

| 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. 2595/Mum/2024
Assessment Year: 2018-19

Raghuleela Estates Private Limited 301 Platina, Plot No. C-59, G Block Bandra Kurla Complex Bandra East Maharashtra - 400098 [PAN: AACCR6864N]	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 2018-19.

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 16/04/2021 framed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the revenue.

3. The cause for assumption of jurisdiction is the claim of deduction of pre-construction interest u/s 24B of the Act on the ground that pre-

construction interest has to be allowed to the extent of the property which is acquired/constructed.

4. Representative of both the sides were heard at length, case records carefully perused and relevant documentary evidences brought on record, considered in the light of Rule 18(6) of the ITAT Rules.

5. During the course of scrutiny assessment proceedings, vide notice dated 01/09/2020 issued u/s 142(1) of the Act, the AO served a questionnaire having 53 questions. The relevant question for our consideration are question nos. 4, 9 and 17 which read as under:-

“4. Please furnish the purpose of obtaining secured/term loans from banks alongwith sanction letter of the bank and its actual utilization. Please furnish copy of ledger accounts showing working of interest capitalized till the date of putting to use of assets if such loan were used for capital expenditure.

9. Furnish the details of the investment in property made during the year along with copy of registered deed, source of investment and income from these investments.

17. Please furnish details of Income from House Property alongwith Rent Agreement and other supporting evidences with respect to taxes paid to local authorities and interest payment on borrowed capital.”

6. The assessee filed its reply on 16/09/2020. In its reply, the assessee furnished the details of borrowed funds, the details of income from house property along with sample rent agreement and further supporting evidences. The details from income from house property was as under:-

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Raghuleela Estates Private Limited

Details of Income From House Property

Assessment Year: 2018-19

Annexure - IX				
Sr. No.	Particular	Address	PAN	Amount
1	ASAHI KASEI INDIA PVT LTD	1502 B, 15 th Floor, The Capital, Plot No C-70, BKC, Bandra (East), Mumbai 400 098	AAAKCA9444P	1,20,70,080
2	FORBES BUMI ARMADA OFFSHORE LTD	Forbes Building, Charanjit Rai Marg, Fort, Mumbai-400 001	AAACF9848A	95,96,088
3	GEMOLOGICAL SCIENCE INTERNATIONAL PVT LTD	H-16, Saraswat Colony, Sitladevi Temple Road, Mahim, Mumbai	AACCG7453N	2,64,33,383
4	GLENMARK PHARMACEUTICALS LTD	B-2, Mahalaxmi Chambers, 22, Bhalubhai Desai Road, Mumbai- 400 026	AAACG2207L	13,49,20,794
5	RAK TRADE FREE ZONE AUTHORITY	P.O Box- 10055, Al Nakheel, Ras Aal Khaimah, United Arab Emirates	AADCR1494D	1,32,88,147
6	SHAPOORJI PALLONJI BUMI ARMADA OFFSHORE PVT. LTD	Forbes Building, Charanjit Rai Marg, Fort, Mumbai-400 001	AAACF6263G	41,03,352
7	TEA POST PVT LTD	Plot No.21, A/b Near Greek View Park, Opp Motel the village, Kalwad Road, Gujrat	AAFCT5415L	4,47,000
8	SARVA INFO SOLUTIONS PVT. LTD	E-599, 3rd Floor, Shyam Plaza, Ramphal Chowk, Sector-7, Dwarka, New Delhi	AAPCS4813F	30,000
Total of revenue from operations (Schedule 19 of financial statement)				20,08,88,844

Raghuleela Estates Private Limited

Details of Income From House Property

Annexure - X

Sr. No.	Name of Property		Amount
A	Lease Income		
1	HDO Building		13,53,97,794
2	Trade Centre		4,01,32,823
3	The Capital		2,53,58,227
4	Less: Property Tax Paid		
	MCGM Dated 28/03/2018	58,05,764	
	MCGM Dated 28/03/2018	19,94,878	
	MCGM Dated 31/03/2018	27,16,462	
	MCGM Dated 31/03/2018	31,77,163	-1,36,94,267
	Total (A)		18,71,94,577
B	Less: Allowable Deduction U/s. 24		
1	Standard Deduction (A x 30%)		5,61,58,373
2	Interest on Loan		
	Laxmi Vilas Bank	3,65,26,620	
	Wadhwa Group Holdings Private Limited	1,05,75,852	4,71,02,472
3	Preconstruction Interest (1/5 of total claimed - 3rd Year)		2,79,61,136
	Total (B)		13,12,21,981
	Total (A-B)		5,59,72,596

6.1. Not satisfied with the reply of the assessee, the AO again issued a notice dated 15/04/2021 specifically asking the assessee the following questions:-

"2. It is observed that you have claimed interest on loan of Rs.4.71 crores and pre-construction interest of Rs.2.8 crores with respect to income from house property. You are required to furnish documentary evidence in support of your claim."

6.2. The assessee once again furnished a reply dated 15/04/2021 along with necessary details, which reads as under:-



Raghuleela Estates Pvt. Ltd.

301, Platina, Plot No. C-59, G-Block, BKC, Bandra (East), Mumbai-400 098.
Tel: 022-67308400 • Fax: 022-67308401
E-mail: info@thewadhwaigroup.com • Website: thewadhwaigroup.com
CIN U45200MH2003PTC142488

15th April, 2021

To,
The Deputy Commissioner of Income Tax
Central Circle 5(4)
Room No. 1927, 19th Floor,
Air India Building, Nariman Point,
Mumbai-400 021

Dear Sir,

Sub: PAN: AACCR6864N
Assessment year: 2018-19
Ref: ITBA/AST/F/142(1)/2021-22/1032421298(1) u/s. 142(1) of the
Income Tax Act, 1961 dated. 15.04.2021.

We are in receipt of the above referred notice dated 15/04/2021 for A.Y. 2018-19 wherein your goodselves have asked to provide various details and documents mentioned therein. In response to the same, we are submitting herewith the following details:

1. Copy of financials of M/s Wadhwaigroup Holdings Pvt Ltd for showing creditworthiness is attached as per (Page No 1 to 60)
2. The Details of interest working including preconstruction interest along with sanction letter is attached (Page No 61 to 82)
3. Details of Investments in property is attached (Page No 83)
4. The Company is engaged primarily in the business of earning lease rental on commercial properties. During the year under consideration the assessee company have earned rent received on letting out the properties at Trade Center, Bandra Kurla Complex, and Glen mark House, Andheri (East), Mumbai and taxed it under Income from House Property. During the year under consideration the Assesse Company has raised rental invoice on Rak Trade Free Zone Authority on quarterly basis from Feb 18 to April 18 (i.e. 3 months) as per term of the agreement. Since the assessee follows mercantile basis of accounting the revenue for the month of Feb18 and March 18 has been offered as rental Income pertains to the AY 2018 -19 and the rent for the month of April18 has been transferred to Rent received in advance which is pertains to AY 2019-20 and offer the same in AY 2019 -20. Copy of ledger account of the AY 2018 -19 is attached (Page No 84 to 85) along with narration wherein its clearly show Rent pertains to April 2018 transfer to Rent received in Advance. In view of above we request your goodself's to not to added in the Total Income for the AY 2018-19. (PageNo)

Thanking you in anticipation.
Yours Faithfully,
For Raghuleela Estates Pvt.Ltd

Sd/-
Authorised Signatory

CERTIFIED TRUE COPY

Raghuleela Estates Pvt Ltd

Assessment Year : 2018-19

Details of Interest claimed as a deduction from House property u/s 24(b)

Sr No	Particulars	Amount
1	Interest paid to Laxmi Vilas Bank	3,65,26,620
2	Interest paid to Wadhwagroup Holdings Pvt Ltd.(Replaced Loan of Laxmi Vilas bank in the Current year)	1,05,75,852
	Total Interest Cost debited to P&L A/c	4,71,02,472
	Interest Cost claimed u/s 24b	4,71,02,472

Note : All of the Interest Cost is claimed as a deduction from House property u/s 24b as the same is incurred for borrowed fund which is directly or indirectly attributable to purchase of Investment in property

Raghuleela Estates Pvt Ltd

Assessment Year : 2018-19

Preconstruction Interest claimed u/s 24(b)

Unit No.	1502A	1502B	202	Total
Saleable Area	3428	4191	5390	
Unit Cost	6,43,12,794	7,86,27,456	9,97,05,750	24,26,46,000
Society Charges	5,70,493	6,97,473	9,31,438	21,99,404
Total	6,48,83,287	7,93,24,929	10,06,37,188	24,48,45,404
Interest Cost	5,00,21,279	6,11,54,954	7,86,50,728	18,98,26,961
Total Cost	11,49,04,566	14,04,79,883	17,92,87,916	43,46,72,365

1/5 of Interest claimed (Rs 189,826,961)

3,79,65,392

Total Preconstruction Interest Claimed year wise

Assessment Year	1502A	1502B	202	Total Interest Claimed in ROI	Remark
Saleable Area	3428	4191	5390		
2016-17	1,00,04,256	1,22,30,991	1,57,30,146	3,79,65,392	Unit 1502A Sold hence proportionately 9 Month Interest Claimed
2017-18	70,63,311	1,22,30,991	1,57,30,146	3,50,24,447	
2018-19	-	1,22,30,991	1,57,30,146	2,79,61,136	
2019-20	-	1,22,30,991	1,57,30,146	2,79,61,136	
2020-21	-	1,22,30,991	1,57,30,146	2,79,61,136	
Total	1,70,67,567	6,11,54,954	7,86,50,728	15,68,73,249	

6.3. From the above, it can be seen that specific queries were raised by the AO to which specific replies were furnished by the assessee along with documentary evidence. After considering the reply and the documentary evidence, the AO framed the assessment order. A perusal of the computation of income of the assessee shows that under the head “income from house property”, the assessee has claimed 1/5th of construction period interest amounting to Rs.2,79,61,136/-.

7. It would not be out of place to mention that in previous two assessment years, similar deduction was claimed and was allowed by the AO which means that this year is not the initial year of claim.

8. Considering the assessment proceedings and the past history, we are of the considered opinion that the AO has examined each and every issue thoroughly with supporting evidences. Therefore, it would be unjust to say that, the PCIT says that the impugned assessment order was erroneous and prejudicial to the interest of the revenue.

8.1. 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 07/02/2024 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 14/02/2024. This clearly shows that the PCIT has not applied his mind independently and has been simply carried away 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. Considering the peculiar facts of the case in the light of aforementioned decisions, we do not find any legality in the assumption of jurisdiction by the PCIT on the proposal sent by the AO. As mentioned elsewhere, the AO has framed the assessment u/s 143(3) of the Act after raising specific queries and receiving specific replies, therefore, on that point also, the PCIT erred in assuming jurisdiction u/s 263 of the Act.

12. 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 7 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 ".

13. 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."

14. 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."

15. 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. 16/04/2021, framed u/s 143(3) of the Act.

16. Before closing it would be pertinent to note that, the claim of interest even if not allowable u/s 24B of the Act then, certainly allowable u/s 36/37 of the Act and, therefore, assuming yet not accepting the view taken by the PCIT as correct, no prejudice is caused to the interest of the revenue as the interest would have been allowed in any case in other provisions of the Act.

17. 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

**S.S.P.*

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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