usurp the power of the CIT and recommend a revision. No overlapping of powers of the authorities under the Act can be permitted. As the revision proceedings in this case have triggered with the AO sending a proposal to the CIT and then the latter passing the order under s. 263 on the basis of such a proposal, it became a case of jurisdiction deficit resulting into vitiating the impugned order. The impugned order is quashed on this legal issue itself."

11. While coming to the aforementioned conclusion, we draw support from the decision of the Hon'ble Supreme Court in the case of *Malabar Industrial Co. Ltd.*, 243 ITR 83 (SC), where the Hon'ble Supreme Court has laid down the following ratio:-

"A bare reading of [section 263](#) of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner 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 one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-- recourse cannot be had to [section 263\(1\)](#) of the Act. The 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 that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous "

12. Further, the Hon'ble Bombay High Court in the case of *CIT vs. Gabriel India Ltd.* reported in [1993] 203 ITR 108 (Bombay), while dealing with identical issue has held as under:-

13. We, therefore, hold that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority. Our aforesaid conclusion gets full support from a decision of Sabyasachi Mukharji J. (as his Lordship then was) in *Russell Properties Pot. Ltd. v. A. Chowdhury, Addl. CIT*. In our opinion, any other view in the matter will amount to giving unbridled and arbitrary power to the revising authority to initiate proceedings for revision in every case and start re-examination and fresh enquiries in matters which have already been concluded under the law. As already stated it is a quasi-judicial power hedged in with limitation and has to be exercised subject to the same and within its scope and ambit. So far as calling for the records and examining the same is concerned, undoubtedly, it is an administrative act, but on examination "to consider" or in other words, to form an opinion that the particular order is erroneous in so far as it is prejudicial to the interests of the Revenue, is a quasi-judicial act because on this consideration or opinion the whole machinery of re-examination and reconsideration of an order of assessment, which has already been concluded and controversy which has been set at rest, is set again in motion. It is an important decision and the same cannot be based on the whims or caprice of the revising authority. There must be materials available from the records called for by the Commissioner.

14. We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Further inquiry and/or fresh determination can be directed by the Commissioner only after coming to the conclusion that the earlier finding of the Income-tax Officer was erroneous and prejudicial to the interests of the Revenue. Without doing so, he does not get the power to set aside the assessment. In the instant case, the Commissioner did so and it is for that reason that the Tribunal did not approve his action and set aside his order. We do not find any infirmity in the above conclusion of the Tribunal."

13. The Hon'ble Supreme Court in the case of *CIT vs. Max India Ltd.* reported in [2007] 295 ITR 282 (SC), had the occasion to consider a similar challenge to 263 proceedings and held as under:-

"1. In our view at the relevant time two views were possible on the word 'profits' in the proviso to section 80HHC(3). It is true that vide 2005 amendment the law has been clarified with retrospective effect by insertion of the word 'loss' in the new proviso. We express no opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular case when the order of the Commissioner was passed under section 263 of the Income-tax Act two views on the said word 'profits' existed. In our view the matter is squarely covered by the judgment of this Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 as also by the judgment of the Calcutta High Court in the case of Russell Properties (P.) Ltd. v. A. Chowdhury, Addl. CIT [1977] 109 ITR 229 at 243.

2. At this stage we may clarify that under para 10 of the judgment in the case of Malabar Industrial Co. Ltd. (supra) this Court has taken the view that the phrase "prejudicial to the interest of the revenue" under section 263 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 interest of the revenue. For example, when the Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the Income-tax Officer is unsustainable in law. According to the learned Additional Solicitor General on interpretation of the provision of section 80HHC(3) as it then stood the view taken by the Assessing Officer was unsustainable in law and therefore the Commissioner was right in invoking section 263 of the Income-tax Act. In this connection he has further submitted that in fact 2005 amendment which is clarificatory and retrospective in nature itself indicates that the view taken by the Assessing Officer at the relevant time was unsustainable in law. We find no merit in the said contentions. Firstly, it is not in dispute when the Order of the Commissioner was passed there were two views on the word 'profit' in that section. The problem with section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated 5-3-1997 in purported exercise of his powers under section 263 of the Income-tax Act."

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14. Considering the facts in totality, in light of the judicial decisions discussed hereinabove, we set aside the order of the PCIT dt. 26/03/2024 and restore that of the AO dt. 31/03/2022, framed u/s 143(3) of the Act.

15. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 20th August, 2024 at Mumbai.

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 20/08/2024

Sd/-

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

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

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai