IN THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN "DB" BENCH: DEHRADUN

BEFORE SHRI YOGESH KUMAR U.S, JUDICIAL MEMBER &
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

[THROUGH VIRTUAL MODE]

ITA No.31/DDN/2022
[Assessment Year : 2017-18]

M/s. THDC India Ltd. Ganga Bhawan, Pragatipuram, Bye Pass Road, Rishikesh, Uttarakhand-249201 ***PAN-AAACT7905Q***	vs	PCIT Aaykar Bhawan, 13 A, Subhash Road, Uttarakhand
APPELLANT		**RESPONDENT**
Assessee by	Shri Jeetan Nagpal, CA Shri Sanjay Arora, CA & Ms. Pallavi, CA	
Revenue by	Ms. Poonam Sharma, CIT DR	
Date of Hearing	08.12.2025	
Date of Pronouncement	18.02.2026	

ORDER

PER MANISH AGARWAL, AM :

The present appeal is filed by the assessee against the order dated 27.03.2022 by Ld. Pr. Commissioner of Income Tax, Dehradun ["Ld. PCIT"] passed u/s 263 of the Income Tax Act, 1961 ["the Act"] arising from the assessment order dated 30.12.2019 passed u/s 143(3) of the Act pertaining to Assessment Year 2017-18.

2. Brief facts of the case are that the assessee is a joint venture company of Government of India and Government of Uttar Pradesh and engaged in the business of generation and supply of hydro-

electric as well as wind power and also engaged in construction of hydro power plants. The return of income was filed on 30.10.2017, declaring total income of INR 6,84,04,420/- after claiming deduction u/s 80-IA of the Act of INR 948,40,76,282/-. The book profits was shown at INR 7,84,96,09,382/- and MAT of INR 1,67,52,32,236/- was paid. The case of the assessee was selected for scrutiny and after considering the submissions made, total income was assessed at INR 4,63,78,80,698/- by making disallowance out of deduction claimed u/s 80-IA of the Act to the extent of INR 211,15,54,378/- and further making addition of INR 245,79,21,900/- on account of late payment surcharge on outstanding debtors for the period of 10 months holding the same as taxable on accrual basis and no deduction u/s 80IA was allowed on such addition.

3. Against the said order, the assessee filed first appeal before Ld. CIT(A) which is pending as on date.

4. In the meantime, vide notice dated 07.03.2022, available at page 1 & 2 of the Paper Book, PCIT initiated revision proceedings u/s 263 of the Act proposing the assessment order as erroneous and prejudicial to the interest of revenue on following two issues:-

(i) Incorrect claim of deduction u/s 80-IA(iv) of the Act on consultancy income of INR 152 Lakhs;

(ii) Addition towards late payment surcharge was made by taking debt period of 10 months and it should have been taken for 12 months.

5. Accordingly, ld. PCIT show-caused the assessee that the assessment order so passed is erroneous and pre-judicial to the interest of the Revenue. After considering the submissions filed by the assessee in response to the show cause notice dt. 07.03.2022, ld. PCIT sought copies of some invoices raised and after perusing the same, has issued another notice on 22.03.2022, placed at page 215 to 216 of PB. In the said notice ld. PCIT observed that receipts towards capacity charges are not qualified for deduction u/s 80-IA and since this issue has not been examined by the AO and therefore, he further show-caused the assessee as to why the assessment order may not be cancelled as erroneous and pre-judicial to the interest of the Revenue. After considering the submissions made by the assessee, ld. PCIT passed the impugned revision order on 27.03.2022, setting aside the assessment order by holding it as erroneous and pre-judicial to the interest of the revenue and direct the AO to pass a fresh order after making due inquiry and investigation with respect to the deduction claimed on capacity charges u/s 80-IA and further directed to charged late payment surcharge from the outstanding debtors for a period of 12 months as against 10 months computed by AO.

6. Aggrieved from the order of Ld. PCIT, the assessee is in appeal before the Tribunal by taking following grounds of appeal:-

1. *"That the order dated 27.03.2022 passed u/s 263 of the Act passed by the Hon'ble PCTT is bad in law as the same is against the law prevailing on the subject matter as well as in excess of jurisdiction.*
2. *That the Hon'ble PCIT has exceeded his jurisdiction in invoking the provisions of section 263 of the Act as the assessment order dated*

30.12.2019 passed by the Ld. AO u/s 143(3) of the Act was neither erroneous nor prejudicial to the interest of revenue.

2.1. *That the Hon'ble PCIT has failed to appreciate that the assessment proceedings were completed after adequate and proper enquiries were made by the Ld. AO and setting aside of the same is erroneous, in excess of jurisdiction and bad in law.*

3. *That the Hon'ble PCIT has erred in holding that the assessment order was erroneous and prejudicial to the interest of revenue in so far as the late payment surcharge should be computed for a period of 12 months as against 10 months without appreciating.*

3.1. *That the late payment surcharge computed by the Ld. AO on accrual basis is not the real income of the Appellant and no addition should have been made on this account.*

3.2. *The judgement of the Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd. Vs Commissioner of Income Tax, [1997] 225 ITR 746 (SC).*

3.3. *Without prejudice, that the CERC Regulations 2014-2019 prescribe a grace period of 60 days from date of billing and the computation of late payment surcharge basis 10 months was correctly done by the Ld. AO.*

4. *That on the facts and circumstances of the case and in law, the Hon'ble PCIT has erred in travelling beyond the first show-cause notice dated 07.03.2022 by cancelling the assessment made by the Ld. AO on the ground which was not covered in the first show-cause notice.*

5. *That on the facts and circumstances of the case and in law, the notice dated 22.03.2022 as issued by the Hon'ble PCIT is bad in law as the notice was issued on a ground which was outside the ambit of the definition of the word 'record' in so far as.*

5.1. *The word 'record includes details available with the Hon'ble PCTT at the time of examination whereas the ground on which the notice dated 22.03.2022 had come to PCIT's attention subsequently during the course of revisionary proceedings.*

5.2. *The contention raised by the Appellant has not been disposed off by the Hon'ble PCIT.*

6. *That without prejudice to the above and on the facts and circumstances of the case and in law, the Hon'ble PCIT has erred in holding that the assessment order was erroneous and prejudicial to the interest of revenue in so far as the Appellant was not eligible to claim deduction u/s 80-1A of the Act on the amount of capacity charges without appreciating that*

6.1. *The capacity charges are a part of revenue from operations of the Appellant and are directly derived by the eligible undertaking*

6.2. It is only on account of CERC Regulations that the Appellant is liable to charge tariff under two components, one of them being capacity charges

7. That the Hon'ble PCIT has erred in holding that capacity charges are not directly linked with sale of energy by placing reliance on the judgement in the case of Pandian Chemicals Ltd 262 ITR 278.

That the Appellant craves leave to add, amend, modify or withdraw the above grounds of appeal."

7. **Ground of appeal No.1** is general in nature hence, dismissed.

8. Regarding **Grounds of appeal No. 2 to 3.3,** before us, Ld.AR for the assessee submits that AO has made due enquiries with respect to the late payment surcharge and has made the addition by computing the late payment surcharge on outstanding debtors by taking the debt period of two months and thus calculated the income for 10 months. Ld. AR submits that against this action of AO, an appeal was filed before the ld. CIT(A) which is pending as on date, thus this issue cannot be made subject matter of revision u/s 263 of the Act.

9. Ld. AR further submits that when the AO has made enquiries which is evident from the fact that the addition has already been made therefore, it cannot be said that AO has not carried out adequate and proper inquiry with respect to the issue before him and further late payment should be computed for the period of 12 months as against 10 months which is nothing but subjective opinion of the AO after duly considering the facts of the case. Ld. AR for the assessee also filed written submissions and requested that the

revision order passed by ld. PCIT on this issue deserves to be hold bad in law. The written submission is reproduced as under:-

3.1. As submitted *supra*, the assessment proceedings in Appellant's case were concluded on 30.12.2019.

Copy of assessment order is placed *at pages 595-609/PB*.

3.2. However, a notice u/s 263 of the Act was issued by the Hon'ble PCIT on 07.03.2022 alleging that the assessment order dated 30.12.2019 as passed by the Ld. AO was erroneous in so far as it is prejudicial to the interest of revenue for reasons mentioned in the said notice, which were –

3.2.1. Claim of deduction u/s 80-IA on 'consultancy income'
3.2.2. Levy of late payment surcharge for 10 months instead of 12 months

Copy of notice dated 07.03.2022 is placed at ***pages 1-2/PB***.

3.3. The Appellant filed its reply on 21.03.2022, submitting as under –

3.3.1. That no deduction has been claimed by the Appellant on 'consultancy income' as alleged by the Hon'ble CIT

3.3.2. That levy of late payment surcharge is notional in nature and even though the same is to be levied, it was correctly levied for 10 months after allowing a grace period of 60 days prescribed by the applicable regulations

Copy of letter dated 21.03.2022 is placed at ***pages 3-12/PB.***

3.4. The Hon'ble PCIT however, proceeded to pass an order u/s 263 holding that the assessment was erroneous in so far as it is prejudicial to the interest of revenue as

3.4.1. Late payment surcharge has been levied for 10 months instead of 12

3.4.2. The Appellant was not entitled to claim deduction u/s 80IA on element of 'capacity charges' which formed a part of its revenue from operations.

Copy of order dated 27.03.2022 is placed at ***pages 223-238/PB.***

3.5. ***Revision order u/s 263 is in violation of Principles of judicial discipline and Rules of Consistency.***

3.5.1. At this juncture, it may not be out of place to mention that -

a) The Appellant had not claimed deduction u/s 80-IA on consultancy income and it was so explained to the Hon'ble CIT who, in all fairness, accepted the contention and did not set aside the assessment order on this issue.

b) The second issue i.e. the Ld. AO has brought to tax notional amount of late payment surcharge on sundry debtors outstanding as on 31.3.2017 @ 1.5% per month after allowing a grace period of 60 days as stipulated in CERC guidelines. The Hon'ble PCIT has however directed the Ld. AO to enhance the late payment surcharge by ignoring the grace period of 60 days and tax the same accordingly.

On the other hand, the Appellant has consistently offered late payment surcharge to tax on receipt basis. The Appellant submits that the Hon'ble ITAT in Appellant's own case for AYs 2008-09 and 2009-10 has held that late payment surcharge is to be treated as income from eligible business and therefore deduction u/s 80-IA would be allowable thereon. Accordingly, the question of taxability of late payment surcharge is of an academic nature and tax neutral, since in either case, it would qualify for deduction u/s 80-IA. The Hon'ble CIT(A) in subsequent years i.e. AYs 2010-11 to 2015-16 have also decided the said issue on similar lines in Appellant's favour.

The fact that deduction u/s 80-IA has been allowed on late payment surcharge by the Hon'ble ITAT in Appellant's own case for AY 2008-09 and 2009-10 is not in dispute and is fairly admitted by the Ld. AO at paras 3.5 and 3.6 of the assessment order **(pls. refer pg. 602/PB).**

The Appellant avers that even for argument's sake it is to be accepted, though not admitted, that late payment surcharge is taxable on accrual basis for 12 months as held by the Hon'ble CIT, no prejudice shall be caused to the Revenue as the same would qualifies for deduction u/s 80-IA in the impugned year as has been held by the Hon'ble ITAT in AYs 2008-09 and 2009-10 in appellant's own case.

It is humbly pleaded that both the Ld. AO and CIT are in breach of principles of judicial discipline in not following the orders of the Hon'ble ITAT and at the very threshold, the impugned revision notice dated 7.3.2022 issued u/s 263 of the Act deserves to be quashed.

c) In so far as the issue of deduction u/s 80IA on revenue for sale of electricity received by the Appellant by way of capacity charges is concerned which in the opinion of the Hon'ble CIT *"is not derived from the eligible business of the assessee but is only attributable and incidental to it"* it is humbly pleaded that the said issue was not raised in the show cause notice dated 7.3.2022 issued u/s 263 but was raised by the Ld. CIT on 22.3.2022 on a perusal of the invoices raised by the Appellant and filed subsequent to the SCN dated 7.3.2022. Thus, the Hon'ble CIT's query does not emanate from assessment record. This aspect has been dealt with in detail with vide our written submissions in support of ground nos. 4 and 5 in following paragraphs.

3.5.2. Be that as it may, the fact that capacity charges forms part of sale proceeds of the electricity generated and sold by the Appellant as defined by the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations, 2014 – Regulation 20 – components of tariff under Chapter 5 which deals with tariff structure and therefore is income derived by eligible business for the purpose of deduction u/s 80-IA is settled and accepted by the Department right from AY 2008-09 which was the first year of claim for deduction u/s 80-IA in the present case.

Relevant extract of CERC Regulations is reproduced at page 220/PB 1.

3.5.3. The Appellant humbly submits that the twin issues on which the assessment order has been set aside i.e. claim for deduction u/s 80-IA on (a) late payment surcharge and (b) capacity charge being part of tariff structure have continued since the very inception when the Appellant claimed deduction under the said section in AY 2008-09 and the succeeding years for which deduction u/s 80-IA is being claimed, it not open for the Hon'ble CIT to exercise revisionary power u/s 263. Appellant places reliance on following judicial precedents:

(i) Hon'ble ***Supreme Court in Principle CIT (Central) v MBL Infrastructure Limited 461 ITR 150*** – wherein the Apex Court has on allowability of deduction u/s 80-IA and revisionary power u/s 263 held that – Headnote reads as under – *"Profit and gains from infrastructure undertakings (Illustrations) – Assessment year 2012-13 – Assessee-company, engaged in road infrastructure development and*

maintenance business, had entered into agreements with a highway department and claimed deductions under section 80-IA – Assessing Officer initially allowed deduction – However, Commissioner invoked revisional jurisdiction under section 263, asserting that assessee was mere a work contractor and Assessing Officer had not correctly applied law on issue of deduction under section 80-IA which made assessment order erroneous and prejudicial to interest of revenue – On appeal, Tribunal made a thorough examination of factual contentions and noted that assessee had not only employed plant and machinery and other assets along with staff but also it had been bearing all risks involved in said infrastructure projects and therefore assessee could not be treated a mere work contractors - It accordingly, quashed order passed under section 263 – ***On appeal, High Court noted that revenue had not disputed that no disallowance was made in previous two assessment years as well as subsequent two assessment years, and further, in absence of any distinguished feature in nature of contract, Rule of consistency had to be applied and deduction under section 80-IA was to be allowed in relevant assessment year also – Whether there was no infirmity in impugned order and therefore, special leave petition was to be dismissed – Held, yes [Paras 2 and 3] [In favour of assessee]"***

(ii) Furthermore, the Hon'ble Delhi High Court in ***CIT v M/s Escorts Ltd.*** **in ITA No. 14/1999**

At paras 8 and 8.1 of the report, the Hon'ble High Court culls out the facts as under:

8. Moving on to the merits of this case, in our view the first and foremost aspect which would have to be kept in mind is that the assessment proceedings qua the assessee have been reopened by the CIT by taking recourse to the powers conferred upon him under Section 263 of the Act. It is now trite law that for invoking the provisions of Section 263 of the Act the CIT's enquiry should have led him to a conclusion that the order he seeks to revise is both erroneous and prejudicial to the interest of the revenue. It has to be borne in mind that the every loss to the revenue is not necessarily prejudicial to revenue [see ***M/s. The Malabar Industries Co. Ltd. Vs. CIT, Kerala State (2000) 2 SCC 18 & CIT Vs. Max India Ltd. (2007) 295 ITR 282(SC)].*** *With this parameter in mind, it would be necessary to appreciate important facets of the case which have emerged on perusal of the record.*

8.1 Firstly, the fact that assessee had been engaged in the activity of buying and selling the units for several years, prior to the relevant year, is not disputed by the department. As a matter of fact it appears that this very issue was raised before the CIT(A) in the assessment year 1986-87. The CIT(A), in the said assessment year, decided the issue against the department. The department evidently did not carry the matter in appeal. We find that the department has not challenged this

position in the grounds of appeal raised before us

And thereafter at para 13 of the Report after considering the judgments in the case of ***Radhasoami Satsang [1992] 193 ITR 321 (SC), Bharat Sanchar Nigam Limited v UOI and Ors., [2006] 282 ITR 273 and Municipal Corpn. Of City of Thane vs Vidyut Metallics Ltd. & Anr. (2007) 8 SCC 688*** on the Rule of Consistency has held at para 13 of the report as under:

13. Therefore, in our opinion, given the fact that the assessee had been engaged in these transactions in the preceding assessment years, CIT could have had no occasion to take recourse to revisional powers under Section 263 of the Act on the fundamental aspects of the transactions in issue on which a view had been taken and, not shown to us as having been challenged. The argument of Ms Bansal that the CIT only sought to treat the price differential as the cost incurred by the assessee towards retention of legal ownership in the units; is premised on the transactions being different from that what the assessee claimed them to be in the earlier assessment year – a position which decidedly remained unchallenged. Such an approach is against the principle of consistency. The department has not shown any special circumstances warranting deviation from the said principle.

3.6. Nextly, it is pleaded without prejudice that while passing the order u/s 263 of the Act, the Hon'ble PCIT grossly failed to appreciate that the first issue for which order u/s 263 has been passed was already evaluated by the Ld. AO. Sufficient details were filed before the Ld. AO on the issue of late payment surcharge, including CERC regulations, basis which he could have levied the LPS for 12 months. However, after sufficiently appreciating facts of the case, the Ld. AO had held that the late payment surcharge was to be levied for a period of 10 months after allowing the grace period.

Issue – Late payment surcharge – examined at length by the Ld. AO during assessment proceedings – as is borne out by the following:

S. no.	***Ld. AO's query***	***Assessee's response***
1.	**Notice dated 30.10.19. Query no. 7** *You have included income relating to other sources in the revenue from operations in the FY 2016-17. These other incomes arising from services provided by you to your clients are ancillary activities or it is int eh nature of interest income and deduction u/s 80-IA is not allowable on these being other income outside the purview of section 80IA. The claim of deduction u/s 80IA against other incomes being*	Assessee's reply is at para 10 of written submissions dated 20.11.2019. **Relevant extract at pg. 297/PB.**

	disallowed every year form AY 2008-09 onwards in your case. On certain points, stand taken by the AO has been upheld by the Ld. CIT(A) Dehradun as well as by Hon'ble ITAT New Delhi and ***on the issues of income and 'excess provision written back' and 'late payment surcharge' the department is in appeal before the Hon'ble Uttarakhand High Court, Nainital against the orders of the ITAT New Delhi.*** *Please furnish detailed bifurcation of other income for FY 2016-17 and explain as to why deduction claimed against other income may not be disallowed and added back to the total income as held in the earlier assessment years being income out of the scope of deduction allowable to the business income of an eligible undertaking.* ***Copy of relevant notice at pg. 290/PB.***	
2.	Notice dated 27.11.19. Query vide Annexure to notice *Please refer to your reply dated 20.11.2019. A perusal of the Chart showing details of other income it is noticed that the sub head of* ***"Late payment surcharges"*** *was not included in the other income for the AY 2017-18. Therefore, you are required to give complete explanation regarding the sub-heads those were not included in other income. Further, It is seen that during the AY 2016-17 Late payment surcharge and Regulatory Interest were clubbed with the revenue from energy sales and the same were considered for while claiming deduction u/s 80IA. Thus, the incomes from* ***"Late payment surcharge"*** *and* ***"Regulatory Interest"*** *were proposed to be considered to income under the head "Income from other sources" as done in the previous years. Further, it is seen that you have shown "fair value gain retention money" amounting to Rs. 1,07,62,798/- in the other income. Please explain the "fair value gain retention money" with documentary evidence. Therefore, you are required to justify as to why the deduction claimed u/s 80IA against Other Income may not be disallowed and added back to the total income as held in the earlier assessment years being income out of the scope of deduction allowable to the business income of an eligible undertaking.*	Assessee's reply is at para 1 of written submissions dated 05.12.2019. **Relevant extract at pg. 462-464/PB.**

<table>
<tr><td></td><td>Copy of relevant notice at pg. 460/PB.</td><td></td></tr>
<tr><td>3.</td><td>Notice dated 17.12.19. Query vide Annexure to notice

Please refer to the pending Income-tax assessment proceeding in your case for A.Y. 2017-18, you are require to furnish following information/documents by 19.12.2019:-

1. Details of sundry debtors amounting to Rs. 1,73,228/- Lacs. Since when the payments is due alongwith the comparative figure for the last financial year in the following format:-
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<tr><td>Name</td><td>Address</td><td>Since when</td></tr>
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2. You also required to furnish other purchase agreements in respect of other projects.

3. You are further required to explain as to how the surcharge on sundry debtors has been accounted for in your books of accounts.

4. Accounting policy followed by you.

5. As per agreement dated 21.04.2004, it is mentioned that the surcharge shall be levied by the THDC in case of delayed payments, whereas as per annual report the surcharge recoverable for sundry debtors for sale of energy & damage/warranty are not treated as accrued due to uncertainty of its realization & are therefore account for on the basis of receipts.

Copy of relevant notice at pg. 466/PB.</td><td>Assessee's reply is at para 1 of written submissions dated 19.12.2019.

Relevant extract at pg. 468-470/PB.</td></tr>
<tr><td>4.</td><td>Notice dated 20.12.19. Query vide Annexure to notice</td><td>Assessee's part reply is at para 1 of written</td></tr>
</table>

	Please refer to the pending income-tax procedding in your case for A.Y. 2017-18, you are require to furnish following details/documentary evidence on or before 23.12.2019 1. *Since, When the surcharges have been charged and how the same is account for in your regular books of account for the last five years.* 2. *When was the surcharge charged last time and under which head it was being reflected in financial statement.* 3. *Copies of bills for which surcharge payment has been delayed.* ***Copy of relevant notice at pg. 553/PB.***	submissions dated 23.12.2019. Assessee's second reply is at para 1 of written submissions dated 26.12.2019. **Relevant extracts are at pg. 554-555/PB and 591-592/PB.**

Thereafter the Ld. AO has given following finding in assessment order (pls. see para 4.3/pg 13 of assessment order – relevant extract at page 607/PB)

"4.3. The submission of the assessee has been gone through very carefully and found no force in it as clause 45 of CERC clarify that any bill for charges payable under these regulations is delayed by a beneficiary of long term transmission customer/DICs as the case may be beyond a period of 60 days from date of billing, a later payment surcharge at the rate of 1.5% per month shall be levied by the generating company or the transmission license, as the case may be. It is evident from the CERC regulation that after delay of 60 days from the date of billing a later payment surcharge at the rate of 1.5% per month should be levied which has not been done during the year under consideration on the sundry debtors of Rs. 163861.46 lacs as on 31.3.2017."

3.7. **Issue – Whether Capacity charges forming part of tariff charged by Appellant from its customers forms part of revenue of eligible business for the purpose of deduction u/s 80-IA? The said issue also examined at length by the Ld. AO during assessment proceedings – as is borne out by the following:**

S. no.	***Ld. AO's query***	***Assessee's response***
1.	**Notice dated 23.8.19. Query no. 4** *Please furnish detailed working of project-vide deduction claimed under chapter VI-A with*	Assessee's reply is at para 3 of written submissions dated 3.9.2019.

	documentary evidence. Please explain the basis of claiming deduction u/s 80-IA. ***Copy of relevant notice at pg. 250-253/PB.***	**Relevant extract at pg. 255-287/PB.**
2.	**Notice dated 16.11.19 Query no. 1** *You have claimed large deduction u/s 80-IA as compared to turnover. Please justify the claiming of large deduction as compared to turnover.* ***Copy of relevant notice at pg. 291-293/PB.***	Assessee's reply is at para 12 of written submissions dated 20.11.2019. **Relevant extract at pg. 299/PB.**
3.	**Notice dated 17.12.19 Query no. 2** You are required to furnish other purchase agreements in respect of other projects. ***Copy of relevant notice at pg. 465-467/PB.***	Assessee's reply is at para 2 of written submissions dated 19.12.2019. **Relevant extract at pg. 468/PB and copies of purchase agreements are at pg. 472-551/PB.**

3.8. Legal propositions on s. 263 jurisdiction –

It is trite law that for exercising revisionary jurisdiction under section 263 of the Act, the pre-requisite twin conditions are that the assessment order should be (a) erroneous and (b) prejudicial to the interest of the Revenue.

Reliance in this regard is placed on the following decisions:

- ***Malabar Industrial Co. Ltd. v. CIT: 243 ITR 83***
- ***CIT vs. Max India Limited: 268 ITR 128 (P&H) [affirmed in 295 ITR 282 (SC)]***
- ***CIT v Kwality Steel Suppliers Complex : 395 ITR 1 (SC)***
- ***CIT vs. Amitabh Bachchan: 384 ITR 200 (SC)***
- ***CIT v. Hindustan Lever Ltd: 343 ITR 161 (Bom.)***
- ***CIT v. Vikas Polymers: 341 ITR 537 (Del.)***
- ***CIT v. Sunbeam Auto Ltd.: 332 ITR 167 (Del)***
- ***CIT vs. Development Credit Bank Ltd: 323 ITR 206 (Bom.)***
- ***Vimgi Investment (P) Limited: 290 ITR 505 (Del)***
- ***Hari Iron Trading Co. vs. CIT: 263 ITR 437 (P&H)***
- ***CIT vs. Gabriel India Limited: 203 ITR 108 (Bom)***

3.9. It is further settled law that if assessing officer has adopted one of the courses permissible in law which may have resulted in loss of revenue, or where two views are possible and the assessing officer has taken one view with which the Commissioner does not agree, the exercise of revisionary power under section 263 of the Act would be without jurisdiction [(refer ***Malabar Industrial (supra), Max India (supra), CIT vs Kwality Steel Suppliers Complex (supra)]***

3.10. Applying the aforesaid settled legal position, it is humbly submitted that the order passed by the Ld. AO is "not erroneous" in as much as the Ld. AO passed the order after due application of mind as elaborated in para 3.6 & 3.7 supra.

3.11. **The Ld. AO made enquiries and applied mind – order not erroneous. It** is emphatically submitted that the Ld. AO in course of the assessment proceedings was not only conscious/aware of the aforesaid issues but also conducted extensive/necessary enquiries/investigations as required in law therein before accepting the same as is evident from details tabulated at Paras 3.6 & 3.7 above.

It is submitted that once all relevant details and documents are available on record and the issue is specifically raised and considered by the concerned officer, in such circumstances, it is not open to the CIT to exercise revisionary jurisdiction unless the AO is found to have failed to make enquiries/verification which should have been made as per law but were not made simply because the CIT differs with the manner of enquiries/investigation, revisionary jurisdiction cannot be exercised.

Reliance in this regard is placed on the following decisions, wherein it has been held that even though the assessment order was silent with respect to the issues raised in the Sec. 263 order that by itself did not vest the Commissioner with valid jurisdiction considering that such issues were considered by the AO and formed part of the assessment record:

- ***Hari Iron Trading Co. vs. CIT: 263 ITR 437 (P&H)***
- ***CIT vs. Eicher Limited: 294 ITR 310 (Del) – confirmed in CIT vs. Kelvinator of India Ltd.: 320 ITR 561 (SC)***
- ***CIT vs. Anil Kumar Sharma: 335 ITR 83 (Del)***
- ***CIT v. Sunbeam Auto Ltd.: 332 ITR 167 (Del)***
- ***CIT v. Vikas Polymers: 341 ITR 537 (Del.)***
- ***CIT vs. Vodafone Essar: 212 Taxman 184 (Del.)***
- ***CIT vs. Development Credit Bank Ltd: 323 ITR 206 (Bom.)***
- ***CIT v. Hindustan Lever Ltd: 343 ITR 161 (Bom.)***
- ***CIT v. Goyal Private Family Specific Trust : 171 ITR 698 (All)***
- ***CIT v. Ganpat Ram Bishnoi :296 ITR 292 (Raj)***
- ***CIT vs. Gidhari Lal: 258 ITR 331 (Raj.)***
- ***Paul Mathew and Sons v. CIT 263 ITR 101 (Ker.)***
- ***CIT v. Arvind Jewellers: 259 ITR 502 (Guj.)***
- ***CIT v. Ratlam Coal Ash Co. 171 ITR 141 (MP)***

In the aforesaid circumstances, it is submitted that the summary set aside of the assessment order by the Hon'ble Commissioner without any reasoning is wholly unjustified and without jurisdiction.

3.12. **Plausible view in law – order not erroneous.** On the perusal of the above, it is submitted that apart from the fact that there was no error whatsoever in the assessment order, the view adopted therein was in any case a plausible view and therefore, no interference is called for in terms of Sec. 263 of the Act.

It has consistently been held by the courts that if the assessing officer has adopted one of the courses permissible in law which has resulted in loss of revenue, or where two views are possible and the assessing officer has taken one view with which the commissioner does not agree, the exercise of the revisionary power under Sec. 263 of the Act would be without jurisdiction.

Reliance in this regard is placed on the following:

- ***Malabar Industrial Co. Ltd: 243 ITR 83 (SC)***
- ***CIT v. Max India Limited: 268 ITR 128 (P&H) [affirmed by SC in 295 ITR 282 (SC)]***
- ***CIT v. Gabriel India Limited: 203 ITR 108 (Bom)***
- ***CIT v. Ganpat Ram Bishnoi: 198 CTR 546/ 152 Taxman 242 (Raj.)***
- ***Paul Mathew & Sons v. CIT: 263 ITR 101 (Ker.)***
- ***Vimgi Investment (P) Limited: 290 ITR 505 (Del.)***
- ***CIT v. Mepco Industries Limited: 294 ITR 121 (Mad.)***

3.13. **Lack of enquiry vs. inadequate enquiry.** It is well set in law that if the concerned officer acting in accordance with law makes an assessment, the same would not be regarded as erroneous simply because according to CIT more enquiries should have been conducted by the officer or the order should have been written more elaborately. In other words, jurisdiction u/s 263 of the Act cannot be invoked for making further enquiries or to go into the process of assessment again merely on the basis that more enquires ought to have been conducted to find something.

It is respectfully submitted that there is distinction between "lack of enquiry" and "inadequate enquiry". While in the former case, assessment order may be regarded as "erroneous" but that would not be so in the latter case where enquiry had actually been conducted by the concerned officer even though the Commissioner may not agree with the nature and manner of conducting enquiries. Reliance in this regard is placed on the following:

- ***CIT vs. Sunbeam Auto Ltd: 332 ITR 167 (Del)***
- ***CIT v. International Travel House: 344 ITR 554 (Del)***
- ***CIT vs. Vikas Polymers: 341 ITR 537 (Del)***
- ***Gulmohar Finances Limited: 170 Taxman 483 (Del.)***
- ***Fab India Overseas vs. CIT: 244 CTR 380 (Del.)***
- ***CIT vs. Vodafone Essar: 212 Taxman 184 (Del.)***

- ***CIT vs. DLF Ltd.: 350 ITR 555 (Del)***
- ***CIT v. Ratlam Coal Ash Co: 171 ITR 141 (MP)***
- ***CIT vs. Ganpat Ram Bishonoi: 152 Taxman 242 (Raj.)***
- ***CIT vs. Mehrotra Brothers: 270 ITR 157 (MP)***
- ***CIT vs. Associated Food Profits (P) Ltd: 280 ITR 377 (MP)***
- ***CIT vs. Development Credit Bank Ltd: 323 ITR 206 (Bom.)***

While issuing the notice dated 07.03.2022, the Hon'ble PCIT had failed to appreciate that in a case where the ld. AO had already made sufficient enquiries during the course of assessment proceedings, and only after proper application of mind had agreed with explanations of the Appellant.

3.14. A reading of section 263 makes it clear that CIT has to exercise his power on the basis of record available before him at the time of issue of notice u/s 263.

For the sake of ready reference section 263 is reproduced hereunder:

263. Revision of orders prejudicial to revenue. (1)The [Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer [or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, [including,—(i)an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or(ii)an order modifying the order under section 92CA; or(iii)an order cancelling the order under section 92CA and directing a fresh order under the said section]."

On the issue of capacity charges and whether deduction u/s 80-IA has been rightly allowed, the issue emanated from Hon'ble CIT's reading of invoices raised against purchasers of energy .. ***(pls. see para 8/pg. 7 of s.263 order – copy placed at pg. 229 of PB 1)***

The fact that invoices were called for by Hon'ble CIT vide query dated 21.3.22 and were submitted by the Appellant vide reply dated 22.3.22 is evident from **copy of said reply which is at pg. 217-222/PB 1)**.

On the proposition that CIT has to exercise power u/s 263 on the basis of record available with him at the time of exercising such power and not any material that comes to his notice subsequently reliance is placed on

- ***Hon'ble SC in CIT v Shri Manjunateshwar Camphor reported in (1998) 96 Taxmann 1***
- ***More recent decision of Hon'ble Bangalore ITAT in Sh. Vinod Kumar Singhal v CIT in ITA no. 1004/Bang/2024***

3.15. In light of the above facts and judicial precedents, the Appellant humbly submits the assessment order has been passed by the Ld. AO after due enquires and

proper application of mind, the same is neither erroneous nor prejudicial to the interest of the Revenue and therefore, the revisionary jurisdiction exercised by the Hon'ble CIT under section 263 is bad in law, without jurisdiction and deserves to be quashed.

4. ***Submissions qua Ground No. 3 – invoking provisions of section 263 for levy of late payment surcharge for 10 months as against 12 months without appreciating that the income on account of late payment surcharge charged to tax by Ld. AO is notional in nature, and without appreciating the grace period of 60 days granted by CERC Regulations –***

4.1. Vide note dated 17.12.2019, the Ld. AO asked the Appellant to explain the accounting policy in respect of surcharge on sundry debtors.

4.2. Vide submission dated 19.12.2019, the Appellant explained that due to uncertainty in realisation of the late payment surcharge, the same is consistently accounted for and offered to tax on receipt basis. It was also submitted that other companies in Power Sector also follow the similar policies of accounting for late payment surcharge on receipt basis. Copy of reply dated 19.12.2019 is placed herewith ***at pages 468-551/PB***.

4.3. Without prejudice to the fact that late payment charge is not taxable on accrual basis *per se,* it is submitted that even if for argument's sake it is to be accepted that the same was taxable on accrual basis – CERC regulations provide for a grace period of 60 days for payment of dues by customers and late payment surcharge is to be charged only thereafter as was correctly appreciated by the Ld. AO.

However, in the notice dated 07.03.2022 issued by the Hon'ble PCIT, it was alleged that late payment surcharge should have been levied for 12 months instead of 10 months as done by the Ld. AO.

4.4. Vide its reply to notice dated 07.03.2022, the Appellant again submitted that the late payment surcharge cannot be charged to tax on notional basis as done by the Ld. AO due to uncertainty in its realisation and should be taxed on receipt basis as done by the Appellant.

However, the Hon'ble PCIT did not concur with the Appellant's submissions and held that the order dated 30.12.2019 passed by the Ld. AO u/s 143(3) is erroneous in so far as it is prejudicial to the interest of revenue as interest/late payment surcharge has been levied for 10 months in place of 12 month.

4.5. In this respect, the Appellant first wishes to draw Your Honour's kind attention towards the provisions of CERC Regulations governing the late payment surcharge.

Late Payment Surcharge is governed by the Regulations issued by Central Electricity Regulatory Commission. Clause No. 45 of the CERC Regulation 2014-19 specify as under –

Late payment surcharge – In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary of long-term transmission customer / DICs as the case may be, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be".

The relevant extract of CERC regulations is at ***para 4.1/pg. 28 of PB1*** – reproduced by the Ld. AO.

4.6. Further, as per ICDS IV, and IND AS 115, recognition of revenue is prescribed to be based on the reasonable certainty of the collection of revenue.

As per AS 115, Revenue from Contracts with Customers

"...

9. An entity shall account for a contract with a customer that is within the scope of this Standard only when all of the following criteria are met:

(a) the parties to the contract have approved the contract (in writing, orally or in accordance with other customary business practices) and are committed to perform their respective obligations;

(b) the entity can identify each party's rights regarding the goods or services to be transferred;

(c) the entity can identify the payment terms for the goods or services to be transferred;

(d) the contract has commercial substance (i.e. the risk, timing or amount of the entity's future cash flows is expected to change as a result of the contract); and

(e) it is probable that the entity will collect the consideration to which it will be entitled in exchange for the goods or services that will be transferred to the customer. In evaluating whether collectability of an amount of consideration is probable, an entity shall consider only the customer's ability and intention to pay that amount of consideration when it is due. The amount of consideration to which the entity will be entitled may be less than the price stated in the contract if the consideration is variable because the entity may offer the customer a price concession."

Considering the above provision and industry practice followed in power sector, the Appellant has framed the following accounting policy for treatment of Late Payment Surcharge:

'Surcharge recoverable from sundry debtors for sale of energy and liquidated damages/warranty claims are not treated on accrued basis due to uncertainty of its realization/acceptance, and are therefore, accounted for on the receipt basis.'

4.7. The Appellant is engaged in generation of power and sale to various DISCOMs. As the financial condition of DISCOMs is not very good and they are reluctant to pay LPS. Therefore, the amount realized from DISCOMs towards sale of power is

first adjusted against the bill relating to sale of energy and the balance amount if any is adjusted towards LPS only after confirmation / certainty of payment of LPS from the beneficiary.

The Appellant submits that mere accrual does not make the income chargeable to tax. The same must also be supported by the concept of certainty of recovery.

4.8. Furthermore, the Appellant submits adopting the basis of accounting from the above IND AS and ICDS, the Appellant has consistently been accounting for late payment surcharge as income on receipt basis only. In the previous years, mercantile system of accounting as well as accounting for late payment surcharge on receipt basis has consistently been followed by the Appellant and accepted by the Ld. Assessing Officer in preceding years.

Now, Your Honour's attention is invited towards the following judicial precedents, wherein it has been held that late payment surcharge cannot be charged to tax on accrual basis –

- ***Pr. CIT Hissar v. M/s Dakshin Haryana Bijli Vittaran Nigam Ltd. SI(C) No.18187 of 2015 decided on 17.07.2019, Manu/SCOR/20434/2019.***

  In this case, Hon'ble Apex Court has dismissed the SLP filed by the revenue against the judgement of Punjab & Haryana High Court in the case of Pr. CIT Hissar v. Dakshin Haryana Bijli Vittaran Nigam Ltd., ITA No. 209 of 2014 decided on 01.10.2014.

  In this judgement, Hon'ble Punjab & Haryana High Court has upheld the order passed by Tribunal that when the realisation of surcharge is uncertain due to continuous defaults by the corresponding parties and the assessee has followed its accounting treatment consistently, then tax on such surcharge can be levied only when it is actually received by the assessee.

- ***Judgement of Hon'ble Delhi Bench of ITAT in the case of Pragati Power vs. Assistant Commissioner of Income-tax [2024] 166 taxmann.com 201 (Delhi - Trib.),*** the head note of which states as under –

  Section 5, read with section 145, of the Income-tax Act,–1961 - I–come - Accrual Of (Time of accrual – Late payment surcharge) - Assessment year 20–8-19 - Assessee was engaged in business of generation of electricity and distributed same through intermediaries - It had entered into Power Purchase Agreements (PPAs) with DISCOMS to regulate terms and conditions in respect of sale of power - Based on PPAs, assessee was eligible to claim sale prices of electricity and late payment surcharge (LPSC) of existing rate of 1.5 per cent per month in case sale considerations were settled beyond agreed period of settlement - Assessing Officer had made an addition of LPSC as income of assessee on ground that assessee followed mercantile system of accounting and same was chargeable to tax whether it was received

or receivable - Whether as per accounting standard and norms, assessee had to declare its income not only based on accrual system but also supported by concept of certainty of rec–very - Held– yes - Whether since assessee had not recovered any LPSC in past, impugned addition was to be deleted - Held, yes [Para 20] [In favour of assessee]

- Judgement of Gauhati Bench of ITAT in the case of ***M/s North Eastern Electric Power Corporation Ltd. v. Pr. CIT Meghalaya, ITA No. 45/Gau/2019 decided on 12.12.2022 (ITAT-Gau)*** dealt with an identical issue, wherein notice u/s 263 was issued as interest on debtors on account of sale of power (post securitization) was accounted for on cash basis and not accrual basis.

  In this case, the Hon'ble ITAT held that change of system of accounting i.e. the LPS on cash basis from the earlier system of accrual basis is revenue neutral because the quantum of LPSC is not a dispute; only the year of taxability is in dispute.

  The Tribunal further quashed the revisionary proceedings u/s 263 by holding that as cash treatment of LPSC has been consistently followed by the assessee and accepted by the Department, the view taken by the Assessing Officer is permissible in law and therefore, action u/s 263 does not lie.

4.9. In light of the above, the Appellant humbly submits that the notice u/s 263 of the Act issued on account of levy of late payment surcharge for 10 months instead of 12 months is erroneous in as much as no notional income can be charged to tax even for 10 months. Further, as the issue had already been examined by the Assessing Officer in detail and the order u/s 143(3) was passed after proper application of mind, proceedings u/s 263 were illegal and deserve to be quashed.

10. On the other hand, Ld. CIT DR for the Revenue vehemently supported the order of ld. PCIT and submits that AO has not made adequate and proper enquiry and investigation with respect to late payment surcharges and further failed to appreciate the facts that the debtors were outstanding on continuous basis and therefore, the grace period of 60 days allowed by him for the year is compensated by the grace period of preceding year and therefore, ld. PCIT has rightly held that late payment surcharges should be charged for a period of 12 months as against 10 months as computed by the AO in the assessment order. With respect to the contention of the AO that

the AO has already made proper and adequate inquiry and investigation, ld. CIT DR submits that ld. PCIT in the revision order clearly demonstrated that AO has failed to appreciate the facts that late payment surcharge was chargeable on the outstanding debtors and therefore, it should be charged for a period of 12 months which fact has not been properly inquired into, therefore, the AO has not made adequate inquiries and investigation before making addition on this count. It is thus, prayed by ld. CIT DR that the revision order be confirmed on this account.

11. Heard the contentions of both the parties and perused the material available on record. At the outset, it is seen that issue on taxability of late payment charges is a legacy issue which is coming since AY 2008-09 and onwards in assessee's own case where the lower authorities has held the same as not eligible for deduction u/s 80-IA of the Act. Later, the revenue was making additions on accrual basis towards late payment surcharges whereas the assessee has declared income on receipt basis as the recovery of late payment surcharged is very uncertain. It is relevant to state here that Co-ordinate Bench of Tribunal since AY 2008-09 and onwards has allowed the deduction u/s 80-IA of the Act on the income declared by assessee on receipt basis towards late payment surcharge by holding the same as derived from income from business activity and further held that same should be taxable on receipt basis as has been accounted for by the assessee. It is further seen that against the addition made by the AO, an appeal is pending before the ld. CIT(A)

therefore, this issue is beyond the jurisdiction of ld. PCIT in revision proceedings.

12. The action of PCIT in the present case of directing the AO to recompute the addition towards late payment surcharge on accrual basis for the period of 12 months as against 10 months is contrary to the settled history of the assessee where income declared by the assessee on "receipt basis" stood accepted by the Co-ordinate Bench of ITAT by observing that the Revenue has not taken consistent approach for taxability of the late payment surcharge wherein some of the AYs, same is allowed to be taxed on receipt basis as declared by the assessee. It is further observed that, the Co-ordinate Bench of ITAT has allowed deduction u/s 80-IA of the Act on late payment surcharge. This being so, even otherwise, the income on account of late payment surcharge whether charged on accrual basis or on receipt basis and further for 10 months or for 12 months makes no difference on the total income since it is eligible for deduction u/s 80-IA of the Act (though the same has not been allowed in the impugned assessment order), on the principal of consistency. Accordingly, there would be no loss of the revenue, by not charging the same for a period of 10 months as against 12 months may be an error however, it is not caused any loss to the Revenue.

13. Regarding the claim of the assessee that AO has already made proper and adequate inquiry, it is observed that AO during the assessment proceedings, asked the assessee to file complete details

of income including other income on which deduction u/s 80-IA was claimed and after considering the submissions made by the assessee has made the disallowance of INR 2,11,15,54,378/- out of total deduction claimed u/s 80-IA on other income declared which include late payment surcharge. Further, the AO in his wisdom has made addition of INR 245,79,21,900/- towards late payment surcharge holding the same as taxable on accrual basis for a period of 10 months. This clearly shows that AO has not only made proper and adequate enquiry and investigation in the matter but also applied his mind and reached to a logical conclusion that income towards late payment surcharge on the outstanding debtor on accrual basis for a period of 10 months should have been added in the hands of the assessee. Once the AO has taken a possible view, the assessment order cannot be said to have been passed without inadequate inquiries or investigation. It is merely change of opinion which do not lead to the belief that the assessment order passed is erroneous and pre-judicial to the interest of the Revenue.

14. In the light of above discussion and further looking to the fact that this issue is pending before ld. CIT(A), in our considered opinion, the assessment order passed by charging the late payment surcharge for a period of 10 months on accrual basis does not hold the assessment order as erroneous and pre-judicial to the interest of the Revenue. Accordingly, Grounds of appeal No. 2 & 3 raised by the assessee are allowed.

15. In **Grounds of appeal Nos. 4 & 5**, the assessee has challenged the action of ld. PCIT in holding the assessment order as erroneous and pre-judicial to the interest of the Revenue beyond the scope of show cause notice issued at the time of initiation of proceedings u/s 263 thus, has exceeded the jurisdiction.

16. In **Grounds of appeal Nos. 6 & 7**, the assessee has challenged the action of PCIT in holding that the deduction u/s 80-IA of the Act on capacity charges has wrongly been allowed without making proper and adequate inquiries and erred in directing the AO to re-frame the assessment after making necessary and proper inquiries regarding allowability of deduction u/s 80IA on capacity charges.

17. Before us, Ld.AR for the assessee submits that the ld. PCIT after examination of the material available on records, has initiated the proceedings u/s 263 on two issue out which the issue of allowability of deduction u/s 80IA on the Consultancy charges was dropped and after considering the submission and fresh material provided by the assessee has raised new issue of allowability of deduction u/s 80IA of the Act on Capacity charges. The ld. AR submits that this issue is not borne out from the records verified by the ld. PCIT and deduction u/s 8-IA was never doubted in any of the preceding or subsequent assessment year thus following the principal of consistency also, for this issue the assessment order cannot be held as erroneous and prejudicial to the interest of revenue. Ld. AR further filed written submission on both the issues, which reads as under:-

5. ***Submissions qua Ground Nos. 4 & 5 – Hon'ble PCIT erred in travelling beyond the first show-cause notice ['SCN'] and cancelling the assessment done by the Ld. AO on the ground which was not covered in the first SCN***

5.1. At the outset, the Appellant wishes to draw Your Honour's kind attention towards the chronology of events covered in the case, which is tabulated hereunder –

Sl. No.	Event	Date
1.	Examination of records by Hon'ble PCIT	-
2.	1st notice u/s 263 issued	07.03.2022
3.	Adjournment letter filed by Appellant	
4.	2nd notice u/s 263 issued	14.03.2022
5.	1st reply filed by the Appellant	21.03.2022
6.	Further query raised by Hon'ble PCIT to submit sale invoices	21.03.2022
7.	2nd reply filed by the Appellant submitting sale invoices on sample basis	22.03.2022

8.	3rd notice issued u/s 263 on reasons arising from Appellant's 2nd reply	22.03.2022

5.2. At this juncture, it would apt to invite the Hon'ble Bench's attention to para 8/pg 7 of the revision order u/s 263 (relevant extract at pg. 229/PB) which reads as under:

"8. In the course of revision proceedings on 22/03/2022, it was noticed from the invoices raised against the purchase or the energy from assessee, that besides the Energy Charges, the assessee was also charging huge amounts in the form of Capacity Charges. It was further noticed that the consolidated bill amount of these invoices (Capacity charges + Energy Charges) was treated as exempt u/s 80-IA of the eligible business"

The Appellant avers that this issue does not emanate from record examined by the Hon'ble CIT before exercising revisionary jurisdiction u/s 263 but was admittedly noticed from copies of invoices submitted by the Appellant during course of hearing on 22.3.2022.

5.3. Now, we wish to bring to Your Honour's kind attention the provisions of section 263 of the Act. The same have been reproduced below for your kind reference:

Quote
Section 263. Revision of orders prejudicial to revenue

(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 is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

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

(a)….
(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

Unquote

5.4. From the perusal of the aforementioned provisions, it is pertinent to note that under the provisions of section 263 of the Act, the Commissioner is empowered to call for and examine the record of any proceedings and if he considered that the order

passed by the Ld. AO is erroneous in so far as it is prejudicial to the interests of the revenue, then an order enhancing or modifying the assessment or cancelling the same with a direction to make it afresh could be passed.

Further, the word 'record' has been defined in Explanation 1 to the Section 263. As per the same, record has been defined to include record relating to any proceedings available at the time of examination by the Commissioner.

That is to mean that the record comprises of details and documents relating to any proceedings under the Act, which were available with the PCIT at the time of examination basis which proceedings u/s 263 are initiated.

5.5. In the present case, the first notice u/s 263 of the Act was issued on 07.03.2022, i.e., it must be before the issue of the 1st notice that the records of assessment proceedings were called for and examined by the Hon'ble PCIT, which formed the basis for issue of revision notice u/s 263 of the Act.

Any information which came to the notice of the Hon'ble PCIT after conducting examination of assessment records and issuing the first show-cause notice is outside the ambit of 'record' as defined under Explanation 1 to section 263 and cannot form a basis for the revision proceedings.

5.6. As evident from the sequence of events tabulated in para 5.1 *supra*, the 1st SCN was issued on 07.03.2022. After the Appellant filed its reply to the said SCN, the Hon'ble PCIT asked it to further file copies of invoices, and basis the invoices so submitted, the PCIT went on to hold that the Appellant is not eligible to claim the deduction u/s 80-IA on the element of 'capacity charges' which forms a part of Appellant's revenue from operations.

5.7. Without prejudice to the submissions made in support of preceding grounds of appeal on the issue of capacity charges, the Appellant humbly submits that the law does not permit the Hon'ble Commissioner to travel beyond the initial SCN during the course of revisionary proceedings and raise fresh issues which do not emanate from record available with him prior to initiation of proceedings u/s 263.

5.8. In this regard, the Appellant wishes to place reliance on the following judicial precedents –

- Judgement of Hon'ble High Court of Madras in the case of ***K.A. Ramaswamy Chettiar vs. CIT [1996] 220 ITR 657 (Madras)***, wherein among other issues, it has been held that

  '...the Commissioner can make use of the materials gathered by him on the date when he issued notice under section 263 for the purpose of invoking his jurisdiction under section 263.'

5.9. Accordingly, the notice dated 22.03.2022, asking the Assessee to justify the deduction claimed u/s 80-IA of the Act on capacity charges, which was issued basis

details submitted during course of revisionary proceedings and not basis the examination of record as defined u/s 263, has not been issued in accordance with provisions of the said section and is invalid. Accordingly, the order of the Hon'ble PCIT, to the extent it renders the assessment order erroneous in so far as it is prejudicial to the interest of revenue on the issue of claim of 80-IA deduction on capacity charges, deserves to be quashed.

6. ***Submissions qua Ground No. 6 & 7 – Hon'ble PCIT erred in holding that the assessment order passed by the Ld. AO is erroneous to the extent deduction u/s 80-IA of the Act has been claimed by the Appellant on element of 'capacity charges'***

6.1. Without prejudice to our submissions in respect of ground nos. 4 & 5 *supra*, that the Hon'ble PCIT's finding basis the notice 22.3.2022 is not valid in law, it is humbly submitted that the Hon'ble CIT has grossly erred in holding that the Appellant's claim of deduction u/s 80-IA on the element of 'capacity charges' is erroneous.

6.2. After receiving Appellant's reply to 1st SCN, the Hon'ble PCIT asked the Appellant to file copies of invoices, which were submitted before him on 23.03.2022. Basis the same, the Hon'ble PCIT issued another notice asking the Appellant's eligibility for claiming deduction u/s 80-IA on element of 'capacity charges' as charged in the invoice.

6.3. The Appellant filed its reply on 25.03.2022, firstly challenging the legal validity of another notice, and secondly justifying it's claim of deduction u/s 80-IA on capacity charges.

However, the Hon'ble PCIT, not being satisfied with the Appellant's reply, opined that capacity charges does not qualify for deduction u/s 80-IA and held that the order u/s 143(3) of the Act was passed by the Ld. AO without proper application of mind to this extent.

6.4. In this regard, the Appellant humbly submits that it is engaged in the business of generation and supply of hydro and wind power. Whatever income it earns from the supply of power is reported under Note 27 of its audited financial statements 'Revenue from Operations' as 'Income from Beneficiaries against Sale of Power'.

It is further submitted that as per Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 ['CERC Regulations'], Regulation 20 'Components of Tariff' under Chapter 5 'Tariff Structure', the tariff for supply of electricity from a hydro generating station shall have two components - Capacity Charge and Energy charge, and the same is to be derived in the manner specified in Regulation 31.

It is also submitted that as per CERC regulations, the capacity charges are towards recovery of annual fixed costs from the beneficiaries and energy charges are toward the supply of electricity that represent recoveries from beneficiaries in proportion to their respective allocation in saleable capacity of the generating station.

Furthermore, Regulation 31 of the CERC Regulations prescribes the manner for computation of Capacity charge.

The relevant extracts of Regulation 20 and Regulation 31 of the CERC Regulations are reproduced hereunder for Your Honour's ready reference –

"20. Components of Tariff:

(1) ...
(2) The tariff for supply of electricity from a hydro generating station shall comprise capacity charge and energy charge to be derived in the manner specified in Regulation 31 of these regulations, for recovery of annual fixed cost (consisting of the components referred to in regulation 21) through the two charges.
(3) ..."

"31. Computation and Payment of Capacity charge and Energy Charge for Hydro Generating Stations:

(1) The fixed cost of a hydro generating station shall be computed on annual basis, based on norms specified under these regulations, and shall be recovered on monthly basis under capacity charge (inclusive of incentive) and energy charge, which shall be payable by the beneficiaries in proportion to their respective allocation in the saleable capacity of the generating station, i.e., in the capacity excluding the free power to the home State:

Provided that during the period between the date of commercial operation of the first unit of the generating station and the date of commercial operation of the generating station, the annual fixed cost shall provisionally be worked out based on the latest estimate of the completion cost for the generating station, for the purpose of determining the capacity charge and energy charge payment during such period.

(2) The capacity charge (inclusive of incentive) payable to a hydro generating station for a calendar month shall be :

AFC x 0.5 x NDM / NDY x (PAFM / NAPAF) (in Rupees)
(where, AFC = Annual fixed cost specified for the year, in Rupees)
NAPAF = Normative plant availability factor in percentage
NDM = Number of days in the month
NDY = Number of days in the year
PAFM = Plant availability factor achieved during the month, in percentage

(3) The PAFM shall be computed in accordance with the following formula:

$$PAFM = 10000 \times \Sigma DCi / \{ N \times IC \times (100 - AUX) \} \%$$

Where,
AUX = Normative auxiliary energy consumption in percentage
DCi = Declared capacity (in ex-bus MW) for the ith day of the month which the station can deliver for at least three (3) hours, as certified by the nodal load dispatch centre after the day is over.

IC = Installed capacity (in MW) of the complete generating station
N = Number of days in the month

(4) The energy charge shall be payable by every beneficiary for the total energy scheduled to be supplied to the beneficiary, excluding free energy, if any, during the calendar month, on ex power plant basis, at the computed energy charge rate. Total Energy charge payable to the generating company for a month shall be:

(Energy charge rate in Rs. / kWh) x {Scheduled energy (ex-bus) for the month in kWh} x (100 – FEHS) / 100.

(5) ..."

6.5. On a perusal of the above, Your Honours would appreciate that the main revenue from operations of the Appellant company is the tariff for sale of electricity, which as prescribed under CERC Regulations is charged under two components, capacity charge and energy charge. However, both these components form a part of the revenue from main operations of the Assessee, and are also booked in its books of accounts as such.

6.6. It is further submitted that sale price of any goods or services is computed basis total cost incurred towards providing such goods or services plus a profit margin. The total cost in this case includes fixed as well as variable cost. Accordingly, recovery of fixed cost is a primary factor in determining the sale price of a good or services, and in Appellant's case, in determining the tariff.

6.7. It is only on account of the CERC Regulations, the Appellant is liable to charge the tariff under two components – capacity charges and energy charges.

6.8. Further, in order to determine the eligibility of deduction u/s 80-IA of the Act, the Assessee first wishes to bring Your Honour's kind attention towards the relevant extract of section 80-IA, which has been reproduced hereunder:

Quote

Section 80-IA – Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprises from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.
(2) ...
(3) ...
(4) This section applies to –

(i) ...
(ii) ...
(iii) ...
(iv) An undertaking which, -
(a) is set up in any part of India for the generation or generation and distribution of power of it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2012;
....
Unquote

6.9. Section 80-IA of the Act allows deduction in the case of an undertaking engaged in eligible business on account of profits and gains derived by the undertaking from such eligible business.

6.10. It is humbly submitted that the Appellant is engaged in the eligible business of generation and distribution of power and charges tariff in the manner prescribed under CERC Regulations for the same. The tariff (including each of its two components – capacity and energy charges) is directly derived by the undertaking of the Appellant from the eligible business of generation and distribution of power, and accordingly, the Appellant is eligible to claim deduction u/s 80-IA on the total tariff (capacity and energy charges), which is reported as revenue from operations in its books of account.

6.11. The Appellant further submits that the reliance placed by the Hon'ble PCIT on Pandian Chemicals Ltd 262 ITR 278 and holding that capacity charges are not directly linked with sale of energy is grossly erroneous. In the case of Pandian Chemicals, the Hon'ble Apex Court has held that *'the words 'derived from' in section 80HH must be understood as something which has direct or immediate nexus with an industrial undertaking'.*

However, in the Appellant's case, as submitted *supra*, both the elements of tariff charged by the Appellant, i.e., capacity charge and energy charge, are derived by the undertaking of the Appellant from the eligible business of generating and distributing power. The capacity charge, as energy charge, forms a part of revenue of operations from business. Had the Appellant not engaged in operations of sale of energy, the Appellant would charge neither capacity charge nor tariff charge from its customers.

Accordingly, it cannot be said that capacity charges are not directly linked with the Appellant's operations of sale of energy. The same are derived by the Appellant from the eligible business and the Appellant has rightly claimed deduction u/s 80-IA on the same.

6.12. The issue evaluated by the Hon'ble Apex Court in the case of Pandian Chemical *(supra)* was whether interest earned on the deposit made with the Electricity Board for the supply of electricity to the assessee's industrial undertaking should be treated as income derived from the industrial undertaking within the meaning of section 80HH.

The Hon'ble Supreme Court upheld the judgement of the High Court wherein it was held that although electricity may be required for the purposes of the industrial undertaking, the deposit required for its supply is a step removed from the business of the industrial undertaking. The derivation of profits on the deposit made with Electricity Board cannot be said to flow directly from the industrial undertaking itself and accordingly, such income was not eligible for deduction u/s 80HH of the Act.

However, in the Appellant's case, the capacity charge is directly a part of the revenue which is collected by the Appellant from its customers on account of sale of electricity. It is a direct source of revenue for the Appellant on account of its operations and is income derived from the industrial undertaking, completely eligible for deduction u/s 80-IA of the Act.

6.13. In light of the above, it is amply clear that Capacity Charges is also a part of revenue and qualifies for deduction under section 80-IA of the Income Tax Act 1961, and the finding of the Hon'ble PCIT is grossly erroneous and deserves to be set aside.

In light of aforesaid it is humbly pleaded that the revision order dated 27.03.2022 passed u/s 263 deserves to be quashed and the assessment order dated 30.12.2019 passed by the Ld. AO deserves to be restored.

18. On the other hand, ld. CIT DR vehemently supports the order of ld. PCIT and submits that ld. PCIT has not exceeded his jurisdiction and based on the material gathered during the hearing in the shape of invoices issued, has observed that the assessee has collected capacity charges on which deduction u/s 80-IA was claimed which is not the income derived from the activity of the undertaking and therefore the action of ld. PCIT in holding the capacity charges as not eligible for deduction u/s 80-IA of the Act is not beyond the jurisdiction u/s 263 of the Act nor it could be said that this issue is raised without referring to the records. It is therefore, requested to confirm the order of ld. PCIT on this issue.

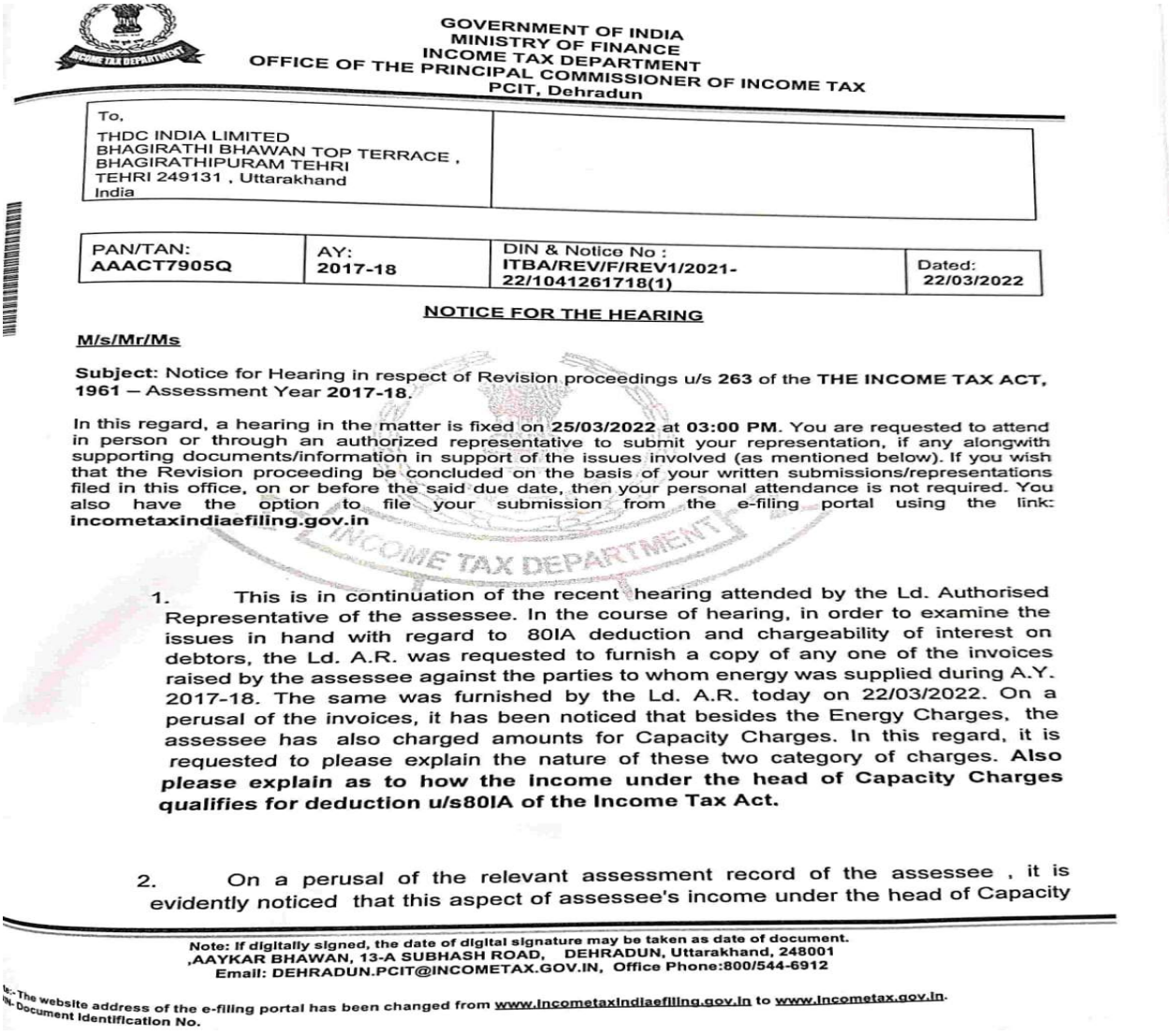
19. Heard the contentions of both the parties at length and perused the material available on record. In the instant case, the proceedings u/s 263 were initiated in terms of first show cause notice issue don 07.03.2022 wherein two issues were raised by ld. PCIT after examination of the records which are as under:-

(i) Allowability of deduction u/s 80-IA on consultancy charges received;
(ii) Taxability of late payment surcharge on accrual basis for a period of 10 months as against the period of 12 months.

20. The assessee had filed reply on 21.03.2021 and after considering the said submission, PCIT asked the assessee to file the sales invoices which were submitted on 22.03.2022. on perusal of the sale invoices, ld. PCIT issued another show cause notice on 22.03.2022, alleging that the AO has not made any enquiry or verification of the fact whether the capacity charges collected by the assessee are eligible for deduction u/s 80-IA of the Act. Accordingly, ld. PCIT vide show cause notice on 22.03.2022 extended the scope of revisionary proceedings and include the issue of allowability of deduction u/s 80-IA on the capacity charges claimed by the assessee.

21. From the above series of events, we find that satisfaction that the assessment order is erroneous and prejudicial to the interest of revenue was prima facie taken when the ld. PCIT has inspected the material available in the assessment folder and based on such inspection, show cause notice was issued to the assessee to explain as to why the assessment order not be hold as erroneous and pre-judicial to the interest of the revenue on two issues as stated above.

Thereafter, on perusal of the show cause notice on 22.03.2022, placed at pages 215 to 216 of PB, it is observed by us that ld. PCIT has based his allegation solely on the examination of details filed by the assessee on the issue of late payment charges from debtors, when ld. PCIT asked the assessee to file the copies of the sale invoices. As per the said notice, PCIT alleged that the issue of allowability of deduction u/s 80-IA on capacity charges has not been examined by the AO. The notice issued on dated 22.03.2022 is reproduced as under:-



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
PCIT, Dehradun

To,
THDC INDIA LIMITED
BHAGIRATHI BHAWAN TOP TERRACE ,
BHAGIRATHIPURAM TEHRI
TEHRI 249131 , Uttarakhand
India

PAN/TAN:	AY:	DIN & Notice No :	Dated:
AAACT7905Q	2017-18	ITBA/REV/F/REV1/2021-22/1041261718(1)	22/03/2022

NOTICE FOR THE HEARING

M/s/Mr/Ms

Subject: Notice for Hearing in respect of Revision proceedings u/s **263** of the **THE INCOME TAX ACT, 1961** – Assessment Year **2017-18**.

In this regard, a hearing in the matter is fixed on **25/03/2022** at **03:00 PM**. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: **incometaxindiaefiling.gov.in**

1. This is in continuation of the recent hearing attended by the Ld. Authorised Representative of the assessee. In the course of hearing, in order to examine the issues in hand with regard to 80IA deduction and chargeability of interest on debtors, the Ld. A.R. was requested to furnish a copy of any one of the invoices raised by the assessee against the parties to whom energy was supplied during A.Y. 2017-18. The same was furnished by the Ld. A.R. today on 22/03/2022. On a perusal of the invoices, it has been noticed that besides the Energy Charges, the assessee has also charged amounts for Capacity Charges. In this regard, it is requested to please explain the nature of these two category of charges. **Also please explain as to how the income under the head of Capacity Charges qualifies for deduction u/s80IA of the Income Tax Act.**

2. On a perusal of the relevant assessment record of the assessee , it is evidently noticed that this aspect of assessee's income under the head of Capacity

Note: If digitally signed, the date of digital signature may be taken as date of document.
,AAYKAR BHAWAN, 13-A SUBHASH ROAD, DEHRADUN, Uttarakhand, 248001
Email: DEHRADUN.PCIT@INCOMETAX.GOV.IN, Office Phone:800/544-6912

Note:- The website address of the e-filing portal has been changed from www.incometaxindiaefiling.gov.in to www.incometax.gov.in.
DIN- Document Identification No.

Charges whether it qualifies for deduction u/s 80IA of the Income Tax Act , has not been examined by the Assessing Officer in the course of assessment proceeding. The Assessing Officer has failed to apply his mind in this regard which, in my opinion, has rendered the immpund assessment order to be erroneous in so far it is prejudicial to the interest of the revenue.

3. Therefore, you are requested to please furnish your explanation to this effect as to why the impugned assessment order may not be cancelled for fresh assessment as stipulated u/s 263 of the Income Tax Act. Please submit your reply on or before 25th March 2022. You have the option to file your submission through e-filing portal of the Income Tax Department using the link: **incometaxindiaefiling.gov.in** or at this office email address: **dehradun.pcit@incometax.gov.in**.

SUNEEL VERMA
PCIT, Dehradun

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

22. It is further brought to our notice by Ld.AR that the issue of allowability of deduction u/s 80-IA on capacity charges is dealt by the Co-ordinate Bench of ITAT in the case of ***UJVN Limited vs PCIT in ITA No.25/DDN/2022 [AY 2017-18]*** wherein vide order dated 15.09.2023, the Co-ordinate Dehradun Bench of ITAT has taken the view that capacity charges are having nexus with the business of generation of power and therefore, is eligible for deduction u/s 80-IA of the Act and accordingly, quashed the order passed u/s 263 of the Act. While reaching to such conclusion, the Co-ordinate Bench has based its findings on the fact that tariff charged is in accordance with tariff prescribed by the Regulatory Authority. In the instant case also, the tariff has been regulated as per Central Electricity Regulatory Commission Regulations, 2014 ("CERC")- where in Regulation 20 titled as "Components of tariff" under Chapter 5 deals with "tariff structure", according to which the tariff for supply of electricity from Hydro Generation station shall have two components:-

(1) Capacity charges;
(2) Energy charges

23. The same should be derived in the manner specified in Regulation 31. The Regulation 31 regulates by CERC Regulations prescribed the manner for computation of the capacity which is reproduced herein above in para 6.4 of submissions made by the assessee. The assessee has charged tariff in terms of the tariff structure prescribed by the Regulatory Authorities and therefore, the tariff so collected is part of the income earned from generation and

distribution of hydro power which is the core activity of the assessee thus is derived from the business undertaking eligible for deduction u/s 80IA of the Act.

24. The relevant observations of the Co-ordinate Bench in the case of UJVN Limited (supra) wherein it is held that the capacity charges are eligible for deduction u/s 80-IA of the Act and quashed the order passed u/s 263 of the Act, are reproduced as under:-

> *8. "We find that Assessee had derived profits and gains from the undertaking to the tune of Rs. 58,25,01,731/- but had claimed deduction u/s 80IA of the Act only for Rs. 51,94,17,583/-. This fact is also confirmed by the Chartered Accountant in Form NO. 10CCB. This claim of deduction of Rs. 51,94,17,583/- matches with computation of total income enclosed in page 2 of the PB wherein, an identical claim is made. All these facts go to prove that the AO had indeed made adequate enquiries during the course of scrutiny assessment proceedings and since there was no change in the manufacturing activities when compared to AY 2014-15, and in view of the fact that in AY 2014-15 the claim of deduction was accepted by the ld AO, there was no reason for the ld AO to take a divergent stand for the year under consideration as facts are identical. Hence it would be incorrect on the part of the ld PCIT to state that adequate enquiries with regard to claim of deduction u/s 80IA of the Act were not made by the ld AO warranting revision u/s 263 of the Act.*
>
> *9. With regard to specific allegation leveled by the ld PCIT in the aspect of capacity charges not having first degree nexus with the sale of energy by the Assessee to UPCL. We find that power purchase agreement entered between Assessee and UPCL on 24.07.2012 is placed on record at page No. 560 of the paper book wherein at page 564 under clause No 6, the expression 'tariff to be charged' by the Assessee is mentioned which reads as under:-*
>
> > *"6.1 The tariff to be charged and its associated terms and conditions for the energy to be supplied by UJVN Ltd. from the projects shall be as per the Tariff Notifications/orders/directions issued/to be issued by UERC from time to time under the Electricity Act, 2003 and/or any other Act/Regulations as may be enacted/substituted by the*

GoU/GoI in place of these provisions. Recovery of Income Tax and Foreign Exchange Rate Variation shall be governed as per orders/directions issued by UERC from time to time."

10. *We find identical issue came up before Hon'ble Madras High Court in the case of M/s. Neyveli Lignite Corporation Ltd Vs. ACIT, Tax Case (Appeal) No. 1317 of 2005 dated 16.07.2012. The questions raised before the Hon'ble Madras High Court are as under:-*

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that components of price for sale of electricity fixed on the basis of tax liability should not be taken as part of the transfer price of lignite and sale price of electricity in computing relief under Section 801A/80IB?

2. If the answer to the question No. 1 is in favour of appellant, whether the notional tax reimbursement in the case of Unit VII of Thermal Power Station II whose entire income is deductible u/s 80IA should also be taken into account for computing relief u/s 80IA?"

11. *It would be relevant to reproduce operating paragraphs of the said judgment as under:-*

"5. It is a matter of relevance to point out herein that in the notification issued on 19.01.2009, Chapter 3 deals with Computation of tariff, wherein clause 13, provided that the components of tariff for the supply of electricity shall comprise of two parts, namely, capacity charge (for recovery of annual fixed cost consisting of the components specified to in regulation 14) and energy charge (for recovery of primary fuel cost and limestone cost where applicable). The tariff for supply of electricity from a hydro generating station shall comprise capacity charge and energy charge to be derived in the manner specified in regulation 22, for recovery of annual fixed cost (consisting of the components referred to in regulation 14) through the two charges. Clause 14 defines Annual Fixed Cost.

6. A reading of the agreement dated 18.02.1999 entered into between the assessee and the various State Electricity Boards thus show the modalities of arriving at the tariff which includes the tax liability of Neyveli Lignite Corporation. Thus, it is evident that the tariff that was arrived at between the parties consisted of various components including tax liability on the income streams from the core activity of NLC and the quantification was to be done on the basis of the methods given in Clause 6.2 of the agreement. A reading of the same thus makes it clear that in strict sense, there was no reimbursement of the tax

liability by the recipient, but was treated as part of the tariff and whatever was done on the receipt of the statement of the tax payable by the assessee was that the tariff price payable on the electricity sold was finally reckoned with reference to the above said tax payment. In the circumstances, it is clear that by "reimbursement", it does not mean that the tax paid by the assessee was very much part of the tariff and hence, part of the sale price.

7. It is seen from the proceedings of the Commissioner of Income Tax under Section 263 of the Act that the assessment was sought to be revised on the ground that the deduction claimed under Section 801A was not properly considered by the Assessing Officer. The Commissioner further pointed out that on a perusal of the agreement the income tax liability of the assessee had been paid by the Electricity Boards and the amount received by the assessee was shown as receipt of the income and included for claiming deduction under Section 801A. The Commissioner of Income Tax viewed that the receipt of the income tax by way of reimbursement was not an income from the manufacturing or production activity. Consequently, no deduction under Section 801A or 801B is to be allowed. Thus, the Commissioner of Income Tax issued the notice under Section 263.

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15. We agree with the submissions made by the learned counsel for the assessee. As rightly pointed out by learned counsel for the assessee, the Revenue does not dispute the genuineness of the Bulk Power Supply Agreement between NLC and the State Electricity Board dated 18.2.1999. The Revenue also does not dispute the fact that the Notification issued by Ministry of Power dated 30.3.1992 provides for the various components of the tariff to be charged for the sale of electricity by the Generating companies to the Board and the same is relevant for understanding the clauses in the agreement. As already seen, the Notification dated 30.3.1992 provides the basis for working of the tariff for sale of electricity. Clause 1.5(d) of the Notification dated 30.3.1992 refers to the manner of what could be the components that could be included in the tariff to be charged on various income streams. Keeping these guidelines in the background, when we look at the agreement entered into betweenthe various State Electricity Boards and the assessee, we find that the computation of the generation tariff is done on the lines indicated in the notification.

16. It is no doubt true that clause 6 of the agreement separately deals with tax liability of the assessee which would form part

of the tariff as per the Notification. Equally, it is true that Annexure A to the agreement gives the norms and parameters for working out the generation power tariff for the 5 year period 1996-97 to 2000-01. The said Annexure however has to be read in the context of clause 4.1. Hence, going by this, we do not find any income tax payable by the assessee or paid by the assessee figuring in Annexure A. The reason is that in clause 6 of the agreement specifies the tax liability of NLC in respect of the income on generation of power from Power Station II (Stage I) and Power Station II (Stage 1), mining of lignite from Mine II for the purpose of generation of power from Power Station II (Stage I) and Power Station 11 (stage II), the amount of grossed up tax that is payable by NLC on the income streams mentioned at items (i) and (ii) were to be borne by the recipients. viz, the State Electricity Boards. Clause 6.2 clarifies that either the grossed up or the actual tax assessed, whichever is less alone would be the liability for the Recipients to bear.

17. In the context of the direction issued in the notification dated 30.3.1992 and Clause 6 in the agreement, it is clear that tax liability is part of the tariff charged for sale of electricity from Thermal Power Generating Stations and it does not stand independent of the tariff charge. If the contemplation is otherwise, there is absolutely no need at all for anyone to enter into an agreement to make the tax liability of one party viz., the assessee as a liability to be borne by another party to the agreement. When the agreement between the parties is guided by the Notifications issued by the Ministry of Power, Government of India and the deliberations between the parties also pointed out the guidelines, under which the agreement themselves were entered into, we do not think there exists any justification in the contention of the Revenue to treat the tax payment shown under clause 6 of the agreement as payment not connected with the tariff charged on the supply an independent of energy. At the risk of repetition, we would say that the tax component is very much part of the sale of electricity from the Thermal Power Generating Stations and the mere fact that a component of the tariff makes a reference to the tax liability with reference to income streams mentioned in clause 6, it does not make such a component as not income to be excluded in considering the relief under Section 801A/80IB. In the circumstances, we hold that there is no such reimbursement of tax paid by NLC from the State Electricity Board. On the other hand the tariff component is quantified in terms of the liability met by the NLC which by no stretch of imagination could convert such a payment by the recipient as a tax liability of the recipient.

18. In the circumstances, we have no hesitation in accepting the plea of the assessee that the Commissioner committed serious error in dissecting the tariff to come to the conclusion that the tax component specified as part of the tariff is reimbursement of the liability of the assessee and hence it would not form part of the income. As already pointed out, when the Revenue had not questioned the genuineness of the agreement between the parties and liberty is thus available for the parties to arrive at the cost of the energy to be supplied by the assessee as guided by the notifications of the Ministry of Power in this regard, we find no ground to sustain the plea of the Revenue that the relief to be granted under Section SOLA calls for exclusion of the tax component in the sale price of electricity. Consequently, the first question raised in the tax case is answered in favour of the assessee and the order of the Tribunal is set aside."

12. *Ld PCIT in the Assessee's case had sought to disturb the claim of deduction on similar lines by holding that energy charges and capacity charges which are part of the energy sales bill are not eligible for deduction u/s 80IA of the Act. In this regard, it would be relevant to refer the UERC regulation which are enclosed at page 723 of PB, wherein, the term 'tariff' is defined as under:-*

Regulation- (72)	***Definition***
72	*"Tariff" means the schedule of charges for either generation or transmission or wheeling and supply of electricity together with terms and conditions for application thereof.*

13. *The said regulation also defined "tariff income" as under:-*

Regulation3 (36)	***Definition***
36	*"Tariff Income" states that the income of the generating company, transmission, licensee, distribution licensee and SLDC arising out of all the charges determined by the commission for generation, transmission, wheeling and retails supply of electricity, SLDC charges, as the case may be, shall be considered as tariff income.*

14. *As per regulation 3(16), 'Commission' means the Uttrarakhand Electricity regularity commission constituted u/s 82 of the Electricity Act, 2003.*

15. *Further, the 'component of tariff ' is also defined in the said regulation as under:-*

i. The tariff for sale of electricity from a thermal power generating station shall comprise of two parts namely, the recovery of annual fixed charges and energy (variable) charges (for recovery of primary fuel cost).

ii. The tariff for sale of electricity from hydro generating station was comprised of two parts namely recovery of annual capacity charges and energy charges.

iii. Recovery of capacity charge and incentive by the generating company shall be based on the adjournment of the operational norms specified for regulation 47. (emphasis supplied by us)

16. *The expression 'non-tariff income' is also defined in the said UERC regulation as under:-*

"85. Non-Tariff Income

The amount of non-tariff income relating to the Distribution Business and/or the Retail Supply Business as approved by the Commission shall be deducted from the Aggregate Revenue Requirement in calculating the revenue requirement from retail sale of electricity of the Distribution Licensee:

Provided that the Distribution Licensee shall submit full details of his forecast of non-tariff income to the Commission along with his application for determination of tariff

The indicative list of various heads to be considered for Non-Tariff Income shall be as under:

(a) Income from rent of land or buildings:
(b) Income from sale of scrap:
(c) Delayed Payment Surcharge,
(d) Rebates for timely payment of bills:
(e) Income from statutory investments;
(f) Interest on delayed or deferred payment on bills;
(g) Interest on advances to suppliers/contractors;
(h) Rental from staff quarters,
(i) Rental from contractors;
(j) Income from hire charges from contactors and others;
k) Income from advertisements, etc.;
(l) Miscellaneous receipts;
(m) Interest on advances to suppliers;
(n) Excess found on physical verification:
(0) Prior period income."

17. Hence, the entire allegation of the ld PCIT is addressed as from the above regulations, it could be seen that Assessee is duly entitled to charge energy charges, capacity charges and shortfall charges. Hence, we hold that the Assessee had rightly collected the sale price which is directly in accordance with the UERC regulations and the tariff prescribed by the UERC. In any case, we find that the charges raised by the assessee company had been duly settled by UPCL. The person to dispute with regard to the pricing would be UPCL and not the Ld. PCIT. Hence, these disputed receipts would form part of tariff to be charged by the Assessee to UPCL. Accordingly, they would have first degree nexus with the business of generation of power and consequentially, the assessee would be eligible for deduction u/s 80IA of the Act on merits.

18. In view of the aforesaid observations, we hold that the ld PCIT grossly erred in invoking the jurisdiction u/s 263 of the Act in the facts of the instant case both on law as well as on merits. Accordingly, the revision order passed by the ld PCIT u/s 263 of the Act is hereby quashed. Grounds raised by the Assessee are allowed."

25. As the facts in this case of the assessee are identical to the case of UJVN Limited as stated above, where the coordinate bench of Dehradun ITAT has already quashed the order u/s 263 by holding that the capacity charges are eligible for deduction u/s 80IA of the Act. Further as observed above, except for the year under appeal, doubts were never raised about the allowability of deduction u/s 80IA on capacity charges in any other assessment years though assessment were completed us/ 143(3) of the Act. Thus, by respectfully following the aforesaid judgment of coordinate bench in the case of UJVN Ltd. and further by following the principal of consistency, the assessee is entitled for deduction u/s 80-IA of the Act on capacity charges received which has direct and first-degree nexus with the business of generation of power. Accordingly, we hold that ld. PCIT has erred in invoking jurisdiction of section 263 of the Act on the facts of the present case and in law. In view of the above

discussion and after considering the overall facts, we allow the Ground of appeal Nos. 5 & 6 raised by the assessee and the revision order passed u/s 263 of the Act is hereby, quashed.

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

Order pronounced in the open Court on 18.02.2026.

Sd/- ***Sd/-***

(YOGESH KUMAR U.S)
JUDICIAL MEMBER

(MANISH AGARWAL)
ACCOUNTANT MEMBER

Date:- 18.02.2026
Amit Kumar, Sr. P.S

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT
6. Guard File

ASSISTANT REGISTRAR
ITAT