आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई। **IN THE INCOME TAX APPELLATE TRIBUNAL** **'C' 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**		
आयकरअपीलसं./**ITA Nos.925 & 926/Chny/2024** निर्धारणवर्ष**/Assessment Years: 2017-18 & 2018-19**		
Vanavil Estate, 4/20, Duraiswamy Reddy Street, West Tambaram, Chennai-600 045.	**v.**	The PCIT (Central), Chennai-1.
[**PAN: AALFV 0770 H**]		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
अपीलार्थी की ओर से/ Appellant by	:	Shri S. Sridhar, Advocate
प्रत्यर्थी की ओर से /Respondent by	:	Shri R. Clement Ramesh-Kumar, CIT
सुनवाईकीतारीख/Date of Hearing	:	19.11.2024
घोषणाकीतारीख /Date of Pronouncement	:	12.02.2025

आदेश **/ O R D E R**

PER ABY T. VARKEY, JM:

These are appeals preferred by the assessee against the orders of the Learned Principal Commissioner of Income Tax, (hereinafter in short "the Ld. Pr.CIT") (Central), Chennai-1, both dated 22.03.2024 for the Assessment Years (hereinafter in short "AY") 2017-18 & 2018-19 passed u/s.263 of the Income Tax Act, 1961 (hereinafter in short "the Act").

2. Brief facts as noted are that, the assessee is a partnership firm engaged in the business of real estate. A survey operation u/s.133A of

the Act was conducted in the case of the assessee on 07.08.2019, in the course of which a laptop was impounded. Upon analysis of the same, it was gathered that the gross receipts of the assessee from the real estate business was substantially higher than the gross receipts reported in the regular books of accounts. The survey team is noted to have quantified the potential escapement of income at 11.59% of the differential receipts. On the basis of the survey findings, the AO is noted to have reopened the assessments for AYs 2017-18 & 2018-19 u/s 148 of the Act. In the reasons recorded for reopening these assessments, the AO had formed a belief that, the income element of 11.59% and 12.56% of the differential receipts had escaped assessment for AYs 2017-18 & 2018-19 respectively. Thereafter, in the reassessment proceedings, the assessee is noted to have disputed the AO's reliance on the contents of the impounded laptop. After considering the submissions and objections of the assessee, the AO is noted to have computed the difference between gross receipts as per books of accounts and the gross receipts as per laptop and treated the same as undisclosed turnover of the assessee. The AO is noted to have estimated the profit element embedded therein at the rate of 11.59% and 12.56% and accordingly framed the assessments for AYs 2017-18 & 2018-19 respectively, u/s 147 of the Act both dated 31.03.2022. The details thereof, as noted from the assessment order is as follows:-

Sl. No.	Particulars	AY 2017-18	AY 2018-19
1.	Gross Receipts as per impounded laptop	Rs.11,96,19,541	Rs.57,56,06,658
2.	Gross Receipts as per books of accounts (according to the AO)	Rs.3,22,02,272	Rs.5,13,18,170
3.	Differential Receipts	Rs.8,74,13,269	Rs.52,42,88,488
4.	Profit element embedded therein added to the total income by AO	Rs.1.01 crores (8,74,13,269 x 11.59%)	Rs.6.58 crores (52,42,88,488 x 12.56%)

3. Aggrieved by the action of the AO, the assessee is noted to have preferred appeals before the Ld. CIT(A) in both the years. During the pendency of the appeal, the Ld. Pr.CIT is noted to have issued notices u/s 263 of the Act, both dated 15.02.2024, proposing to revise the income tax assessments completed u/s 147 of the Act for both the AYs 2017-18 & 2018-19. In the notice, the Ld. Pr.CIT is noted to have observed that the AO's action of adding only the profit element qua the differential receipts was erroneous. According to the Ld. Pr.CIT, the assessee had already claimed all the expenditure in the Profit & Loss Account and no evidence was adduced for any additional expenditure and therefore, according to him, the entire suppressed receipts ought to have been brought to tax. It is noted that while quantifying the value of suppressed receipts, the Ld. Pr.CIT had computed the differential receipts at Rs.5,80,42,094/- and Rs.45,43,54,220/- as opposed to the figures of Rs.8,74,13,269/- &

Rs.52,42,88,488/- adopted by the AO, for AYs 2017-18 & 2018-19 respectively.

4. The assessee is noted to have furnished their replies to the show cause notices issued u/s 263 of the Act for both the AYs on the same lines. The copies of these replies are found to be placed at Pages 78-83 and 163-168 of the Paper-book. The Ld. Pr.CIT however did not agree with the explanations put forth by the assessee and passed the impugned revisionary orders u/s 263 of the Act for both the AYs 2017-18 & 2018-19 dated 22.03.2024, directing the AO to bring to tax the entire differential receipts between the total receipts from business as per the impounded laptop and the declared receipts. Aggrieved by the orders of the Ld. Pr.CIT, the assessee is now in appeal before us.

5. Having regard to the facts taken note of above, both sides agreed that the appeals for both the years are similar and therefore, ITA No.925/Chny/2024 for AY 2017-18 is taken as the lead case, decision of which will be followed in the appeal for AY 2018-19.

6. Assailing the action of the Ld. Pr.CIT, the Ld. AR for the assessee submitted that, the impugned reassessment order and the addition made therein, which was sought to be set aside by the Ld. Pr.CIT was already in challenge before the Ld. CIT(A) and pending for adjudication on the date of invocation of the revisionary jurisdiction. The Ld. AR brought to our

notice that the assessee had disputed the reliance placed by the AO on the disputed seized material i.e. the laptop as well as the contents thereof and therefore, since the matter was already challenged before the Ld. CIT(A), who has co-terminus powers of the AO, the Ld. Pr.CIT was unjustified in simultaneously invoking revisionary powers u/s 263 of the Act on the very same issue and that such action was in violation of the fetter/bar set out in Explanation 1 to Section 263 of the Act. For this, the Ld. AR placed reliance on the decision of the Hon'ble jurisdictional Madras High Court in the case of **Smt. Renuka Philip vs ITO (409 ITR 567)**.

7. The Ld. AR further argued on merits that the impugned issue had already been critically analyzed in detail by the survey team as well as the AO. Taking us through the reasons recorded for reopening, notices issued u/s 142(1) of the Act as well as the findings recorded in the assessment orders passed u/s 147 of the Act, the Ld. AR contended that there was no lack of enquiry on this issue and therefore, the Ld. Pr.CIT could not interfere with these completed assessments u/s 263 of the Act. The Ld. AR further brought to our notice a plethora of judgments wherein it has been held that, where details of any undisclosed receipts/sales are unearthed in the course of any search/survey, then the whole amount cannot be brought to tax but it is only the profit element embedded therein which can be assessed to tax. He accordingly submitted that the view adopted by the AO bringing to tax the profit element of the

differential receipts was a permissible view in law and therefore, relying upon the decision of the Hon'ble Supreme Court in the case of **Malabar Industrial Co. Ltd. v. CIT (243 ITR 83),**he urged that the impugned order passed u/s 263 of the Act was bad in law and therefore ought to be cancelled.

8. Per contra, the Ld. CIT, DR appearing for the Revenue vehemently supported the order of the Ld. Pr.CIT. Reiterating the observations of the Ld. Pr.CIT, he argued that since the Ld. CIT(A) had not yet passed the appellate order on the issue impugned in the order u/s 263 of the Act, the bar set out in Explanation 1 to Section 263 of the Act cannot be applied. He further submitted that the assessment order lacked any detailed discussion on the impugned issue and that the AO did not record any basis as to how he arrived at a conclusion to assess only the profit element instead of the gross receipts and therefore, this showed that the reassessment order was passed without application of mind. The Ld. CIT, DR therefore urged us not to interfere with the order of the Ld. Pr.CIT.

9. We have heard both the parties and perused the material placed on record before us. It is noted that, in the case in hand, the Ld. Pr.CIT invoked jurisdiction u/s 263 of the Act principally on the broad allegation that there was failure to conduct proper enquiries which the facts of the case required the AO to make. According to Ld. Pr.CIT, the assessment

order suffered from lack of enquiry as also non-application of mind to the facts of the case resulting in a patently erroneous addition. As a result, in the opinion of Ld. Pr. CIT, the AO's order was erroneous and prejudicial to the interests of the Revenue and therefore liable for revision u/s 263 of the Act. Before us, the assessee has seriously contested the impugned order both on legality as well as on its merits.

10. We first take up the legal challenge of the assessee which is that the Ld. Pr.CIT was prohibited in terms of Explanation 1(c) to Section 263 of the Act, in directing revision of the impugned issued viz., addition of entire supressed receipts as opposed to the profit element embedded therein. It is noted that Explanation (1) to Section 263 of the Act lays down certain circumstances in which the power under Section 263 of the Act is not exercisable by the Ld. Pr.CIT.The relevant Explanation 1(c) to Section 263, which is in dispute in the present case, reads as follows:

> "**Revision of orders prejudicial to revenue**
>
> 263(1)...
>
> (a) to (b)** ** **
>
> (c) Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the 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."

11. It was brought to our notice that the Hon'ble jurisdictional Madras High Court in the case of Renuka Philip (supra) has held that the above language used in Explanation 1(c) provides that, when the appeal is pending before the Commissioner (Appeals), then jurisdiction under Section 263 of the Act cannot be exercised. In the decided case, the assessee had originally filed the return of income disclosing long term capital gain and had claimed the entire sum as exempt u/s 54 of the Act. The case of the assessee was reopened u/s 147 of the Act and the AO found that the assessee was not eligible for exemption u/s 54 of the Act and therefore denied the same, however, at the same time, the AO found the assessee to be eligible for exemption u/s 54F of the Act and thus allowed proportionate claim. Aggrieved by this action of the AO, the assessee had carried the matter in appeal before the CIT(A). In the meanwhile, and during the pendency of the appeal, the Ld. CIT had invoked revisionary jurisdiction u/s 263 of the Act wherein he held that, the deduction allowed by the AO u/s 54F of the Act was also erroneous and therefore directed the AO to disallow the same. On appeal, the Hon'ble Madras High Court found that the larger issue which was the allowability of exemption u/s 54 of the Act as opposed to Section 54F was pending before the CIT(A) and therefore the CIT could not have exercised the power u/s 263 of the Act for denying the deduction u/s 54F of the Act,

which was already in dispute before the CIT(A). The relevant findings of the Hon'ble High Court taken note of by us, is as follows:-

> "22. The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the re-assessment order dated 31.12.2009 stating that his claim for deduction under Section 54 of the Act should be accepted.
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> 23. Therefore, in the process of considering as to what relief the assessee is entitled to, the Assessing Officer held that the assessee is entitled to claim deduction under Section 54F of the Act and assigned certain reasons for that. Therefore, the larger issue was pending before the Commissioner of Appeals, and in such circumstances, the Commissioner could not exercise power under Section 263 of the Act on account of the statutory bar. Therefore, on this ground also, the assumption of jurisdiction under Section 263 of the Act was wholly erroneous."

12. In light of the above binding legal position, we now revert back to the facts of the present case. As noted in the preceding paragraphs, the survey action conducted upon the assessee resulted in impounding of a laptop, which contained purported details of the receipts of the assessee from its real estate business, which was found to be substantially higher than what was reported in the books of accounts. Upon analysis of the same, the AO had recorded specific reasons computing the value of suppressed receipts and also working out the undisclosed profit percentage qua such supressed receipts which had escaped tax. Thereafter, after making enquiries in the reassessment, the AO had

framed the assessment order wherein he had brought to tax undisclosed profit embedded in the supressed receipts. It was brought to our notice that, the assessee had disputed the reliability of the material found from the laptop itself, on the ground that the data therein was not put to the test of the provisions of Section 65A and Section 65B of the Indian Evidence Act. The assessee had therefore claimed that no addition could have been made on the basis of such unreliable material. Accordingly, the assessee is noted to have disputed the addition of the undisclosed profit in relation to the suppressed receipts, before the Ld. CIT(A). In the meantime, it is observed that the Ld. Pr.CIT had exercised power u/s 263 of the Act and passed the impugned order holding that the addition of undisclosed profit was unjustified and that the entire receipts ought to have been added to the total income. Applying the ratio decidendi emerging from the above decision (supra), we find that the larger issue which was the reliability of the impounded material itself, was in dispute and pending before the Ld. CIT(A), who having the co-terminus powers of the AO was required to look into the entire gamut of the issue before passing the appellate order. Accordingly, we find merit in the plea of the assessee that, in terms of bar set out in Explanation 1(c) to Section 263 of the Act and in light of the above binding decision of the Hon'ble Madras High Court (supra), the Ld. Pr.CIT was unjustified in exercising revisional jurisdiction u/s 263 of the Act on the impugned issue, which was already

pending in appeal, and therefore the impugned order being bad in law is directed to be cancelled.

13. For completeness, we also take up the other argument raised by the assessee objecting the merits of the impugned order passed u/s 263 of the Act and that the Ld. Pr.CIT had exceeded the scope of revisionary jurisdiction vested in himu/s 263 of the Act.For this, we have to first examine the scope of revisionary jurisdiction u/s 263 of the Act. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in **Malabar Industrial Co. Ltd. v. CIT (243 ITR 83)** wherein their Lordships 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 interests 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; or (ii) Assessing Officer's order is in violation of the principles of natural justice; or (iii) if the AO's order is passed without application of mind; or (iv) if the AO has not investigated the issue before him. It is only under these circumstances enumerated in the foregoing, that an order passed by the Assessing Officer can be termed as erroneous for the purpose of Section

263 of the Act. Coming 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 interests 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 Industrial Co. Ltd (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 Section 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 the CIT must also further show that as a result of an erroneous order, some loss is caused to the interests of the Revenue. Their Lordships 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 interests 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 interests of the Revenue unless the view taken by the Assessing Officer is unsustainable in law.

14. We note that both in the Show Cause Notice [SCN] as well as in the impugned order, it is not the case of the Ld. Pr.CIT that, the AO had not

made enquiry into the issue. Instead, the case of Ld. Pr.CIT is that, the AO had not applied his mind at all to the facts gathered in the course of assessment. According to the Ld. Pr.CIT, there was no information in the assessment order or the file to indicate that the assessee had furnished any details and that the AO had applied his mind to the same before estimating the profits on the undisclosed receipts, instead of bringing to tax the entire receipts. In the opinion of the Ld. Pr.CIT, the assessee had already claimed the entire expenditure in the Profit & Loss Account and therefore there was no question of taxing only the profit in the receipts but the entire receipts ought to have been brought to tax. This inaction of the AO, according to the Ld. Pr.CIT, rendered the assessment order to be erroneous and prejudicial to the interests of the Revenue.

15. From the material placed on record before us, we find that the AO, in his recorded reasons, had explicitly set out his mind after examining the seized material and the survey team's analysis that it was the profit embedded in the suppressed receipts found from the laptop, which in his belief, had escaped assessment. The relevant reasons recorded for reopening the assessment for AY 2017-18 (lead case) is noted to be as under:

> Survey u/s 133A of the Income-tax Act, 1961 has been conducted in the case of the assessee on 07.08.2019. For the FY 2016-17 (AY 2017-18), the assessee firm has disclosed receipts of Rs.3.22 Crores but as per the impounded laptop, the gross receipt is Rs.11.96 Crores.

> No entries found regarding expenditures were found in registers / computer / laptop. The apparent difference in the receipts worked out to Rs.8.74 Crores and adopting the net profit @ 11.59% (after deducting the partner's salary from the receipts), the difference in net profit arrived at 1.01 Crore. On perusal of the ITR, it is clear that the assessee has not disclosed the same.

16. Thereafter, it is noted that the AO in his notice u/s 142(1) of the Act dated 22.03.2022 had set out a detailed questionnaire regarding the suppressed receipts found in the impounded laptop. The AO is noted to have also *inter alia* questioned the absence of entries regarding expenditure in the laptop. The relevant requisition of the AO is noted to be as under:

> "1. Please furnish statement of computation of your income from all sources during the year.
>
> 2. Please furnish a copy of audit report, Profit and Loss account along with schedules/notes to accounts, Balance Sheet.
>
> 3. Please furnish a copy of the partnership deed.
>
> 4. Please reconcile the income declared in the Income tax return filed by you and the tax credit claimed in the return of income for A.Y. 2017-18 with Form 26AS.
>
> 5. Survey u/s 133A of the Income-tax Act, 1961 has been conducted in the case of the assessee on C7.08.2019. For the FY 2016-17 (AY 2017-18), the assessee firm has disclosed receipts of Rs.3.22 Crores but as per the impounded laptop, the gross receipt is Rs. 11.96 Crores.
>
> No entries found regarding expenditures were found in registers / computer / laptop. The apparent difference in the receipts worked out to Rs.8.74 Crores and adopting the net profit ® 11.59% (after deducting the partner's salary from the receipts), the difference in net profit arrived at 1.01 Crore. On perusal of the ITR, it is clear that the assessee has not disclosed the same.
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> As against the income, it is seen that the assessee has admitted only Rs. 37,33,880/- as income under the head 'profit and gains from the Business' and not the additional receipts amounting to net profit of Rs. 1.01 Crore which is ascertained based on the average profit percentage.
>
> The assessee has not disclosed the additional receipts admitted during the statement recorded u/s 133A. It is also evident from the survey findings that the assessee is not maintaining proper books of accounts. Further, the ascertained net profit to the tune of Rs.1.01 Crores. Therefore, the income chargeable to tax

of Rs. 1.01 Crores has escaped assessment as the assessee has not disclosed the same."

17. It is noted that the assessee had furnished a detailed reply to the above notice u/s 142(1) of the Act, copy of which has been placed at Page 23-26 of the Paper-book. The AO thereafter, is noted to have again issued another notice u/s 142(1) of the act dated 28.03.2022 wherein he is noted to have called for the complete details of the expenses claimed in the Profit & Loss Account. After these enquiries, the AO is noted to have framed the reassessment order u/s 147 of the Act. On perusal of the reassessment order, it is noted that the AO had set out his detailed findings for bringing to tax the profit element embedded in the undisclosed receipts. The relevant discussion in the assessment order is noted to be as follows:-

9. The assessee's arguments are duly considered and found not to be acceptable for the following reasons:

The impounded materials necessary for arriving at the income has already been handed over to the assessee firm on 23.08.2019. The quantification has been based on the books and documents, electronic devices impounded during the course of survey proceedings.

The assessee has not reconciled the apparent difference in receipts which was worked out to Rs. 8.74 crores and net profit of Rs. 1.01 crore has been arrived at after adopting the net profit 11.59%, till date, despite the time available with the assessee from 23.08.2019 and despite the opportunities provided during the post survey/ assessment proceedings. Presently, the assessee is taking an unfounded prayer that the assessment is based on statements, loose sheets/excel sheets/pen drives, etc.

There is no evidence whatsoever that the assessee was under duress during the course of survey proceedings and it has taken more than 4 years for the assessee to retract from the findings admitted by the assessee, Shri. C.Balakrishnan (one of the partners of the firm) in statement u/s.133A of the Income-tax Act, 1961. Therefore, the plea of the assessee that Shri C.Balakrishnan (one of the partners of the firm) was under duress cannot be accepted. In fact, the findings are based on impounded materials and not just on mere statements recorded.

> 10. The assessee firm was also requested to produce documentary evidences regarding land owners payments, details of the land owners. No such details have been produced by the assessee till date. The assessee vide letter dated 26.03.2022 has stated that the Gross Receipts declared by the assessee was Rs.6.15 Crores and not Rs. 3.22 Crores. The assessee has stated that the amount of Rs.3.22 Crores represents the net surplus transferred to the profit and loss account after deducting Land owner payment of Rs.2.93 Crores against the Land owner receipts of Rs.6.15 Crores. However, in the absence of details regarding land owner payments, the argument cannot be accepted.
>
> 11. With the materials available on record, the difference in net profit was arrived at 1.01 Crore. The assessee has not controverted the finding with material evidences/reconciliation. Therefore, an amount of Rs.1.01 crore has been added to the total income of the assessee.

18. In light of the above narrated facts, it is noted that, the AO had examined the survey material, applied his mind, recorded his reasons for reopening the assessment, and thereafter, he made specific enquiries from the assessee and then, recorded his findings for bringing to tax the undisclosed profit qua the suppressed receipts found in the impounded material. Having taken note of these facts, we are therefore unable to subscribe to the Ld. Pr.CIT's finding that the AO had framed the impugned assessment without applying his mind to the facts of the present case. Rather, we find that, the AO had made specific enquiries and also recorded his findings for assessing the undisclosed profit.

19. Before us the Ld. CIT, DR however had argued that the figures adopted by the AO for working out the suppressed profits was incorrect, which showed that he had not applied his mind to the facts of the case. In this regard, it is noted that the quantification of gross receipts as per the laptop made by the AO has not been disputed by the Ld. Pr.CIT. It is noted that, the dispute relates the computation of gross receipts as per

books of accounts. According to Ld. Pr.CIT, had the AO applied his mind, then he would have noted that the gross receipts as per books of accounts at Rs.6,15,77,447/- and not Rs.3,22,02,272/-, as stated in the assessment order. It was brought to our notice that, this particular aspect had been pointed out by the assessee itself in their reply to notice u/s 142(1) of the Act, wherein it was submitted before the AO that, the gross receipts as per books of accounts was Rs.6,15,77,447/- and not Rs.3,22,02,272/-. The AO is noted to have specifically taken note of this contention but rejected the same, which have already taken note of above. However, for the sake of convenience, the relevant observations made by the AO, in this regard, are being again reproduced hereunder: -

> ".. The assessee vide letter dated 26.03.2022 has stated that the Gross Receipts declared by the assessee was Rs.6.15 Crores and not Rs. 3.22 Crores. The assessee has stated that the amount of Rs.3.22 Crores represents the net surplus transferred to the profit and loss account after deducting Land owner payment of Rs.2.93 Crores against the Land owner receipts of Rs.6.15 Crores. However, in the absence of details regarding land owner payments, the argument cannot be accepted."

20. In light of the above, we are therefore unable to countenance this line of argument by the Revenue that the AO had not applied his mind to the facts of the case and had *ex-facie* adopted incorrect figure while computing the addition. Instead, it is observed that the AO had specifically considered this aspect and rejected the same and hence it cannot be said to be a case of non-application of mind. Moreover, as rightly pointed out by the Ld. AR of the assessee that, the action of the

AO did not cause any prejudice to the interests of the Revenue, because he had resultantly computed a higher value of suppressed receipts in the relevant AY 2017-18. If this action of the AO is interfered with, then it would result in reduction in the value of suppressed receipts, which cannot be done u/s 263 of the Act. For these reasons, we reject this particular line of contention of the Revenue.

21. We further note that the Ld. Pr.CIT had laid much emphasis on the aspect that, as the assessee was unable to bring on record evidences regarding incurrence of expenses outside the books, the AO should not have taxed the profit element but the entire value of receipts, and such action of the AO showed his non-application of mind. The Ld. Pr. CIT is noted to have proceeded on the assumption that, the entire expenses had already been recorded in the P&L A/c and that there were no expenses incurred outside the books and therefore the entire receipt ought to be brought to tax. The Ld. AR has rightly pointed out that, these observations of the Ld. Pr.CIT is based on his own subjective notion and is not backed by any cogent material or evidence. We are in agreement with the Ld. AR that, the Ld. Pr.CIT has essentially sought to substitute his own view with the view adopted by the AO. However, for doing so, as noted in the preceding paragraphs, the Ld. Pr.CIT is required to demonstrate that the view adopted by the AO was a patently unsustainable view in law. But, if there are two views possible on this

aspect, and the AO had adopted the view which favoured the assessee, then such action of the AO cannot be termed as 'erroneous' in terms of Section 263 of the Act. This proposition is supported by the decision of Hon'ble Supreme Court in the case of **Malabar Industrial Co. Ltd. v. CIT (supra)**.

22. It was brought to our notice that, the view entertained by the AO bringing to tax the profit element qua the undisclosed receipts was based on the proposition that it cannot be a matter of argument that, the amount of receipts/ sales by itself would represent the income of the assessee. For this, our attention was invited to the following findings rendered by the Hon'ble Gujarat High Court in the case of **CIT Vs President Industries (258 ITR 654)**.

> "3. Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner (Appeals) and the Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be a matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question, whether entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred to about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales."

23. It was also brought to our attention that, on similar set of facts, this Tribunal at Mumbai in the case of **M/s Prime Developers Vs ACIT (ITA No. 175-178/M/2010)** had rejected the Revenue's plea that the profit should not be estimated on the undisclosed sales unless the assessee was able to substantiate the incurrence of expenses with evidences. This Tribunal is noted to have upheld the assessee's plea for estimation of profit element embedded in suppressed receipts in real estate business, by observing as under:-

> "42. Scope of Reasonable Expenditure: Assessee needs to expend in order to earn income/profit and it is basic and universal principle in any business. This principle applies to both accounted and unaccounted profits. In a case of unaccounted profits, due to its very nature of unaccounting, normally, the parties do not maintain evidences and therefore, evidencing such unaccounted evidences is impossibility. Probably, for this reason, the courts have taken conscious view that it is for the assessing authority to quantify reasonable expenditure considering the facts of the case and industry. Legally speaking, the judgments are uniform in asserting that entire sale proceeds should not be added as income. Honble High court of Ahmadabad ruled in the case of Panna Corporation that the " assessee ought to have spent reasonable amount for the purpose of receiving such gross profit' (para 14 of Tax Appeal No 325 of 2000 dt. 16.6.2012). Further, Hon'ble High Court Of Madhya Pradesh held in the case of President Industries 258 ITR 654 that ' entire sale proceeds of the assessee should not be added in his income'. Further, from the judgment in case of Panna Corporation (supra), it is settled proposition that there is no need for the assessee to demonstrate the genuineness of the claim of unaccounted expenditure in the cases of this kind. The underlined logic is that the unaccounted expenditure is always unevidenced and never maintained. Therefore, transferring onus on to the assessee in matters of this kind is not approved. Ex consequenti, it is for the AO allow necessarily reasonable deduction towards such unaccounted expenditure without demanding evidences, considering the nature of industry and also evidences relating to extents of net profits earned by the assessee. Considering the above legal position on the matter, we are of the clear-cut opinion, the AO's conclusions on this issue are certainly erroneous. In principle, we uphold

> the views of the CIT(A) in this regard. Therefore, relevant grounds raised in the revenue's appeals are dismissed."

24. It was brought to our notice that the above findings of this Tribunal have been affirmed by the Hon'ble Bombay High Court in their decision rendered in ITA No.2452 of 2013. Likewise, it is noted that in the case of **ITO Vs. Anand Builders(ITA No.52 of 2002)**, this Tribunal in similar circumstances had held that, 8% of the unaccounted on-money could be taxed in place of the entire unaccounted on-money receipts since there is always the unaccounted payments. The above decision of this Tribunal is noted to have been upheld by the Hon'ble Gujarat High Court and the SLP filed against the judgment before the Supreme Court [SLP(C) no 14166 0f 2003] was also dismissed and reported in 265 ITR 37 as under;-

> "Dismissed the special leave petition filed by the Department against the judgment dated January 21, 2002 of the Gujarat High Court in ITA No. 52 of 2002 whereby the High Court dismissed the Department's appeal on the ground that no substantial question of law arose. The question of law raised in the appeal before the High Court was whether the Appellate Tribunal's finding while directing the Assessing Officer to tax only 8 per cent of the unaccounted on money receipt instead of fully taxing it, in the absence of any evidence of expenditure, could not be stated to be perverse."

25. The Ld. AR also brought to our notice another decision of Hon'ble Gujarat High Court in the case of **PCIT, Surat Vs. Anupam Organiser [(2020) (9) TMI 973]** wherein it was held that, the Tribunal was justified in considering that the assessee ought to have spent reasonable amount for the purpose of receiving the amount of on-monies and thus,

what could be brought to tax was the profit embedded in such receipts and not the entire receipts.

26. In light of the above decisions (supra), we find that the view adopted by the AO of not taxing the entire value of suppressed receipts but only the profit element embedded therein, was indeed a permissible view in law, in the facts and circumstances of this case.

27. For the reasons set out above, we therefore are of the considered view that the order dated 31.03.2022 passed by the AO bringing to tax the profit element of the undisclosed / suppressed receipts instead of taxing the entire value, cannot also be said to be unsustainable in law. As noted above, the course adopted by the AO while passing the order u/s 143(3)/147 of the Act was one of the permissible views in law. We are of therefore of considered view that the assessment order dated 31.03.2022 passed u/s 147 cannot be said to have been passed without application of mind or on incorrect assumption of facts. As noted above, the AO while passing the assessment order had discharged the dual role and has taken a plausible view in law, which cannot be said to be unsustainable in law. In the aforesaid facts and circumstances therefore, the impugned order u/s 263 of the Act dated 22.03.2024 is held to be unsustainable. Hence, we cancel the same by allowing the appeal of the assessee.

28. Since the facts and circumstances in the lead case under consideration, being AY 2017-18 are identical to the facts & circumstances involved in AY 2018-19, our above decision shall apply *mutatis mutandis* to the assessee's appeal in ITA No. 926/Chny/2024 as well. Hence, we accordingly cancel the impugned order u/s 263 of the Act dated 22.03.0204 for AY 2018-19 as well.

29. In the result, the appeal for both AYs 2017-18 & 2018-19 stands allowed.

Order pronounced on the 12th day of February, 2025, in Chennai.

Sd/-	**Sd/-**
(जगदीश**)**	**(एबीटी. वर्की)**
(JAGADISH)	**(ABY T. VARKEY)**
लेखासदस्य**/ACCOUNTANT MEMBER**	न्यायिकसदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 12th February, 2025.
TLN, Sr.PS

आदेशकीप्रतिलिपिअग्रेषित**/Copy to:**

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