

IN THE INCOME-TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER &
SHRI BIJAYANANDA PRUSETH, ACCOUNTANT MEMBER
आयकर अपील सं./ITA Nos.501 & 502/SRT/2024
(AYs: 2014-15 & 2015-16)
(Hybrid Hearing)

Wind Financial Services LLP, [Formerly known Wind Financial Services Pvt. Ltd.] Shop No.102/A, 436 Sq Feet Built Up, Dabhel, Daman & Diu, Valsad – 396215	Vs.	The PCIT, Valsad
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AADFW6369H		
(Appellant)		(Respondent)

Appellant by	Shri S. N. Divetia, AR
Respondent by	Shri Ritesh Mishra, CIT-DR
Date of Hearing	12/03/2025
Date of Pronouncement	21/05/2025

आदेश / ORDER

PER BIJAYANANDA PRUSETH, AM:

These appeals by the assessee emanate from the orders passed under section 263 of the Income-tax Act, 1961 (in short, 'the Act') by the learned Principal Commissioner of Income Tax, Valsad [in short, 'ld. PCIT'], dated 16.03.2024 for assessment years (AYs) 2014-15 and 2015-16. Since facts of the cases and the grounds taken up in the appeals are similar except variation in the amount, these appeals were heard together and a common order is passed for the sake of convenience and brevity. ITA No. 501/SRT/2024 is taken as the 'lead case'.

2. Grounds of appeal raised by the assessee in ITA No.501/SRT/2024, are as under:

“1.1 The order passed u/s 263 on 16.03.2024 for A.Y.2014-15 by Pr. CIT Valsad setting aside the order of AO u/s 147 r.w.s. 144B on 25.03.2022 as erroneous and prejudicial to the interest of Revenue is wholly illegal, unlawful and against the principles of natural justice.

1.2 The Ld. Pr. CIT has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant with regard to the impugned exercise of revision u/s 263.

2.1 The Ld. Pr. CIT has grievously erred in law and on facts in holding that the assessment order passed u/s 147 r.w.s. 144B on 25.03.2022 by AO was erroneous and prejudicial to the interest of Revenue so that action of revision u/s 263 was justified.

2.2 The Id. Pr. CIT has erred in law and or on facts in invoking the powers of revision u/s 263 of the Act, since the condition precedent were not satisfied.

2.3 That in the facts and circumstances of the case as well as in law, the Ld. Pr. CIT ought not to have invoked the powers u/s 263 when assessment order passed u/s 147 r.w.s. 144B on 25.03.2022 by AO was not erroneous and prejudicial to the interest of Revenue.

2.4 The Ld. Pr. CIT has grievously erred in law and on facts in setting aside assessment order u/s 147 r.w.s. 144B on 25.03.2022 by AO on all the issues raised in revision for making proper inquiries.

It is, therefore, prayed that the order passed by Ld. Pr. CIT, Valsad deserves to be quashed.”

3. Facts of the case in brief are that assessee filed its return of income for AY.2014-15 on 30.11.2014, declaring total income of Rs.15,29,624/-. The assessee is engaged in arbitrage activities in shares. The case was selected for scrutiny and order u/s 143(3) was passed on 30.11.2016, accepting the returned income. Subsequently, the Id. PCIT issued notice u/s 263 to revise the said assessment order passed u/s 143(3) of the Act as erroneous and prejudicial to the interests of revenue on the grounds that no proper enquiries were conducted by the Assessing Officer (in short, 'AO'). The appellant filed reply but the contention was

rejected and order u/s 263 of the Act was passed on 15.03.2019 setting aside the order of AO. Aggrieved by the order of Id. PCIT, appellant filed appeal before the ITAT bearing ITA No.314/SRT/2019 which is pending for disposal. In the meanwhile, the AO issued notice u/s 148 of the Act dated 31.03.2021 after recording reasons that the assessee was one of the beneficiaries of fictitious losses in equity/derivative trading through member JM Financial Services Limited (in short, 'JMFSL') on BSE platform amounting to Rs.47,44,000/-. Subsequently, notices u/s 142(1) of the Act was issued on 21.12.2021 and 07.02.2022. In response to which assessee filed reply dated 04.01.2022 submitting details regarding business and trading activities and financials of the assessee. After considering the submission, the AO passed the order u/s 147 r.w.s. 144B dated 25.03.2022 without making any modification to the returned income. Thereafter, the Id. PCIT called for the records and examined the same. He has issued notice u/s 263 of the Act on 13.02.2024 in respect of the derivative transactions resulting loss of Rs.47,44,400/- through JMFSL on BSE platform. He has observed that as per the information received from the Investigation Wing, Mumbai under "Project Falcon", there was co-ordinated and premeditated trading in illiquid stock options. Huge losses were generated by various clients by letting the option expire instead of acting upon the options. The company was one of the beneficiaries of such fictitious losses in equity/derivative trading amounting to Rs.47,44,000/- in the year under consideration through manipulative transactions using expiry trades on BSE option derivative segments. The Id. PCIT referred to

the decision of Hon'ble Supreme Court in case of Rakhi Trading Pvt. Ltd., in CA No.1969 of 2011, dated 08.02.2018 where it was held that nobody intentionally trades for a loss and intentionally trading for loss is not a genuine dealing in securities. He held that though the case was re-opened on the very issue, the AO completed the assessment on 25.03.2022 without making any modification to the returned income. The FAO-NFAC subsequently intimated the jurisdictional AO (JAO) that due to paucity of time, 450 documents available in case of assessee could not be examined to find out the clandestine transactions of assessee in BSE options trading and return of income was accepted. Hence, Id. PCIT observed that the FAO has not made any verification or applied his mind while passing the order on 25.03.2022. Thereafter, the Id. PCIT relied on the decision of the Hon'ble Supreme Court in case of Malabar Industries Ltd., 243 ITR 83 (SC) and observed that the AO has neither verified the information on records nor has verified the submissions and assessed the income without making any modification or addition. This has led to evasion of income of Rs.47,44,000/- and short levy of tax of Rs.15,65,520/-.

3.1 In reply, the assessee filed a detailed submission which is reproduced at pages 9 to 21 of the 263 order. The case of the assessee has been time and again assessed, revised and reassessed without any modification. The company had filed all the details before the AO during the original assessment proceedings u/s 143(3) and the subsequent proceedings u/s 143(3) r.w.s. 263 and 147 of the Act. The FAO-NaFAC completed after considering the submission made by the

company. The case is proposed to be modified when the case has already been re-assessed on the same ground only, i.e., intimation of FAO to the JAO. It was also submitted that assessee had filed detailed reply on 11.02.2022 and the AO passed the order on 25.03.2022. Therefore, AO had adequate time to verify all the details. The assessee explained the nature of the arbitrage business at para 3 of the submission to the Id. PCIT. It was also submitted that in arbitrage business any gain or loss should not be considered in isolation but at a composite transaction since the assessee might have purchased and sold in cash segment or other F&O segments. The appellant had traded in 1,21,87,20,095 units resulting in total volume of Rs.22,385.04 Crore and the volume from few trades in BSE - F&O was 23,51,000 units, which is negligibly small at 0.00193% of total trades. It was also submitted that the assessee has been carrying on trade in various segments and exchanges including NSE and BSE on the cash and derivative segments. The broker of the assessee issued valid contract notes as per requirement of SEBI/Exchanges for the alleged trades which were also subjected to various charges and taxes. Hence, the claim that it is indulging in artificial and non-genuine transaction is not correct. It was submitted that trades of the appellant have all traits of being genuine and therefore, cannot be categorized as non-genuine. It was also submitted that out of 1.5 years of investigation, the impugned trades of the appellant is only on six days. Hence, the appellant submitted that the order u/s 147 of the Act is not erroneous and prejudicial to

the interests of revenue. The appellant requested not to revise the said order u/s 263 of the Act.

3.2 The Id. PCIT considered the submission of the assessee and held that the order passed by the AO on 25.3.2022 was without making any modification to the returned income. The assessee had entered into fictitious losses in equity/derivatives during the year through manipulative transactions using expiry trade on BSE option derivative segments. The resultant loss was Rs.47,45,000/-. The Id. PCIT also reproduced the communications dated 25.03.2022 of the FAO after passing the order u/s 147 r.w.s. 144B of the Act dated 25.03.2022. In the said letter, the FAO has stated that options executed are not from illiquid trades. Further, he stated that due to paucity of time, the case of the assessee could not be examined to find out the clandestine transactions of the assessee in BSE option trading. He, therefore, requested to initiate proceedings u/s 263 of the Act. In view of the said communications, the Id. PCIT held that AO failed to verify the information available on hands as well as the submission of the assessee during re-assessment proceedings. Failure to make investigation lead to lack of application of mind and thereby the impugned order is erroneous u/s 263 of the Act. The Id. PCIT also did not accept contention of the assessee that order u/s 263 of the Act has already been passed on the issue and therefore another order u/s 263 of the Act cannot be passed. The Id. PCIT also relied on the decision of Hon'ble Supreme Court in case of Malabar Industries Ltd. (supra), CIT vs. Mohhamed Meeran Sahul Hameed, Civil Appeal No.6204 of 2021, dated

07.10.2021 and held that AO failed to make addition of Rs.47,44,000/-, which resulted in short levy of tax of Rs.15,65,520/-; hence, the order is also prejudicial to the interests of revenue. He has relied on the decision in cases of CIT vs. Puspa Devi, 29 Taxman 377 (Pat.), CIT vs. Seshasayee Paper & Boards Ltd., 242 ITR 490 (Mad.), CIT vs. Himachal Pradesh Financial Corporation, 186 Taxman 105 (HP) and CIT vs. Amitabh Bachchan, 240 Taxman 221 (SC). As a result, he set aside the order of AO dated 25.03.2022 with a direction to AO to frame fresh assessment as per the discussion made in the 263 order. He also directed AO to make proper and meaningful enquiry on the issues in the order u/s 263 of the Act. He directed AO to grant reasonable and sufficient opportunity of hearing to the assessee.

4. Aggrieved by the order of PCIT, the assessee filed appeal before the Tribunal. The learned Authorized Representative (Id. AR) of the assessee filed a paper book containing 142 pages, which includes the replies to the AO during the original assessment proceedings u/s 143(3), reasons for re-opening and notice u/s 142(1) including the questionnaire on the impugned loss of Rs.47,44,000/-, reply of assessee to the FAO, charts showing sale-purchases with JMFSL, details of bills from JMFSL and reply to the Id. PCIT. The Id. AR submitted that during the original assessment proceedings u/s 143(3), the appellant had filed reply giving complete details of revenue from option and details of purchases and sales of shares and derivative with JMFSL, Demat account held with JMFSL. After considering the said reply, AO passed the order and hence the impugned issue was examined by him. The issue was considered by the AO and being satisfied, he

has not made any addition. Subsequently, the case was taken up for revision u/s 263 of the Act on the ground that no proper enquiries were made by the AO. The said order u/s 263 of the Act dated 15.03.2019 is being contested by appellant before Tribunal and is pending for disposal. Again, the case was re-opened by the AO on the same issue. The assessee filed elaborate details and reply to the FAO, which is enclosed at pages 1 to 112 of the paper book. After being satisfied with the reply of the assessee dated 11.02.2022, the AO passed the order on 25.03.2022 accepting the returned income. Hence, the AO has applied his mind to the facts on issue and taken a considered decision not to add the impugned loss. Thereafter, the Id. PCIT has passed the revision order ignoring the detailed submissions by the assessee which is at pages 1 to 142 of the paper book. The appellant had also enclosed daily summary report and scrip-wise yearly report in Annexure C. The details of 21 scrip in BSE and F&O was enclosed as Annexure D. The Id. AR submitted that the Id. PCIT has not appreciated the details and explanation given by the appellant during the assessment as well as revisionary proceedings and wrongly set aside the order u/s 147 r.w.s. 144B of the Act, dated 25.03.2022. The Id. AR further stated that the assessee did not prevent AO to make any further enquiry. The details submitted by the assessee were not voluminous. If the contention of the revenue is that AO himself referred the matter for revision to Id. PCIT is accepted, then every AO would make similar request after completing the assessment. In view of these factual and legal

issues, the Id. AR submitted that the order passed by the Id. PCIT u/s 263 of the Act is not liable to be sustained.

5. On the other hand, learned Commissioner of Income-tax – Departmental Representative (Id. CIT-DR) supported the order of Id. PCIT and submitted that it is procedurally correct. He has discussed as to how the order of AO is erroneous and prejudicial to the interests of revenue. He submitted that the AO failed to examine if the assessee was doing composite business. Further, the AO himself requested the Id. PCIT to invoke revisionary power u/s 263 of the Act.

6. We have heard both parties and perused the materials available on record. We have also deliberated the case laws relied upon by both sides. The appellant has submitted that the PCIT erred in invoking jurisdiction u/s 263 of the Act by holding that order of the AO u/s 147 r.w.s 144B of the Act is erroneous and prejudicial to the interests of revenue. Before deciding the ground, it would be proper to reproduce section 263 of the Act to appreciate scope and admit of the said section:

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

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

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

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

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

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

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

6.1 It is clear from a plain reading of section 263 of the Act that the PCIT or the CIT may call for and examine the records of any proceedings under the Act. If he considers that any order passed by the AO or the TPO is erroneous in so far as it is prejudicial to the interests of revenue, he is required to give assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, he may pass such order thereon as the circumstances of the case justify including enhancing or modifying the assessment order, cancelling the assessment and directing a fresh assessment. Explanation 2 was inserted below sub-section (1) with effect from 01.06.2015 to declare as to what shall be deemed to be “erroneous in so far as it is prejudicial to the interest of revenue”. The instances which would fall in the above category are: (i) the order is passed without making inquiries and verification which should have been made; (ii) the order is passed allowing the relief without inquiring into the claim; (iii) the order has not been made in accordance with any order, direction, or instruction

issued by the Board u/s 119 of the Act; or (iv) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or the Supreme Court in the case of the assessee or any other person.

6.2 Let us examine the assessment order u/s 147 r.w.s. 144B dated 25.03.2022 in the background of statutory provisions discussed above. As mentioned by the AO, the reason for re-opening was as under:

".....the assessee is one of the beneficiaries of such fictitious Losses in Equity/Derivative Trading through member 'JM Financial Services Limited' on BSE Platform. As per data/details available, it is seen that the assessee has entered into transaction of fictitious Losses in Equity/Derivative amounting to Rs 47,44,000/- in the year under consideration through Manipulative Transactions using Expiry Trades on BSE Options Derivative Segment..."

The AO issued notice u/s 142(1) of the Act on 21.12.2021 and 07.02.2022 calling for various necessary information to complete the assessment. The notice issued by the AO at pages 19 and 20 of the paper book. At para 3 of the Annexure to the said notice, the AO had called for the following details:

"3. On perusal of your ROI, it is found that you had claimed losses amounting to Rs.47.44,000/- for A.Y.2014-15 pertaining to the transactions on BSE in the Equity/ derivative Segment with JM Financial Services Limited. Kindly give the details of the claim of losses for the F.Y. 2013-14, along with the detailed submission of the trading activity with which company/firm the said loses had occurred."

6.3 In reply to the said notice, the assessee filed reply dated 11.02.2022 to the AO, which is at pages 32 to 48 of the paper book. The assessee had also submitted chart showing sales-purchases with JMFSL for FY.2013-14 (AY.2014-15). It had also filed a chart showing Sauda details with JMFSL for the subject

year. Another chart showing party-wise quantity and rate was also filed by the assessee. The assessee also filed "BSE to related scrip-wise report of FY.2013-14", which at pages 62 to 73 of the paper book. The details showing "JMFSL-NES-CAPITAL", is at pages 74 to 92 of the paper book. The Sauda summary report from JMFSL and bills from JMFSL, are at pages 93 to 112 of the paper book. It is, thus, clear that the assessee has filed detailed reply and submitted various supporting evidences to the FAO in its reply dated 11.02.2022. After considering these reply and details, the AO has passed the order u/s 147 r.w.s. 144B on 25.03.2022. Thus, the AO got more than 42 days, (i.e., 11.02.2022 to 25.03.2022) to consider the reply and the details submitted to him. Therefore, the plea of the revenue that the AO could not verify the details due to paucity of time is factually not correct. Be that as it may, we also find that the assessee was subjected to regular scrutiny u/s 143(3) of the Act where one of the issues was share transactions in F&O derivatives. The assessee vide submission dated 21.06.2016, had submitted details of purchases and sales of shares and derivatives. It also submitted share related expenses including brokerage, SEBI fees, service tax, STT transaction charges, stamp duty and other charges paid to the brokers. It also filed the contract notes/ledger of the broker. The assessee had also submitted Demat account held with JMFSL. After considering all these details, the AO passed assessment order u/s 143(3) on 30.11.2016 accepting the returned income of assessee. Subsequently, the Id. PCIT had issued notice u/s 263 of the Act to revise the said assessment order. The assessee submitted issue-wise reply

but Id. PCIT rejected the contention of the assessee and passed order u/s 263 of the Act on 15.03.2019, setting aside the assessment order. The appeal against the said order is pending for disposal. In the meantime, the AO completed fresh assessment u/s 143(3) r.w.s. 263 on 23.12.2019 assessing the total income at Rs.15,29,624/-. Again, the AO initiated re-assessment proceedings u/s 147 of the Act and passed the subject re-assessment order on 25.03.2022 wherein he has again accepted the returned income, after calling for various details which have been discussed above. Therefore, the assessee has been subjected to assessment, revision, re-assessment at different times and in all the proceedings, the returned income has been accepted. As discussed earlier, the AO had called for various details including issues relating to trading in F&O segment expressly and after considering the explanation and details he has accepted the return of income. It is, therefore, clear from the facts on record that AO has taken a considered view, with which the Id. PCIT does not agree. Therefore, it cannot be said that the AO did not apply his mind to the facts of the case and passed the assessment order in a perfunctory manner.

7. Against the above factual background, let us see whether the order of the AO is erroneous and prejudicial within the meaning of section 263 of the Act. A bare reading of the section reveals that the PCIT can call for and examine the record of any proceedings under the Act and if he considers that any order passed by the AO is erroneous in so far as it is prejudicial to the interests of the revenue, he may after giving opportunity of hearing and after making or causing

to be made such inquiry as he deems necessary, pass such order as the circumstances of the case justify. The Hon'ble Supreme Court in the case of Malabar Industries Ltd. vs. CIT, 243 ITR 83 (SC) held that every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of revenue. When an AO adopts one of the courses permissible in law and it results in loss of revenue or when two views are possible and the AO has taken one view with which the Commissioner does not agree, it cannot be treated as erroneous order prejudicial to the interests of revenue unless the view taken by the officer is unsustainable in law. In the subsequent decisions, the same principles have been affirmed by the Hon'ble Supreme Court. The Hon'ble Court in case of CIT vs. Greenworld Corporation, 314 ITR 81 (SC) held that the jurisdiction u/s 263 can be exercised only when both the following conditions are satisfied i.e., (i) the order of the AO should be erroneous and (ii) it should be prejudicial to the interests of revenue. These conditions are conjunctive. An order of assessment passed by the AO should not be interfered with only because another view is possible. The Hon'ble Apex Court in case of Max India Ltd. vs. CIT 295 ITR 282 (SC) held that the Commissioner has to be satisfied of the twin conditions as stated above. If one of them is absent, recourse cannot be had to Section 263 of the Act. We find that the impugned issue of "fictitious loss of Rs.47,45,000/-" was duly considered by the AO at the time of assessment as well as re-assessment proceedings. He has certainly examined the above issue by calling for the details from the assessee and after examination of the reply and

evidences submitted by the assessee, he has accepted the explanation of the assessee and not made any addition on the impugned issue. Thus, the AO has duly considered the issue, applied his mind and taken a considered view. Hence, in view of the decision of Hon'ble Supreme Court in case of Malabar Industries Ltd. (supra), the decision of the PCIT to invoke provisions of section 263 of the Act cannot be sustained.

8. The impugned issue can be analysed from another angle. In the instant case, as stated above, the AO had called for the explanation on the subject issue from the assessee and assessee had furnished its explanation and details, which clearly shows that the AO had undertaken the exercise of examining as to whether any addition is called for in respect of transactions with JMFSL. It is clear that the AO was satisfied with the assessee's explanation and therefore, he accepted same. The grievance of the PCIT is that the AO should have made further inquiry in respect of the impugned issue, rather than accepting the assessee's explanation. Therefore, it could not be said that it was the case of "*lack of inquiry*". There is a distinction between "*lack of inquiry*" and "*inadequate inquiry*". If there was any inquiry, even inadequate, that could not, by itself, give occasion to the PCIT to pass order u/s 263 of the Act merely because he has different opinion in the matter. It is only in cases of lack of inquiry that such a course of action could be opened. In the present case, the AO has duly examined the facts and formed an opinion that no addition is necessary in view of the reply of the assessee on the subject issue. In view of the above facts and decisions

cited supra, the decision of PCIT that the order passed by AO was erroneous and prejudicial to the interests of revenue is not correct. Accordingly, we set aside the order passed u/s 263 of the Act by the PCIT.

9. In the result, the appeal of the assessee is allowed.

ITA No.502/SRT/2024 (AY.2015-16):

10. Facts of the present appeal are similar and identical except variation in the amount of loss. In the present case, the loss in equity-derivative trading through JMFSL was Rs.39,60,500/- as against Rs.47,44,000/- in ITA No. 501/SRT/2024 (supra). Hence, following the reasons given in ITA No. 501/SRT/2024 (AY.2014-15), we set aside the order of Id. PCIT passed u/s 263 of the Act.

11. In the result, the appeal of the assessee is allowed.

12. In the combined result, the appeals of the assessee are allowed.

Order is pronounced under provision of Rule 34 of ITAT Rules, 1963 on 21/05/2025.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat

दिनांक/ Date: 21/05/2025

SAMANTA

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent
3. The CIT(A) / PCIT
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-
(BIJAYANANDA PRUSETH)
ACCOUNTANT MEMBER

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS