

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND**

SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं/ITA Nos.208-210/CTK/2024

(निर्धारण वर्ष / Assessment Year : 2003-2004 to 2005-2006)

Paradip Port Authority, Paradip Port Trust Administrative Building, SO Paradip, Jagatsinghpur PAN No. :AAALP 0055 A	Vs	DCIT, Circle-1(1), Cuttack
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(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
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निर्धारिती की ओर से /Assessee by	:	Shri S.K.Tulsiyan, Advocate
राजस्व की ओर से /Revenue by	:	Shri Saroj Kumar Dubey, CIT-DR
सुनवाई की तारीख / Date of Hearing	:	25/09/2024
घोषणा की तारीख/ Date of Pronouncement	:	25/09/2024

आदेश / O R D E R

Per Bench :

These three appeals are filed by the assessee against the separate orders of the Id. PCIT, Bhubaneswar-1, all dated 30.03.2024, for the assessment years 2003-2004, 2004-2005 & 2005-2006, respectively.

2. Similar and identical grounds have been raised by the assessee in all the appeals. Therefore, for the sake of convenience, we shall first take up the appeal for the assessee for A.Y.2003-2004 in ITA No.208/CTK/2024, wherein the assessee has raised the following grounds :-

1. *That on the facts and in the circumstances of the case and in law, the impugned order passed u/s 263 of the Act dated 30-03-2024 is not as per law since the order passed u/s 260 of the Act dated 10-10-2022 is not prejudicial to the interest of the revenue, thus the mandatory cumulative condition stipulated in section 263 of the Act that the order should be erroneous and prejudicial to the interest of the revenue is not met.*
2. *That on the facts and in the circumstances of the case, the learned PCIT failed to consider the submissions filed by the*

assessee during revision proceedings wherein the assessee submitted revised computation of income and substantiated that there is no short fall in application of funds in the relevant year, thus the order passed u/s 260 of the Act dated 10-10-2022 is not prejudicial to the interest of the revenue.

3. *That on the facts and in the circumstances of the case, the learned PCIT failed to consider the submissions of the assessee wherein it was submitted that accumulation of 15% of Gross receipts even if not made by the assessee in its return of income, still it is eligible for the benefit of statutory deduction of 15% on Gross receipts u/s.11(1)(a) of the I.T. Act, 1961 by virtue of the judgment of the Hon'ble Supreme Court in the case of Addl.CIT Vs. A.I.N. Rao Charitable Trust (1995) 129 CTR 205 and CBDT Circular No: 14 (XL-35) dated April 11, 1955.*
4. *That the appellant craves leave to alter, amend and substitute any of the abovementioned grounds and add any other grounds on or before the date of hearing.*

3. Brief facts of the case are that the assessee trust originally filed an application on 28.03.2006 for registration as a charitable or religious trust or institution u/s.12AA of the Act with retrospective effect from A.Y.2003-2004 to 2005-2006. The said application was dismissed by the Id. CIT vide order dated 29.09.2006. Thereafter the assessee preferred appeal before the ITAT who vide order dated 06.05.2008 restored the matter to the CIT for a fresh adjudication. Thereafter the Id. CIT(E), Hyderabad vide order dated 23.03.2017 has granted registration to the assessee u/s.12A of the Act w.e.f. 01.04.2002. After receiving the order of granting exemption w.e.f 01.04.2002, the assessee filed revised returns for all the three years claiming exemption u/s.11 of the Act. The said revised returns were not admitted by the AO as they were barred by limitation and finally this issue was decided by the Hon'ble High Court of Orissa vide its order dated 12.07.2022, wherein the Hon'ble High Court has held that the revised return should be admitted as the period of delay is beyond the

control of the assessee and should be ignored. Consequent upon the order of the Hon'ble High Court of Orissa, the AO passed the order u/s.260 of the Act, dated 10.10.2022 and assessed the income of the assessee for the three years at Nil after allowing the exemption u/s.11 of the Act. Against this order of the AO passed u/s.260 of the Act, Id. Pr.CIT, Bhubaneswar-1 has initiated proceedings u/s.263 of the Act by issue of notice dated 12.07.2023 by observing that the said order is erroneous as well as prejudicial to the interest of revenue as the AO has not examined the application of funds as claimed by the assessee while allowing the exemption u/s.11 of the Act for all the years. He, accordingly passed the orders u/s.263 dated 30.03.2024 in all the three years. Against this order, the assessee is in appeal before us.

4. During the course of hearing, Id. AR filed his written submissions which read as under :-

Please refer to the facts and submissions of the case below:

1. The assessee is a trust registered u/s 12AA of the Act w.e.f. 01-04-2002 vide an order passed the learned CIT(E), Hyderabad dated 23-03-2017.

2 The assessee filed revised returns for the above 3 assessment years claiming exemption u/s. 11 of the LT. Act. The revised returns for the A.Ys. 2003-04 to 2005-06 were filed on 15-07- 2021.

3. An application was moved before the Assessing Officer with a request to give effect to the benefit of 12AA registration in view of the Certificate issued by the CIT(E), Hyderabad for these three years considering the revised returns filed by the assessee.

3. However, on 28th September, 2021 an order was passed by the A.O., rejecting the application/request of the assessee for re-assessment of the case for A.Ys. 2003-04 to 2005-06 on the ground that the revised returns are barred by limitation

4 Aggrieved, the assessee filed a Writ before the Hon'ble HC of Orissa. The Hon'ble High Court vide order dated 12-07-2022

disposed of the Writ Petition wherein the HC directed that the said delay should be condoned.

5. Consequent upon the order of the Hon'ble High Court of Orissa and after due consideration of the submission of the assessee, the total income of the assessee was computed as Rs.Nil after allowing the benefit of exemption u/s 11 of the Act for all the subject assessment years. Copy of the order dated 10-10-2022 passed u/s 260 of the Act is placed in the Paper book at page 120-121, 122-124 and 17-19 for AYs 2003-04, 2004-05 and 2005-06 respectively.

6. Subsequently, notice dated 12-07-2023 was issued by the learned PCIT, Bhubaneshwar u/s 263 of the Act for AYs 2003-04, 2004-05 and 2005-06 wherein the order passed u/s 260 of the Act dated 10-10-2022 was proposed to be revised since the same was erroneous and prejudicial to the interest of the revenue. Copy of the notices for all the years is enclosed at page no.1-16 of the paper book.

Detailed submissions were filed before the learned PCIT on 12-02-2024 wherein the

assessee submitted a revised computation of income and explained that the order dated 10-10-2022 is not prejudicial to the interest of the revenue. It was submitted that section 11(1)(a) of the Act allows a charitable institution registered u/s 12A of the Act to accumulate 15% of its gross receipts. In the present case, undoubtedly the assessee is a trust registered u/s 12A of the Act and thus is eligible to claim the exemption u/s 11(1)(a) of the Act. However, inadvertently, the assessee computed the statutory exemption of 15% u/s 11(1)(a) on net surplus instead of gross receipts during the year. The same is evident from the revised return of income filed by the assessee before the learned AO, relevant extract also reproduced in the notice issued u/s 263 of the Act for all theyears wherein exemption u/s 11(1)(a) of the Act was computed on net surplus as per Income and Expenditure A/c and not on gross receipts.

8 Therefore, the assessee submitted revised computations for all the years before the learned PCTT taking statutory exemption of 15% on the gross receipts u/s 11(1)(a) of the Act. In doing so, reliance was placed on the judgments of the Hon'ble Apex court in the case of Addl. CIT Vs. A.L.N. Rao Charitable Trust (1995) 129 CTR 205 and CIT vs. Programume for Community Organisation [2001] 116 Taxman 608 (SC). The original computation as per the revised return and revised computation filed before the learned PCIT is enclosed with the submissions. It was requested before the learned PCIT to consider the revised computation of income filed with the submissions.

8.1 It was submitted that on perusal of the revised computation prepared in accordance with the provisions of section 11(1)(a) of

the Act, it may kindly be noted that there was excess application of funds in AY 2003-04 and AY 2004-05. In AY 2005-06, there was a short application of funds of Rs.7,38,48,052/-. It was further submitted that the learned PCIT in his notice issued u/s 263 of the Act has himself admitted that the assessee has accumulated/set aside a sum of Rs. 16,29,46,025/- in Fixed Deposits under Port's Fund and Assistance for reconstruction and rehabilitation for the year, refer page 87 of the paper book. The sum of Rs. 16,29,46,025/- was included in the sum of Rs.1,10,52,64,123/- declared in Form 10B for AY 2005-06, refer page 112 of the paper book. Thus, there was no short application of funds by the assessee in AY 2005-06. Without prejudice, even otherwise, the excess application of funds in AY 2003-04 and AY 2004- 05 is eligible to be setoff with the shortfall of AY 2005-06 by virtue of the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income-tax (Exemption) vs Subros Educational Society reported in [2022] 136 taxmann.com 236 (SC) wherein dismissing the review petition filed by the Revenue, it was held that,

"Any excess expenditure incurred by trust/charitable institution in earlier assessment year could be allowed to be set-off against income of subsequent years by invoking section 11; Review petition dismissed."

8.2 Further, placing reliance on an old Circular issued by the Central Board of Direct Taxes Circular No: 14 (XL-35) dated April 11, 1955 which states that "Officers of the Department must not take advantage of ignorance of an assessee as to his rights, it was submitted that even if the accumulation of 15% of Gross receipts is not made by the assessee in its return of income, still it is eligible for the benefit of statutory deduction of 15% of Gross receipts u/s11(1)(a) of the LT. Act, 1961.

8.3 In the backdrop of the above facts, it was submitted that even if the assessment order is treated as erroneous, the same is not prejudicial to the interest of the revenue, hence the assumption of jurisdiction u/s 263 of the Act is not as per law since both the conditions mentioned in section 263 of the Act ie. order is erroneous and also prejudicial to the interest of the revenue is not met in the present case. Reliance in this regard was placed on the following judicial precedents.

Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs. Commissioner of Income-tax (243 ITR 83)

Hon'ble Supreme Court in the case of CIT v. Max India Ltd [2007] 295 ITR 0282-SC

Calcutta High Court in Dawjee Dadabhoy and Co. v. S. P. Jain [1957] 31 ITR 872 (Cal),

PCIT vs Subhash Kabini Power Corporation Ltd [2016] 69 taxmann.com 394 (Karnataka HC)

Hon'ble Bombay High Court in the case of Commissioner of Income-tax v. Gabriel India Ltd. 203 ITR 108 (Bom)

The learned PCIT perused the submissions of the assessee and remitted the case back to the file of the AO holding that,

4 It is judicially held that where an Assessing Officer, who is supposed to protect the interest of revenue as a tax collector and does not perform his job in the right spirit and has passed the assessment order perfunctorily which shows lack of application of mind, failure to conduct enquiry with due diligence before passing the order would make the order erroneous. Reference in this context to be made to the decision of Delhi High Court in the case of Duggal & Co v. CIT (1996) 226 ITR 456 (Del), wherein it has been held as under.

"The ITO is not only an adjudicator, but also an Investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is incumbent on the AO to further investigate the facts stated in the return, when circumstances would make such an enquiry prudent. The word "erroneous" in section 263 includes the failure to make such enquiry."

5. In the light of facts as narrated supra and on the arrival of judicial view on the subject, I hold that the assessment order in this case dated 10.10.2022 is erroneous in so far as it is prejudicial to the interest of revenue & the AO is directed to examine the above issues for the limited purpose of which the case is remitted back to the AO to decide the matter after giving adequate opportunity of being heard to the assessee."

10 Aggrieved, the assessee is in appeal before Your Honours.

11. Reiterating the facts of the case, your kind attention is invited to the recent judgment of the Hon'ble jurisdictional Cuttack Bench in the case of Gyanodaya Educational Trust vs ITO (Exemptions) in ITA 304/CTK/2023 pronounced on 03-06-2024 wherein it was held that,

8. From this, it is clear that the legislature is of the opinion that only the amount in excess of 15% which is not applied and otherwise not allowed to be exempted is only taxed. In view of this discussion, the application of the assessee for rectification for allowing deduction of the amount of 15% of the gross receipts out of total amount of income i.e. Rs 76,26,863/- is a mistake apparent from record and, therefore, we direct the AO to allow that deduction of 15% of the gross receipts and charge the tax on the shortfall of Rs. 9,43,500/- only. We order accordingly.

Thus, it is amply clear that the assessee is eligible to claim statutory exemption of 15% on gross receipts. Even, no adverse comment was pointed out by the learned PCIT in the revised computation of income filed by the assessee. Even the learned PCIT has admitted in all his orders that "In view of the above discussion, it is not prejudicial to the interest of the revenue

However, the learned PCIT held that proper enquiries were not conducted by the learned AO and therefore the case was remitted back to the file of the learned. AO to examine the issue.

12. By virtue of the judgment of the Hon'ble Apex Court in the case of CIT vs. Programme for Community Organization (supra) which is law of the land as per Article 141 of the Constitution, the revised computation filed by the assessee taking into consideration statutory exemption of 15% of the gross receipts is as per law and thus the order passed by the learned AO dated 10-10-2022 is not prejudicial to the interest of the revenue to invoke the rigors of section 263 of the Act. This mistake was apparent from records and the same should have been rectified u/s 154 of the Act.

12. The assessee has duly substantiated that the order passed by the learned AO dated 10-10- 2022 for the subject assessment years are not prejudicial to the interest of the revenue and hence assumption of jurisdiction u/s 263 of the Act is not sustainable.

13. Hence, in the backdrop of the above facts, since the order passed u/s 263 of the Act is not prejudicial to the interest of revenue, the mandatory twin conditions mentioned in section 263 of the Act are not met, the order passed by the learned PCIT dated 30-03-2024 u/s 263 of the Act remitting the case back to the file of the learned AO is not sustainable in law and is liable to be quashed in limine.

Hope the above submission is in order and to your satisfaction.

5. Besides the above written submissions, Id. AR also placed reliance on the submissions made before the Id. Pr.CIT during the course of proceedings u/s.263 of the Act. The relevant extract of the submissions are as under :-

In this regard, at the outset, it is humbly submitted that the computation filed by the assessee before the learned AO during assessment was incorrect as the assessee computed the statutory exemption of 15% u/s 11(1)(a) of the Act on Net Surplus as against Gross Receipts during the year. Here, it is first relevant to quote Section 11(1)(a) of the Act which reads as under."

"11. (1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income- (a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India: and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen per cent of the income from such property;"

On a perusal of the above section, it can be safely said that out of the income accruing to a trust in the previous year from property held by it wholly for charitable or religious purpose, the income to the extent of 15% will be permitted to be accumulated for charitable or religious purpose and the same shall not be included in computation of total income.

In this regard, the assessee humbly states that even if the accumulation of 15% of Gross receipts is not made by the assessee in its return of income, still it is eligible for the benefit of statutory deduction of 15% of Gross receipts u/s11(1)(a) of the I.T. Act, 1961.

To buttress the contention of the assessee, reliance is placed on the judgement of the Hon'ble Supreme Court in the case of AddL.CITVs. A.IN. Rao Charitable Trust reported in (1995) 129 CTR 205 wherein it was held that,

"A mere look at section 11(1)(a) as it stood at the relevant time clearly shows that out of the total income accruing to a trust in the previous year from property held by it wholly for charitable or religious purposes, to the extent the income is applied for such religious or charitable purpose, the same will get out of the tax net but so far as the income which is not so applied during the previous year is concerned, it least 25 per cent of such income or Ra 10,000, whichever is higher, will be permitted to be accumulated for charitable or religious purpose and it will also get exempted from the tax net."

(Emphasis supplied)

Again, the Hon'ble Supreme Court in the case of CIT vs. Programme for Community Organization (2001) 116 Taxman 608 (SC) has held that

"3. The question that really requires consideration is whether, for the purposes of section 11(1)(a) of the income-tax Act, 1961 ('the Act'), the amount for the grant of exemption of twenty-five per cent should be the income of the trust or it should be its total income determined for the purposes of assessment to income-tax. This question has to be answered in the light of these facts, the assessee-trust received donations in the aggregate sum of Rs.

2.57.376. It applied there out for its charitable purposes the aggregate sum of Rs. 1.70.369 leaving a balance of Rs. 87.010. The question is whether the assessee is entitled in accumulate twenty-five per cent of Rs. 2,57,376, as it contends, or twenty-five per cent of Re 87,010, as the revenue appeared to contend."

Section 11(1)(a) reads thus:

"11. Income from property held for charitable or religious purposes-(1)(a) Income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India: and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of twenty-five per cent of the income from such property:

"4. Having regard to the plain language of the above provision, it is clear that a charitable or religious trust is entitled to accumulate twenty-five per cent of its income derived from property held under trust. For the present purposes, the donations, the assessee received, in the sum of Rs.2,57,376, would constitute its property and it is entitled to accumulate twenty-five per cent there out. It is unclear on what basis the revenue contended that it was entitled to accumulate only twenty-five per cent of Rs. 87,010.

5. For the aforesaid reasons, the civil appeal is dismissed."

(Emphasis supplied)

Relying on the aforesaid judgments of the Hon'ble Supreme Court, the Hon'ble ITAT, Mumbai Bench in the case of ITO v. SethWalchandHirachand Memorial Trust vide order dated 29.03.2017(ITA LT.A. No.4852/Mum/2016) held as under:

"7. We observe that Id CIT(A) has allowed the claim of the assessee, inter alia, observing as under:

"6.3 I have considered the A.Q.'s order as well as the appellant's A/R submission. I have also carefully observed the findings of the Hon Ne Supreme Court in the case of programme for community organization reported in 245 ITR 1. wherein the Hon'ble Supreme Court, while delivering the said judgement has stated that "Having regard to the plain language of the above previsions, it is clear that a charitable or religions trust is entitled to accumulate twenty five percent, Thus, taking note of all these facts, I find merits in the arguments of the appellant, Besides this, I also get strong opined from the recent judgment of Hon'ble Bombay High Court in the case of CIT Vs. Trustees of Bhat Family Research Foundation, wherein the Hon'ble Bombay High Court states that It is clear from clause (a) of sub-section (1) of section 11 that income derived from property held under trust wholly for charitable purposes of

religious purposes shall not be included in the total income to the extent to which it is applied for such purposes in India and where it is accumulated for such application to the extent whichever is higher. The exemption of accumulated income to the extent of 25% or Rx.10,000/-, whoever is higher, is unqualified and unconditional. Further to that, I also place reliance to the judgment of Hon'ble Supreme court in the case of Addl. CIT VS. A.IN. Rao Charitable Trust (1995) 129 CTR 205, wherein it is held that exemption available u/s 11(1)(a) i.e 15% of income is unfettered and not subject to any conditions.

6.4. Considering all the above factual position as well as the case laws referred as above. I consider a proper and appropriate to hold that the A.O. was not justified in denying the claim of the appellant for ITA No. 4852/M/2016 A.Y.2010-11 accumulation of income. Accordingly this ground of appeal is allowed

8. We observe that Id CIT(A) has relied on the decision of Hon'ble Supreme Court in the case of A.I.N. Rao Charitable Trust(supra), wherein, it is held that exemption available u/s.11(1)(a) i.c. 15% of income is unfettered and not subject to any conditions. In the case before us, assessee has claimed 15% accumulation w/s.11(1)(a) of the Act. Hence, we do not see any reason to interfere with the order of the Ld. CIT(A) and reject ground of appeal taken by department."

6. On appraisal of the above mentioned order it is not in dispute that the matter of controversy has been decided in favour of the assessee by the Hon'ble Income Tax Appellate Tribunal by following the decision of the Hon'ble Supreme Court decision in case of CIT Vs. A.LN. Rao Charitable Trust (1995) 129 CTR 205. In view of the order passed by the co- ordinate bench we allowed this issue in favour of the assessee and delete the addition confirmed by the CIF(A) in question. Accordingly, this issue is decided in favour of the assessee against the revenue.

It is further submitted that even if the assessee fails to claim accumulation of 15% of Gross receipts in its return of income, then also it is eligible to claim the benefit of statutory deduction of 15% of Gross receipts u/s11(1)(a) of the 1.T. Act, 1961 since the exemption available u/s 11(1)(a) i.e. 15% of income is unfettered and not subject to any conditions,

Article 265 of the Constitution of India lays down that no tax shall be levied except by authority of law. Hence only legitimate tax can be recovered and even a concession by a tax-payer does not give authority to the tax collector se recover more than what is due from him under the law.

Extract of Article 265 of Constitution of India

"265 Taxes not to be imposed save by authority of line No sex shall be levied or collected except by authority of law

Reliance is also placed on an old Circular issued by the Central Board of Direct Taxes Circular No: 14.(XL-22) dated April 11. 1955, it states:

"Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the Initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would in the long run, benefit the Department for it would inspire confidence in him that he may be sure of getting a square deal from the Department. Although therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should

(e) Draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other,

(b) Freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs."

Placing reliance on this Circular, the Hon'ble ITAT, Kolkata in the case of Madhavi Nag vs ACIT (ITA No.512/Kol/2015) has held that the appellate authorities under the Act have the power to consider the claim of the assessee even if the same is not reported in the return of income filed for the year. In this case, the CIT(A) was of the view that the assessee offered to tax the long term capital gain in the return of income filed by him. The assessee had not filed the revised return of income claiming exemption of long term capital gain u/s 10(38) of the Act. The CIT(A) relied on the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd Vs CIT 284 ITR 323 (SC) and was of the view that the assessee cannot make a claim which is not supported by a revised return of income. He therefore held that the AO rightly dismissed the application of the assessee u/s 154 of the Act. Aggrieved. the assessee went in appeal before the Hon'ble ITAT, Kolkata. The Hon'ble ITAT held that,

"I have heard the rival submissions. The CBDT Circular No.14 of 1955 dated 11.04.1955 has taken a view that the officers of the department must not take advantage of ignorance of the assessee about his rights and it is their duty to assist the tax payer in every reasonable way particularly in the matter of claiming and securing reliefs. In my view therefore the revenue authorities ought not to

have rejected the application u/s 154 of the Act on the ground that the assessee has not filed the revised return of income. The CIT(A) has placed reliance on the decision of the Hon'ble supreme Court in the case of Goetz (India) Ltd. (supra) for sustaining the order of the AO u/s 154 of the Act. The Hon'ble Supreme Court in its decision rendered in the case of Goetze (India) Ltd vs CIT has clarified that the appellate authorities under the Act have the power to consider the claim even if the business of the revised return of items in my view, therefore the chain of the assessee that Long Term Capital Gain is exempt also 10(38) of the Act has to be the AQ. It is seen from the order of AO u/s 154 of the Act that the AO wanted details of acquisition and proof of payment of STT. I therefore set aside the order of CIT(A) and remand the question of exemption of Long Term Gains 10(38) of the Act to the AO for fresh consideration. The assessee is directed to file necessary evidences before the AO to substantiate his claim.

Reliance is also placed on the recent judgment of the Hon'ble ITAT, Kolkata in the case of Indian Chamber of Commerce vs DCIT ITA Nos. 933 & 934/Kol/2013) wherein allowing the exemption of 15% on gross receipts u/s 11(1)(s) of the Act, it was held that,

32.1. Similarly in the case of CIT vs. Programme for Community Organization [2001] 116 Taxman 608 (SC) wherein it has held that the accumulation w/s 11(1)(a) has to be computed on the gross income by observing and holding as under: "3. The question that really required consideration is whether, for the purposes of section 11(1)(a) of the Income Tax Act, 1961 ("of the Act), the amount for the grant of exemption of twenty five percent should be the income of the trust or it should be its total income determined for the purposes of assessment to income tax. This question has to be answered in the light of these facts the assessee that received donations in the aggregate sum of Rs. 2,57,376/- It applied thereof for its charitable purpose the aggregate sum of Rs. 1,70,369. Leaving a balance of Rs. 87,910. The question is whether the assessee is entitled to accumulate twenty five percent of Rs. 2,57,376 contends, or twenty five percent of Rs. 87,010 as the revenue appeared to contend.

2. Considering the facts of the case and ratio laid down by the Hon'ble Apex Court we are inclined to direct the AO to allow the accumulation u/s 11(1)(a) of the Act on the gross receipt of the assessee and not on the net receipt. Accordingly ground raised by the assessee is allowed.

> The Hon'ble ITAT, Kolkata in the case of DCIT vs M/s TRFI Investment Pvt. Ltd (LT.A No. 1331/Kol/2014) relying on the Circular issued by the Central Board of Direct Taxes Circular No: 14 (XL-35) dated April 11, 1955 held that,

7. We have heard the rival submissions. The Id DR vehemently relied on the order of the Id AO. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. It is not in dispute that the assessee had sold certain shares and derived gains of Rs 3,37,52,643/-. It is not in dispute that the said shares were held for more than 12 months prior to the date of its sale and hence the resultant gains thereon would be Long Term Capital Gains. It is not in dispute that the said sale of shares had duly suffered STT and had been routed through recognized stock exchange. The only error committed by the assessee was mentioning the long term capital gains figure in the wrong column of the IT return, which had admittedly triggered this dispute. In our considered opinion, the error committed by the assessee is only a clerical error for which the assessee cannot be fastened with this huge tax liability. We find that the id CITA had duly examined the entire documents in this regard such as Demat statement, contract notes, Broker bill, and evidence for payment of STT etc. We find that Article 265 of the Indian Constitution states that 'no tax shall be collected or levied except by an authority of law. This goes to prove, that the government is empowered to collect tax from the citizens only as per the mandate provided in the law. If the statute provides certain reliefs to the assessee the even without any claim made thereon by the assessee. In the instant case, the assessee had duly made this claim by way of a revised computation in the assessment proceedings and had mentioned all the details in the ITR, though reflected in the wrong column thereon. The revenue cannot take advantage of an ignorance of an assessee. This view has been endorsed by the CBDT vide its Circular No. 14 (XL-33) dated 11.4.1933 which is reproduced hereunder for the sake of convenience

Administrative instructions for guidance of Income-tax Officers on matters pertaining to assessment.

1. The Board have issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assessee in matters affecting their interests and convenience. It appears that those instructions are not being uniformly followed

2. Complaints are still being received that while Income-tax Officers are prompt in making assessments likely to result into demands and in effecting their recovery, they are lethargic and indifferent in granting refunds and giving reliefs due to assessee under the Act. Dilatoriness or indifference in dealing with refund claims (either under section 48 or due to appellate, revisional, etc., orders) must be completely avoided so that the public may feel that the Government are actually prompt and careful in the matter of collecting taxes and granting refunds and giving reliefs.

(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to

assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run. Benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should-----

6. The intention of this circular is not that tax due should not be charged or that any favour should be shown to anybody in the matter of assessment, or that where investigations are called for, they should not be made. Whatever the legitimate tax it must be assessed and must be collected. The purpose of this circular is merely to emphasize that we should not take advantage of an assessee's ignorance to collect more tax out of him than is legitimately due from him. Circular: No. 14(XL-35), dated 11-4-1955.

7.1. We find that the Id CITA had rightly appreciated the facts of the case of the assessee together with its related documents and had granted relief in the form of claim of exemption u/s 10(38) of the Act by due appreciation of the aforesaid circular. It is well settled that the Circulars and Instructions issued by the CBDT are binding on the revenue. Hence we do not find any infirmity in the order of the Id CITA. Accordingly, the grounds raised by the revenue are dismissed. 8. In the result, the appeal of the revenue is dismissed."

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Reliance is also placed on the judgment of CIT v. Ramco International [2009] 180 Taxman 38-4 (Punjab & Haryana HC) wherein it was held that,

2. The assessee claimed deduction under section 501B of the Act and though Form 10CCD and other requisite documents were furnished the Assessing Officer without referring to the said documents made an appeal, the appellate authority upheld the claim of the assessee. The Tribunal held up the said view

3 Learned counsel for the revenue submit that the assessee made claim by way of an application without filing a revised return and in such a situation, judgment of the Hon'ble Supreme Court in Goetze India Limited v. CIT 284 1TR 323 was applicable and deduction could not be allowed.

4. We are unable to accept the submission. The Tribunal has considered this issue and found that as per Form 10CCB filed

during assessment proceedings, the claim of the assessee was admissible. Finding of the Tribunal is an under

"19. In view of the above, we find no error in the order of the learned CIT(A). It has correctly been held by the first appellate authority, inter alia that as per Form No.10CCB filed during the assessment proceedings, the claim made by the assessee was admissible and the same remained to be allowed. The order of the learned CIT(A) is hereby upheld in view of the above discussion. The grievance of the department stands rejected."

5. In view of the finding that the assessee was not making any fresh claim and had duly furnished the documents and submitted Form for claim under section 2018, there was no requirement for filing any revised return. The judgment relied upon was not applicable.

6. Accordingly, we are unable to hold that any substantial question of law arises.

7. The appeal is dismissed

In the present case, undoubtedly the assessee is a trust registered u/s 12A of the Act and thus is eligible to claim the exemption u/s 11(1)(a) of the Act. However, inadvertently, the assessee computed the statutory exemption of 15% u/s 11(1)(a) on net surplus instead of gross receipts during the year. The same is evident from the revised return of income filed by the assessee before the learned AO, relevant extract also reproduced in the present notice issued u/s 263 of the Act wherein exemption u/s 11(1)(a) of the Act was computed on net surplus as per Income and Expenditure A/c and not on gross receipts.

The revised computation of these three assessment years is as follows:

Sl No.	AY	2003-04	2004-05	2005-06
1.	INCOME Gross receipts as per Income and Expenditure A/c			
	Income From Operation (a)			
	Finance and Misc Income(b)	3,81,22,44,658	4,12,72,82,943	4,71,38,34,002
	Total (a+b)	25,33,04,319	18,79,37,391	24,26,05,504
2.	Less : 15% of gross receipts permitted to be accumulated u/s 11(1)(a) (c)	4,06,55,48,977	4,31,52,20,334	4,95,64,39,506
	Balance amount required to be applied towards objects of the Trust (a+b+c) (A)	60,98,32,347	64,72,83,050	74,34,65,926
3.		3,45,57,16,630	3,66,79,37,284	4,21,29,73,580

<u>APPLICATION OF FUNDS</u>				
Revenue	Expenditure/			
Application as per Income and Expenditure A/c				
Revenue Expenditure (a)		2,11,78,99,644	2,12,95,68,377	2,39,41,39,182
Finance and Misc Expenditure (b)		1,15,86,87,910	90,85,05,584	1,15,06,34,621
Total Revenue Expenditure(a+b)		3,27,65,87,554	3,03,80,73,961	3,54,47,73,803
Capital Expenditure Application as per Schedule -3, Fixed Assets (c)		65,40,57,923	33,67,65,810	9,46,51,725
Repayment of Capital Loan (ADB) taken from Govt. of India refer schedule 2 of the Accounts (d)		-	1,06,01,00,000	49,97,00,000
Total Application towards object of the trust (a+b+c+d) (B)		3,93,06,45,477	4,43,49,39,771	4,13,91,25,528
Excess application/(Short fall) in Application (B-A)		47,49,28,847	76,70,02,487	(7,38,48,052)

The assessee humbly request your goodself to consider the revised computation furnished at this stage and oblige.

On a perusal of the above revised computation prepared in accordance with the provisions of section 11(1)(a) of the Act, it may kindly be noted that there was excess application of funds in AY 2003-04 and AY 2004-05. In AY 2005-06, there was a short application of funds of Rs.7,38,48,052/-. In this regard, please note that your goodself on perusal of the audited accounts of the assessee trust has specifically admitted in the present notice that the assessee has accumulated/set aside a sum of Rs.16,29,46,025/- in Fixed Deposits under Port's Fund and Assistance for reconstruction and rehabilitation for the year. The sum of Rs. 16,29,46,025/- was included in the sum of Rs.1.10,52,64,123/- declared in Form 10B for AY 2005-06. Thus, there was no short application of funds by the assessee in AY 2005-06.

Without prejudice, even otherwise, the excess application of funds in AY 2003-04 and AY 2004-05 is eligible to be staff with the shortfall of A 2003-06 by virtue of the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income-tax (Exemption) va Subres Educational Society reported in (2022) 136 tuxmann.com 236 (SC) wherein dismissing the review petition filed by the Revenue, it was held that

"Any excess expenditure Incurred by trust/charitable institution in earlier assessment year could be allowed to be set-off against income of subsequent years by invoking section 11: Review petition dismissed."

Further, w.r.t your allegation that in Form 1018 the assessee has mentioned that the purpose for which the amounts have been accumulated or set apart is mentioned as "Infrastructure Development, it is submitted that the assessee trust is itself an infrastructure Project for development and maintenance of Paradip Port, Orissa under the Ministry of Shipping, Government of India. The term "Infrastructure Development is a wide term and the amounts set aside by the assessee under Port's Fund and Assistance for reconstruction and rehabilitation was nothing but part of infrastructure Development work of the Paradip Port only. The Port is now equipped with 17 (seventeen) berths, 3 (three) Single Point Moorings (SPM), (one) Ro-Ro Jetty, a well maintained Approach and Entrance Channel having 17.1 Mtrs minimum depth to handle a wide range of vessels up to maximum LOA of 300 Mtrs The funds of Rs. 16,29,46,025/- was utilised for port infrastructure activities. Here, your kind attention is invited to the definition of infrastructure facility as stated in section 801A of the Act which reads as follows

Explanation For the purposes of this clause, "infrastructure facility" means

- (a) a road including toll road, a bridge or a rail system;*
- (b) a highway project including housing or other activities being an integral part of the highway project,*
- (c) a water supply project, water treatment systems, irrigation project, sanitation and sewerage system or solid waste management system,*
- (d) a port, airport, inland waterway, inland port or navigational channel in the sea;*

Thus, the term used by the assessee in Form 108 and the audited accounts should be treated as one and not differently.

In view of the above facts, it is evident that even if the assessment order is treated as erroneous, the same is not prejudicial to the interest of the revenue, hence the assumption of jurisdiction u/s 263 of the Act is not as per law since both the conditions mentioned in section 263 of the Act i.e. order is erroneous and also prejudicial to the interest of the revenue is not met in the present case.

Here, it would be first relevant to discuss the scope of Section 263 of the Act which reads as follows:

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

Vide Finance Act, 2013 w.e.f. 01-06-2015 a new explanation Explanation 2' was added to section 263 of the Act which reads as follows

Explanation 2. For the purposes of this section, it is hereby declared that an order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,-

(a) the order is passed without making inquiries or verification which should have been made,

(b) the order is passed allowing any relief without inquiring into the claim

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

A simple reading of the section 263 of the Act quoted above makes it clear that the power of suo moto revision can be exercised by the Commissioner only if, on examination of records of any proceedings under this Act, he considers that any order passed by the Assessing 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.

Your kind attention is brought to the judgment of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs.

Commissioner of Income-tax (243 ITR 83) wherein it was held by the that:

"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 suomotu 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, (1) the order of the Assessing Officer sought to be revised is erroneous; and (8) it is prejudicial to the Interests of the Revenue. If one of them is absent if the order of the Income-tuz Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot he had to section 263(1) of the Act

"The phrase "prejudicial to the interests of the Revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of un order of the Assessing Officer, cannot be treated at prejudicing to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in lass 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 interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."

In CIT Max India Lal 120071 295 ITR 0282-SC it was held that:

"The phrase "prejudicial to the interests of the Revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an 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 interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."

> As observed by the Calcutta High Court in Dewjee Dadabhoy and Co. v. S. P. Jain (1957) 31 ITR 872 (Cal), at page 881.

"the words prejudicial to the interests of the Revenue have not been defined, but it must mean that the orders of assessment challenged are such as are not in accordance with low, in consequence whereof the lawful rescue due to the State has not been realized or cannot be realized. It can mean nothing else

PCIT vs Subhash Kabini Power Corporation Ltd [2016] 69 taxmann.com 394 (Karnataka HC)

"It is settled legal position that one of the requirements for exercise of power under section 263 is that the order passed by the lower authority should not only be erroneous, but should also be prejudicial to the interest of the revenue, which is lacking in the instant case and rightly found so by the Tribunal. [Para 13) Therefore, the order passed by the Tribunal deserved to be upheld [Para 14)"]

The Hon'ble Bombay High Court in the case of Commissioner of Income-tax. Gabriel India Ltd. 203 ITR 108 (Bom) held that

"Any and every erroneous order cannot be the subject-matter of revision because the second requirement must be fulfilled

There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute, on an incorrect or incomplete interpretation, a lesser tax than what was just has been imposed

From the above, thus, it is understood amply and the same, being a legal position well laid out by the Apex Court and followed by all other Courts and the revenue Department alike, that action u/s 263 of the Act cannot in any circumstances be taken by the CIT unless both the conditions of the assessment Order being erroneous and prejudicial to the revenue, are present.

Since the assessment order is not prejudicial to the interest of the revenue, your goodself is requested to drop the present revision proceedings initiated for AYs 2003-04, 2004-05 and 2005-06

The assessee will be highly obliged for the same.

6. The main argument of the Id. AR is that the assessee has been granted registration w.e.f. 01.04.2002 in all the three years under appeal and it is entitled for exemption u/s.11 of the Act. Since the assessee trust had already applied its receipts for charitable purpose, therefore, it is entitled for the exemption available to it. Ld. AR further submitted that in the order, the Id. Pr.CIT himself has admitted that the assessment order is though could be held as erroneous but since the assessee is not liable to tax as it has made the necessary application of fund in accordance with

the provisions of the Act, therefore, there is no loss to revenue. He, therefore, submitted that the twin conditions as enumerated u/s.263 of the Act i.e. order must be erroneous as well as prejudicial to the interest of revenue, is not satisfied and, thus, the order of the Id. Pr.CIT giving direction u/s.263 of the Act to re-examine the details filed by the assessee, deserves to be struck down.

7. *Per Contra*, the Id. CIT-DR vehemently supported the order of the Id. Pr.CIT and submitted that the AO while giving effect the order of the Hon'ble High Court of Orissa, has simply proceeded with the revised return filed by the assessee and has failed to examine the claim of the assessee with regard to application of fund, therefore, the order of the Id. Pr.CIT deserves to be upheld.

8. We have heard rival submissions and perused the material available on record. Before going into the merits of the case, we first see the provisions of Section 263 of the Act, which are as under :-

Revision of orders prejudicial to revenue.

263. (1) *The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [including,—*

- (i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or*
- (ii) an order modifying the order under section 92CA; or*
- (iii) an order cancelling the order under section 92CA and directing a fresh order under the said section.]*

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

3. • an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall include—

3. • 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 [or the Transfer Pricing Officer, as the case may be,] conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner uthorized by the Board in this behalf under section 120;

[(iii) an order under section 92CA by the Transfer Pricing Officer;]

(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 Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

I where any order referred to in this sub-section and passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or 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.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner,—

3. • the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

*I the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119;
or*

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

[Explanation 3.—For the purposes of this section, “Transfer Pricing Officer” shall have the same meaning as assigned to it in the Explanation to section 92CA.]

(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, 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.

9. From the order of the Id. Pr.CIT, we find that in para 3.3 of the order Id. Pr.CIT himself has observed that the assessment order is not prejudicial to the interest of revenue. The relevant observations of the Id. Pr.CIT as contained in para 3.3 read as under :-

3.3 As per AR's submission, the assessee has established the application of fund in respective A.Ys. Though it was apparent from record that the order was erroneous, documents reveal that the assessee is not liable to tax because necessary application of fund has been made in accordance with the provisions of the I. T. Act.

It is seen that only in A.Y. 2005-06, there is shortfall of Rs.7.38 Crore in application of fund. However, in previous 2 A.Ys, there is excess application of Rs.124.19 Crore. As per Hon'ble Supreme Court's decision in the case of CIT Vs Subros Educational Society shortfall in any year can be adjusted against excess application of fund in other years. Accordingly shortfall for A. Y. 2005-06 is adjusted against excess of other years and hence, there is no tax impact.

In view of the above discussion, it is not prejudicial to the interest of revenue.

Emphasis supplied.

4. It is judicially held that where an Assessing Officer, who is supposed to protect the interest of revenue as a tax collector and

does not perform his job in the right spirit and has passed the assessment order perfunctorily which shows lack of application of mind, failure to conduct enquiry with due diligence before passing the order would make the order erroneous. Reference in this context is invited to the decision of Delhi High Court in the case of Duggal & Co v. CIT(1996) 226 ITR456(Del), wherein it has been held as under.

"The ITO is not only an adjudicator, but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls further enquiry. It is incumbent on the AO to further investigate the facts stated in the return, when circumstances would make such an enquiry prudent. The word "erroneous" in section 263 includes the failure to make such enquiry."

5. In the light of facts as narrated supra and on the anvil of judicial view on the subject, I hold that the assessment order in this case dated 10.10.2022 is erroneous in so far it is prejudicial to interest of revenue & the AO is directed to examine the above issues for the limited purpose of which the case is remitted back to the AO to decide the matter after giving adequate opportunity of being heard to the assessee.

10. Since the Id. Pr.CIT himself is of the opinion that the assessment order may be erroneous but it is not prejudicial to the interest of revenue, therefore, as per the provisions of Section 263 of the Act, it does not satisfy the twin conditions for directing the AO for making further verification in the matter by taking shelter of Section 263 of the Act. The Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs. CIT, reported in 243 ITR 83 (SC), has held as under :-

"A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar 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 phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an 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 interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law.”

11. The Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd., reported in [2007] 295 ITR 282 (SC), has also expressed the same view and held as under :-

The phrase "prejudicial to the interests of the revenue" has to be read in conjunction with the expression "erroneous" order passed by the assessing officer. Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interests of the revenue. For example, when an 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 interests of the revenue , unless the view taken by the Income Tax Officer is unsustainable in law.

12. In the instant case, admittedly there was no loss to the revenue as the assessee has already granted registration u/s.12A of the Act w.e.f. 01.04.2002 and the income was duly applied for the designated purposes as per law, thus, it does not satisfied the twin conditions as provided u/s.263 of the Act to invoke this section. Therefore, the action of the Id. Pr.CIT in directing the Assessing Officer to decide the matter afresh, has no legs to stand. Thus, the order passed by the Id.Pr.CIT u/s.263 of the Act is hereby quashed.

13. In the result, all the three appeals of the assessee are allowed.

Order dictated and pronounced in the open court on 25/09/2024.

Sd/-
(GEORGE MATHAN)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 25/09/2024

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
Paradip Port Authority,
Paradip Port Trust Administrative
Building, SO Paradip, Jagatsinghpur
2. प्रत्यर्थी / The Respondent-
DCIT, Circle-1(1), Cuttack
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT,
Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

Sd/-
(MANISH AGARWAL)

लेखा सदस्य/ ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack