

आयकर अपीलीय अधिकरण
कोलकाता 'बी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA

श्री राजपाल यादव, उपाध्यक्ष (कोलकाता क्षेत्र)

एवं

श्री संजय अवरथी, लेखा सदस्य

के समक्ष

Before

SRI RAJPAL YADAV, VICE-PRESIDENT

&

SRI SANJAY AWASTHI, ACCOUNTANT MEMBER

I.T.A. No.: 1080/KOL/2024

Assessment Year: 2018-19

Goutam Ghosh.....*Appellant*
[PAN: ADQPG 7993 P]

Vs.

PCIT, Kolkata-13.....*Respondent*

Appearances:

Assessee represented by: Miraj D. Shah, AR.

Department represented by: Abhijit Kundu, CIT DR.

Date of concluding the hearing : August 20th, 2024

Date of pronouncing the order : October 16th, 2024

ORDER

Per Sanjay Awasthi, Accountant Member:

In this case, the appellant filed the return of income for AY 2018-19 on 31.10.2018 declaring total income of Rs. 16,83,870/-. The case was selected for scrutiny on the issue of "investment in immovable property". The Assessing Officer (hereinafter referred to as ld. 'AO') is seen to have issued necessary notices and asked for details regarding the issue on which the case was picked up for scrutiny. Thereafter the ld. AO is seen to have accepted the returned income. Following this, the ld. Pr. CIT, Kolkata-13 issued a notice initiating proceedings u/s 263 of the Income Tax Act, 1961 (in short the 'Act')

on the ground of alleged under-assessment of income to the tune of Rs. 43,17,802/-. This figure has been arrived at by considering the differential between stamp duty valuation (Rs. 76,87,802/-) and the purchase price (Rs. 33,70,000/-), leading to a difference of Rs. 43,17,802/-. Through the said notice it was proposed to tax this amount u/s 56(2)(x) of the Act. Thereafter, the appellant is seen to have advanced a number of reasons to canvass the point that taxability of the amount worked out by the ld. Pr. CIT was not legally feasible during the year under consideration. However, the ld. Pr. CIT passed an order working out the taxable income as under:

“7.4. The market value of the subject properties, as determined by the Stamp Valuation Authority for Stamp Duty purpose, are at Rs.76,87,802/- (Deed No. 1-0502-05611/2017) and Rs.1,37,65,503/- (Deed No. 1-0502-05713/2017) respectively whereas the Set Forth Values were Rs.4,00,000/- and Rs.33,70,000/- respectively. In case of any immovable property, which could be land and building or both, if the property is received for consideration and the stamp duty value of such property exceeds Rs.50,000/- or 5% of the consideration, then the stamp duty value in the excess of consideration will be taxable as income in the hands of the buyer.

In the case of the assessee, the 105% of the consideration payable by the assessee is Rs.39,58,500/- [1,05(Rs.33,70,000/-+Rs.4,00,000/-)] which is less than Stamp Duty Value of the Property i.e. Rs.2,14,53,305/- (Rs.76,87,802/-+Rs.1,37,65,503/-). Hence, provisions u/s 56(2)(X) of the Income Tax Act, 1961 is applicable and an addition of Rs.1,74,94,805/- (Rs.2,14,53,305/- minus Rs.39,58,500/-) is being made.*

In view of the encompassing facts and circumstances of the case and respectfully following the ratio of judgments of Hon'ble judicial authorities as discussed in detail in the preceding paragraphs, the Assessing Officer is directed to tax income as per provisions of section 69 and section 56(2)(X) the Income Tax Act, 1961 and give necessary effects as per law and pass necessary Order accordingly.”

1.1. Aggrieved with this action of ld. Pr. CIT, the appellant is before us through the following grounds of appeal:

“1. FOR THAT the impugned order passed by the Ld. PCIT-13, Kolkata u/s 263 dated 27.03.2024 is illegal, unlawful and contrary to the provisions of the law and accordingly, the same is liable to be struck down in appeal.

2. FOR THAT the Ld. PCIT erred in law and misconceived the unambiguous provisions of Sec. 45(5A) of the Income Tax Act and made unlawful addition

of Rs. 1,74,94,805/- u/s 56(2)(x) without applying his mind in the case in hand and such order of the Ld. PCIT is beyond his jurisdiction and liable to be struck down in appeal.

3. FOR THAT merely because the PCIT is of a different opinion, it would not justify action u/s 263 of the Act.

4. FOR THAT when the Assessing Officer, NFAC, Delhi completed the assessment as per law and taken a perfectly correct view of the position of the law, the same cannot be branded as prejudicial and erroneous by the PCIT.

5. FOR THAT in the instant case, the assessee did not make any investment in immovable property in question and he only executed a registered Joint Development Agreement along with Power of Attorney and no construction, whatsoever, took place on such property as Howrah Municipal Corporation so far did not sanction the plan of construction and therefore, as per the provisions of Sec. 45(5A) the question of application of Sec. 56(2)(x) did not arise at all.

6. FOR THAT even otherwise the order of PCIT is bad in law as it travelled beyond the Show Cause Notice initially issued u/s 263.

7. FOR THAT when the Assessing Officer, NFAC, Delhi completed the assessment, as per the law as laid down in the statute and rightly followed the law and therefore, the assessment framed u/s 143(3) cannot be held to the erroneous or prejudicial to the interest of the Department.

Your appellant craves leave to add, amend, modify, rescind, supplement or alter any of the ground or grounds at the time of hearing.”

2. During the course of hearings before us, the Id. Counsel for the assessee pointed out the detailed response filed before the Id. AO with respect to his queries regarding the investments in properties, from a paper book filed in which the assessee's response dated 29.09.2020 has been presented for perusal. It is seen from this response that details of Joint Development Agreement (in short 'JDA') dated 11.09.2017 were provided and it was mentioned that through this JDA the proprietorship concern of this assessee (G.C Construction), being developer, would start the construction work of the proposed building after obtaining sanction of the building plan and delivery of vacant possession of the said property. The entire project was supposed to be completed within three years from the date of sanction of building plan and delivery of vacant possession. It is seen that the appellant also filed a

copy of this agreement and extracted certain relevant portions from the same in the body of his reply. It is noteworthy that even at the stage of Id. AO, it was averred that considering the provisions of Section 45(5A) of the Act there was no question of taxability of any amount in the assessment year under consideration. Since as per this Section capital gains from transfer of a capital asset would be taxable in the year in which certificate of completion for the whole or part of the project would be issued by the competent authority.

2.1. Before the Id. Pr. CIT, the assessee filed a comprehensive reply as under:

“This is to bring to your kind attention that I am in receipt of statutory communication in relation to partial modification of letter dated 08.05.2023 vide DIN- ITBA/COM/S/91/2023-24/ 1052649727(1), whereby the amount of Rs. 3,37,000/- (Set-Forth Value) has been proposed to be modified thereby treating it as Rs. 1,37,65,503/-.

In relation to the same, I would like to state that this modification will have no effect at all as due to Non-Sanctioning of Building Sanction plan by the Howrah Municipal Corporation, the Joint Development Agreement could not be proceeded further with. The copy of such Joint Development Agreement (JDA) is annexed for your perusal.

As per the records of Howrah Municipal Corporation, this land has been categorized as factory land on which no residential or commercial building can be constructed as per the Corporation Rules.

During the proceedings u/s 144B/143(3), these questions were raised by the Assessing Officer and considering our reply filed on different dates, the return income was accepted as the issue of taxation in case of JDA is triggered only after completion of construction and such completion certificate is obtained as per Section 45(5A) of the Income Tax Act, 1961.

“(5A) Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset: PROVIDED that the

provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of the said certificate of completion, and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer. Explanation : For the purposes of this sub-section, the expression— (i) “competent authority” means the authority empowered to approve the building plan by or under any law for the time being in force; (ii) “specified agreement” means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash; (iii) "stamp duty value ” means the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both.]”

Therefore, the order of the Assessing Authority, being no erroneous, your Honor has no jurisdiction to revise the same under the grab of Section 263 of the Income Tax Act, 1961.

Section 263 cannot be invoked for adding Stamp Value under JDA where taxation is triggered after completion u/s 45 (5A) of the Act.

This, being the rule of the land, Stamp Duty Value is only attracted at the time of completion. Even otherwise without prejudice to the right and contentions, Stamp Duty Value of land can only be applied after obtaining Valuation Report from the DVO as directed by the Hon’ble Calcutta High Court in the case of Sunil Kumar Agarwal. Copy is enclosed.

In this view of the matter, I request to drop the proceedings wrongly proposed to be initiated u/s 263 of the Act as your assumption of jurisdiction u/s 263 is unlawful and illegal and beyond any stretch of imagination, does the Assessing Authority’s Order being perfectly legal after full inquiry of the matter, the Ld. PCIT cannot now sit to review the matter when there is no error in the order of Assessment.”

2.2. The ld. D/R relied on the order of the ld. Pr. CIT.

3. We have considered the impugned order, the ld. AO's order, the contention of ld. D/R and the contention of the ld. AR as evidenced from the paper book and his oral submissions. This matter needs to be examined from several angles. To begin with, we need to understand the mandate given u/s 263 of the Act.

3.1. For this understanding strength is drawn from the order of a Coordinate Bench of ITAT Kolkata in the case of *M/s. Rani Sati Agro Tech Pvt. Ltd. vs. ITO* in *ITA No. 85/Kol/2022* order dated 19.06.2023, in which while analysing the provisions of Section 263 of the Act various case laws have been considered. The relevant part of the order of the Coordinate Bench of the Tribunal is reproduced as under for drawing a valid reference:

“10.1. On a bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the ld. Pr. CIT taken u/s 263.

11. Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC) has laid down following ratio with regard to provisions of section 263 of the Act:

“There can be no doubt that 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. In the same category fall orders passed without applying the principles of natural justice or without application of mind. 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 ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO 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 ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC)". [Emphasis Supplied]

11.1. Hon'ble Apex Court in the case of CIT vs. Max India Limited as reported in 295 ITR 0282 has held that:

"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 s. 263 has to be read in conjunction with the expression "erroneous" order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, when the ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the ITO is unsustainable in law."

11.2. Hon'ble Madhya Pradesh High court in the case of CIT vs. Associated Food Products (P) Ltd as reported in 280 ITR 0377 has held that:

"10. In view of the aforesaid pronouncement of law and taking into consideration the language employed under s. 263 of the Act, it is clear as crystal that before exercise of powers two requisites are imperative to be present. In the absence of such foundation exercise of a suomoto power is impermissible. It should not be presumed that initiation of power under suomoto revision is merely an administrative act. It is an act of a quasijudicial authority and based on formation of an opinion with regard to existence of adequate material to satisfy that the decision taken by the AO is erroneous as well as prejudicial to the interests of the Revenue. The concept of "prejudicial to the interests of the Revenue" has to be correctly and soundly understood. It precisely means an order which has not been passed in consonance with the principles of law which has in ultimate eventuate affected realization of lawful revenue either by the State has not been realized or it has gone beyond realization. These two basic ingredients have to be satisfied as sine qua non for exercise of such power. On a perusal of the material brought on record and the order passed by the CIT it is

perceptible that the said authority has not kept in view the requirement of s. 263 of the Act inasmuch as the order does not reflect any kind of satisfaction. As is manifest the said authority has been governed by a singular factor that the order of the AO is wrong. That may be so but that is not enough. What was the sequitur or consequence of such order qua prejudicial to the interest of the Revenue should have been focused upon. That having not been done, in our considered opinion, exercise of jurisdiction under s. 263 of the Act is totally erroneous and cannot withstand scrutiny. Hence, the Tribunal has correctly unsettled and dislodged the order of the CIT. [Emphasis supplied]"

12. In the light of the provisions of section 263 of the Act and a settled position of law, powers u/s 263 of the Act can be exercised by the Pr. Commissioner/Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and also prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the judgment of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 taxmann.com 272 (Bombay).

12.1. This view is further supported by the decision of the Hon'ble Gujarat High Court in the case of Shri Prakash Bhagchand Khatri in Tax Appeal No. 177 with Tax Appeal No.178 of 2016, wherein the Hon'ble Gujarat High Court was seized with the following substantial question of law:

"Whether the Tribunal is right in law and on facts in upholding the order passed by the CIT under section 263 of the Act on merits and still storing the issue of allowability of deduction under section 54 of the Act to the file of Assessing Officer even though the working of allowability of deduction under section 54F is available in the order under section 263 which is not disputed by the assessee before ITAT."

13. We find that the Hon'ble Delhi High Court in the case of CIT vs. Anil Kumar reported in 335 ITR 83 has held that where it was discernible from record that the A.O has applied his mind to the issue in question, the ld. CIT cannot invoke section 263 of the Act merely because he has different opinion. Relevant observation of the High Court reads as under:

"63. We find the Hon'ble Delhi High Court in the case of Vikas Polymer reported in 341 ITR 537 has held as under:

“We are thus of the opinion that the provisions of s. 263 of the Act, when read as a composite whole make it incumbent upon the CIT before exercising revisional powers to: (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfilment of these twin conditions that the CIT may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the CIT may call for the records and if he prima facie considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interest of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. The twin requirements of the section are manifestly for a purpose. Merely because the CIT considers on examination of the record that the order has been erroneously passed so as to prejudice the interest of the Revenue will not suffice. The assessee must be called, his explanation sought for and examined by the CIT and thereafter if the CIT still feels that the order is erroneous and prejudicial to the interest of the Revenue, the CIT may pass revisional orders. If, on the other hand, the CIT is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to the interest of the Revenue, he may choose not to exercise his power of revision. This is for the reason that if a query is raised during the course of scrutiny by the AO, which was answered to the satisfaction of the AO, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the AO called for interference and revision. In the instant case, for example, the CIT has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment. Assuming it to be so, in our opinion, this does not justify the conclusion arrived at by the CIT that the AO had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the CIT was duly reflected in the respective assessments of the partners who were I.T. assesseees and the unsecured loan taken from M/s Stutee Chit & Finance (P) Ltd. was duly reflected in the assessment order of the said chit fund which was also an assessee.”

64. Since in the instant case the A.O. after considering the various submissions made by the assessee from time to time and has taken a possible view, therefore, merely because the DIT does not agree with the opinion of the A.O., he cannot invoke the provisions of section 263 to substitute his own opinion. It has further been held in several decisions that when the A.O. has made enquiry to his satisfaction and it is not a case of no enquiry and the DIT/CIT wants that the case could have been investigated/ probed in a particular manner, he cannot assume jurisdiction u/s 263 of the Act. In view of the above discussion, we hold that the assumption of jurisdiction by the DIT u/s 263 of the Act is not in accordance

with law. We, therefore, quash the same and grounds raised by the assessee are allowed."

13.1. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263:

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

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

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

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

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

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

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

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

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard."

13.2. Apart from above stated broader principles, one more principle needs to be added in view of the judgment of Hon'ble Delhi High Court in the case of *ITO vs. D.G. Housing Projects Ltd.* [2012] 343 ITR 329 (Delhi) that the ld. CIT has to examine and verify the issue himself and give a finding on merits and form an opinion on merits that the order passed by the AO is erroneous and prejudicial to the interest of the Revenue. Relevant extract is reproduced below:

"In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

3.2. Our attention was drawn also to the case of *PCIT vs. Usha Polychem India (P) Ltd.* reported in [2023] 149 taxmann.com 240 (Cal) wherein the Hon'ble Calcutta High Court has held that where the Principal Commissioner invoked revision jurisdiction u/s 263 of the Act in case of assessee on the basis of an information received from Dy. Director (Investigation) regarding huge amount of unaccounted funds received in bank account of assessee, there since a re-assessment proceeding was already invoked and completed on basis of same information, impugned revision was unjustified. In this case there are similar facts as the assessment order considered by the ld. Pr. CIT

for action u/s 263 of the Act, has been passed u/s 147/143(3) of the Act. The relevant part of the order of the Hon'ble Calcutta High Court is reproduced as under:

“4. The short issue which falls for consideration in the instant case is whether the assumption of jurisdiction by the Principal Commissioner of Income Tax, Kolkata - 2 (PCIT) under section 263 of the Act was justified. The Tribunal had allowed the assessee's appeal and held that the PCIT has not recorded any finding that he has reason to believe that income assessable to tax has escaped assessment and the revenue being aggrieved by the said finding on an appeal before us. What is important to note in the instant case is that the assessment for the year under consideration, AY 2012-13 was completed on 30-3-2015. Subsequently, the assessment was reopened based on the information received from the DDIT (Investigation) Unit 2(2), Kolkata dated 6-3-2019. Thereafter, notice under section 148 of the Act was issued on 29-3-2019 and in response to such notice the assessee filed its return of income declaring a total income of Rs. 23,440/-. Subsequently, notices were issued under sections 143(2), 142(1) of the Act and the assessee filed his response along with documents. The Assessing Officer on considering the documents and the return furnished by the assessee accepted the stand taken by the assessee and completed the assessment. It is seen that PCIT has exercised jurisdiction under section 263 of the Act on the very same information furnished by the DDIT (Investigation) Unit 2 (2) dated 63-2019. On perusal of the order passed by the PCIT dated 15-3-2021 in which the show cause notice issued under section 263 of the Act has been extracted, the PCIT has not recorded any finding that he has reason to believe that income that is assessable to tax has escaped assessment.

5. In the absence of such finding, we are of the view that the Tribunal was right in coming to the conclusion that the PCIT erred in exercising its jurisdiction. Our view is supported by the decision in the case of Pr. CIT v. Anindita Steels Ltd. [2022] 137 taxmann.com 203 (Cal.).

6. The learned standing counsel for the appellant relied upon the decision of the Hon'ble Supreme Court in Malabar Industrial Co. Ltd. v. CIT [2000] 109 Taxman 66/243 ITR 83/[2000] 2 Supreme Court Cases 718 and, in particular two paragraphs 10 and 11 of the said decision.

7. In fact, the said decision would support the case of the respondent assessee and would lead us to affirm such an order.

8. Thus, in the light of the factual aspect brought out by the Tribunal while granting relief to the assessee, we find no substantial questions of law, much less substantial questions of law arising for consideration in this appeal.”

The decisions mentioned above will need to be applied to the facts of this case.

3.3. In this case, it also deserves to be mentioned that on the very same ground that the Id. Pr. CIT has invoked the provisions of Section u/s 263 of the Act, the Id. AO had also enquired and apparently been satisfied by the assessee's contention. Thus, the Id. Pr. CIT is seen to have taken an adverse note of the JDA in as much as income has been determined in the assessment year under consideration, whereas the Id. AO had been convinced by the *bona fide* of the assessee's arguments before him and not taken any adverse view in this very same matter. Right at the outset, this case would be decided in favour of the appellant following the case of *CIT vs. Greenworld Corporation* reported in [2009] 314 ITR 81 (SC). However, a more compelling reason to decide the issued in favour of the appellant would be the provisions of Section 45(5A) of the Act, which was brought into the statute books by the Finance Act, 2017 to hold as under:

"[(5A) Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by [the consideration received in cash, if any,] shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset :

Provided that the provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of the said certificate of completion, and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer."

3.4. Through the operation of this Section, taxable income would arise once the project as per a JDA would obtain a certificate of completion for the whole or part of the project, from the competent authority. In this case, in the year

under consideration, none of the conditions laid down in this Section are fulfilled for recognizing revenue. It is also seen that another anomaly has crept into the impugned order when the ld. Pr. CIT has resorted to several assumptions, without backing of facts, leading him to conclude that the fiscal behaviour of the appellant was allegedly not in keeping with what a prudent businessman would normally do. Thus, for example, he has presumed that just because the advance amount paid by the appellant has not been returned back then he has mentioned that no prudent businessman would block his capital for an indefinite period.

4. Considering this discussion, it is held that not only was the impugned issue considered by the ld. AO but also the provisions of Section 45(5A) of the Act would lead to the conclusion that the adverse inference drawn by the ld. CIT(A) was not justified. Also, the impugned order is based on a number of assumptions which could not possibly be used to draw any adverse conclusion against the appellant. Hence, his action cannot be supported and considering the tests discussed in para 3 (*supra*), this matter is decided in favour of the appellant and the order of ld. Pr. CIT is quashed.

5. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 16th October, 2024.

Sd/-

[Rajpal Yadav]
Vice President

Dated: 16.10.2024

Bidhan (P.S.)

Sd/-

[Sanjay Awasthi]
Accountant Member

Copy of the order forwarded to:

1. **Goutam Ghosh, 247, Panchanantala Road, Howrah, West Bengal, 711101.**
2. **PCIT, Kolkata-13.**
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata