आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री एबी टी. वर्की, न्यायिक सदस्य एवं
श्री जगदीश, लेखा सदस्य **के समक्ष**

BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI JAGADISH, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.1396/Chny/2024**
निर्धारणवर्ष/**Assessment Year: 2014-15**

M/s. Madurai Power – Corporation Pvt. Ltd., No.3, 2nd Street, Subba Rao Avenue, Greams Road S.O., Nungambakkam, Chennai-600 006.	**v.**	The PCIT, Corporate Circle-4(1), Chennai.
[**PAN: AACCM 7661 C**]		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
अपीलार्थी की ओर से/ Appellant by	:	Mr. N.V.Balaji, Advocate
प्रत्यर्थी की ओर से /Respondent by	:	Mr. Nilay Baran Som, CIT
सुनवाईकीतारीख/Date of Hearing	:	11.09.2024
घोषणाकीतारीख /Date of Pronouncement	:	04.12.2024

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Learned Principal Commissioner of Income Tax, (hereinafter in short "the Ld.PCIT"), Chennai-4, dated 13.03.2024 for the Assessment Year (hereinafter in short "AY") 2014-15 passed u/s.263 of the Income Tax Act, 1961 (hereinafter in short "the Act").

2. The brief facts are that the assessee filed its original RoI for the relevant AY 2014-15 on 28.11.2014 declaring an income of Rs.9.95 Crs. after claiming deduction u/s.80IA of Rs.41.21 Crs. Later, the return was picked up for scrutiny u/s.143(3) of the Act and the assessment was completed on 10.05.2016 after making disallowance of Rs.53.24 lakhs, out of assessee's claim of deduction u/s.80IA of the Act and assessed income at Rs.10,12,96,106/-. Thereafter, the AO issued notice u/s.148 of the Act conveying his desire to re-open the assessment u/s.147 of the Act on the following reasons:

> The company is engaged in the business of generation and supply of power to Tamilnadu Electricity Board. It e-filed its return of income for the A.Y. 2014-15 admitting total income of Rs.9,59,71,300/- after claiming deduction u/s.801A of Rs.41,21,30,275/-. Subsequently, the case was assessed u/s.143(3) and assessed Income was Rs.10,12,96,106/-. The company generates power by using major raw material as 'Low Sulphur Heavy Stock (LSHS) / Low Sulphur Furnace Oil. The power is generated by using it's Thermal Power Plant located at Madurai. The assessee owns and operates a 106MW fuel oil fired electric power plant and generates the power. As per New Appendix-1, item No. 8 clause (ix) A (d) of Schedule-III Part A of Rule 5 of Income Tax Rules, 1962 states that Energy Saving devices being high efficiency boilers (Thermal efficiency higher than 75% in case of coal fired and 80% in case of oil/gas fired boiler) are eligible for depreciation allowance of 80% of written down value. However, the assessee has claimed only 15% depreciation, there by the assessee is claiming excess deduction u/s.80IA of the Income Tax Act, 1961.
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> Further, the assessee company had acquired building from Standard Chartered Bank on 17-04-2013 for Rs.11,88,67,800/- and claimed depreciation @ 5% (Rs.59,43,390/-) on buildings as against eligible depreciation at 10% (Rs.1,18,86,780/-) thereby short claim of depreciation which results excess claim of deduction u/s.80IA of the Income Tax Act, 1961.
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> Hence, I have reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment resulting the escapement of income due to the fact that the subject of excessive relief. Necessary approval may be accorded as per the provisions of section 151 of the Income Tax Act, 1961 for issue of notice u/s.148 of the Income Tax Act, 1961.

3. Pursuant to receiving the reason for re-opening (supra), assessee filed its objection against re-opening of assessment. And the AO after

hearing the assessee raised queries on two issues i.e. (i) As to why assessee claimed only 15% depreciation on the Higher Efficiency Boilers (being energy saving device), when it was eligible for depreciation allowance of 80% on the Written Down Value (WDV). The AO alleged that the assessee was claiming less depreciation on the Higher Efficiency Boilers in order to claim higher/excess deduction u/s.80IA of the Act and asked assessee as to why the excess deduction claimed be disallowed. Pursuant to which, the assessee replied (found placed at Page Nos.25-48 of the Paper Book) wherein assessee brought to the notice of the AO that Boilers in question are generating electricity and can't be termed as Energy Saving Devises which are specifically prescribed under clause (ix) of item (8) of Schedule-III and that energy saving devices lowers consumption of energy and saving of energy can't be equal to generation of electricity. And the AO accepted the contention of the assessee and dropped this issue. And on the second issue which was raised in the reasons recorded for reopening, the AO had drawn adverse inference against the assessee in respect of the depreciation claimed @5% on building as against eligible depreciation at 10% for the building acquired from Standard Chartered Bank on 17.04.2013 at Rs.11,88,67,800/-; and thus, the AO made an addition of Rs.59,43,390/- (short claim of depreciation) which resulted in excess claim of deduction u/s.80IA of the Act by order dated 29.03.2022 u/s.147 r.w.s.144B of the Act.

4. The aforesaid action of the AO dated 29.03.2022 passed u/s.147/143(3) of the Act has been interfered by the Ld.PCIT u/s.263 of the Act holding it to be erroneous as well as prejudicial to the interest of the Revenue on the following reasons:

> 02. Subsequent to the original assessment, from the examination of the records it was observed that the assessee has claimed depreciation @ 15% on high efficiency boilers as against the eligible claim @ 80%. It was also observed that the assessee claimed depreciation @5% on building as against the eligible claim @10%. Since the assessee is eligible to claim deduction u/s.80IA for a period of 10 years, it was apparent that the assessee was claiming higher profits for the period for which it is eligible to claim deduction u/s.80IA by reducing its claim of depreciation so that in the years when this claim of deduction u/s.80IA is no longer available, it can reduce its taxable profits by claiming higher depreciation. Since this action of the assessee has an effect of reducing its taxable profits for the subsequent years, the case of the assessee was reopened. The reassessment u/s.147 r.w.s. 143(3) was completed on 29.03.2022 by allowing further depreciation in respect of building. However, the depreciation on high efficiency boilers which was claimed @ 15% as against the eligible claim @ 80% was not disturbed in the reassessment. As explained earlier, the assessee by claiming depreciation at a lower rate in the years when it is eligible to claim deduction u/s.80IA is trying to reduce its future tax liabilities on expiry of the eligible period by claiming a higher depreciation on the said assets. Therefore, the said reassessment order u/s.147 r.w.s. 143(3) dated 29.03.2022 was erroneous and prejudicial to the interest of revenue.

5. The assessee objected to exercise of jurisdiction u/s.263 of the Act and brought to his notice that the issue which has been found fault by the Ld.PCIT was one of the issues on which the AO had resorted to re-opening of scrutiny assessment which was completed on 10.05.2016 u/s.143(3) of the Act. It was pointed out to the Ld.PCIT that the AO in the re-assessment proceedings u/s 147 of the Act, had enquired about the very same issue regarding short claim of depreciation (80% depreciation on the WDV of boilers used by the assessee) alleging that assessee by claiming less depreciation on the Higher Efficiency Boilers, was claiming higher/excess deduction u/s.80IA of the Act. And that the AO after going

through the submissions which is placed from Page Nos.25 to 48 of the Paper Book, being satisfied, has accepted the claim of the assessee and dropped the issue; and has only made addition in respect of the second issue i.e. short claim of deduction in respect of the building (refer the reasons recorded supra). Thus, the assessee contended before the Ld.PCIT that the AO dropped the very same issue which Ld PCIT was raising, after re-opening the assessment and conducting enquiring about it i.e., claim of depreciation in respect of boilers and not drawing any adverse inference against the assessee's claim on the issue and thereby the AO accepted the depreciation claimed by assessee @15% on plant & machinery rather than 80%. Therefore, according to the assessee, the the AO has discharged his dual role as an investigator and as an adjudicator by taking a plausible view and therefore, the Ld. PCIT should not have exercised his revisional jurisdiction on this issue. However, the Ld. PCIT didn't agree with the aforesaid submissions of the assessee and held that the assessee by claiming depreciation at a lower rate in the relevant year [when it was eligible to claim higher depreciation of 80%] was claiming higher deduction u/s.80IA of the Act and in that process was trying to reduce its future tax liabilities; and that after expiry of the eligible period u/s.80IA of the Act, it would claim higher depreciation on the said assets. Therefore, according to the Ld. PCIT, the AO's order passed u/s.147/143(3) dated 29.03.2022 is erroneous as well as

prejudicial to the interest of the Revenue and therefore, he partly set aside the re-assessment order with a direction to the AO to make necessary enquiries and pass a fresh order after providing an opportunity to the assessee of being heard. This action of the Ld. PCIT has been challenged before us.

6. We have heard both the parties and since assessee has raised legal issue, challenging the jurisdiction of the Ld.PCIT to invoke his revisional jurisdiction, let us first examine the scope of revisional jurisdiction u/s. 263 of the Act. For that, let us take the guidance of judicial precedence as laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions should be satisfied before jurisdiction u/s.263 of the Act is exercised by the ld. CIT. The twin conditions which need to be satisfied are that (i) the order of the Assessing Officer must be erroneous and (ii) as a consequence of passing an erroneous order, prejudice is caused to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous i.e. (i) if the Assessing Officer's order was passed on assumption of incorrect facts; or assumption of incorrect law; (ii) Assessing Officer's order is in violation of the principles of natural justice; (iii) if the AO's order is passed by the without application of mind; or (iv) if the AO has not investigated the issue before him. In the circumstances enumerated above only the order passed by the Assessing

Officer can be termed as erroneous for the purpose of S.263 of the Act. Coming next to the second limb, the AO's erroneous order can be revised by the Ld. CIT only when it is shown that the said order is prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue'' has to be read in conjunction with an "erroneous" order passed by the Assessing Officer. The Hon’ble Supreme Court, held that for invoking powers conferred by S.263; the CIT should not only show that the AO's order is erroneous as a result of any of the situations enumerated above but CIT must also further show that as a result of an erroneous order, some loss is caused to the interest of the revenue. Their Lordship in the said judgment held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. It was further observed that when the Assessing Officer adopts one of the course permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the Ld. CIT does not agree, it cannot be treated as an order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

7. Here in this case, the Ld. PCIT has interfered with the re-assessment order passed by the AO dated 29.03.2022 u/s.147 of the Act, wherein, the Ld. PCIT find fault with the action of the AO while framing the Re-Assessment Order accepted the claim of on the issue of depreciation @15% on plant & machinery which according to the Ld.PCIT ought to have been @80% since the boilers used was energy saving device. In this regard, we note that the assessee which is in the business of running power plant had filed its RoI on 26.11.2014 for AY 2014-15 declaring total income of Rs.9,59,71,300/- [after claiming deduction u/s.80IA of the Act to the tune of Rs.41,21,30,275/-] which RoI was selected for scrutiny and the Assessment Order was framed by the AO u/s.143(3) on 10.05.2016 computing total income at Rs.10,12,96,106/- which assessment was re-opened, *inter-alia*, on two issues including the issue which is the bone of contention raised by the Ld.PCIT in the impugned order viz., less depreciation claimed by assessee @15% on Plant & Machinery when assessee could have claimed depreciation on boiler @80% (refer reasons record supra). And the AO enquired about it during reassessment proceedings and asked assessee as to why it claimed only 15% depreciation on the Higher Efficiency Boilers (being energy saving device), when it was eligible for depreciation allowance of 80% on the Written Down Value (WDV). And the AO alleged that the assessee was claiming less depreciation on the Higher Efficiency Boilers in

order to claim higher/excess deduction u/s.80IA of the Act and asked assessee as to why the excess deduction claimed be disallowed. Pursuant to which, the assessee replied (found placed at Page Nos.25-48 of the Paper Book) wherein assessee brought to the notice of the AO that Boilers in question are generating electricity and can't be termed as Energy Saving Devises which are specifically prescribed under clause (ix) of item (8) of Schedule-III and that energy saving devices lowers consumption of energy and saving of energy can't be equal to generation of electricity. And the AO accepted the contention of the assesse especially stated at Page Nos.25-30 of the Paper Book. Thus on this precise issue, the AO had conducted his enquiry and being satisfied with the reply of assessee has accepted it.

8. Therefore, the action of the AO can't be held to be without conducting any enquiry. And the AO's action of accepting the reply of assessee on the issue and not drawing any adverse findings against the assessee, cannot be interfered by Ld PCIT without him giving a finding that the view of the AO on this issue was unsustainable in law as held by the Hon'ble Supreme Court in the case of Malabar Industries Ltd., (supra). We also note that the Hon'ble jurisdictional High Court in the case of Virtusa Consulting Services (P) Ltd. v. DCIT reported in [2022] 442 ITR 385 (Madras), has also taken such a view, which is reproduced as under:

27. In Kumar Rajaram v. ITO [2019] 110 taxmann.com 109/267 Taxman 65/[2020] 426 ITR. 185 (Mad.), the Court considered the scope of section 263 of the Act and after noting the decision in CIT v. Gabriel India Ltd. [1993] 71 Taxman 585/203 ITR 108 (Bom.) and the decision of the High Court of Delhi in CIT v. Sunbeam Auto Ltd. [2010] 189 Taxman 436/[2011] 332 ITR 167 held that the power exercised under section 263 of the Act was on account of mere change of opinion. The operative portion of the judgment reads as follows:-

> 5. The Commissioner had issued show cause notice dated 12-3-2015 under section 263 of the Act. In the show cause notice, the Commissioner states that the figures mentioned by the assessee were culled out from the records, thus there was no other independent material which formed the basis of the show cause notice. The CIT while issuing the show cause notice did not rely upon any independent material nor on any interpretation of law but on perusal of the records was of the view that the expenditure cannot be allowed as deduction. Along with the filled in questionnaire, the assessee had filed the copy of the last will and testament of his father, sale deed of the Bangalore property and the legal opinion given by the learned counsel for the assessee. After perusal of the same, the Assessing Officer has taken a stand and passed the order. Therefore, it cannot be stated that the Assessing Officer did not apply his mind to the issue, after all the Assessing Officer cannot be expected to write a judgment. Admittedly there was an inquiry conducted by the Assessing Officer and it is not the case of the CIT that there was a lack of inquiry or inadequate inquiry.
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> 6. In the case of CIT v. Gabriel India Ltd. [1993] 203 ITR 108 (Bom.), it was held that suo motu revision under section 263 of the Act can be exercised only if on examination of the records of any proceedings under the Act, the Commissioner considers that an order passed by the Income Tax Officer is erroneous in so far as it is prejudicial to the interest of revenue. It was further held that this power is not arbitrary or uncharted power, it can be exercised only on fulfilment of the requirements laid down in Sub- section (1), that an order is erroneous in so far as it is prejudicial to the interests of the revenue, must be based on materials on the record of the proceedings called for by the Commissioner and if there are no materials on record, the basis on which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings will be illegal and without jurisdiction. It was further held that the Commissioner cannot initiate proceedings with a view to start fishing and roving enquiries into the matters or orders which are already concluded as such an action will be against the well accepted policy of law that there must be a point of finality in all illegal proceedingthe stale issues should not be reactivated beyond a particular stage. Section 263 of the Act does not visualize a case of substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order unless the decision is held to be erroneous. Merely because the Commissioner is not fully satisfied with the conclusion of the Income Tax Officer, the order cannot be turned to be erroneous. On a reading of the order dated 1-7-2015/22-7-2015 passed under section 263 of the Act one can easily form an opinion that the order is based upon the interpretation which the CIT has given to the terms and conditions of the last will and testament of the assessee's father dated 30.10.2008. Thus, it is evident that the CIT has made a roving enquiry and substituted his view to that of the view taken by the Assessing Officer who had done so after conducting an enquiry into the matter and after calling for all documents from the

assessee, one of which is the last will and testament executed by the assessee's father. Therefore, we are of the clear view that this is not a case where the Commissioner could have invoked the power under section 263 of the Act. For all the above reasons, the Substantial Questions of Law 1 and 4 are answered in favour of the assessee.

13. The Substantial Question of law No.3 is with regard to the expenditure claimed by the assessee. The assessee had produced documents before the Assessing Officer who had scrutinized the same and accepted the genuinity of the claim and granted the benefit. The CIT disallowed the expenses on the ground that the Assessing Officer did not make an in depth inquiry. A similar finding was tested for its correctness by the High Court of Delhi in the case of CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167 and it was held that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was an inquiry, even adequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act merely because he has a different opinion in the matter and it is only in cases of lack of inquiry that such a course of action would be open. As mentioned by us in the preceding paragraphs, the assessee has responded to the notice issued under section 142 of the Act and produced documents and records including their statement of total income wherein they had given the entire details including the receipts issued by the respective persons to whom payments were effected, all of which were through banking channels. Therefore, in our considered view the finding rendered by the CIT was perverse which ought not to have been affirmed by the Tribunal more so for the reason that there was no evidence with regard to the expenses like professional fee, etc. The Tribunal failed to note that the assessee had produced the copies of the receipts signed by the respective party before the Assessing Officer who was satisfied with the same and in the absence of any fraud being alleged with regard to the authenticity of those documents, the CIT could not have revised the assessment by invoking section 263 of the Act. For the above reasons, the Substantial Question of law No.3 is answered in favour of the assessee."

28. Ms. R. Hemalatha, learned Senior Standing Counsel sought to sustain the order of the PCIT as affirmed by the Tribunal by reiterating the conclusion arrived at by the PCIT that enquiry was not conducted by the Assessing Officer.

29. In the preceding paragraphs, we have dealt with the said issue and we have recorded our satisfaction that the Assessing Officer did conduct an enquiry, called for documents from the assessee, which were submitted by the assessee and after considering the documents and records and discussing the case with the assessee, the assessment was completed. The reference to the TPO was also made, who had concluded that there is no adjustment required to the ALP.

30. In support of her contention, reliance was placed on the decision in CIT v. Nalwa Investments Ltd. [2011] 11 taxmann.com 98/199 Taxman 211 (Mag.)/338 ITR 522 (Delhi). We find the said decision would not assist the case of the Revenue, since in the said case, the Assessing Officer failed to apply his mind as to whether dividend income could be given character of business income for the purpose of set off and therefore, the question of there being plausible view did not arise and therefore, the order of the Tribunal was quashed. In the case on hand, we have found that the Assessing Officer did apply his mind and then come to the conclusion.

31. Reliance was placed on the decision in the case of Nagal Garment Industries (P.) Ltd. v. CIT [2020] 113 taxmann.com 4 (MP). This decision is also distinguishable on facts, as in paragraph 9 of the judgment, the Assessing Officer after issuing a questionnaire to the assessee, on considering the reply filed by the assessee and after recording that the reply was not satisfactory, did not proceed further in the matter. Therefore, the decision cannot be applied to the facts before us.

32. Reliance was also placed on the decision in CIT v. Modi Brother [2007] 164 Taxman 331 (MP). The question of law, which was framed for consideration, was whether the Tribunal was justified in considering the documents, which were not on record before the Assessing Officer while passing the order impugned in the said appeal. The Court had remanded the matter without expressing any opinion on the question framed and therefore, the decision cannot be relied on as a precedent.

33. In the light of the above discussions, we are of the clear view that the Tribunal committed an error in not interfering with the order passed by the PCIT.

9. In the light of the aforesaid discussion, we find that the AO while passing the re-assessment order dated 29.03.2022 u/s.147 of the Act did apply his mind to the issue [less depreciation claimed by assessee @15% on Plant & Machinery when assessee could have claimed depreciation on boiler @80%] has accepted the claim of the assessee being satisfied with the explanation given by it during re-assessment proceedings as found by us (supra). In such a scenario, the action of the AO can't be held to be a view taken without enquiry or without application of mind. According to us, the Ld. PCIT couldn't have interfered with the action of the AO without giving a finding that the view of the AO on the issue [accepting the claim made by assessee on less depreciation on boilers] as unsustainable in law. It is a well settled position of law, the Ld. PCIT can't substitute his views with that of the AO, if the AO's view on the issue is a plausible view. Since there is no finding of the Ld. PCIT that the action of the AO accepting the claim made by the assessee on the fault

found by the Ld. PCIT, are unsustainable in law, we are of the considered opinion that the Ld. PCIT erred in exercising his jurisdiction u/s.263 of the Act without fulfilling the conditions precedent for doing so. Therefore, we quash the impugned action of u/s.263 of the Act.

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

Order pronounced on the 04th day of December, 2024, in Chennai.

Sd/-	**Sd/-**
(जगदीश**)**	**(एबी टी. वर्की)**
(JAGADISH)	**(ABY T. VARKEY)**
लेखा सदस्य**/ACCOUNTANT MEMBER**	न्यायिक सदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 04th December, 2024.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF